

Memorandum of Agreement

among the

State of West Virginia,
West Virginia Department of Transportation

and the

Commonwealth of Pennsylvania,
Pennsylvania Department of Transportation

and the

State of Maryland,
Maryland Department of Transportation

and the

State of Ohio,
Ohio Rail Development Commission

and the

Department of Transportation,
Federal Highway Administration,

for the

The National Gateway Project

PURPOSE OF THE AGREEMENT

The purpose of this Memorandum of Agreement (“Agreement”) is to establish the roles and responsibilities of the West Virginia Department of Transportation (“WVDOT”), the Pennsylvania Department of Transportation (“PennDOT”), the Maryland Department of Transportation (“MDOT”), the Ohio Rail Development Commission (“ORDC”), and the Federal Highway Administration (“FHWA”) (hereinafter known as the “Parties”). The Parties will jointly participate in the first phase of the National Gateway Project.

BACKGROUND

WHEREAS, Title XII of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”), Pub. L. No. 111-5, provides that “...the Secretary of Transportation shall distribute funds provided...as discretionary grants to be awarded to State and local governments or transit agencies on a competitive basis for projects that will have a significant impact on the Nation, a metropolitan area, or a region.” The Recovery Act also provides that “...projects eligible for funding provided under this heading shall include, but not be limited to, highway or bridge projects eligible under title 23, United States Code, including interstate rehabilitation, improvements to the rural collector road system, the reconstruction of overpasses and interchanges, bridge replacements, seismic retrofit projects for bridges, and road realignments; public transportation projects eligible under chapter 53 of title 49, United States Code, including investments in projects participating in the New Starts or Small Starts programs that will expedite the completion of those projects and their entry into revenue service; passenger and freight rail transportation projects; and port infrastructure investments, including projects that connect ports to other modes of transportation and improve the efficiency of freight movement.”

WHEREAS, the Recovery Act provides that the authority to award a grant under the Transportation Investment Generating Economic Recovery (“TIGER”) Discretionary Grant Program and perform oversight may be transferred from the Secretary of Transportation to the Administrators of the Federal Highway Administration, the Federal Transit Administration, the Federal Railroad Administration and the Maritime Administration.

WHEREAS, pursuant to the Recovery Act, the Secretary of Transportation awarded a \$98 million TIGER grant (“TIGER funds” or “TIGER funding”) to the State of Ohio, on behalf of the States involved in this project, to carry out the first phase of the National Gateway Project. The first phase of the National Gateway Project, (hereinafter referred to as the “Project”), consists of all work to allow double-stacked freight trains to run between Northwest Ohio to Chambersburg, Pennsylvania, by way of West Virginia and Maryland. The Project consists of a series of clearance projects, including track lowering, bridge replacements, and tunnel improvements, within the States of Ohio, Pennsylvania, West Virginia, and Maryland;

WHEREAS, portions of the Project will also be funded with Recovery Act funds, state funds, and CSX funds distinct from the TIGER grant;

WHEREAS, the ORDC signed a Term Sheet covering this Project on August 31, 2010, and a

AGREEMENT No. DTFH71-11-X-50004

TIGER Grant Agreement in December 2010.

WHEREAS, the States of Pennsylvania, West Virginia, Maryland and Ohio (the "States") have authority to participate in the Project by the legislative authority given to their respective departments of transportation by State law;

WHEREAS, 23 U.S.C. § 308(a) authorizes the United States Secretary of Transportation to perform engineering or other services in connection with the survey, design, construction, and improvements of highways for other Federal or State cooperating agencies, and "highways" has been interpreted to include surface transportation projects such as this one;

WHEREAS, FHWA division offices in Pennsylvania, West Virginia, Maryland and Ohio and the Federal Railroad Administration ("FRA") will lead federal environmental review for the Project. FHWA, Eastern Federal Lands Highway Division ("EFLHD") will be responsible for coordinating and facilitating of the overall schedule for the Project and managing federal funds transferred to EFLHD. Only certain portions of the work will be paid for with federal funds, as noted below.

WHEREAS, the design and construction of the Project will be done by CSX (the "Railroad") under the terms of a separate agreement between the Railroad and EFLHD.

NOW THEREFORE, the PennDOT, MDOT, the WVDOT, the ORDC (the "State DOTs"), and the EFLHD do hereby mutually agree as follows:

ARTICLE I: SCOPE OF WORK (Obligations, Responsibilities, and Funding)

A. The ORDC agrees:

1. To request that all TIGER funds be transferred directly to EFLHD, as authorized by 23 U.S.C. § 132. The request shall be made to Ed Strocko, FHWA TIGER Discretionary Program Modal Coordinator. In addition, ORDC, through an agreement with the Railroad, will provide, during the Project period of performance, \$ 1,100,000 dollars to FHWA to pay for EFLHD's project oversight costs. EFLHD's project oversight costs will be paid from this \$ 1,100,000 dollars.
2. To comply with the TIGER Grant Agreement signed in November 2010. To comply with all TIGER grant reporting requirements specified in the Grant Agreement, including reports related to the performance measures and reports specified in Section 6 of the Grant Agreement and Attachment D to the Grant Agreement. In the case of a discrepancy between the Grant Agreement and this Agreement, the Grant Agreement shall govern.
3. ORDC will comply with ARRA reporting requirements through standard processes and procedures.

B. The State DOTs, as relevant to the Project work within their State, agree to:

1. Cooperate with EFLHD and the Railroad to the extent necessary where State DOTs involvement is required to advance the Project. Designate PennDOT to be the state DOT responsible for coordinating the review of the environmental documents by MDOT, WVDOT, and ORDC.
2. Participate in public involvement activities as may be required in the environmental review process. Cooperate in the efforts of FHWA division offices and FRA to obtain the required environmental approvals.
3. Cooperate and be responsible for participating in any decisions associated with any improvements or modifications to facilities owned or maintained by the State, or otherwise where their interests are involved.
4. At the discretion of the State DOTs, review design and construction plans, specifications, and estimates ("Plans") for the Project. For projects utilizing TIGER funding as indicated in Attachment A to this Agreement, the Railroad will submit Plans to EFLHD at 70%,

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95%, and 100% for review. EFLHD will coordinate review of the Plans with the appropriate state.

5. Ensure that any activity related to improvements or modifications to facilities owned or maintained by the State DOTs complies with applicable federal and state statutes, regulations, and policies. This includes conducting construction inspections, if necessary, for any activity related to improvements or modifications to facilities owned or maintained by the State DOTs. In addition, the State DOTs agree to have the Railroad perform construction inspections for any Railroad-owned facilities located within their respective state.
6. Serve on any consultant selection panel convened by EFLHD and the Railroad.
7. Participate in the final inspection of the constructed facility to the extent that facility impacts state-owned roadways or bridges. State DOTs' employees shall coordinate such inspection with EFLHD and agree to comply with any safety requirements imposed by the Railroad for review of its facilities.
8. Accept improvements or modifications to facilities owned and/or administered by the State DOTs for maintenance, provided that the improvements meet State DOTs' standards, specifications, and requirements.
9. Continue to comply with all ARRA requirements, including reporting requirements.
10. Agree that during the term of any final agreement governing the Project, State DOTs' will work cooperatively with the FRA and participating railroads in the development of high speed rail projects within States in which one or more rail freight projects will be funded under the TIGER grant agreement; and the FHWA, FRA, and the States will work to ensure that both high speed rail and TIGER projects in the States are coordinated to optimize rail capacity for freight and passenger use, subject to considerations for the safety of rail passengers, employers and the general public.

C. EFLHD agrees to:

1. Issue the decision document required by the National Environmental Policy Act ("NEPA") and other related statutes.
2. Coordinate the overall schedule for the Project and facilitate cooperation among the Parties and the Railroad.
3. Accept and manage federal TIGER funds transferred to EFLHD for the Project.
4. Select consulting services, as appropriate, using procurement procedures in accordance with the Federal Acquisition Regulation ("FAR") and the Transportation Acquisition Regulation ("TAR").

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5. Provide a quarterly status report to the State DOTs on the overall management of the Project. The report will detail, at a minimum, the financial status, schedule, and current and upcoming contracting activities of the Project, as well as any specific issues that have arisen.
6. Provide a Special Project Manager to coordinate day-to-day administration, including technical issues, of the Project. Technical issues will be discussed between the Parties as they arise.
7. Review the Financial Plan to be prepared by the Railroad for the Project.
8. Serve as the representative of the Parties to this Agreement on any consultant selection panel convened by the Railroad.
9. Ensure to the maximum extent possible that:
 - a. design and construction work will be contracted out, except work that is normally done by the Railroad's internal staff. It is recognized that decisions regarding whether to contract for construction engineering and inspection must be made by the Railroad.
 - b. contracting is done competitively and that the contracts contain no clauses related to local hiring or local hiring preferences.
 - c. solicitations are posted on State DOTs' websites and linked to a federal website as allowed;
 - d. contractors meet the States licensing and insurance requirements to the extent such requirements can be met after bid opening but prior to award of the contract;
 - e. contracts contain small business subcontracting provisions in compliance with the requirements of the FAR, including the submission of a small business and disadvantaged business subcontracting plan, as required by Part 19 of the FAR.
10. Receive from the Railroad and provide to the State DOTs for review as appropriate the plans, specifications, and estimates, along with other necessary design documents for review and comment at the normally scheduled milestone completion percentages.

D. Responsibility of all Parties to Cooperate

All Parties to this Agreement shall agree to cooperate with each other and with the Railroad in an effort to not delay the completion of the Project.

ARTICLE II. FUNDING AND REIMBURSEMENT

The respective financial obligations of the parties under this Agreement shall be as follows:

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- A. The State of Ohio, through the ORDC and on behalf of the States involved in this Project, has been awarded \$98 million in funding under the TIGER Discretionary Grant Program. The ORDC agrees to request that all TIGER funds be transferred directly to EFLHD, as authorized by 23 U.S.C. § 132.
- B. The ORDC, upon receipt of funds from the Railroad, will provide, during the Project period of performance, an estimated \$1,100,000 to FHWA to pay for EFLHD's project oversight costs. EFLHD's Project oversight costs will be paid from this \$1,100,000. It is anticipated that the ORDC will provide the funds necessary to pay for EFLHD's project oversight costs before the end of each Federal fiscal year; however, the ORDC and the Railroad understand that EFLHD will not be able to incur Project oversight costs without the necessary funding being made available to FHWA.
- C. EFLHD, on behalf of the United States Department of Transportation, will provide to the Railroad TIGER funding up to \$98 million. Additionally, the States of Pennsylvania and Ohio will contribute a total of \$65 million (Pennsylvania and Ohio funds and Recovery Act funds apportioned to the State of Ohio) for the Project. The Railroad shall be responsible for the remaining total cost of the Project.

ARTICLE III: OTHER TERMS OF AGREEMENT

- 1. This Agreement and the authorizations granted in it shall be effective only after the execution and approval by all Parties to this Agreement.
- 2. This Agreement shall be in force and effect and shall remain in effect until the work, including payment, has been completed to the mutual satisfaction of all Parties, plus the Railroad.
- 3. The Agreement may be modified by written consent of all of the Parties.
- 4. The Parties will be afforded an opportunity to inspect, review and comment on, at any time, work in progress, the financial records, and any other supporting documentation.
- 5. The Parties will be afforded an opportunity to participate in all meetings and field reviews.
- 6. This Agreement is governed by federal law, regulations, and policy.

ARTICLE IV: KEY OFFICIALS AND CONTACTS

Designated points of contact for the coordination of this project are as follows:

For the PennDOT:

Eric G. Madden
Deputy Secretary for Aviation & Rail Freight
Pennsylvania Department of Transportation
400 North Street, 8th Floor
Harrisburg, PA 17120-0095
Phone: 717.783.2026

For the MDOT:

Ms. Caitlin Hughes Rayman
Assistant Secretary for Policy and Freight
Maryland Department of Transportation
7201 Corporate Center Drive
Hanover, Maryland 21076
Phone: (410) 865-1092
Fax: (410) 865-1113
Email: crayman@mdot.state.md.us

For the WVDOT:

Mr. David E. Cramer, PE
Acting Executive Director
WV Public Port Authority
1900 Kanawha Boulevard, East Building 5, Room 125
Charleston, WV 25305
304.558.9211
304.558.0333
David.E.Cramer@wv.gov

For the ORDC:

Matthew R. Dietrich
Executive Director
Ohio Rail Development Commission
1980 West Broad Street, 2nd Floor
Columbus, Ohio 43223
Phone: (614) 644-0306
Fax: (614) 728-4520
Email: matt.dietrich@dot.state.oh.us

For FHWA:

Mr. Robert Morris
Senior Project Manager

Department of Transportation
Federal Highway Administration
Eastern Federal Lands Highway Division
21400 Ridgetop Circle
Sterling, Virginia 20166
Phone: (571) 434-1569
Fax: (703) 404-6217
Email: robert.morris@dot.gov

ARTICLE V: TERMINATION

This Agreement will terminate when all transfers of funds are completed and all work associated with this Agreement has been approved by the Parties in writing. Approval by the State DOTs will be with regard to facilities that are owned and maintained by the respective State. Approval by the State DOTs will be by written notification to the EFLHD.

In case of the failure on the part of any Party to observe any of the conditions of the Agreement, any affected Party shall notify the other Party of the violation and allow a reasonable time to cure the violation. In the event that the violation is not cured within what the affected Party considers a reasonable time, the affected Party may terminate this Agreement by giving thirty (30) days written notice of termination to all Parties, effective at the end of the thirty (30) day period.

ARTICLE VI: ASSIGNMENT

No transfer or assignment of this Agreement, or any part thereof or interest therein, directly or indirectly, voluntarily or involuntarily, shall be made unless such transfer or assignment is first approved in writing by all Parties.

ARTICLE VII: LIABILITY

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 fullest extent such responsibility is permitted under the law of each respective State. All claims shall be processed pursuant to applicable governing law of each State.

Any claim that might be cognizable under the Federal Tort Claims Act (Title 28, United States Code, Section 2671, et seq.) or the tort claim provisions of State law, 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 according to the laws of that Party's State or, for the Federal Government, of the United States.

ARTICLE VIII: REQUIRED AND STANDARD CLAUSES

1. Nothing in this Agreement shall be construed as limiting or affecting the legal authorities of the Parties, or as requiring the Parties to perform beyond their respective statutory authorities. Nothing in this Agreement shall be deemed to bind any party to expend funds in excess of available appropriations. This Agreement is subject to all laws governing federal and state procurement and to all regulations and rules promulgated thereunder, whether now in force or hereafter enacted or promulgated, except as specified in this Agreement. Nothing in this Agreement shall be construed as in any way impairing the general powers of the Parties for supervision, regulation, and control of its property under such applicable laws, regulations, and rules.
2. **NON-DISCRIMINATION:** The Parties shall not discriminate in the selection of employees or participants for any employment or other activities undertaken pursuant to this Agreement on the grounds of race, creed, color, sex, or national origin, and shall observe all of the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252; 42 U.S.C. Section 2000(d), et seq.). The Parties shall take positive action to ensure that all applicants for employment or participation in any activities pursuant to this Agreement shall be employed or involved without regard to race, creed, color, sex, or national origin.
3. **ANTI-DEFICIENCY ACT:** Pursuant to the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1) (1994), nothing contained in this Agreement shall be construed as binding the United States or any State to expend any sum in excess of appropriations made by Congress for the purposes of this Agreement, or as involving the United States or any State in any contract or other obligation for the further expenditure of money in excess of such appropriations.
4. **LOBBY PROHIBITION:** The Parties will abide by the provisions of 18 U.S.C. § 1913 (Lobbying with Appropriated Monies).
5. It is expressly understood by the Parties that none of the rights, duties, and obligations described in this Agreement shall be binding on any of the States until all applicable statutory provisions of each State have been complied with, and until such time as all necessary state funds are made available and forthcoming by the appropriate state agency and such expenditure of funds have been approved, if necessary, by the appropriate legislative and administrative boards and commissions of each State.

ARTICLE IX. EXECUTION IN COUNTERPARTS


This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

ARTICLE X. ENTIRE AGREEMENT

This Agreement and its attachments constitute the entire Agreement and understanding of the Parties with respect to the Project. No oral or other written provisions shall have any force or effect except those contained in a written amendment to this Agreement executed by the Parties.

IN WITNESS THEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives.

**OHIO RAIL DEVELOPMENT COMMISSION
STATE OF OHIO**



Matthew R. Dietrich
Executive Director

12/16/10
Date

DEPARTMENT OF TRANSPORTATION
FEDERAL HIGHWAY ADMINISTRATION

for Donald W. Miller 12/17/10
Melisa Ridenour, P.E. Date
Division Engineer
Eastern Federal Lands Highway Division

DEPARTMENT OF TRANSPORTATION
STATE OF WEST VIRGINIA

Paul A. Mattox, Jr. 12/17/10

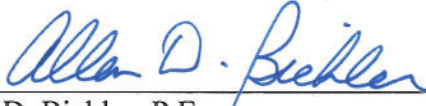
Paul A. Mattox, Jr., P. E.
Secretary of Transportation/
Commissioner of Highways

Date

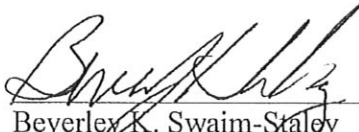
APPROVED AS TO FORM THIS
17 DAY OF Dec. 2010

[Signature]
ATTORNEY LEGAL DIVISION
WEST VIRGINIA DEPARTMENT
OF HIGHWAYS

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION
COMMONWEALTH OF PENNSYLVANIA

 Allen D. Biehler 12/17/10
Allen D. Biehler, P.E. Date
Secretary of Transportation

DEPARTMENT OF TRANSPORTATION
STATE OF MARYLAND

 12-17-10
Beverley K. Swaim-Staley
Secretary of Transportation

Date