



COMMONWEALTH of VIRGINIA

Commonwealth Transportation Board

W. Sheppard Miller, III
Chairperson

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Agenda item # 3

RESOLUTION OF THE COMMONWEALTH TRANSPORTATION BOARD

February 21, 2023

MOTION

Made By: Mr. Fowlkes, **Seconded By:** Ms. Sellers,

Action: Motion Carried, Unanimously

Title: Authorization for the Commissioner of Highways to enter into Standard Project Agreements with the West Virginia Department of Transportation–Division of Highways for Improvements to the East River Mountain Tunnel

WHEREAS, on December 18, 1964, the Commonwealth of Virginia and the State of West Virginia entered into an *Agreement for the Handling of Maintenance of an Interstate Tunnel under East River Mountain* (the “1964 Agreement”); and

WHEREAS, the 1964 Agreement apportioned costs between Virginia and West Virginia for both routine maintenance and major repairs to the East River Mountain Tunnel (ERMT), twin rock bore tunnels that accommodate Interstate Route 77 and connect Bland County, Virginia, with Mercer County, West Virginia; and

WHEREAS, in accordance with the 1964 Agreement, for costs other than routine maintenance, the Virginia Department of Transportation (VDOT) shall bear the costs for the portion of the tunnel in Virginia and the West Virginia Department of Transportation–Division of Highways (WVDOH) shall bear the costs for the portion of the tunnel in West Virginia; and

WHEREAS, VDOT and WVDOH have determined that ERMT, a special structure as defined by subsection A of § 33.2-374 of the Code of Virginia, is in need of rehabilitation and the replacement of components, and that such improvements shall be conducted incrementally as individual projects pursuant to one or more Standard Project Agreements (collectively, the “Project”); and

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WHEREAS, as recently as December 6, 2022, the Commonwealth Transportation Board updated and provided an annual approval for the Special Structures Program 50-Year Long-Term Plan, which included a risk-based prioritization of needed work planned for ERMT over the next fifty years; and

WHEREAS, VDOT is agreeable, to the extent permissible by the laws of the Commonwealth of Virginia and the State of West Virginia, to cause the Project to be performed and to share costs with WVDOH apportioned on the basis of the ratio of the tunnel’s length in each state to the total length thereof; and

WHEREAS, subsection B of § 33.2-221 of the Code of Virginia empowers the Commonwealth Transportation Board to enter into all contracts and agreements with other states necessary for the proper coordination of the location, construction, maintenance, improvement, and operation of transportation systems; and

WHEREAS, accordingly, it is recommended that this Board authorize the Commissioner of Highways to enter into one or more Standard Project Agreements with WVDOH to implement the Project.

NOW, THEREFORE, BE IT RESOLVED, the Commonwealth Transportation Board hereby authorizes the Commissioner of Highways to enter into and execute one or more Standard Project Agreements with WVDOH, for funding and administration of the Project, substantively similar to the attached Exhibit A, with such changes and additions as the Commissioner deems necessary.

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CTB Decision Brief

Authorization for the Commissioner of Highways to enter into Standard Project Agreements with the West Virginia Department of Transportation–Division of Highways for Improvements to the East River Mountain Tunnel

Issues: Pursuant to subsection B of § 33.2-221 of the Code of Virginia, the Virginia Department of Transportation (VDOT) is requesting that the Commonwealth Transportation Board (CTB) authorize the Commissioner of Highways to sign one or more Standard Project Agreements with the West Virginia Department of Transportation Division of Highways (WVDOH) to allow for improvements to the East River Mountain Tunnel (ERMT).

Facts: On December 18, 1964, the Commonwealth of Virginia and the State of West Virginia entered into an Agreement for the Handling of Maintenance of an Interstate Tunnel under East River Mountain (the “1964 Agreement”). The 1964 Agreement apportioned costs between the states for both routine maintenance and major repairs to the ERMT, twin rock bore tunnels that accommodate Interstate Route 77 and connect Bland County, Virginia, with Mercer County, West Virginia. The 1964 Agreement provides that, for costs other than routine maintenance, WVDOH shall bear the costs for the portion of the tunnel in West Virginia and VDOT shall bear the costs for the portion of the tunnel in Virginia.

VDOT and WVDOH have determined that ERMT, a special structure as defined by § 33.2-374 (A) of the Code of Virginia, is in need of rehabilitation and the replacement of components, and that such improvements shall be conducted incrementally as individual projects (collectively, the “Project”) pursuant to separate Standard Project Agreements. Further, as recently as December 6, 2022, the CTB updated and provided an annual approval for the Special Structures Program 50-Year Long-Term Plan, which included a risk-based prioritization of needed work planned for ERMT over the next fifty years. VDOT is agreeable, to administer the Project and to share costs with WVDOH, apportioned on the basis of the ratio of the tunnel’s length in each state to the total length thereof, which is situated approximately 45.5% in West Virginia and 54.5% in Virginia.

Recommendation: VDOT recommends that the CTB authorize the Commissioner of Highways to enter into one or more Standard Project Agreements with WVDOH for those improvements to ERMT identified in the Special Structures Program 50-Year Long-Term Plan. The Standard Project Agreements shall be substantively similar to Attachment A, with such changes and additions as the Commissioner deems necessary.

Action Required by CTB: The Code of Virginia requires a majority of the Board’s members to authorize the Commissioner of Highways, on behalf of VDOT, to enter into one or more Standard Project Agreements with WVDOH for the ERMT improvements.

Result if Approved: The Commissioner will be authorized to execute one or more Standard Project Agreements between VDOT and WVDOH to conduct the Project.

Options: Approve, Deny or Defer

Public Comments/Reaction: N/A

EXHIBIT A
STANDARD PROJECT AGREEMENT
BETWEEN
THE WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION
DIVISION OF HIGHWAYS
AND
THE VIRGINIA DEPARTMENT OF TRANSPORTATION
FOR THE EAST RIVER MOUNTAIN TUNNEL

*[*Project Title, UPC____]*

THIS AGREEMENT (“Agreement”) is made and entered into upon the last day of execution below, by and between the West Virginia Department of Transportation, Division of Highways (“WVDOH”), an agency of the State of West Virginia, and the Virginia Department of Transportation (“VDOT”), an agency of the Commonwealth of Virginia (each a “Party” and hereinafter collectively referred to as the “Parties”).

WITNESSETH THAT:

WHEREAS, on December 18, 1964, the Commonwealth of Virginia and the State of West Virginia entered into an Agreement for the Handling of Maintenance of an Interstate Tunnel under East River Mountain (the “1964 Agreement”); and

WHEREAS, the 1964 Agreement apportioned costs between the Parties for both routine maintenance and major repairs to the East River Mountain Tunnel (“ERMT”), twin rock bore tunnels that accommodate Interstate Route 77 and connect Bland County, Virginia, with Mercer County, West Virginia; and

WHEREAS, the 1964 Agreement provides that, for costs other than routine maintenance, WVDOH shall bear the costs for the portion of the tunnel in West Virginia and VDOT shall bear the costs for the portion of the tunnel in Virginia; and

WHEREAS, the Parties have determined that the ERMT, a special structure as defined by § 33.2-374 (A) of the Code of Virginia, is in need of rehabilitation and the replacement of components, including *[*insert description of Project]* (the “Project”); and

WHEREAS, VDOT and WVDOH have agreed, to the extent permissible by the laws of the

State of West Virginia and of the Commonwealth of Virginia, to cause the Project to be performed and to share costs as apportioned on the basis of the ratio of the tunnel's length in each state to the total length thereof; and

WHEREAS, the Virginia Commissioner of Highways or his designee has the legal authority to enter into this Agreement in accordance with §§ 33.2-248 and 33.2-223 of the Code of Virginia, and has obtained approval to enter into this Agreement from the Commonwealth Transportation Board pursuant to § 33.2-221 (B) by resolution dated [**pending*]; and

WHEREAS, the West Virginia Commissioner of Highways has the legal authority to enter into this Agreement in accordance with §§ 17-2A-8 and 17-4-19 of the West Virginia Code.

NOW, THEREFORE, in consideration of the mutual covenants herein set forth, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

I. GENERAL PURPOSE

The Parties hereto establish their respective responsibilities with regard to the implementation of the Project, for which the approximate description, estimated costs, and schedule are set out as Attachment A, Scope of Work Project Addendum, and which is incorporated herein.

II. RESPONSIBILITIES OF THE PARTIES

a. The Parties agree:

1. To conduct required processes and activities in accordance with this Agreement, and to cooperate to maintain the schedule and funding set out in Attachment A for the Project;
2. To coordinate applicable activities to ensure satisfactory completion of the Project; and
3. To designate a project manager to coordinate the work of the Project.

b. VDOT agrees:

1. To prepare the contract plans and other related documents and to cause the Project to be undertaken in accordance with Virginia laws, standards, regulations, and guides;
2. To maintain accurate records of Project costs, make such records available for review by WVDOH upon request, and retain such records for three years upon

federal closeout;

3. To submit to WVDOH an estimate of costs anticipated for each phase of work for the Project;
4. To coordinate and manage, to the extent necessary, the work of all contractors engaged in performing work related to the Project; and
5. On or before September 1 of each year during Project design and construction, to submit to WVDOH an annual statement of incurred costs.

c. WVDOH agrees:

1. To grant access to West Virginia's right-of-way, free of any fees, to VDOT, VDOT's authorized contractors, and other parties as required for activities to undertake and support the Project;
2. At no cost to VDOT, to participate in all field reviews and other Project development activities and milestones upon request;
3. To identify the federal or other funds, including any non-federal funds needed to comply with any state matching share requirements, that will be transferred or otherwise committed to satisfy West Virginia's allocable costs for the Project;
4. To apply for and obtain any required permits and approvals needed from and issued or provided by an agency or political subdivision of West Virginia; and
5. To make any and all efforts to meet schedule timeframes, including but not limited to funding timeframes, for the Project.

III. FUNDING

- a. Generally and in accordance with the 1964 Agreement, VDOT shall bear responsibility for the share of Project costs associated with the portion of the tunnel in Virginia and WVDOH shall bear responsibility for the share of Project costs associated with the portion of the tunnel in West Virginia. Accordingly, unless otherwise agreed to by the Parties and hereinafter provided in Attachment A, the share of Project costs shall be equal to an allocation of 54.5% of the costs to Virginia and 45.5% of the costs to West Virginia.
- b. All additional costs resulting from change orders, modifications, cost overruns, and/or delays shall be apportioned among the Parties as set forth in Section III (a) above.

- c. All funds and activities pursuant to the Project will be subject to the requirements of Title 23 of the United States Code, Title 23 of the Code of Federal Regulations, and standard Federal-Aid procedures.
- d. If WVDOH applies federal funds to the Project, the transfer of funds to VDOT will be in accordance with FHWA Order 4551.1, "Funds Transfers to Other Agencies and Among Title 23 Programs" dated August 12, 2013, as the same may be updated or amended. WVDOH shall initiate the transfer of the federal funds allocable to its share of each phase of work by the process outlined in FHWA Order 4551.1 prior to the initiation/authorization of each phase of work.
- e. If WVDOH applies non-federal funds to the Project, VDOT will submit monthly invoices for eligible Project costs, which shall include all necessary documentation as agreed to by the Parties. Within 30 days of receipt of the monthly invoices, WVDOH will make payment to VDOT. "Eligible Project Costs" shall mean all necessary costs that are incurred by VDOT to complete the Project.
- f. Once the Project has been completed, any unspent funds that were allocated by a Party to the Project shall be returned and/or transferred back.

IV. DISPUTE RESOLUTION

Any dispute between the Parties that cannot be resolved by the designated Project managers shall be formally presented in writing to VDOT's Bristol District Administrator/Engineer and WVDOH's District Ten Engineer for review and resolution. If the dispute cannot be resolved by the second level of review, then the matter may be presented to the Virginia Commissioner of Highways and the West Virginia Commissioner of the Division of Highways.

V. KEY OFFICIALS AND CONTACTS

Notice to, and approval by, VDOT or WVDOH under the terms of this Agreement shall be to and by the West Virginia's Commissioner of the Division of Highways and VDOT's Commissioner of Highways, or their respective duly authorized agents or employees. Any notice and approval shall be deemed given when delivered, if personally served, or if delivered by mail, five (5) days after being posted with the U.S. Post Office, first class postage pre-paid at the following addresses.

For VDOT:

Commissioner of Highways
Virginia Department of Transportation

1401 East Broad Street
Richmond, Virginia 23219

For WVDOH:

Commissioner of the Division of Highways
Division of Highways
1900 Kanawha Blvd East
Building Five, Room 110
Charleston, West Virginia 25305-0430

VI. GENERAL TERMS AND CONDITIONS

- a. VDOT's obligations pursuant to this Agreement shall not be valid and enforceable unless funds are appropriated by the Virginia General Assembly and allocated by the Commonwealth Transportation Board. Similarly, WVDOH's obligations pursuant to this Agreement shall not be valid and enforceable unless funds for this Project are appropriated and properly allocated to WVDOH.
- b. WVDOH shall be afforded the opportunity to review and approve the contract construction plans prior to the commencement of construction activities. Any disagreement about the design and/or construction of the Project shall be governed by Section IV above.
- c. As a matter of courtesy, VDOT agrees to provide three (3) days' written notice to WVDOH prior to the commencement of construction activities.
- d. This Agreement contains the entire agreement and understanding of the Parties related to the Project, and may not be amended, modified, or discharged nor may any of its terms be waived except by an instrument in writing signed by the Parties.
- e. If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each such term and provision of the Agreement shall be valid and be enforced to the fullest extent permitted by applicable law.
- f. Nothing set out in this Agreement shall constitute a waiver of the Parties' rights to seek any and all damages to the extent authorized by law, nor shall anything in this Agreement limit any defenses that the Parties may have with respect to such claims for damages.

- g. The Parties mutually agree that no provision of this Agreement shall create in the public, or in any person or entity other than the Parties, rights as a third party beneficiary hereunder, or authorize any person or entity, not a party hereto, to maintain any action for, without limitation, personal injury, property damage, breach of contract, or return of money, or property, deposit(s), cancellation or forfeiture of bonds, financial instruments, pursuant to the terms of this Agreement or otherwise.
- h. The Parties mutually agree and acknowledge, in entering this Agreement, that the individuals acting on behalf of the Parties are acting within the scope of their official authority and the Parties agree that neither Party will bring a suit or assert a claim against any official, officer, or employee of either Party, in their individual or personal capacity for a breach or violation of the terms of this Agreement or to otherwise enforce the terms and conditions of this Agreement.
- i. The Parties accept full responsibility for any property damage, injury, or death caused by the acts or omissions of their respective employees, acting within the scope of their employment, or their contractors' scope of work, to the extent allowed by the law. All claims shall be processed pursuant to applicable governing law.
- j. Any claim filed alleging an injury during the performance of this Agreement, which may be traced to a Party, shall be received and processed by the Party having responsibility for the particular injury-causing condition, under the law that governs such Party.
- k. Nothing in this Agreement shall be construed as limiting or affecting the legal authorities of the Parties, or as requiring the Parties to perform any action beyond their respective authorities. Nothing in this Agreement shall be deemed to bind any Party to expend funds in excess of available appropriations.
- l. This Agreement shall be in full force and effect as of the date of last execution and shall remain in effect until the Project has been completed and the payment for all costs has been made.
- m. Either Party may elect to terminate this Agreement by providing 90-day written notice to the other Party. All eligible Project expenditures incurred up to the date of termination shall be considered a Project cost and shall be paid by the Parties in accord with their respective/proportionate shares.
- n. Nothing in this Agreement shall be construed as a waiver of Virginia or West Virginia's sovereign immunity.

(Signature Page Follows)

IN WITNESS WHEREOF, the Parties hereto have caused their respective names to be signed by their duly authorized officers.

COMMONWEALTH OF VIRGINIA,
DEPARTMENT OF TRANSPORTATION

By: _____

Stephen C. Brich, P.E, Commissioner of Highways

Date: _____

STATE OF WEST VIRGINIA,
COMMISSIONER OF HIGHWAYS

By: _____

Jimmy Wriston, P.E., Commissioner of Highways

Date: _____

ATTACHMENT A

SCOPE OF WORK

PROJECT ADDENDUM

EAST RIVER MOUNTAIN TUNNEL

*[*Project Title, UPC ____]*

1. DESCRIPTION OF WORK:

2. PERIOD OF PERFORMANCE:

3. PROJECT COSTS:

4. PROJECT SCHEDULE MILESTONES:

5. ALLOCATED FUNDING REQUIREMENTS:

6. AMENDMENT:

No amendment to this Project Addendum will be effective unless it is in writing and signed by the Parties or their designees.