



MAINE DEPARTMENT OF TRANSPORTATION
Locally Administered/Private Developer Project Agreement
With the
Town of Falmouth
Regarding Route 1/Turnpike Connector Project and Surplus Land Conveyance

Draft: January 19, 2016

This Locally Administered/Private Developer Project Agreement (the “Agreement”) is entered into by and between the Maine Department of Transportation, an agency of the State of Maine with headquarters at 24 Child Street, Augusta, Maine (“MaineDOT”), and the Town of Falmouth, a municipal corporation and body politic with its principal offices at 271 Falmouth Rd , Falmouth, Maine (the “Municipality.”) (MaineDOT and the Municipality are collectively referred to as the “Parties”).

RECITALS

1. U.S. Route 1 runs, in part, through the Town of Falmouth, and is served by a series of highway ramps that provide access to and egress from the Maine Turnpike Falmouth Spur, as well as a bridge that crosses over Route 1 (the “Ramp System”);
2. The Ramp System has excess capacity, due to construction of other highway improvements designed to carry portions of the traffic originally intended to be served by the Ramp System;
3. MaineDOT owns a parcel of land encumbered by the components of the Ramp System lying easterly of Route 1, consisting of approximately eleven (11) acres, more or less (the “MaineDOT Land”);
4. The Municipality, in an effort to spur additional economic opportunities along Route 1 in Falmouth, has proposed implementation of a highway construction project that will eliminate portions of the Ramp System by incorporating an at-grade intersection or roundabout and associated infrastructure of sufficient capacity (the “Highway Project”) and, in turn, allow for commercial development of the MaineDOT Land;
5. While the Highway Project is expected to potentially create two additional surplus properties owned by MaineDOT through the removal of ramps located westerly of Route 1, these properties are not subject to the Municipality’s Request for Proposals (defined herein).
6. To fund the construction of the Highway Project, the Municipality has proposed a public/private partnership in which the Municipality, with MaineDOT oversight, solicits a developer to fund and effectuate construction of the Highway Project with MaineDOT design approval in exchange for receiving a Governor’s Deed to the MaineDOT Land.
7. The appraised value of the MaineDOT Land is expected to meet or exceed the cost of developing and constructing the Highway Project, and the Parties intend for the Highway Project to go

<i>Internal use only</i>
TEDOCS #: _____
CT #: _____
CSN #: _____
PROGRAM: _____

forward only if that expectation is realized, or if the selected developer and/or the Municipality agree to fund any overages or perform additional work to the extent of any underages. MaineDOT shall not contribute financially to the cost of the Highway Project beyond that of providing staff resources and conveying the MaineDOT Land to the selected developer.

NOW THEREFORE, in accordance with the foregoing, the Parties agree as follows:

8. **Municipal Authorization:**

The Municipality shall first obtain authorization from its governing board to proceed with the implementation of the concepts outlined in this Agreement (the “Municipal Authorization”). Execution of this Agreement by the authorized municipal entities shall indicate satisfaction of this condition.

9. **Appraisal of MaineDOT Land:**

Upon Municipal Authorization, the Municipality shall, at its expense, hire a Maine Certified General Real Estate Appraiser acceptable to MaineDOT to determine the fair market value of the MaineDOT Land. The appraiser’s report shall be prepared in conformance with the Federal Highway Administration’s Uniform Act and shall be submitted to MaineDOT for review and approval before final acceptance of the report by the Municipality (the “Appraisal”).

10. **Request for Proposals:**

The Municipality shall, at its expense, issue a Call for Offers soliciting qualified entities to design and construct the Highway Project, including removal of all obsolete components of the Ramp System, in exchange for receiving a deed to the MaineDOT Land. The Call for Offers process shall be directed by the following contingencies:

- a. The Call for Offers shall include the requisite MaineDOT minimum design standards, specifications, and any other considerations, as well as review and scoring criteria developed jointly by MaineDOT and the Municipality;
- b. The Municipality and MaineDOT shall work cooperatively to draft the Call for Offers and, upon acceptance by both Parties, the Municipality shall issue the Call for Offers and collect all submissions for review and consideration by the Municipality
- c. The Call for Offers will be supplemented upon MaineDOT’s review and approval of the Appraisal to inform interested responders of the determined value of the MaineDOT Land, and the deadline for submissions in response to the Call for Offers shall be extended if the timing of review and approval of the Appraisal is not consistent with the anticipated timeline set out in the Call for Offers.
- d. The Municipality shall have the right to reject any and all proposals and to waive irregularities.

- e. It is the Parties' intent that the appraised value or purchase price, whichever is higher, of the MaineDOT Land shall be comparable to the cost of fully implementing the selected Highway Project.
 - i. If implementation of the selected Highway Project will cost more than the appraised value of the MaineDOT Land, the Highway Project shall not proceed unless the Municipality or the developer selected in the Call for Offers process (the "Selected Developer") agrees to fund the difference between the two. In no event shall MaineDOT contribute financially to the cost of the Highway Project beyond that of providing staff resources and conveying the MaineDOT Land to the Selected Developer.
 - ii. If implementation of the selected Highway Project will cost less than the value of the MaineDOT Land, the Municipality hereby agrees, at its own cost, to cause additional roadway infrastructure work approved by MaineDOT to be completed on State roads within the Municipality (the "Additional Municipal Work") of a value sufficient to bring the total cost of the Highway Project plus the Additional Municipal Work up to the appraised value of the MaineDOT Land. This process will ensure that the State of Maine receives the full benefit of its investment of the appraised value of the MaineDOT Land.
 - iii. The Call for Offers shall allow the Municipality to select a developer that does not offer the greatest financial return to MaineDOT, provided that upon further negotiation the selected developer agrees to perform Additional Municipal Work of a value sufficient to bring the total cost of the Highway Project plus the Additional Municipal Work up to the appraised value of the MaineDOT Land

11. Project Funding and Financial Assurances:

- a. The Municipality, through its contract with the Selected Developer, will ensure that the Selected Developer is responsible for all costs incurred by it or its agents, contractors or subcontractors in connection with implementation and completion of the Highway Project, including but not limited to design, development, permitting and construction.
- b. As a condition to awarding the Call for Offers to the Selected Developer, the Municipality shall require that the Selected Developer provide the Municipality with performance and payment bonds or an irrevocable letter of credit in lieu of such bonds complying with the terms of 14 M.R.S. § 871, acceptable to the Municipality and naming the Municipality as the beneficiary. The value of the performance bond, payment bond, and letter of credit, as applicable, will be in the full amount of the cost of completing the Highway Project, and shall conform to the general requirements for surety as outlined under Section 110 of the State of Maine, Department of Transportation Standard Specifications, November 2014 Edition (the "MaineDOT Standard Specifications");
- c. The Municipality, through its contract with the Selected Developer, shall require that any consultants/contractors hired by the Selected Developer to work on the Highway Project comply with insurance requirements consistent with those required by MaineDOT, as follows:

- i. Construction contractors shall comply with insurance requirements consistent with those outlined under Section 110 of the MaineDOT Standard Specifications. Minimum insurance requirements shall include, but are not limited to, Workers' Compensation Insurance. Commercial General Liability Insurance and Automobile Liability Insurance as defined therein. All policies shall name the Municipality as an Additional Insured.
- ii. Consultants shall comply with insurance requirements consistent with those outlined in the most recent version of MaineDOT's Consultant General Conditions. Minimum insurance requirements shall include, but are not limited to, Professional Liability Insurance, Workers' Compensation Insurance. Commercial General Liability Insurance and Automobile Liability Insurance. All policies shall name the Municipality as an Additional Insured.
- iii. All consultants/contractors hired by the Selected Developer shall submit to the Municipality copies of applicable certificates of insurance as proof of their insurance coverages.

The Municipality's contract with the Selected Developer shall provide for the suspension or termination of all work associated with the Highway Project in progress if such insurance is terminated or canceled without being replaced with comparable insurance.

- d. The Municipality, through its contract with the Selected Developer, shall require that any consultants/contractors hired by the Selected Developer to work on the Highway Project provide signed, valid and enforceable Performance and Payment Bonds under terms consistent with those required by MaineDOT under Section 110 of the MaineDOT Standard Specifications and in compliance with the terms of 14 M.R.S. § 871. Bonds shall be issued in the full amount of the associated contract and payable to the Municipality.
- e. All costs incurred by MaineDOT staff in developing the Call for Offers and overseeing the Highway Project, including but not limited to design review, project management and construction oversight, shall be the responsibility of MaineDOT and shall not be included in the overall Highway Project costs borne by the Selected Developer.
- f. All costs incurred by the Municipality's staff in developing the Call for Offers and overseeing the project, including but not limited to design review and construction oversight, shall be the responsibility of the Municipality unless negotiated between the Municipality and the Selected Developer to be costs assumed by the Selected Developer. In no event shall such costs be included in the Selected Developer's overall Highway Project costs for the purpose of comparing the Highway Project's value against that of the MaineDOT Land as outlined in Section 10.d herein.

12. Project Development, Construction and Oversight:

- a. Roles of Municipality:

- i. The Municipality shall be responsible for primary coordination with and oversight of the Selected Developer for all purposes related to the Highway Project as though the Highway Project were being implemented as a Locally Administered Project (“LAP”) in accordance with MaineDOT standards. At all times, the Municipality shall ensure that all policies and procedures of MaineDOT’s LAP guidelines (available at <http://www.maine.gov/mdot/lpa/lpadocuments/>) are followed. In contracts related to the Highway Project, the Selected Developer and contractors performing work on the Highway Project shall be required to follow the policies and procedures in said LAP guidelines
- ii. The Municipality shall provide MaineDOT with monthly progress reports obtained from the Selected Developer for the duration of the Highway Project listing tasks completed, any changes in staffing, and any issues that could affect the Highway Project schedule;
- iii. The Municipality shall provide construction oversight of the Highway Project, either through a contract for consultant engineering services or through assignment of qualified municipal personnel trained to implement the LAP process.
- iv. The Municipality shall be responsible for ensuring the quality of all design plans, specifications and estimates for the Highway Project using a documented quality-control process. Acceptance of the final plans, specifications and estimates (“PS&E”) package by MaineDOT shall not relieve the Municipality and, if applicable, its contracted engineering consultant of responsibility for the quality of the engineering documents for the Highway Project
- v. The Municipality shall provide the public and all abutters to the Highway Project with opportunity to learn about the Highway Project and express concerns using a public process that is appropriate for the scope of work and acceptable to the MaineDOT Project Manager;
- vi. The Municipality shall ensure that all required environmental documents, including but not limited to the National Environmental Policy Act (“NEPA”) checklist if applicable, are submitted to MaineDOT;
- vii. The Municipality shall ensure that all required approvals, permits and licenses for the Highway Project are obtained. Copies of all such documents and an environmental certification shall be part of the final PS&E package submitted to MaineDOT by the Municipality;
- viii. MaineDOT’s Utility Accommodation Rules (2014) shall apply to all required utility relocations. The Municipality shall coordinate the Highway Project with all affected utilities.
- ix. In contracts related to the Highway Project, the Municipality shall ensure that the Selected Developer includes provisions that require the contractor to indemnify, defend, and hold harmless the Municipality and MaineDOT, their officers, agents, and employees from all claims, suits, or liabilities arising from negligent or

wrongful acts, errors, or omissions by the contractor, its officials, agents, employees, consultants, or subcontractors.

b. Roles of MaineDOT:

- i. While oversight of the Highway Project rests with the Municipality as though the Highway Project were being implemented as a Locally Administered Project in accordance with MaineDOT standards, MaineDOT will assign a Project Manager (the “MaineDOT Project Manager”) to the Highway Project to carry out the State’s responsibilities and to be available to the Municipality and its designated project engineer for advice and consultation as necessary. The MaineDOT Project Manager or a designee will have the authority to:
 1. Request design changes if necessary to meet applicable laws and design standards;
 2. Review and inspect construction activities and associated documentation, and test materials used in connection with the Highway Project to ensure compliance with the Highway Project specifications.
- ii. MaineDOT may reject work or materials that do not comply with the Highway Project specifications. In such instance, the Municipality shall be responsible, or shall hold the Selected Developer responsible, for any costs incurred to bring such work or materials into compliance, and shall take all other action needed to ensure proper performance of this Agreement and compliance with Highway Project specifications.
- iii. MaineDOT shall assist the Municipality in the development of the Call for Offers and associated scoring criteria.
- iv. Upon satisfactory completion of the Highway Project, convey the MaineDOT Land to the Selected Developer by Governor’s Deed. MaineDOT shall be responsible for preparation of the deed and costs associated thereto, except that the Selected Developer shall be responsible for the Selected Developer’s share of real estate transfer taxes due upon recording of the deed, if any.

13. Maintenance of Infrastructure:

Upon completion of the Highway Project, the Municipality shall be responsible for all year-round maintenance associated with the resulting infrastructure in a manner consistent with that applied to infrastructure located within the Urban/Compact limits. Maintenance shall consist of upkeep and repairs necessary to preserve the intended public use of the infrastructure for its intended life as measured by industry standards, all winter maintenance, and all associated costs.

14. Project Records and Audit:

“Project Records” shall consist of all printed or electronic plans, specifications, contracts, reports, notes, or other documents prepared by or for the Municipality or the Selected Developer in connection with the Highway Project. The Municipality shall require copies of all Project Records

from the Selected Developer, and shall retain all Project Records for at least four (4) years from the date of MaineDOT's final acceptance of the Project. If any litigation, claim, negotiation or audit has begun before the end of this four (4) year period, all Project Records shall be kept at least until all action and resolution of all issues arising from it are complete. All Project Records shall be provided to MaineDOT upon request after completion or termination of the Highway Project.

15. **Termination:**

- a. Each Party reserves the right to terminate the Highway Project for any reason prior to the Municipality's award of a contract to the Selected Developer.
- b. This Agreement may be terminated at any time by mutual written agreement of the Parties.
- c. The Municipality may postpone, suspend, abandon or otherwise terminate this Agreement for any reason prior to the onset of construction.
- d. The Municipality may postpone, suspend, abandon or otherwise terminate this Agreement for cause after the onset of construction upon thirty (30) days written notice to MaineDOT, and with the condition that, in such event, the Municipality shall be responsible, at its cost, for ensuring that any disturbed portions of the highway infrastructure are immediately restored to a condition acceptable to MaineDOT, in MaineDOT's sole discretion. At no time shall the Municipality allow conditions to exist that compromise the safety of the traveling public, nor shall MaineDOT be required to implement or pay for such restorative work.
- e. MaineDOT may postpone, suspend, abandon or otherwise terminate this Agreement for cause upon thirty (30) days written notice to the Municipality if the Municipality fails to perform any of the services required under this Agreement to the satisfaction of MaineDOT, and if the Municipality fails to remedy any such default in a manner reasonably satisfactory to MaineDOT within fourteen (14) days following receipt of written notice to remedy the same.

MaineDOT may, at its option, and after such fourteen (14) days' written notice has expired, cure such default for the account of the Municipality, and the Municipality shall reimburse MaineDOT for the amount paid for any reasonable expense or contractual liability so incurred, with interest.

In no event shall any such action taken under this section be deemed a breach of contract, nor shall it represent MaineDOT's waiver of claims for breach of contract or its right to any other remedy it may have pursuant to this Agreement, or at law or in equity.

- f. In the event of any such termination, the Municipality and all consultants and contractors working on the Highway Project shall stop work immediately, except for work required to protect public health and safety, and provide MaineDOT with all Highway Project records within thirty (30) days of termination date.

16. **Expiration:**

All provisions of this Agreement, except those which, by their very nature, are intended to survive this Agreement, shall expire upon satisfactory completion of the Highway Project and all terms of this Agreement.

17. Debarment:

- a. The Municipality agrees that it shall not contract with an outside entity that is debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal or state agency.
- b. The Municipality agrees that if it contracts with an outside entity, that entity and its principals shall certify that they:
 - i. Have not within a 3-year period preceding the date of such contract been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with the following:
 1. Obtaining, attempting to obtain, or performing a public (federal, state or local) transaction or contract under a public transaction;
 2. Violating federal or state antitrust statutes; or
 3. Committing embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
 - ii. Are not currently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state or local) with commission of any of the offenses enumerated in paragraph i of this section; and
 - iii. Have not within a 3-year period preceding this agreement had one or more public transactions (federal, state or local) terminated for cause or default.

18. Conflict of Interest:

By signing this Agreement, the Municipality agrees that it shall not enter into a contract with any outside entity that has a financial or other interest in the Highway Project or in its outcome, other than the performance of the contract and the other consideration outlined in this Agreement. This prohibition includes, without limitation: a.) any agreement with, or other interest involving, third parties having an interest in the outcome of the Highway Project that is the subject of the contract; b.) any agreement providing incentives or guarantees of future work on the project or related matters; and c.) any interest in real property acquired for the Highway Project unless such real property interest is openly disclosed to MaineDOT before the person or entity entered into the contract.

19. General Provisions:

- a. Governing Law. This Agreement shall be construed under the laws of the State of Maine. Additionally, all activities under this Agreement shall be performed in accordance with applicable federal laws and regulations, including without limitation Title 23 in the U.S.

Code (USC) for statutory law, Title 23 in the Code of Federal Regulations (CFR) for administrative law, and Title 2 CFR, Part 200, “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.”

- b. Independent Capacity. The Municipality, its employees, agents, representatives, consultants and contractors shall not act as officers, employees or agents of MaineDOT.
- c. Flow Down. Contracts between the Municipality and any consultant, contractor or other third party shall contain or incorporate by reference all applicable provisions of this Agreement.
- d. Binding Effect. The Parties shall be bound by the terms of this Agreement. This provision shall apply to the Agreement’s executors, their successors, administrators and legal representatives.

IN WITNESS WHEREOF, the Parties have executed this Agreement effective on the date last signed below.

Town of Falmouth

Maine Department of Transportation

By: _____
Nathan A. Poore
Falmouth Town Manager
Duly authorized

By: _____
Dale Doughty, Director,
Bureau of Maintenance and Operations
Duly authorized

Date: _____

Date: _____