

DESIGN AND CONSTRUCTION AGREEMENT

Contract No. 092016-COM-DC

This Design and Construction Agreement (this “Agreement”) is made and entered into this _____ day of _____, 2016 (the “Effective Date”), by and between the City of Mesa, a municipal corporation duly organized and existing under the laws of the State of Arizona (“City”) and Valley Metro Rail, Inc., a non-profit corporation, duly organized and existing under the laws of the State of Arizona (“Valley Metro”). The City and Valley Metro may be collectively referred to as “Parties” and individually as “Party.”

RECITALS

A. The LeSueur and Main Street Pedestrian Signal Project (the “Project”) consists of constructing a new north-south pedestrian signal at the intersection of LeSueur and Main Street. The new Pedestrian signal will cross a City street and Valley Metro rail and guideway and will be totally integrated into both systems.

B. Valley Metro is the lead agency for rail development in the region.

C. The Parties are entering into this Agreement to identify the roles, responsibilities, and expectations of the Parties for the design and construction of the Project.

D. The Parties entered into a Public Way Use Agreement in September 2004, and the Amended and Restated Public Way Use Agreement in August 2011 authorizing Valley Metro to use, on a non-exclusive basis, certain City real property for the operation and maintenance of the System.

E. The Parties entered into an Operations and Maintenance Agreement in May 2007 and the Amended and Restated Operations and Maintenance Agreement in October 2013 identifying the roles, responsibilities, and expectations of each Party with respect to the operations and maintenance of the System, including the Gilbert Road LRT Extension.

F. The City will be responsible for coordinating and obtaining the funding for the Project. The City has, or will acquire the rights-of-way, easements, and other property necessary to construct and operate the Project.

G. Valley Metro agrees to construct the Project pursuant to a design developed and provided by the City.

H. To the extent that the Project becomes a part of the light rail System, Valley Metro agrees to incorporate the operation and maintenance of the Project into the overall System operations and maintenance.

AGREEMENT

In consideration of the foregoing recitals, which are incorporated herein, and the terms and conditions of this Agreement, the Parties agree as follows:

1. Effective Date And Term

1.1 Effective Date

Upon being duly executed by the Parties, this Agreement shall be effective as of the date written in the first paragraph of this Agreement.

1.2 Term

The Term of this Agreements shall begin on the Effective Date and shall continue (unless terminated or cancelled sooner as provided herein) until the completion of the Project and all payments to Valley Metro, as applicable, have been made by the City.

2. City's Obligations

2.1 Design

The City has hired a design consultant to prepare construction drawings for all improvements related to the Project (the "Plans"). A copy of the Final Plans, is attached hereto as Exhibit A. The City has distributed the Plans to Valley Metro and non-City utilities for review. The City has addressed comments from Valley Metro and non-City utilities, and updated and finalized the Plans as necessary to complete the Project.

2.2 Payment

Pursuant to the process and procedures set forth in Section 3.2 below, and up to a maximum price of \$181,938.06, the City will be responsible for the payment of all costs and charges (except for Valley Metro's reviews of the Plans and any updates thereto) related to the completion of the Project according to the final Plans. The City will budget for a ten percent (10%) contingency in connection with payment for the work on the Project. Any expenditure of contingency funds on the construction cannot be approved without prior concurrence of the City of Mesa.

2.3 Building Permits

The Final Plans show that an electrical meter will be a part of the Project. The City will obtain the necessary building permits for the electrical meter.

2.4 Land Rights and Permissions

The City will obtain all land rights and permissions, including, but not limited to, rights of entry, and temporary construction easements, necessary for the completion of the Project.

2.5 Review and Comment on Construction Bids

The City will participate in Valley Metro's activities to obtain bids and negotiate a construction contract

2.6 Testing, Inspections and City Acceptance of Non-Project Improvements

To the extent that the Project includes improvements that will be owned, operated and maintained by the City after construction, the City will conduct all testing and inspections necessary for the completion of the Project. The City will accept any such improvements according to its usual and customary practices and timelines.

3. Valley Metro's Obligations

3.1 Design Review

Within a reasonable time after receipt of the Plans and any updates thereto, Valley Metro will review and comment on the Plans provided by the City. Valley Metro will not charge the City for reviewing and commenting on the Plans or any updates thereto.

3.2 Billing

Within five (5) calendar days of receiving a payment application from the contractor Valley Metro will send a copy to the City. Once reviewed and approved by the City, Valley Metro will approve payment to the contractor. The intent of this provision is that the City will have sufficient time review the billings of the contractor and remit payment to Valley Metro within any applicable prompt pay requirements.

3.3 Construction

Valley Metro will bid and construct the Project in compliance with all applicable state and federal laws. Within a reasonable time before Valley Metro selects a contractor to perform the work associated with the Project, Valley Metro will submit all bid documents to the City for the City's review and comment. Valley Metro will include a provision in its agreement with the contractor chosen to construct the Project identifying the City as a third-party beneficiary of the contract. Valley Metro shall be responsible for project management and administration and these tasks shall be accomplished consistent with Valley Metro's policies and procedures for the Project and this Agreement.

3.4 Schedule and Completion Date

Valley Metro will use its best efforts to complete the Project on or before November 23, 2016 (the "Completion Date"). Valley Metro will require that its contractor provide a construction schedule designed to meet the Completion Date. If Valley Metro determines, at any time during the execution of the work on the Project, that completion will not be achieved by the Completion Date, Valley Metro will immediately contact the City to schedule a telephonic or in-person meeting to discuss the schedule and alternatives for achieving completion on or the Completion Date. Such telephonic or in-person meeting shall occur no later than five (5) days after Valley Metro's determination that the Project may not be complete by the Completion Date.

3.5 Testing, Inspections and Valley Metro Acceptance of Project Improvements

To the extent that the Project includes improvements that will be owned, operated and maintained by Valley Metro after construction, Valley Metro will conduct all testing and inspections necessary for the completion of the Project. Valley Metro will accept any such improvements according to its usual and customary practices and timelines.

3.6 Warranty

Valley Metro shall institute a General Warranty of One (1) year as part of the construction contract. Valley Metro will be responsible for notifying the contractor of any warranty issues and tracking and scheduling of warranty work with the City of Mesa. Additionally, all manufacturer's warranties for materials provided for the Project shall be extended to the City of Mesa, as applicable.

4. General Provisions

4.1 Termination and Remedies

4.1.1 Termination for Cause

If a Party fails to perform its obligations under this Agreement or fails to comply with the terms, conditions, and requirements of this Agreement and such failure continues for a period of 60 days after written notice thereof from the other Party, such failure shall constitute a default under this Agreement; provided, however, that if the failure is such that more than 60 days would reasonably be required to cure the default, then the defaulting Party shall have such additional time as is reasonably necessary to cure the default so long as the defaulting Party commences performance or compliance within 60 days of notice and diligently proceeds to complete the cure. If a default is not cured within the time allowed under this section, the non-defaulting Party may terminate this Agreement and seek other remedies allowed under this Agreement.

4.1.2 Remedies

In the event of a default that is not cured within the time permitted under Section 4.1.1, the non-defaulting Party may, in addition to terminating this Agreement, seek specific performance, injunction, special action, or declaratory relief. Additionally, the non-defaulting Party may seek all remedies, including in law and equity, available to it, but no remedy that would have the effect

of amending any provisions of this Agreement shall become effective without the formal amendment of this Agreement.

4.2 Continuing Obligations

Expiration or termination of this Agreement does not terminate the Parties' obligations existing or arising prior to or simultaneous with, or attributable to, the termination or events leading to or occurring before termination.

4.3 Agreement Non-Assignable

Valley Metro may not assign or otherwise transfer any of its rights or obligations hereunder to a third party without the express prior written consent of the City, which consent may be granted or withheld by the City in its sole and absolute discretion. Any assignment or transfer without such prior written consent shall be void.

4.4 Indemnification

Except for Claims (defined below) arising solely and exclusively from the negligence or willful acts or missions of the Indemnitees (defined below), Valley Metro shall indemnify, defend, save and hold harmless the City and its officers, officials, agents, and employees (collectively, the "Indemnitees") from and against any and all claims, actions, liabilities, damages, losses, expensed, and costs, including court costs, attorneys' fees, and costs of claim processing, primary loss investigation, and litigation (collectively, "Claims") for bodily injury or personal injury (including death), loss or damage to tangible or intangible property: (1) arising out of the work or out of the anticipated and performed construction under the terms of this Agreement including, but not limited to, any and all construction claims related to the Project (including claims from Valley Metro's construction contractor, subcontractor(s), material suppliers, or third parties), and claims related to maintenance of the construction site; or (2) caused, or alleged to be caused, in whole or

in part, by the negligent or willful acts or omissions of Valley Metro or any of its owners, officers, directors, agents, or employees.

It is the specific intent of the Parties that the Indemnitees shall, in all instances except loss or damage resulting from the sole and exclusive negligence of the Indemnitees, be indemnified against all liability, loss or damage of any nature whatever or on account of any injuries to or death of person or damages to or destruction of property belonging to any person arising out of or in any way connected with the performance of this Agreement.

This indemnity includes, but is not limited to, any claim or amount arising out of or recovered under the Workers' Compensation Law or arising out of the failure of Valley Metro to conform to any federal, state, or local law, statute, ordinance, rule, regulation, or court decree.

It is agreed that Valley Metro will be responsible for primary loss investigation, defense, and judgment costs. Valley Metro agrees to waive all rights of subrogation against the Indemnitees.

4.5 Insurance

Valley Metro shall maintain insurance coverage consistent with the risk program established by Valley Metro Member Cities.

4.6 Notice

Any notice, consent or other communication ("Notice") required or permitted under this Agreement shall be in writing and either delivered in person, deposited in the United States mail, postage paid, registered or certified mail, return receipt requested, or deposited with any commercial air courier or express service addresses as follows:

If intended for Valley Metro:
Valley Metro Rail, Inc.
101 N. First Avenue, Suite 1300
Phoenix, AZ 85003
Attention: General Counsel

With Copy to:
Valley Metro Rail, Inc.
101 N. First Avenue, Suite 1300
Phoenix, AZ 85003
Attention: Director of Capital and Service Development

If intended for the City:
City of Mesa, Arizona
Office of the City Manager
P.O. Box 1466
Mesa, AZ 85211
Attention: City Manager

If hand-delivery:
City of Mesa, Arizona
Office of the City Manager
20 E. Main Street, Suite 750
Mesa, Arizona 85201

With Copy to:
City of Mesa, Arizona
P.O. Box 1466
Mesa, AZ 85211
Attention: City Engineer

If hand-delivery:
City of Mesa, Arizona
City Engineer
20 E. Main Street, 5th Floor
Mesa, Arizona 85201

Notice shall be deemed received and effective at the time it is personally served, on the second day after its deposit with any commercial air courier or express service, or on the fifth day after the notice is deposited in the United States mail, as applicable. Any time period that requires

notice shall be computed from the time the Notice is deemed received. Either Party may change who or where notice is to be sent by notifying the other Party as provided in this Section.

4.7 No Joint Venture or Agency

Nothing contained in this Agreement shall create any partnership, joint venture, or agency between or among any of the Parties. Each Party shall at all times be an independent operator and shall not at any time purport to act as an agent for the other Party.

4.8 Funds Appropriations

The City is a governmental agency that relies upon the appropriation of funds by its governing body to satisfy its obligations. In the event that an appropriation is not granted for the City to meet its obligations under this Agreement, the City shall have the right to terminate the Agreement without penalty on the last day of the fiscal period for which funds were legally available. In the event of such termination, the City agrees to provide written notice of its intent to terminate 30 calendar days prior to the stated termination date.

4.9 Applicable Law and Venue

This Agreement shall be governed by, and construed in accordance with, the laws of the State of Arizona. Any and all litigation between the Parties arising from this Agreement shall be litigated solely in the appropriate state court located in Maricopa County, Arizona.

4.10 No Waiver

No covenant or condition of this Agreement may be waived by any Party, unless done so in writing. Forbearance or indulgence by Party in any regard whatsoever shall not constitute a waiver of the covenants or conditions to be performed by the other Party.

4.11 Severability

In the event any term or provision of this Agreement is held to be invalid or unenforceable, the validity of the other provisions shall not be affected, and the Agreement shall be construed and enforced as if it did not contain the particular term or provision that is deemed to be invalid or unenforceable.

4.12 No Third-Party Beneficiaries

This Agreement is intended to benefit the corporate and municipal interests of Valley Metro and the City alone, and no other person shall claim any implied right, benefit or interest under this Agreement. The Parties intend not to create rights in or remedies to any third party as a beneficiary of this Agreement or of any duty, covenant, obligation or undertaking established under this Agreement.

4.13 Governmental and Police Powers

The Parties acknowledge the right vested in the City pursuant to general law to exercise its governmental and police powers for the protection of the health, safety, and welfare of its citizens and the City's property. Nothing in this Agreement shall be construed as precluding or limiting the City from exercising such powers.

4.14 Drug Free Workplace Program

Valley Metro is hereby advised that the City, to ensure the safety and health of employees and the public working on City contracts and projects, has adopted a policy establishing a drug free workplace for itself and as a requirement for contractors doing business with the City. Valley Metro shall require a drug free workplace for all employees, contractors, and subcontractors working under this Agreement. Valley Metro shall prohibit and ensure that its employees and

agents do not possess or use, and are not be under the influence of, intoxicating substances or illegal drugs while providing services under this Agreement.

4.15 Employment Practices

Valley Metro represents that it does not discriminate against any employee or applicant for employment or person to whom it provides services because of race, color, religion, sex, national origin, or disability, and asserts that it complies with all applicable Federal, state, and local laws and executive orders regarding employment. Valley Metro, its employees, contractors, and subcontractors will comply with applicable provisions of Titles VI and VII of the U.S. Civil Rights Act of 1964, as amended, Section 504 of the Federal Rehabilitation Act, the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) and applicable rules in performance under this Agreement.

4.16 E-Verify Compliance

As required by A.R.S. §§ 41-4401 and 23-214, Valley Metro represents and warrants compliance with all federal immigration laws and regulations that relate to employees and compliance with the E-verify requirements of A.R.S. § 23-214(A). Breach of the above-mentioned warranty shall be deemed a breach of the Agreement and may result in the termination of the Agreement by the City. The City retains the legal right to randomly inspect the papers and records of Valley Metro and any of its contractors and subcontractors who work under this Agreement to ensure compliance with the above-mentioned laws. Further, Valley Metro shall include a provision in its contracts with contractors and subcontractors requiring compliance with, and a warranty under, A.R.S. §§ 41-4401 and 23-214, and allowing Valley Metro to terminate any such contract for a breach of such warranty and allowing Valley Metro and the City to inspect the papers

and records of the Construction Contractor's and subcontractor's employees to ensure compliance with the above-mentioned laws.

4.17 A.R.S. § 38-511 Notice

This Agreement may be subject to cancellation pursuant to A.R.S. § 38-511.

4.18 Surviving Provisions

All warranties, representations, and duties to indemnify, defend, and hold harmless shall survive the termination, cancellation, or expiration of this Agreement; additionally, all obligations which reasonably should survive shall survive.

WHEREFORE, the Parties have each executed this Agreement as of the date set forth above.

VALLEY METRO RAIL, INC.

CITY OF MESA

By: _____
Scott W. Smith
Chief Executive Officer

By: _____
Christopher J. Brady
City Manager

APPROVED AS TO FORM

APPROVED AS TO FORM

By: _____
Michael J. Minnaugh
General Counsel

By: _____
James N. Smith
City Attorney