

Washington Metropolitan Area Transit Authority
Board Action/Information Summary

☒ Action ☐ Information

Document
Number:
205579

Resolution:
☒ Yes ☐ No

Presentation Name:

Crystal City East Entrance PCA

Project Manager:

Alan Watson

Project Department:

Project and Design Management Office

Purpose/Key Highlights:

To authorize the General Manager and Chief Executive Officer or designee to negotiate and execute a reimbursable agreement with Arlington County to fully fund WMATA's support of the design, construction and transfer a new east entrance to the Crystal City Metrorail Station.

Interested Parties:

Arlington County
East Entrance, LLC the project developer
JBG Smith Properties LP, a member of the LLC
Clark Construction, a member of the LLC

Background:

WMATA operates the Crystal City Metrorail Station, on the Metrorail Blue and Yellow lines, in the Crystal City neighborhood of the National Landing section of Arlington County, Virginia. The existing station entrance is served by seven bus bays, with four bays located on South Bell Street and three bays located on 18th Street South. A Capital Bikeshare station is located on South Bell Street across 18th Street South from the station entrance. A corral for dock-less scooters and bicycles is located on 18th Street South at South Bell Street. The Crystal City station does not include any Park & Ride or Kiss & Ride facilities.

The Crystal City Metrorail Station Access Study, completed in 2002, focused on identifying and evaluating specific station and area improvements with a goal of increasing convenience and safety for customers accessing the station. The study proposed a new east entrance at the northwest corner of 18th Street and Crystal Drive that would connect via a new pedestrian tunnel to the station's existing mezzanine. The study noted that this new entrance would shorten walk distances for customers accessing the station from the east by over 500 feet and would also eliminate the need for pedestrians to walk up-hill on 18th Street South between Crystal Drive and the existing entrance on South Bell Street.

The Crystal City Sector Plan, approved in 2010, identified the need for continued development of a robust multi-modal transportation network to support the proposed redevelopment of Crystal City. The transportation element of the plan recommended enhancing connections between existing public transportation modes through several improvements, one of which was a second entrance to the Metrorail station in the proximity of 18th Street South and Crystal Drive.

The purpose of the Crystal City Station Access and Second Entrance Study, completed in 2014, was to develop feasible alternatives for enhanced access to the Crystal City Metrorail Station including a potential second entrance. The study evaluated five second entrance alternatives, one alternative focused on lower cost access improvements, and four alternatives which would involve the addition of an elevator only. The study recommended construction of a new entrance at the northwest corner of 18th Street South and Crystal Drive (the "Project")

In 2016, Arlington County included the Project in its Transit Development Plan (TDP) and Capital Improvement Plan (CIP).

In October 2018, the County Board approved the plan to redevelop a portion of Crystal Square in Crystal City. The new second entrance for the Crystal City Metrorail Station is planned to be integrated into the development. The Project also serves as an important link to VDOT's future Route 1 Multimodal Improvements Project and was identified as one of five transportation projects included in Virginia's Memorandum of Understanding with Amazon as part of the HQ2 development.

In 2019, Arlington County selected the Developer team under an unsolicited proposal made pursuant to the Virginia Public-Private Education Facilities and Infrastructure Act of 2002, VA. Code Ann. 56-575 et. Seq ("PPEA"). In 2020, the Arlington County Board approved the Interim Agreement to develop the design to the 30% stage to provide sufficient scope and cost detail for the development of a Comprehensive Agreement with a Guaranteed Maximum Price (GMP) for final design and the construction through the PPEA process. Concurrently, WMATA & Arlington County executed a *Design Support Agreement* (DSA) for design support services such as design reviews and investigations.

An Environmental Evaluation Report was completed in January of 2021. The development team submitted materials to FTA which approved the Documented Categorical Exclusion in April 2021. On April 22, 2021 by resolution 2021-14, the

Board authorized a Compact public hearing to receive public comment on the addition the Project - also known as the east entrance to the Crystal City Metrorail station - and the public hearing was held on July 13, 2021. On October 28, 2021 by resolution 2021-36, the Board approved the public hearing staff report and recommendation to add the Crystal City East Entrance to the Mass Transit Plan.

Discussion:

Since the approval of the staff report and addition of the Project to the Mass Transit Plan, Arlington County, the developer East Entrance LLC and WMATA have advanced the design to 30% design stage. On July 15, 2023, the Arlington County Board approved an agreement with the developer for the final design and construction of the project. The project cost is estimated to be \$146.1 million. Concurrently, Arlington County and WMATA have negotiated a reimbursable project agreement which will govern the coordination between Arlington County, the developer and WMATA through the completion of the design, construction and acceptance of the facility by WMATA. The agreement establishes the design and construction standards for the project and acceptance criteria. In addition, the agreement provides for reimbursement for all of WMATA's costs including design reviews, construction inspections, service adjustment costs such as bus bridging if required, and reimbursement for any equipment such as fare gates. As a reimbursable project and as required by Resolution 99-63, the County will be invoiced and make payment in advance for WMATA's costs.

The Arlington County Board is scheduled to consider the Project Coordination Agreement (PCA or reimbursable agreement) on September 25, 2023.

Funding Impact:

To date WMATA's costs associated for the development of the East Entrance project have been funded under the DSA with Arlington County. The PCA requires all of WMATA's costs associated with the design completion, construction, inspection, and turnover of the new facility to be borne by the County. These expenses are funded in advance . Future facility operating costs are not included nor addressed herein.

Previous Actions:

WMATA and Arlington County entered into a Design Support Agreement on August 18, 2020. (no board action required)

Board resolution 2021-14 adopted April 22, 2021, authorizing a Compact public hearing for a new entrance to Crystal City Metrorail Station and alter the Mass Transit Plan.

Board resolution 2021-36 adopted October 28, 2021 approving the public hearing staff report and amending the Mass Transit Plan for the new East Entrance at Crystal

City.

Next Steps:

Authorization by the Board for the General Manager and Chief Executive Officer or designee to negotiate and execute a reimbursable agreement for Arlington County to fully fund, design, construct and transfer a new east entrance to the Crystal City Metrorail Station.

Bilateral execution of the PCA by WMATA and Arlington County as authorized by their respective boards.

Completion of the design documents will take approximately one year with review and approval by appropriate WMATA staff.

Construction should commence in approximately 9 months, with revenue operations expected to begin Summer 2027.

Recommendation:

Approval to: execute a reimbursable project agreement between WMATA and Arlington County for a new east entrance to Crystal City Metrorail Station

PRESENTED AND ADOPTED: September 28, 2023

SUBJECT: APPROVAL OF REIMBURSABLE AGREEMENT WITH ARLINGTON COUNTY
FOR NEW EAST ENTRANCE AT CRYSTAL CITY METRO STATION

2023-32

RESOLUTION
OF THE
BOARD OF DIRECTORS
OF THE
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

WHEREAS, Resolution 2011-30, as amended, requires Board of Directors approval of reimbursable agreements over \$500,000; and

WHEREAS, Resolution 2021-36 approved the *Public Hearing Staff Report, Staff Analysis of the Public Hearing and Staff Recommendations, Proposed New Entrance to the Crystal City Metrorail Station, Arlington, Virginia* on the proposed new east entrance and amended the Mass Transit Plan to include the new entrance; and

WHEREAS, Arlington County will enter into an agreement directly with a developer to design and construct the new east entrance at its sole cost and responsibility; and

WHEREAS, Arlington County and WMATA have negotiated a reimbursable agreement whereby Arlington County will fully fund all WMATA costs incurred during design, construction, and transfer of ownership of the new east entrance to the Crystal City Metro Station to WMATA, substantially in the form as shown in Attachment A; and

WHEREAS, Staff recommends entering into the reimbursable agreement with Arlington County, which is currently estimated to be approximately and not less than \$9 million;

NOW, THEREFORE, be it


RESOLVED, That the General Manager and Chief Executive Officer or designee is authorized to negotiate and execute a reimbursable agreement for Arlington County to fully fund, design, construct, and transfer of ownership of a new east entrance to the Crystal City Metro Station to WMATA, substantially in the form as shown in Attachment A; and be it further

Motioned by Mr. Smedberg, seconded by Dr. Hadden Loh

Ayes: 7- Mr. Smedberg, Mr. McAndrew, Dr. Hadden Loh, Ms. Kline, Mr. Letourneau, Mr. Drummer and Ms. Worth

RESOLVED, That in order to ensure timely execution of the reimbursable agreement for a new east entrance to the Crystal City Metro Station, this Resolution shall be effective immediately.

Reviewed as to form and legal sufficiency,



Patricia Y. Lee
Executive Vice President, Chief Legal Officer
and General Counsel

WMATA File Structure No.:
4.3.3 – Reimbursable Agreements

CRYSTAL CITY METRO STATION SECOND ENTRANCE PROJECT

PROJECT CONSTRUCTION COORDINATION AGREEMENT

by and between

**WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY**

and

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA

DATED: _____

PROJECT CONSTRUCTION COORDINATION AGREEMENT

THIS PROJECT CONSTRUCTION COORDINATION AGREEMENT (“**Agreement**”) is entered into as of _____ (the “**Effective Date**”) by and between **Washington Metropolitan Area Transit Authority**, an interstate compact agency (“**WMATA**”), and the County Board of Arlington County, Virginia, a political subdivision of the Commonwealth of Virginia, (“**County**”) (sometimes collectively referred to as the “**Parties**” and individually as a “**Party**”).

RECITALS:

WHEREAS, WMATA and the County desire to construct an additional entrance to the Crystal City Metrorail Station that will be located at the northwest corner of Crystal Drive and 18th Street South and will include an entrance stair and ADA compliant elevators at the northwest corner of Crystal Drive and 18th Street South (the “**Project**”); and

WHEREAS, the Project will provide mezzanine space connecting to the existing station train room area and will include station and passenger facilities such as the faregate array, fare vending machines, station manager kiosk, required mechanical rooms, restrooms, and an employee breakroom; and

WHEREAS, County has agreed to design, construct, and obtain all necessary land rights for the Project at its sole cost as further provided in Section 7; and

WHEREAS, the County received an unsolicited proposal (the “**Proposal**”) from CESC Square, L.L.C., a Virginia limited liability company and a subsidiary of JBG Smith Properties LP under the Virginia Public-Private Education Facilities and Infrastructure Act of 2002 as Amended and the corresponding Arlington County Guidelines to design and construct the Project; and

WHEREAS, after evaluation of the Proposal, the County determined to accept the Proposal and entered into an Interim Agreement for CESC Square, L.L.C. to complete the 30% design of the Project; and

WHEREAS, after execution of the Interim Agreement, CESC Square, L.L.C. assigned the Interim Agreement to JBGS/TRS, L.L.C., a Delaware limited liability company and subsidiary of JBG Smith Properties LP (the “**Developer**”); and

WHEREAS, the Parties previously entered into a Design Support Agreement dated [July 30, 2020] for the 30% design of Project (the “**Design Support Agreement**”); and

WHEREAS, the 30% design is complete (**Exhibit L**) and the County intends to enter into a Comprehensive Agreement (“**Comprehensive Agreement**”) with the Developer to complete final design and construction of the Project on a design-build basis; and

WHEREAS, at the completion of the design and construction of the Project in accordance with this Agreement, WMATA will accept ownership and operation and maintenance of the Project; and

WHEREAS the Parties desire to set forth the procedures for the County’s coordination with WMATA for the final design and construction of Project;

NOW, THEREFORE, in consideration of the agreements, terms, covenants, and conditions hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. DEFINITIONS.

- 1.1. Capitalized Terms in this Agreement shall have the meanings set forth in this Article.

“Adjacent Construction Project Manual” means WMATA’s Adjacent Construction Project Manual, Version 5a dated September 21, 2015, as it may be amended, supplemented or replaced from time to time.

“Agreement” is defined in the preamble and shall include any amendments, supplements, or other modifications of this Agreement from time to time.

“Applicable Law” means all present and future applicable laws, ordinances, rules, regulations, permits, authorizations, judicial decisions, orders and requirements, including, without limitation, building and zoning laws and codes, of all applicable federal, State and county governments, the departments, bureaus, commissions, authorities, boards or officers thereof, and any national or local board of fire underwriters, or any other body or bodies exercising similar functions having or acquiring jurisdiction of, and which affect or are applicable to the Project or any part thereof.

“Approved Design and Construction Documents” means the Design and Construction Documents as approved by WMATA. The “Approved Construction Documents” shall also include any approved changes/modifications (including change orders, shop drawings, and/or requests for information) to these documents and shall also include any and all such documents that may also be required to be completed in connection with the issuance of any government approvals. The Approved Construction Documents shall not contain, propose or constitute an acceptance of any restrictions, or the imposition of any requirements, that would or could result in any permanent adverse impact on the safety of, ingress to or egress from, the security of and/or the operations of the Metro Station or any WMATA Facilities.

“As-Built Documentation” means the complete coordinated and unified set of working drawings, specifications, studies, and reports depicting the Project as constructed upon Final Completion thereof, and including, *inter alia*, the Design and Construction Documents, redlined/clouded to show all field changes (as well as a clean version of the same), and all approved shop drawings and change orders.

The final As-Built Documentation must comply with the Adjacent Construction Project Manual, WMATA CAD Standards, and Civil 3D Styles, as amended or replaced from time to time.

“Business Day” means a workday from Monday through Friday that is not a Federal holiday.

“Calendar Day” means consecutive days inclusion of Saturdays and Sundays.

“Certificate of Final Completion” means a written statement executed by Developer certifying that the Project has achieved Final Completion in accordance with the terms herein, which Certificate of Final Completion shall be countersigned by WMATA and the County upon their approval thereof.

“Certificate of Substantial Completion” means a written statement executed by Developer certifying that the Project has achieved Substantial Completion in accordance with the terms herein, which Certificate of Final Completion shall be countersigned by WMATA and the County upon their approval thereof.

“Commercially Reasonable Business Efforts” means the timely and diligent undertaking of all steps usually, customarily and fiscally prudent under the circumstances that a general contractor takes to lawfully achieve the objective to which the particular effort pertains.

“Comprehensive Agreement” means the Agreement executed by and between the Developer and the County to complete final design and construction of the Project, which shall be subject to the terms and conditions of this Agreement.

“Construction Mistakes and Defects” means those defects in construction arising from failure to construct the Project (i) in accordance with generally accepted practices appropriate to the activities undertaken, (ii) in accordance with this Agreement or the Design and Construction Documents, as approved or deemed approved by WMATA, and as modified by change orders approved or deemed approved by WMATA, and (iii) in accordance with the WMATA Design and Construction Standards, but such defects shall not include defects in construction of the Project to the extent that WMATA specifically requested in writing for work to be performed in a manner, with materials or of a design that resulted in such defects and the County constructed the Project (or a portion thereof) in compliance with WMATA’s specific instructions. The County shall be liable for such defects in materials or workmanship described above where the County chose such materials or methods of workmanship in its discretion. There may be minor, immaterial variations from the Design and Construction Documents that do not negatively affect the safety, function, durability or maintenance of the Project, as determined by WMATA in its reasonable discretion, and such minor immaterial variations shall not be considered defects.

“*Construction Site*” means the area generally depicted on **Exhibit A**, which shall be further defined in the Design and Construction Documents.

“*County*” is defined in the Preamble.

“*County Project Representative*” is defined in **Section 5.11(a)**.

“*Design and Construction Documents*” means any and all conceptual, design and construction documents, drawings, for all design and construction work relating to the Project. The preparation of Design and Construction documents shall be divided by Work Packages. The Design and Construction Documents shall not contain, propose or constitute an acceptance of any restrictions, or the imposition of any requirements, that would or could result in any permanent adverse impact on the safety of, ingress to or egress from, the security of and/or the operations or maintenance of the Metro Station or any WMATA Facilities.

“*Developer*” means JBGS/TRS, L.L.C. and Clark

“*Event of Default*” is defined in **Section 10.1**.

“*Final Completion*” or “*Finally Complete*” or any similar term means the final completion and operational readiness of the Project, including:

- the completion of all Punch List items;
- to the extent required, any State, county and/or municipal inspections and/or certifications have been successfully completed such that the facilities can be placed in service for their full use and function;
- the delivery to WMATA of an assignment of ownership to WMATA of all of the County’s design and construction documents, specifications and shop drawings, together with the design and construction documents, specifications and shop drawings themselves;
- the delivery to WMATA of an as-built survey of the Project complying with the then-current standards of the American Land Title Association and the American Congress of Surveying and Mapping (or such professional organizations as may replace them from time to time to set standards for land surveys);
- the delivery to WMATA of a final certificate of completion on the then-current form promulgated by the American Institute of Architects (or such other professional organization that may

succeed to its role of promulgating industry-standard forms of this type) from the architect or engineer for the Project;

- the delivery to WMATA of an unconditional waiver of liens by the County's general contractor and from any subcontractor paid independently of the general contractor, and from any service provider entitled to file a mechanic's or materialmen's lien under Applicable Law;
- the clearing of the appropriate area of all equipment, materials, tools and rubbish; and
- the issuance by WMATA of a Certificate of Final Completion or acceptance, the decision to issue (or not) shall be determined by WMATA in its sole discretion.

"Functional Operations Test" means an operational test of the Project conducted by the County after it has been fully installed by the County. This test shall be conducted to determine whether individual components are installed and integrated to operate on a system level per the design intent and the manufacturer's specifications. Such test must take place with WMATA's personnel present.

"General Contractor" means the general contractor hired by the Developer.

"Maintenance of Traffic Plan" means the plan for maintaining continuous safe and effective pedestrian and vehicular traffic in and around the Project site, including WMATA's access to and from all WMATA Facilities on or adjacent to the site, during construction. The Maintenance of Traffic Plan must include any interim and temporary operational measures necessary to ensure that WMATA is able to maintain existing levels of service. The Maintenance of Traffic Plan must meet the WMATA Design and Construction Standards (as hereinafter defined) and must be approved by WMATA prior to commencement of any construction work on the Project. Any and all costs associated with the Maintenance of Traffic Plan must be borne by the County.

"Metro Station" means the Crystal City Metrorail Station, including all of WMATA's related equipment, structures, and interests.

"Notice" is defined in **Section 11.1**.

"Notice to Proceed" shall mean the issuance by the County to Developer of a notice to proceed under the Comprehensive Agreement.

"Payment and Performance Bonds" means bonds complying with **Section 6.3** below.

“*Project*” means (i) all design, construction, and any other work necessary for the development of the improvements related to an additional entrance to the Metro Station as more particularly described in the Design and Construction Documents, and (ii) any other infrastructure work relating to the foregoing, including any interim facilities necessary to maintain WMATA’s operations during the construction of the Project. The permanent location of the Project will be determined in the Approved Construction Documents.

“*Project Representatives*” means the County Project Representative and WMATA Project Representative.

“*Project Schedule*” is defined in **Section 4.1**.

“*Punch List*” means a list of minor construction deficiencies existing at the time that Substantial Completion has been achieved. Punch List items must be singular (i.e., items may not include sub-items) and may only include items capable of being completed within thirty (30) days from the date of the Certificate of Substantial Completion. Any items that could materially impede WMATA’s operations are not “minor construction deficiencies” and therefore mean that Substantial Completion has not been achieved and therefore shall not be included on the Punch List.

“*Real Estate Permit*” means the form of Real Estate Permit attached hereto as **Exhibit B**.

“*Safety Acceptance*” – A status that will be issued by the WMATA Safety Department upon successful inspection of the proposed facilities based upon the Safety and Security Specifications during Substantial Completion inspections.

“*Safety and Security Certification Plan*” means a safety and security certification plan in accordance with 49 CFR Parts 611, 633 and 659, FTA Handbook for Transit Safety and Security Certification, FTA Circular 5800.1, and the most recent update of the WMATA Safety and Security Certification Plan (further guidance is provided under WMATA Division 1 – General Requirements Specification section – 01115 Safety and Security Certification) in existence as of the Effective Date.

“*Substantial Completion*,” “*Substantially Complete*” and any similar term means that, the Project has been completed, except for Punch List items, in accordance with the Design and Construction Documents and is functional and ready for its intended purposes, and each of the following has been achieved:

- the Developer’s inspecting or design architect or engineer has issued and delivered to the County and WMATA a certificate of substantial completion in the form attached hereto as **Exhibit C** for the Project, subject to Punch List items;

- issuance by appropriate jurisdiction of a certificate of occupancy or non-residential use permit or their equivalent for the Project, if applicable, and a copy has been delivered to WMATA;
- the delivery to WMATA of two (2) hard copy sets in PDF format and four (4) electronic copies in AutoCAD format (or such formats as may hereafter replace the same) of the As-Built Documentation, certified by the Developer's project architect or professional engineer as accurate and compliant with the approved Construction Documents;
- WMATA and the County have countersigned the Certificate of Substantial Completion;
- a Safety Acceptance is issued to the County by WMATA in accordance with the Safety and Security Specifications attached hereto as **Exhibit D**;
- the delivery to WMATA of two (2) clean, complete and legible copies of all warranties and guaranties of equipment, installation or materials, together with duly executed instruments assigning them to WMATA, together with all technical materials needed to maintain the effectiveness of such warranties and guaranties;
- the delivery to WMATA of two (2) clean, complete and legible copies of all manufacturers' instructions, related maintenance manuals, training manuals or videos or the like, replacement lists, detailed drawings, all keys (including any pass cards and access codes) and spare parts, and any technical requirements necessary to operate and maintain such equipment and materials;
- operating and maintenance training for the Project has been provided to and completed by WMATA personnel in accordance with then-applicable WMATA standards; and
- The Parties have entered into an Operating and Maintenance Agreement.

"*WMATA Compact*" means the interstate compact that created and organized WMATA pursuant to Public Law 89-774, 80 Stat. 1324, Maryland Acts of General Assembly Chapter 869-1965, Virginia Acts of Assembly Chapter 2-1966, and Resolution of D.C. Board of Commissioners adopted November 15, 1966, as the same may be amended from time to time.

"*WMATA Design and Construction Standards*" means the Adjacent Construction Project Manual, the WMATA Station Site and Access Planning Manual, the

WMATA Manual of Design Criteria, the Standard Specifications to be used for the Project, attached hereto as **Exhibit E**, WMATA CAD Standards, Civil 3D Standards, the WMATA survey datum, and the WMATA Sign and Graphics Manual in effect on the date that the County issues its Notice to Proceed under the Comprehensive Agreement to the Developer; provided, however, if construction of the Project does not commence within two (2) years of such date, then WMATA may require the County to update the design to the then current versions of the Adjacent Construction Project Manual and/or WMATA Design Criteria and Standards and the County must update its design and submit such updated design for WMATA's approval.

“WMATA Facilities” or “WMATA Facility” means the Metro Station, adjoining tracks, entrances/exits, passageways (surface and subsurface), ramps, retaining walls, and other facilities for the Metro Station and any adjacent support facilities, including all improvements, infrastructure components, tangible property, structures and supports, access, curbing, guttering, drains, storm water facilities, utilities, parking (including lots, garages, spaces, meters, gates and revenue-collection facilities) located on property owned or used by WMATA; and all improvements, facilities, equipment, structures and other tangible property used in the operation, access to and from, maintenance, repair, servicing, removal and/or replacement of WMATA's train, bus or other transit operations, wherever located, including all rail stations, rails, tunnels, tracks, bus bays, bus lay-over bays, bus transfer areas, supervisor kiosks, employee bathrooms, electric substations, conduits and lines, pedestrian walkways, waiting and shelter areas, facilities serving persons with disabilities, cooling towers, chiller plants, vent and fan shafts, bicycle rack and locker areas, Bike & Ride facilities, parking lots and parking garages, Kiss & Ride facilities, storage and maintenance yards and facilities, and all other associated facilities notwithstanding that some of the facilities may have been constructed by or at the expense of County or another third party. The WMATA Facilities are and shall be owned by WMATA and shall not be conveyed or leased to the County. WMATA reserves all rights relating thereto, including making additions or other alterations, demolishing all or any part of them, changing the nature of their use, changing the name of the Metro Station, and determining the use (or non-use) thereof, all in WMATA's sole and absolute discretion.

*“WMATA Project Representative” is defined in **Section 5.11(a)**.*

*“Work List” is defined in **Section 5.6(a)**.*

“Work Package” means any portion of work to be designed and constructed as an individual package to progress different work elements or phases. Each Work Package shall be design and constructed in coordination with all Work Packages to ensure a complete and successful project design and construction. The project shall be divided into Work Packages in a logical manner that considers project's complexities related to work elements, budget, and schedule.

2. COUNTY OBLIGATIONS.

- 2.1 *Construct and Complete.* The County hereby covenants to design and construct and complete, or cause to be completed, the Project, at the County's sole cost, in accordance with the terms and conditions of this Agreement. The County will be responsible for all the construction work associated with the Project, obtaining all approvals for the Project (including but not limited to all necessary approvals from all governmental authorities having jurisdiction over the Project, obtaining any further zoning, site plan and conceptual plan approvals, obtaining all building permits and other approvals required in order to commence construction and obtaining all final inspections and approvals once construction has been completed), conducting any necessary public hearings (provided, however that WMATA shall conduct the Compact Public Hearing at the County's sole cost and expense), and ensuring all environmental requirements are satisfied.
- (a) *Best Practices.* The County shall design and construct the Project in accordance with current applicable codes as well as applicable best commercial practices and standards.
 - (b) *WMATA Standards.* The County shall design and construct the Project in compliance with this Agreement, the Approved Construction Documents, the WMATA Design and Construction Standards in effect on the date that the County issues its Notice to Proceed to the Developer under the Comprehensive Agreement, applicable codes and Applicable Law. The foregoing notwithstanding, WMATA shall have the right to require specific standards and technology for the Project if the Project is not substantially complete within two (2) years of Notice to Proceed to the Developer.
 - (c) *Correction of Mistakes.* The County hereby covenants to correct or cause to be corrected, at no cost or expense to WMATA, all Construction Mistakes and Defects.
 - (d) *No Binding WMATA.* The County has no right or authority, express or implied, to commit or otherwise obligate WMATA in any manner whatsoever except to the extent expressly authorized in a separate writing by WMATA.
 - (e) *Books and Records.* From the Effective Date to the date that is three (3) years following Final Completion of the Project, County shall maintain records relating to the design and construction of the Project including all supporting documentation. Such books and records shall be maintained at the County's offices. WMATA may, but is not required to, audit and make copies of all of the County's documents, books, and records related to the

design, construction, and budgeting for the Project for the purpose of verifying compliance with this Agreement; WMATA shall be given access to such documents, books and records upon ten (10) Business Days' Notice. This subsection shall survive the expiration or termination of this Agreement.

- (f) *WMATA Review of the County Contracts.* WMATA shall have the right to review and comment on the Comprehensive Agreement entered into for the Project prior to execution of such agreement.
- (g) *WMATA Third-Party Beneficiary Status; Assignment.* The Comprehensive Agreement shall provide that WMATA is an express third-party beneficiary thereunder (including under any indemnification provisions) and shall recognize the terms and conditions of this Agreement.

3. QUALITY ASSURANCE AND QUALITY CONTROL.

3.1. *Quality Control and Quality Assurance.* The County shall cause Developer to implement a quality control plan and a quality assurance plan in the execution of the Project in accordance with this Section 3.

- (a) *Quality Control and Quality Assurance Plan.* The quality control and quality assurance plans shall address quality assurance in organization, oversight, design, development, installation, inspection, review, and record keeping. The quality control and quality assurance plans shall be consistent with the FTA-IT-90-5001-02.1 and ISO 9001:2008 standards or any update thereto. The same person(s) may not have roles in either design, construction/production, quality control and quality assurance on any portion of the work performed under this Agreement. The quality control and quality assurance plans shall be provided prior to the start of construction and are subject to WMATA's approval as part of the approved Construction Documents.
- (b) *Quality Control Manager.* County shall cause Developer to create the quality control plan and name one individual as quality control manager for the Project within thirty (30) days of the Notice to Proceed under the Comprehensive Agreement. The quality control manager's sole duties on the Project shall be to provide quality control management independent of design, construction and profit. The quality control manager shall be responsible for all quality control activities and act as the primary contact on quality control issues. The quality control manager must report directly to someone at least one level above the Developer's project manager. The quality control manager must be a professional engineer with sufficient experience and expertise to perform the duties required of such a role.
- (c) *Quality Assurance Manager.* County shall hire an independent third party to perform as the quality assurance manager for the Project. Hiring of this

position shall be subject to WMATA approval. The quality assurance manager shall assure that the quality control plan is followed. The quality assurance manager will be responsible for ensuring quality controls are integrated with quality assurance activities and requirements. The Quality Assurance Manager shall ensure that all construction submittals to WMATA are complete, reviewed by the County, and are in accordance with the construction contract, the Approved Construction Documents and this Agreement. The Quality Assurance Manager shall ensure that the Safety and Security Certification Plan is properly executed. The quality assurance manager must be a professional engineer with sufficient experience and expertise to perform the duties required of such a role and approved by WMATA. Replacement of this position is also subject to WMATA approval.

- (d) *Quality Control Testing.* The County shall hire an independent qualified/accredited third party to perform industry standard inspection and testing on the Project, or as otherwise required by the WMATA Design and Construction Standards or by the governing jurisdiction(s).
- (e) *Quality Control and Assurance Reports.* WMATA shall be copied on all quality control and assurance documents and test results related to the Project. WMATA may, but is not required to, audit and review quality control and quality assurance documents to ensure compliance with this Agreement.
- (f) *Quality Oversight Activities by WMATA.* WMATA's personnel may, but are not required to, perform quality oversight at any time on the Project, including (but not limited to) site visits, initiating meetings with the County, testing, and accompanying all of County's quality control or quality assurance designees during the quality control and quality assurance activities and audits performed on the Project. The presence of WMATA's personnel shall not relieve the County of any of its quality assurance and quality control responsibilities hereunder.

4. CONSTRUCTION SCHEDULE AND PLANS.

4.1 *Project Schedule.*

- (a) *Project Schedule.* The County will create and maintain a project schedule setting forth the commencement, milestone, and completion activities for the construction of the Project ("**Project Schedule**"). The Project Schedule must delineate all Work Packages ("Work Packages"), as well as all submittals and activities involving WMATA, including, but not limited to, all testing and commissioning. These submittals and activities must be tied to the appropriate predecessor and successor items that comprise the overall

Project Schedule. The County shall regularly submit the Project Schedule and any updates thereto to WMATA in the source format.

- (b) *No Changes Without WMATA Approval.* Dates shown on the approved Project Schedule that relate to the WMATA Facilities and/or operations shall not be changed unless the change is reviewed and approved by WMATA, such approval not to be unreasonably withheld, conditioned or delayed.
- (c) *Notification of Changes.* The County shall promptly send Notice of any changes to the Project Schedule to WMATA, including any anticipated delays to the Project Schedule and will also provide a complete up-to-date Project Schedule to WMATA monthly.

4.2 *Design and Construction Documents.* The County shall, or shall cause the Developer to prepare the Design and Construction Documents.

- (a) *WMATA Approval Predicate.* Prior to engaging in any construction work package related to the Project, the County must obtain WMATA's written approval of the Design and Construction Documents. In the event that the County or the Developer perform any Project construction work prior to such time as WMATA approves the Design and Construction Documents, such work shall be at the County's risk, the County shall pay all costs for any rework required by WMATA, WMATA shall have the right to issue a Stop Work Order at WMATA's discretion if the work is suspected to be or in fact is adversely impacting safety or operations of any WMATA Facilities, and WMATA shall retain all approval rights for the final Design and Construction Documents.
- (b) *Contents.* The Design and Construction Documents shall include, but not be limited to, the following:
 - (i) The Project Schedule.
 - (ii) A schedule-based submittal plan listing the submissions to be made to WMATA for review and approval.
 - (iii) A written description and graphical representation of the physical impact that construction of the Project will have on WMATA Facilities. The description must list all penetrations, borings and planned modifications at or near any portion of WMATA Facilities.
 - (iv) A list of any and all WMATA Facilities to be affected, altered, and/or removed during the construction of the Project and

procedures to be used for protection, restoration, and/or replacement of the WMATA Facilities affected, removed, and/or altered.

- (v) Progressive stages of design, including 60% and 90%, 100%, and “release for construction” submittals, including an outline of the critical construction procedures (including but not limited to procedures concerning the interface with the WMATA Facilities) and all temporary construction work (including blasting, supportive excavation, shoring, false work and form work), state proposed means and methods and the approximate duration of each activity. The intent of the 100% design submittal is for the County and WMATA to ensure the 90% design submittal comments have been satisfactorily addressed.
 - (vi) A plan for tying in the Project to the WMATA Facilities.
 - (v) A construction phasing plan and the Maintenance of Traffic Plan.
 - (vi) The quality control and quality assurance plans for the Project.
 - (vii) The procedures to be used for commissioning start up, testing, and demonstrating the Project, to the extent applicable.
 - (viii) A detailed plan for addressing all scheduled service outages.
- (c) *Submissions to WMATA for Approval.* To obtain WMATA’s approval of any construction submittal, the County must submit to WMATA an electronic (.pdf) copy of the proposed submittal. The County shall submit such electronic copies for review using WMATA’s electronic data management system (currently called “Procore”) or other mutually agreed software.
- (i) *Submissions Must Be Certified.* Prior to each submission to WMATA, the County shall cause the Developer’s designer of record to stamp their approval on such submission to certify that the submission is complete and complies with the terms of this Agreement. The County shall cause the Developer’s designer of record to stamp such submission as evidence of its approval of them.
 - (ii) *Quality Assurance Manager Review and Approval.* Prior to submission to WMATA the County shall cause its Quality Assurance Manager to review and approve such submission confirming that the submission is complete and complies with the terms of this Agreement.
 - (iii) *Submission Compliance.* All submissions to WMATA shall comply with the WMATA Design and Construction Standards, as set forth in **Section 2.1(b)**, and all Applicable Laws.

- a. If the County knows that portions of any submission are at variance with the WMATA Design Criteria and Standards, the Adjacent Construction Project Manual, or any Applicable Laws, the County shall inform WMATA in writing upon discovery of the variance and in all events effect corrections in a manner satisfactory to WMATA.
 - b. If the County wishes to design and construct any portion of the Project at variance from the WMATA Design Criteria and Standards and/or the Adjacent Construction Project Manual, the County must submit such request by the means identified above and obtain WMATA's prior written approval of each variance. WMATA will respond to such request within fifteen (15) Business Days or such other period as mutually agreed upon.
- (iv) *Design Submissions.* All design submissions must comply with the following:
- a. After review for completeness by the Quality Assurance Manager. The County shall submit each submission to WMATA for review with a design review log for recording WMATA responses. The parties' agreed-upon form of the design and review log is attached hereto as **Exhibit F**.
 - b. The County will respond to WMATA's comments in the parties' design review log after receiving WMATA's comment on the Design and Construction packages related to "60% design" "90% design" and "100% design."
 - c. After County has provided said responses to WMATA, the County and WMATA may schedule an in-person meeting to discuss; provided however, WMATA must be given at least thirty (30) Calendar Days to distribute and review County's responses before any such meeting may take place.
 - d. County hereby acknowledges that WMATA previously provided as-built drawings, existing survey data, property boundaries, and other related information of the existing infrastructure of the station and around Project site; provided, however, WMATA agrees to provide any updates and/or additional information related to the foregoing at or before the Notice to Proceed under the Comprehensive Agreement. The County shall not have the benefit of, and shall not rely upon, any information provided by WMATA under this paragraph. If WMATA has provided, or hereafter provides, any documents, opinions or work product of its own or of consultants, surveyors, architects, engineers, title companies, governmental authorities or any other persons or entities, WMATA has done so or hereafter does so only for the convenience of the County to help the County perform its own evaluations and not so that the County may legally rely upon them; the

provision of such documents, opinions or work product shall not create or give rise to any liability of or against WMATA or its directors, officers, employees, consultants, surveyors, architects, engineers, title companies or any other persons or entities.

- (v) *WMATA Time for Review.* WMATA shall have thirty (30) Calendar Days to review any submission. WMATA's time for review shall not begin to toll until the complete comprehensive set of documents in sufficient detail, as determined by WMATA, has been submitted. If a submittal is received after 2:00 pm, then WMATA's allotted time for review will not begin to run until the following Business Day. WMATA shall provide its approval, rejection, or comments, qualifications, and objections on each submission within the 30 Calendar Days. The County will incorporate agreed upon design changes and comments into the approved Construction Documents. The County must obtain WMATA's approval of each such submission before proceeding further in construction.
- a. If such a proposed submission is not approved after its third (3rd) iteration is submitted to WMATA for approval, the Parties and the Developer shall meet and use Commercially Reasonable Business Efforts to determinate whether a mutually acceptable version of the proposed submission can be agreed to.
 - b. If no agreement is reached within 30 Business Days after the third (3rd) submission then the Project Representatives shall be the first level of dispute resolution.
 - c. Any dispute that cannot be resolved by the Project Representatives shall be formally presented in writing to the Project's second level reviewers, who shall be (i) the Vice President for the Project Implementation and Construction Office or designee for WMATA and (ii) the Transportation Director for the County. Any resolution of the dispute shall be reduced to writing and signed by the second level reviewers.
 - d. If the dispute cannot be resolved by the second level of review, then the matter shall be presented to the Arlington County Manager for the County and the Executive Vice President for the Office of Capital Program Delivery of WMATA for a final determination.
 - e. WMATA shall not be subject to financial penalties due to construction delays caused by excessive review times resulting from incomplete submittals, and additional budget for WMATA reviews may be required above the estimate provided herein.

- (vi) *Additional Information.* County shall provide WMATA with any additional information in its possession or control that WMATA may reasonably request to assist WMATA in evaluating any submission.
- (vii) *Changes to Approved Submissions.* Once WMATA has approved a submission, WMATA may require changes only to comply with a safety issue and/or legal or regulatory mandate. The County shall not change an approved submission without WMATA's prior written consent. County shall submit any proposed change(s) to the approved submission, including but not limited to change orders and shop drawings, to WMATA for review. To ensure that WMATA is able to evaluate how the proposed change is incorporated into the Project, the County shall submit a complete and comprehensive change proposal package (which must include all parts of the Project and/or WMATA Facilities to be impacted by such proposed change) when seeking a change under this Section. WMATA shall review and provide written approval or rejection of the proposed change. When a previously-approved submission is being re-submitted because of a change thereto, WMATA's approval rights shall be limited to only matters not previously approved by WMATA; provided, however, all previous approvals are conditional and subject to WMATA's receipt of additional information, enhanced detail provided at subsequent stages of design or development, and/or changes to the Project which change the matter previously approved.

5. CONSTRUCTION OF THE PROJECT.

- 5.1 *Cause Construction.* County shall cause the construction of the Project in accordance with the Approved Design Construction Documents and the other provisions of this Agreement.
- 5.2 *WMATA Facilities.*
 - (a) *WMATA Real Estate Permit.* Access to WMATA's property for the purposes of constructing the Project shall be governed by the terms of a separate Real Estate Permit executed by WMATA and the party seeking to access WMATA's property, in the form attached hereto as **Exhibit B**.
 - (b) *Work on WMATA Facilities.* County shall cause each person on its development team physically working on WMATA Facilities (e.g., employees of the General Contractor, subcontractors, and on-site service providers and consultants) to obtain a WMATA badge from the JDAC Project Manager prior to working on WMATA Facilities and, if required by WMATA, to successfully complete WMATA's right-of-way safety training course. County acknowledges that WMATA will require a background check to be provided to WMATA on each person applying for a WMATA badge.

- (c) County shall cause the Developer to require that its General Contractor to provide its staff and subcontractors and WMATA staff with appropriate facilities to include, but not be limited to, bathrooms, work areas and breakroom areas. County also shall cause the Developer to require its General Contractor to provide the appropriate utilities to service these facilities and construction activities. The County shall cause the Developer to require its General Contractor and its subcontractors shall not use WMATA facilities and utilities without prior approval.
- (d) *SSWP/GOTRS*. Any work within WMATA's right of way or other operational areas will require WMATA approval of a "Site Specific Work Plan" (SSWP) and/or a "General Orders and Track Rights" (GOTRS) before such work can begin. Such work includes, but is not limited to, any work that requires operational adjustments (e.g., shutdowns, bus bridges, or single-tracking), access to WMATA's track area, or reconfiguration of power or other similar operational systems. The County acknowledges that WMATA's approval of SSWP and/or GOTRS requests may take in excess of ninety (90) days, depending on which areas will be affected and the complexities of the work.
- (e) WMATA cannot guarantee access to WMATA Facilities; WMATA operations, maintenance and emergencies take priority.

5.3 *Coordination Meetings, Progress Reports.*

- (a) *County Coordination*. The County shall coordinate and schedule pre-construction meetings at least ten (10) days prior to commencing all major construction operations of the Project; during construction, the County shall coordinate and schedule progress meetings not less frequently than monthly. At such meetings, the County shall cause its construction team to be prepared, among other things, to review the Project Schedule and to review safety and security compliance matters. At the preconstruction meeting, the County, the Developer, the General Contractor and WMATA will discuss and determine a meeting schedule, which shall at least include bi-weekly joint progress and "look-ahead" meetings.
- (b) *Progress and Look-Ahead Meetings*. The County shall conduct bi-weekly joint progress and "look-ahead" meetings to discuss all aspects of the Project relevant to the next two weeks. The County Project Representative and representatives from the Developer and General Contractor and any material subcontractors relevant to that work, and the County shall attend such meetings.
- (c) *Presence at Meetings*. WMATA shall have the right to be present at all meetings the subject of which is the Project. The County shall provide WMATA at least five (5) Business Days' Notice before holding any meeting related to the Project. All meeting Notices must include a meeting agenda for

that proposed meeting. If WMATA gives Notice that it is unable to attend any such meeting, and it is possible and reasonable to reschedule that meeting, the meeting shall be rescheduled to such time as may be convenient for WMATA.

- (d) *Meetings Scheduled by WMATA.* WMATA has the right to schedule meetings on five (5) Business Days' Notice to the County. At such meetings, the County shall cause its construction team to be prepared, among other things, to review the Project Schedule and to review safety and security compliance matters.
- (e) *Meeting Minutes.* The County shall provide meeting minutes to WMATA within five (5) Calendar Days after any meeting relating to the Project or two days before the next meeting, whichever occurs first.
- (f) *Progress Reports.* The County shall provide WMATA with a written monthly status report regarding matters covered by this Agreement. The status report shall summarize the progress of the project, compare the state of the project to the Project Schedule (including any explanation of any delays), and provide such other information as may be customarily reported on projects of similar size and scope.

5.4 *Site Review and Assessment.*

- (a) *Access.* During construction of the Project, WMATA's personnel shall have: (1) reasonable daily access to such Project for the purpose of determining whether such construction operations pose a safety risk to the public or to any other Project or WMATA Facilities, and to confirm that the construction of the Project conforms with the WMATA Design and Construction Standards and the approved Construction Documents, including relevant architectural, structural, electrical, mechanical, sheeting and shoring, excavation and utility drawings and (2) uninterrupted access to WMATA Facilities (other than the Project being constructed).
- (b) *Stop Work Order.* WMATA's inspector(s) shall have the absolute authority to stop County's construction of the Project if in his/her reasonable opinion, the Developer, General Contactor or any subcontractor(s) is/are working (1) in a manner that interferes with WMATA's operations, (2) in a dangerous or unsafe manner that could affect WMATA Facilities, WMATA's operations, WMATA's customers or the general public, (3) not in conformance with the WMATA Design and Construction Standards or the WMATA-approved Construction Documents, or (4) in a manner that is not consistent with the terms of this Agreement. Such inspector(s) shall also have the right to issue corrective notices to the County for work that is dangerous or unsafe or that is not in conformance with the above referenced documents, and the County shall promptly undertake and complete the corrective action identified in such notice. The authority of WMATA's inspector shall be incorporated into the Comprehensive Agreement.

- (i) In the event of an emergency, as determined by WMATA in its sole discretion, WMATA shall have the immediate right to issue a “*stop work order*.” The County shall comply, and shall cause the Developer and/or General Contractor, subcontractors and other service providers to comply with any such stop work order.
 - (ii) In the event of a non-emergency, as determined by WMATA in its sole discretion, WMATA shall first provide the County with Notice of noncompliance. The County shall have three (3) Business Days to cure such noncompliance before WMATA may issue a “*stop work order*.” The County shall comply, and shall cause the Developer and/or General Contractor, subcontractors and other service providers to comply with any such stop work order.
 - (iii) WMATA shall further have the right to seek a court injunction, directive, or similar relief in order to enforce WMATA’s rights described in this Section.
- (c) *Remedial Action.* Upon WMATA issuing a stop work order, the parties shall meet promptly to remedy the issue. The County shall execute such an agreed upon remedy at its sole cost.

5.5 *Construction Obligations.* The County covenants to construct the Project in accordance with the following:

- (a) *No Adverse Effects to WMATA.* The County shall plan, schedule, and perform its obligations under this Agreement so as to integrate the Project with the existing WMATA Facilities and so as to not adversely affect the operations, safety, or security of any WMATA Facilities in any respect, unless otherwise approved by WMATA in its sole and absolute discretion.
- (b) *Diligent Completion.* The County shall diligently work to complete all work related to the Project in accordance with the approved Construction Documents and as otherwise provided herein.
- (c) *Equipment, Material, and Articles.* All equipment and material incorporated into the Project shall be in accordance with the approved Construction Documents. Materials installed or used in the construction relating to the Project without the prior written approval of WMATA shall be at the risk of subsequent rejection by WMATA, with removal, replacement, and any related costs to be borne solely by the County.
- (d) *Coordination.* Until Final Completion, the County shall be responsible for coordinating construction of the Project, including but not limited to (i) controlling circulation and movement of vehicular and pedestrian traffic on,

about and around Construction Site during construction in accordance with the approved Maintenance of Traffic Plan and (ii) determining means and methods of construction access, staging and storage.

- (e) *Safe Project Area.* During the course of constructing the Project, the County shall maintain the Construction Site in a safe manner and in compliance with all Applicable Laws. The County shall take all actions and implement all protections necessary to ensure that its construction-related activities and all equipment, materials and substances used, generated or brought onto WMATA's property pose no threat to the safety of persons, the environment, or property of WMATA, including, without limitation, providing and maintaining barricades, fences, signs, lighting and other safety devices necessary for employee and public safety.
- (f) *Safety and Security Certification Plan.* Prior to the commencement of construction, County shall develop for WMATA's review and approval, and thereafter execute, a Safety and Security Certification Plan for the Project.
- (g) *Monitoring.* The County shall implement a monitoring plan in accordance with the Adjacent Construction Project Manual. As part of such plan, the County shall conduct a preconstruction survey of all WMATA Facilities on or adjacent to the Construction Site prior to the start of any construction related activity (this survey shall serve as a baseline survey) and perform monitoring of the facilities during construction.
- (h) *Damage.* The County shall repair all damage to WMATA Facilities and/or operations, and/or the property of others arising from or attributable to the County's actions or omissions (and/or the actions or omissions of its contractors, subcontractors, consultants, employees, agents, representatives, or invitees) at no cost or expense to WMATA, excluding, however, any loss, damage or injury that results solely from the acts or omissions of WMATA, its employees, business invitees, or contractors. Any such repair work must comply with the WMATA Design and Construction Standards.
- (i) *Americans with Disabilities Act.* The Project shall be designed and constructed in compliance with the then current Americans with Disabilities Act Standards for Transportation Facilities adopted by the U.S. Department of Transportation (2006) (as updated and amended from time to time) and the U.S. Department of Justice's 2010 Americans with Disabilities Act Standards (as updated and amended from time to time).
- (j) *Storm Sewer/Water/Electrical Systems.* Except as may be set forth in the Design and Construction Documents, the County shall not use WMATA's storm sewer, storm water management facilities, water supply or electrical systems without the prior written permission of WMATA.

- (k) *Discharge Permits.* The County shall review and comply with any applicable discharge permits so the design and construction methods chosen will avoid potential violations.
- (l) *Explosives.* The County shall not use explosives for the performance of the Project without prior written approval from WMATA. Due to the proximity of WMATA Facilities, WMATA may withhold its approval in its sole and absolute discretion.
- (m) *Utilities.* The County shall notify all local utility companies and hire a private utility locator (with regards to WMATA Facilities) and mark the location of any utility lines prior to commencing any work on the Construction Site or on the Project.
 - (i) The County shall pay all charges for utilities used, constructed, or modified in connection with the construction and completion (but not operation) of the Project and shall be liable for any interference, harm or disruption of any utility service to WMATA arising from or attributable to its construction-related activities.
 - (ii) Existing utility services to WMATA Facilities must remain in place and shall not be utilized by the County during the construction of the Project except and to the extent shown on the approved Construction Documents.
- (n) *Public Communication.* The County shall conduct all public outreach and community relations for the Project's construction phases and, in cooperation with WMATA, will develop an overall outreach strategy and communications plan and timeline that complies with WMATA's Public Participation Plan. WMATA will review and approve the final plan and communications materials. The County will plan and execute communications and outreach activities and maintain a Project website that communicates construction, the County policy, and regulatory information until Substantial Completion. WMATA will be responsible for and broadcasting information about interruptions to Metro service related to construction activity. All public communication efforts, including related signage and materials, shall be at the County's sole cost and expense.
 - (i) The County will manage all public and media inquiries prior to Substantial Completion; and will include WMATA on all responses. WMATA will have sole authorization for media access to the construction site and reserves the right to deny access for failing to adhere to safety requirements as determined by WMATA in its sole and absolute discretion. A WMATA representative must accompany any media on-site.
 - (ii) Once construction is complete and the Project has been turned over to WMATA, WMATA will, in close coordination with the County,

assume all public outreach and community relations activities, including any events marking the entrance opening.

- (o) *Fire Protection.* The County shall ensure all work complies with the latest version of NFPA 130. All fire protection system components shall be subject to the approval of WMATA's Fire Marshal.
- (p) *Taking WMATA Facilities Out of Service.* The County shall be required to provide interim WMATA Facilities with respect to any WMATA Facilities taken out of service during the construction of the Project, in accordance with the approved Construction Documents. Interim WMATA Facilities must conform to the WMATA Design and Construction Standards.
- (q) *Re-use and Disconnection of Existing WMATA Facilities.* If the County and WMATA agree to re-use any parts of the existing WMATA Facilities as part of the Project, the parties shall conduct a joint inspection of such WMATA Facilities prior to it being disconnected. The County must provide WMATA Notice at least sixty (60) Business Days prior to any date it desires to disconnect such WMATA Facilities, so the parties may schedule such joint inspection. Within ten (10) Business Days after the date of such inspection, WMATA shall deliver a draft certificate of the condition of such WMATA Facilities to County which shall include, without limitation, a list of all of the WMATA Facilities parts or other components that are intended to be included in the Project and the condition of each such part or component. The County shall review such draft certificate and deliver to WMATA within five (5) Business Days after receipt thereof a Notice either notifying WMATA that it approves such certificate or identifying any concerns it has with the draft certificate. If the County disapproves the certificate or identifies any concerns therewith, the parties will work together to resolve the same until such time as the certificate is agreed upon in writing by both parties in their reasonable discretion. The County shall not disconnect any such WMATA Facilities until both parties have signed such certificate. The County shall be solely responsible for insuring Project components tie-in with existing WMATA Facilities. Any need for the replacement, upgrade or other changes to existing WMATA Facilities necessary to accomplish this tie-in shall be the sole responsibility of the County.
- (r) *Restoration of the Construction Site.* The County shall remove all construction materials, equipment and debris and restore the Construction Site, as improved by the Project, to a clean and safe condition and landscaped in accordance with the Adjacent Construction Project Manual, the approved Construction Documents, and the Maintenance of Traffic Plan promptly upon Final Completion of the Project or the earlier termination of this Agreement.
- (s) *Construction Signage.* The County shall display information signs approved by WMATA at the Construction Site clearly indicating the identity of the party responsible for the work being performed.

- (t) *Davis-Bacon Act.* The County agrees that the Project shall be built by County in compliance with the Davis-Bacon Act, 40 U.S.C 276a et seq.
 - (u) *Other Applicable Requirements.* The County agrees to comply with any other requirements of the local jurisdiction(s) applicable to the Project.
 - (v) *Commercially Reasonable Business Efforts.* The foregoing provisions are not intended to be exclusive. The County shall and shall cause Developer to perform such other duties in connection with the Project as would normally be performed by a developer working for its own account on a project of similar size, type and degree of complexity.
- 5.6 *Substantial Completion and Final Completion.* The County shall work diligently to achieve Substantial Completion and Final Completion. Whether or not Substantial Completion or Final Completion has been achieved shall be determined by WMATA in accordance with this Agreement.
- (a) *Work List.* The County shall create and maintain, or cause the General Contractor to create and maintain, throughout the construction of the Project, a list of work items that have commenced but have not yet been completed (“**Work List**”). The Work List will eventually serve as a basis for the Punch List. The County shall provide WMATA with the most up-to-date version of the Work List upon request from WMATA.
 - (b) *Substantial Completion.* When the County considers the Project to be nearing Substantial Completion, the County shall have the right to so notify WMATA, which Notice shall include copies of all materials stated in the definition of Substantial Completion, and WMATA and the County shall jointly schedule an inspection and testing, [including a Functional Operations Test,] of the Project within fifteen (15) Business Days after the giving of the County’s Notice [provided, however, that the inspection and testing may be postponed if any conditions specified in the definition of Functional Operations Test cannot be met]. The County shall bear sole responsibility for having any required governmental inspectors available at any inspection and testing (or re-inspection and testing, if applicable) of the Project. If WMATA determines that Substantial Completion has not occurred, WMATA shall, within seven (7) Business Days following the date of completion of such inspection and testing, deliver to the County WMATA’s specific written objections to the condition of the Project which causes such Project not to be in a state of Substantial Completion, and the County shall diligently proceed to remedy the conditions noted by WMATA at its expense; provided, however, that such remedial action by the County shall be without prejudice to the County’s right to seek resolution of any dispute between WMATA and the County with respect to (i) whether Substantial Completion has been achieved in accordance with this Agreement, and (ii) whether WMATA was correct in requiring the County to take such

remedial action. When the County considers the Project to be ready for re-inspection and testing, WMATA and the County shall jointly schedule a re-inspection and testing of the Project within five (5) Business Days following WMATA's receipt of written notice from the County requesting such re-inspection and testing, and WMATA shall inform the County of its conclusions upon such re-inspection and testing within seven (7) Business Days following the date of completion of such re-inspection and testing. The foregoing re-inspection and testing process shall be continued until the Project has reached a state of Substantial Completion and WMATA and the County have agreed upon the Punch List. The County shall complete all Punch List items within thirty (30) days after the Punch List is agreed upon.

- (c) *Final Completion.* Within seven (7) Business Days following the last to occur of Substantial Completion, the County remedying all items on the Punch List, and the satisfaction of all other components of the definition of Final Completion, WMATA shall deliver to the County a Certificate of Final Completion certifying that the Project has been accepted by WMATA. The process for determining Final Completion shall be the same process as stated in the preceding subsection to determine Substantial Completion.

5.7 *Project Closeout.* WMATA shall submit its final expenditure report to the County within one-hundred and twenty (120) days from Certificate of Final Completion. The County will review and approve or reject within thirty (30) days. If the County rejects WMATA's final expenditure report, WMATA will have thirty (30) days to rectify and re-submit the final expenditure report to the County. After final County approval, WMATA must refund any overpayment and/or balance of any unexpended funds from the WMATA Cost Account to the County within sixty (60) days. The County shall pay WMATA for any shortfall within sixty (60) days.

5.8 *Covenant to Correct Construction Mistakes and Defects.* The County shall remedy or cause to be remedied, at its sole cost and expense, any Construction Mistakes and Defects of which it is given Notice within one (1) year after the Developer has completed all obligations under the Comprehensive Agreement or such longer period as may be required by any specific requirement or specification in the approved Construction Documents, or, with respect to latent defects, within five (5) years after the Developer has completed all obligations under the Comprehensive Agreement. County shall notify WMATA of Developer's completion of all obligations under the Comprehensive Agreement within two (2) Business Days of the same. The County shall remedy the Construction Mistakes and Defects within thirty (30) days after delivery of a Notice of Construction Mistakes and Defects, provided, however, that if such remedy is not reasonably susceptible of being completed within such thirty (30) day period, the County shall not be deemed to be in default hereunder so long as the County has promptly commenced the remedial work within such thirty (30) day period and diligently prosecutes the same to completion within an additional ninety (90) days. Notwithstanding the foregoing, in the event of an emergency, or in the event of a condition that threatens the lives or safety of any persons or property, or the safety,

security, or operational capabilities of any WMATA Facilities, the County shall remedy the Construction Mistakes and Defects immediately. In furtherance of the foregoing, County shall either (i) obtain for WMATA a direct warranty from the General Contractor for the foregoing five (5)-year warranty against latent defects or (ii) if the County does not act under preceding **clause (i)**, the County shall, by this clause, be deemed to, and hereby does, non-exclusively assign to WMATA a five (5)-year warranty against latent defects running to the County's benefit in accordance with **subsection (b)** below. At the end of the aforesaid one (1) year or five (5) year period, as applicable, the County's warranty shall terminate except as to claims by WMATA arising from fraud or such gross mistakes as may amount to fraud and except as to claims made prior to the expiration of the one (1) year or five (5) year period, as applicable.

- (a) *WMATA's Cure Rights.* Without prejudice to any other right or remedy of WMATA at law, in equity, or under the terms of this Agreement, if the County fails to remedy any Construction Mistakes and Defects in accordance with the terms of this Agreement beyond any applicable notice and cure period, WMATA may take reasonable measures to cure such failure and the County hereby agrees to reimburse WMATA for its verifiable costs related thereto.
- (b) *Contractor's Warranties.* All warranties and guaranties of equipment, installation or materials furnished to the County or its (sub)contractors by any manufacturer or supplier shall be deemed to run to the benefit of, and are hereby assigned by the County to, WMATA. The County shall render reasonable assistance to WMATA in enforcing the rights and remedies under any such assigned warranty, at no out-of-pocket cost to the County.
- (c) *Rights Additive.* The rights and remedies of WMATA provided in this Section are in addition to and do not limit any rights afforded to WMATA by any other provision of this Agreement.
- (d) *Survive Termination.* The terms of this Section shall survive the date of issuance of the Certificate of Final Completion.

5.9 *Mechanic's Liens.* The County shall keep the WMATA Facilities and the land thereunder and thereabout free and clear of all mechanic's, materialmen's, and other liens for or arising out of, or in connection with, work or labor done, services performed, or materials or equipment used or furnished in connection with the County's project. In the event, that notwithstanding the foregoing, such a lien is filed against all or any portion of the WMATA Facilities (including the Project), the County shall take action to have such lien to be removed [or bonded over] within ten (10) Business Days of the filing thereof; in the event the County fails to do so within such 10-day period, WMATA shall have the right to do so, in which event, the County shall promptly reimburse WMATA for the costs thereof.

- 5.10 *Project Opening.* WMATA is not required to take custody or begin to operate the Project until Final Completion has been achieved but may, in WMATA's sole and absolute discretion, take custody or begin to operate earlier.
- 5.11 *Project Representatives.* Each party to this Agreement will designate an individual as its Project representative (respectively, the "**WMATA Project Representative**" and the "**County Project Representative**" and collectively the "**Project Representatives**") for purposes of coordinating the exchange of information, processing of requests, addressing solutions and otherwise implementing the terms of this Agreement and the approved Construction Documents (but not amending or otherwise altering or modifying the terms of this Agreement or the approved Construction Documents).
- (a) *Initial Representatives.* As of the date of this Agreement, the WMATA Project Representative shall be the Director for Adjacent and Task Order Construction and the County Project Representative shall be Transit Bureau Chief or designee.
- (b) *Changing Representatives.* Each party shall deliver to the other parties Notice of any change in the identity of its Project Representative. Until a party receives Notice of a change of designation or limitation of authority of a Project Representative, such party shall be entitled to (1) rely upon the designations made in this Section or subsequently made and (2) rely upon the full authority of each of the Project Representatives designated in this Section (or subsequently designated) to act on behalf of the party by which it was designated to coordinate the Project.

6. INDEMNITY, INSURANCE, AND BONDS.

6.1 *Indemnity.*

- (a) *Indemnity.* The County shall, or shall require the Developer, the General Contractor's and any and all contractors and subcontractors to indemnify and hold harmless WMATA and WMATA's officers, officials, and employees against any liability and claims for injury, including personal injury to or death of person or persons, and for loss or damage occurring in connection with the Project. The indemnity described herein is a contractual undertaking that is not limited by the limits of insurance provided in relation to this Agreement.
- (b) *County to Defend.* If any suit, action or proceeding is brought, or any other claim is made, against WMATA, its employees, or agents by reason of any such claim, the County, upon Notice from WMATA, shall, or shall cause the Developer, the General Contractor, and any and all subcontractors to defend the same with counsel reasonably satisfactory to WMATA, provided, WMATA

shall have the right to engage its own counsel which shall be at the expense of WMATA unless WMATA reasonably determines that counsel for the contractor cannot adequately represent the interests of WMATA.

6.2 *Insurance.* Prior to commencement of the Project and through the date of the Final Completion, County shall, or shall cause the Developer, General Contractor and any and all subcontractors to procure insurance in accordance with the requirements described in **Exhibit -G**. In the event WMATA has elected to take possession and/or operate the Project pursuant to Section 5.10 above, Developer has satisfied all obligations under the Comprehensive Agreement, and County has notified WMATA of such completion as required under this Section, Developer and County may cease providing the insurance required for the Project.

6.3 *Payment and Performance Bonds.*

- (a) *General Requirements.* Before undertaking any construction on the Construction Site, the County shall, or shall cause the Developer to secure and file with WMATA the bonds set forth in this Section (collectively, the **“Payment and Performance Bonds”**). The Payment and Performance Bonds must be obtained from a federally-approved surety company having sufficient assets and approved by WMATA and shall be countersigned by a resident agent of the surety in the Commonwealth of Virginia with a copy of the agent’s license as issued by the relevant Commonwealth’s Department of Insurance or equivalent. The Payment and Performance Bonds may be dual obligee bonds running to the benefit of both WMATA and the County but shall not include any provision to the effect that nonpayment or any other default by the County or any contractor or lender shall release, reduce or otherwise affect the surety’s obligations to WMATA. Each bond shall provide that (i) the obligations of the surety shall be unconditionally activated upon the occurrence of an Event of Default or of any other event or circumstance that under this Agreement entitles WMATA to make a claim on the bond, and (ii) WMATA shall be given written notice by the surety concurrently with the surety’s notice to the County of any default by the County or its contractors under the construction contract, the bond or any other document relating to the Project.
- (b) *Payment Bond.* The County shall, or shall cause the Developer to post a payment bond equal to one hundred percent (100%) of the hard costs of the Project and naming WMATA as obligee for the benefit of laborers, subcontractors, material suppliers, and others that have or may have claims or liens against the Project, the Construction Site, or WMATA’s interest therein. The payment bond shall be substantially in the form attached hereto as **Exhibit H**. Said payment bond shall name WMATA as obligee or a co-obligee and shall cover the lien free completion of the Project in accordance with the provisions of this Agreement.

- (c) *Performance Bond.* The County shall, or shall cause the Developer to post a performance bond naming WMATA as an obligee to secure the completion of the Project in an amount equal to one hundred percent (100%) of the aggregate hard and soft costs of the Project. The performance bond shall be substantially in the form attached hereto as **Exhibit I**. Said performance bond shall name WMATA as obligee or a co-obligee for the completion of the Project by the surety if the County and/or its Developer are determined by WMATA to be in default of this Agreement.
- 6.4 *Environmental Liability.* The County shall remediate, at its sole cost and expense, any environmental condition required as a result of (i) County's or Developer's, General Contractors', and any and all contractors' or subcontractors' activities under this Agreement or any Real Estate Permit, or (ii) any pre-existing condition affecting any portion of the Construction Site.
- 6.5 *Survive Termination.* The terms of this Section shall survive the expiration or earlier termination of this Agreement.

7. WMATA'S SCOPE OF SERVICES AND COSTS.

- 7.1 *WMATA's Costs.* The County shall fund in advance, and keep funded, an account to be held by WMATA ("**WMATA Cost Account**") for all of WMATA's costs incurred in relation to the Project. WMATA's costs will likely include (but not be limited to) costs of reviews and approvals, progress meetings, operational support (e.g., escorts, flagging, support services), coordinating and monitoring of construction, administrative costs, third-party consultant support (e.g., reviews, inspections, testing), construction closeout and commissioning, and the use of WMATA-provided equipment. In addition to the WMATA's costs, the County agrees to reimburse WMATA internal and overhead expenses associated with the work performed. These WMATA expenses include, but may not be limited to escort, design review/engineering review, inspection, force account, and indirect, overhead, and other burden applied to these expenses pursuant to WMATA's standards and practices. The County acknowledges and agrees that there are no terms, conditions, or limitations on, or associated with the funding to be provided by the County to WMATA pursuant to this Agreement that are not expressly articulated in this Agreement.
- (a) WMATA is permitted to draw from the WMATA Cost Account throughout the duration of the Project. WMATA shall provide the County with a quarterly expenditure report that includes a progress report of work performed during the period along with an itemized accounting and description of costs incurred by WMATA. WMATA will submit expenditure reports within sixty (60) days of the end of each quarter unless WMATA otherwise notifies the County. On each expenditure report, WMATA will certify in writing that its costs are costs incurred in connection with the Project. The quarterly expenditure reports shall be in the form of **Exhibit J** and shall also include back-up documentation for third

party costs, if any. In the event WMATA's costs exceed the amount provided in the WMATA Cost Account for such quarter the County shall include the additional funds due to WMATA to restore the fund balance with the next deposit of the quarterly payment into the WMATA Cost Account. In the event WMATA's costs are less than the amount provided in the WMATA Cost Account for such quarter WMATA shall deduct the amount of the overpayment from the next invoice of the quarterly payment into the WMATA Cost Account. The County shall not be permitted to reject a WMATA funding request on the basis that costs included are not reimbursable by grant funds. Requests from the County for additional information regarding expenditure reports shall not give the County the right to deny a funding request or delay payment for the same. WMATA shall not be required to provide any reports other than those expressly required by this Agreement.

- (b) WMATA shall provide the County with an estimate of its costs related to the Project based on the current Project Schedule and proposed work. The current estimate is \$9,400,110 as shown on **Exhibit K**. Should the Project Schedule or required work change such that funding is insufficient, WMATA will notify the County and provide a revised estimate (including minimum account balance thresholds, if applicable).
- (c) Within ten (10) Business Days of execution of this Agreement WMATA will submit to the County a proposed annual budget for the upcoming fiscal year for WMATA's anticipated work pursuant to this Agreement and will invoice the County for the first two quarterly payments.
- (d) The County will make payment to WMATA within thirty (30) Calendar Days. WMATA will track the Project costs by a unique WMATA project control number.
- (e) WMATA agrees to only use such personnel and resources as are reasonably necessary to perform the services under this Agreement.
- (f) Any disputes concerning a funding request shall be resolved in accordance with the Dispute Resolution provision of this Agreement.
- (g) WMATA SHALL NOT PERFORM WORK RELATED TO THE PROJECT UNLESS WMATA COSTS ACCOUNT FUNDING IS AVAILABLE. In the event that the WMATA Costs Account established herein has insufficient funding, all work will stop on the Project until additional funding is provided in accordance with this Agreement.

8. REPRESENTATIONS AND WARRANTIES.

8.1 *Representations and Warranties of the County.* The County hereby represents and warrants as follows:

- (a) *Organization.* The County is a political subdivision of the Commonwealth of Virginia.
- (b) *Authority.* The County has the power and authority to enter into this Agreement and has taken all actions necessary to cause this Agreement to be executed and delivered, and this Agreement has in fact been duly and validly executed and delivered by the County.
- (c) *Binding Obligation.* This Agreement is a legal, valid, and binding obligation of the County, and is enforceable against the County in accordance with its terms, subject to bankruptcy or other equitable principles that may limit the rights of creditors.
- (d) *No Breach.* The County's entering into this Agreement will not violate any Applicable Laws or breach any contract to which the County is a party or by which it is bound or the provision of the County's organizational documents.
- (e) *No Litigation.* There are no actions, suits, arbitrations, government investigations, or pending proceedings to which the County or any of its members, officers, or directors is a party, nor to the best of the County's knowledge, are any of the foregoing threatened, which might adversely affect the County's right or ability to enter into or perform under this Agreement.
- (f) *Conflicts of Interest, Debarment.* No officer, Board member, or employee or agent of the County who deals in any way with management, real estate, construction, procurement, planning, or joint development, or any member of any such person's immediate family (which term "immediate family" shall, for the purposes of this Section, mean the parent, spouse, sibling, child, grandparent or grandchild of any of the foregoing persons), has or will have any financial or other interest in, or in common with, the County. The County will comply, and the County will contractually obligate each of its third-party contractors at any tier to comply with or contractually obligate its subcontractor(s) to comply, with the provisions of Executive Orders 12549 and 12689, "Debarment and Suspension," 31 U.S.C. § 6101, and U.S. DOT regulations on Debarment and Suspension at 49 CFR Part 29. The County shall include the requirements of the preceding sentence in each first-tier subcontract, and shall require each second- and lower-tier contractor to include them in any lower tier subcontract.

8.2 *Representation and Warranties of WMATA.* WMATA hereby represents and warrants to the County as follows:

- (a) *Organization.* WMATA is an interstate compact agency, organized and existing under the laws of the State of Maryland, the Commonwealth of Virginia and the District of Columbia, is in good standing under Federal and local laws, and has the power and authority to carry on business as contemplated by this Agreement.
- (b) *Authority.* WMATA has power and authority to enter into this Agreement and has taken all actions necessary to cause this Agreement to be executed and delivered, and this Agreement has in fact been duly and validly executed and delivered by WMATA.
- (c) *Binding Obligation.* This Agreement is a legal, valid, and binding obligation of WMATA, and is enforceable against WMATA in accordance with its terms, subject to bankruptcy or other equitable principles that may limit the rights of creditors.
- (d) *No Breach.* WMATA's entering into this Agreement will not violate any Laws or breach any contract to which WMATA is a party or by which it is bound or the provisions of any WMATA organizing document.
- (e) *No Litigation.* There are no actions, suits, arbitrations, governmental investigations or pending proceedings to which WMATA is a party, nor to the best of WMATA's knowledge, are any of the foregoing threatened, which might adversely affect WMATA's right or ability to enter or perform under this Agreement.

9. DISPUTE RESOLUTION.

The Parties each agree to assign point persons with authority to act on their behalf to implement and exercise their respective responsibilities and rights under this Agreement. WMATA hereby names the Director for Adjacent and Task Order Construction and the County hereby names Transit Capital Program Manager ("Project Point of Contacts"). The Project Point of Contacts shall be the first level of dispute resolution.

Any dispute that cannot be resolved by the Project Point of Contacts shall be formally presented in writing to the Project's second level reviewers, who shall be (i) the Vice President of Project Implementation and Construction (PICO) and (ii) the Transportation Director for the County. Any resolution of the dispute shall be reduced to writing and signed by the second level reviewers.

If the dispute cannot be resolved by the second level of review, then the matter shall be presented to the Arlington County Manager for the County and the Executive Vice President, Office of Capital Program Delivery of WMATA for a final determination.

10. DEFAULT; REMEDIES.

10.1 *County Default.* Subject to the procedures set forth in **Section 10.2** below, any of the following events shall constitute an "**Event of Default**" by County:

- (a) *Non-construction.* The County has discontinued material construction for a period of more than ninety (90) consecutive days or has abandoned construction of the Project.
- (b) *Stop Work Order.* The County or any of its contractors, subcontractors or service providers fails to comply with a stop work order issued by WMATA.
- (c) *Transfer.* The County permits a change in control or transfers any of its rights or obligations under this Agreement.
- (d) *Voluntary Bankruptcy.* The County voluntarily files for liquidation, reorganization, receivership, or other similar relief under any federal or state bankruptcy or insolvency law, or makes a general assignment for the benefit of creditors.
- (i) *Involuntary Bankruptcy.* The County has any involuntary bankruptcy or insolvency action filed against it, or suffers a trustee in bankruptcy or insolvency or receiver to take possession of the assets of the County, or suffers an attachment or levy of execution to be made against any substantial portion of its assets, unless, in any of such cases, such circumstance shall have been stayed or dismissed within one hundred twenty (120) days thereafter.
- (j) *Other Nonperformance.* The County breaches any term or provision, or defaults in the performance of, any obligation under this Agreement that is not otherwise addressed in this Section, if such default remains uncured for ten (10) days from the giving of Notice to the County of such default, provided, however, that if cure of such default is feasible but not reasonably susceptible of being completed within such ten (10) day period, such cure period shall be extended for so long as is reasonably necessary to complete said cure, not to exceed an additional ninety (90) days, if the County has promptly commenced work on such cure within such ten (10) day period and diligently prosecutes the same to completion with such stated longer period.

10.2 *WMATA's Remedies.* WMATA shall have the following remedies following an Event of Default:

- (a) *Self-help.* WMATA may execute contracts for and/or perform any remaining work related to the Project or otherwise cure the default or failure, all at the cost and expense of the County, and shall be entitled to damages, other than consequential or punitive damages, and all other legal and equitable remedies WMATA may have against the County or any sureties on the Payment and

Performance Bonds. The County shall reimburse WMATA for all reasonable and verifiable costs and expenses related to such remedy within thirty (30) days after WMATA makes written demand on the County for payment. In the event of emergency, or in the event of a condition that threatens the lives or safety of any persons or property, or the safety, security or operational capacities of any WMATA Facilities, WMATA shall have the right to eliminate the emergency or threatening condition and to exercise the foregoing self-help remedies immediately.

(b) *Enforce Payment and Performance Bonds.* WMATA may enforce its rights under the Payment and Performance Bonds.

(c) *Termination.*

(i) WMATA in its sole discretion may elect to terminate this Agreement. If WMATA elects to terminate this Agreement, WMATA shall give Notice of such termination to the County. WMATA's remedies and the County's obligations under this Article shall survive such termination.

(ii) Upon termination of this Agreement, the County shall deliver and assign to WMATA all Design and Construction Documents for or relating to the Project. The County shall further deliver to WMATA copies of all contracts and subcontracts, and any other information designated by WMATA, relating to the construction of the Project in the County's possession or control.

(iii) Upon such termination, the County shall reimburse all outstanding costs owed to WMATA under this Agreement and WMATA shall deliver to the County a statement and detailed accounting of the County funds provided to the WMATA Cost Account to date and return any unexpended funds within Ninety (90) Business Days of the termination.

(iii) If this Agreement is terminated prior to Final Completion for any reason, the County shall promptly remove all debris and restore all WMATA property and WMATA Facilities, at no cost to WMATA, to a clean and safe condition. If some of the WMATA Facilities have not been or cannot be placed in their intended locations for any reason, then the County shall place or store the affected WMATA Facilities in a location and manner acceptable to WMATA in its sole and absolute discretion and at no cost to WMATA.

10.3 *Mutual Termination.* This Agreement may be terminated by the mutual written consent of WMATA and the County.

- 10.4 *No Consequential or Punitive Damages.* Notwithstanding anything to the contrary in this Agreement or Applicable Law, neither party may recover consequential or punitive damages against the other party under this Agreement.
- 10.5 *Remedies Cumulative.* The Parties rights and remedies under this Agreement and Applicable Law shall be cumulative, and no one exercise of any of such rights or remedies shall prohibit a further exercise of that or any other such right or remedy.

11. NOTICE.

- 11.1 *Notices.* All notices, demands or requests which are required or permitted by this Agreement to be given or delivered to either party (“**Notice**”) shall be in writing and shall be: (1) personally delivered; (2) sent prepaid for next business day delivery by a nationally recognized overnight courier service; or (3) sent by certified mail, return receipt required. Notices and other communications shall be deemed to have been given on the earlier of actual receipt or on the first business day upon which delivery is attempted, even if delivery cannot be made due to refusal of, or failure by the addressee to accept, such attempted delivery. Except as otherwise provided in herein, any such notice or other document shall be addressed as follows:

If to County:	Transit Bureau Chief Department of Environmental Services 2100 Clarendon Blvd, Suite 900 Arlington, VA 22201
With copies to:	County Attorney 2100 Clarendon Blvd., Suite 403 Arlington, VA 22201
If to WMATA:	Alan Watson, Director Adjacent and Task Order Construction Please submit to ajwatson@wmata.com in addition to the hard copy.
With copies to:	Executive Vice President, Chief Legal Officer and General Counsel Washington Metropolitan Area Transit Authority 300 Seventh Street, S.W. Washington, D.C. 20024

- 11.2 *Change of Address.* Each party may change its address or addresses for delivery of Notice by giving Notice of such change of address to the other party.

12. MISCELLANEOUS.

12.1 *Disclaimer of Liability.*

- (a) *Reviews and Inspections.* Reviews and inspections are conducted for WMATA's sole benefit, and not for the benefit of any other party or person. By reviewing, approving, accepting, inspecting, requiring the correction of any contracts or other agreements, submissions or construction, participating in meetings, or conducting inspections, or having the right to do any of the same, (i) WMATA accepts no liability for any design and/or construction defects, flaws, or mistakes, and waives none of its legal rights, (ii) WMATA shall not be deemed to warranty, guarantee, or give assurance regarding the means of construction or of the adequacy of the work or of the Project as constructed or (iii) WMATA shall not be deemed to waive the quality control or quality assurance required by this Agreement.
- (b) *"As Is" Data.* All data, documents or other information provided by WMATA is provided "as is" and "with all faults." WMATA does not warrant, guaranty, or assure the adequacy of any data, documents or other information provided by WMATA. The County is responsible to verify all data, documents and other information, including but not limited to field conditions, environmental contamination pertaining to the design and construction of the Project.

12.2 *Exhibits and Recitals.* Each Exhibit and Recital to this Agreement is incorporated into this Agreement by reference and forms an essential part of this Agreement. Any Exhibit which is not physically attached to this Agreement shall be treated as if it were part of this Agreement nevertheless.

12.3 *Headings; Captions.* The Article headings, Section headings and subsection captions of this Agreement are for convenience and reference only and in no way define, limit or describe the scope or intent of this Agreement nor in any way affect this Agreement.

12.4 *Number and Gender of Words.* Wherever the context so permits, the singular shall include the plural, the plural shall include the singular, and the use of any gender shall be deemed to include all or no genders.

12.5 *Interpretation and Construction.* No provision of this Agreement will be construed in favor of, or against, any particular party by reason of any presumption with respect to the drafting of this Agreement. Both parties are represented by counsel and have fully participated in the negotiation and wording of this Agreement. To the extent the context requires or permits, (i) any reference to the word "including" or "includes" means "including, without limitation;" (ii) any reference to the word "includes" means "includes, but is not limited to;" (iii) any reference to "may" means "may, but is not obligated to" or "may, at its option;" (iv) any reference to the phrase "may not" means "is prevented or prohibited from" or "is not required to;" and (v) reference to the phrase "at any time" also means "from time to time." The submission of drafts, comments to

drafts, and changes from drafts to this final Agreement shall not bind either party nor shall they be considered in determining the meaning of this Agreement.

- 12.6 *Cumulative Remedies and Waiver.* Except as otherwise provided in this Agreement, no remedy herein conferred or reserved is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any default, omission or failure of performance hereunder shall impair any right or power or be construed as a waiver thereof, but any such right and power may be exercised from time to time and as often as deemed expedient. No waiver, amendment, release or modification of this Agreement shall be established by conduct, custom or course of dealing. In order to be enforceable, any waiver, release or relinquishment must be in writing and signed by the party to be charged therewith.
- 12.7 *Binding Effect; Successors and Assigns.* This Agreement shall be binding upon and inure to the benefit of WMATA and the County and their respective permitted successors and assigns.
- 12.8 *No Other Third-Party Beneficiaries.* Nothing in this Agreement, expressly or impliedly, is intended to or shall be construed to confer upon or to give to any person or entity other than WMATA and/or the County any rights, remedies, or claims under or by reason of this Agreement or any of the provisions set forth herein, and all such rights, remedies or claims shall be for the sole and exclusive benefit of the parties hereto. Nothing in this Agreement creates any contractual relationship between WMATA and any contractor, subcontractor, materialmen, consultant or other service provider, and WMATA shall not be responsible for making any payments to any contractor, subcontractor, agent, consultant, employee, or supplier of the County.
- 12.9 *No Partnership.* This Agreement does not create any partnership, joint venture, agency, or other similar relationship among the parties.
- 12.10 *Entire Agreement; Amendments.* This Agreement embodies the entire agreement between the parties relating to the Project except the any WMATA-issued real estate permit related to the Project. This Agreement and may be amended or supplemented only by an instrument in writing executed by both parties.
- 12.11 *Approvals.* All approvals required from either party hereto must be in writing to be effective.
- 12.12 *Time of the Essence.* Time shall be of the essence with respect to all provisions of this Agreement.
- 12.13 *Non-Use of WMATA Status.* The County understands and agrees that in no event shall the County, or any contractor, subcontractor, supplier, materialman, or other third-party

assert or attempt to assert for its own benefit any exemption or immunity available to WMATA under the WMATA Compact.

- 12.14 *Anti-Deficiency Clause.* It is the intent and understanding of the parties that the Project is to be undertaken at no cost to WMATA. In accordance with the WMATA Compact, all obligations of WMATA under this Agreement that directly or indirectly require the expenditure by WMATA of any of its funds are subject to the appropriation and availability of funding through WMATA's budgetary procedures.
- 12.15 *No Waiver of Sovereign Immunity.* Nothing in this Agreement shall be deemed or construed to constitute a waiver of WMATA's sovereign immunity.
- 12.16 *Debarment and Suspension.* No member of or delegate to Congress, or resident commissioner, shall be admitted to share a part of this Agreement, or to any benefit that may arise therefrom; but this provision shall not be construed to extend this Agreement if made with a corporation for its general benefit.
- 12.17 *Governing Law and Venue.* This Agreement shall be construed in accordance with the laws and judicial precedents in effect in the Commonwealth of Virginia except to the extent that the laws of Virginia conflict with the WMATA Compact, in which case WMATA shall be governed by the WMATA Compact. Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement shall be brought against any of the parties hereto only in the United States federal court located in the Commonwealth of Virginia, and each party irrevocably consents to the exclusive jurisdiction of such federal court (and of the appropriate appellate court) in any such action or proceeding and waives any objection to venue laid therein.
- 12.18 *Counterparts.* This Agreement may be executed in counterparts, each of which shall constitute an original and all of which together shall constitute one and the same instrument.
- 12.19 *Invalid or Unenforceable Term.* If any provision of this Agreement or the application thereof to any person or situation is held to be illegal, invalid or unenforceable under present or future laws, such provision or application will be fully severable. This Agreement will be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Agreement and the remaining provisions of this Agreement will remain in full force and effect and may not be affected by the illegal, invalid or unenforceable provision or by its severance from this Agreement.
- 12.20 *Force Majeure.* Neither party shall be held responsible for failure to perform the duties and responsibilities imposed by this Agreement if such failure is due to fires, riots, rebellions, natural disasters, wars, or an act of God beyond control of the Parties that would make performance impossible or illegal.

12.21 *County Sovereign Immunity.* Nothing in this Agreement shall be construed to waive the County's sovereign immunity or to limit any protections or rights the County enjoys under Virginia law as a political subdivision of the Commonwealth of Virginia.

(Signatures follow on the next page)

WMATA:

**WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY**

By: _____ (seal)
Name: _____
Title: _____

COUNTY BOARD OF ARLINGTON COUNTY, VIRGINIA

By: _____
Name: _____
Title: _____

Approved as to Legal Form:

County Attorney

EXHIBIT A – CONSTRUCTION SITE

EXHIBIT B – REAL ESTATE PERMIT FORM

EXHIBIT C – CERTIFICATE OF SUBSTANTIAL COMPLETION

EXHIBIT D – SAFETY AND SECURITY SPECIFICATIONS

EXHIBIT E – STANDARD SPECIFICATIONS

EXHIBIT F – DESIGN AND REVIEW LOG FORM

EXHIBIT G – INSURANCE REQUIREMENTS

EXHIBIT H – PAYMENT BOND FORM

EXHIBIT I – PERFORMANCE BOND FORM

EXHIBIT J – QUARTERLY EXPENDITURES FORM

EXHIBIT K – WMATA COSTS ESTIMATE