

**STAFF REPORT FOR CALENDAR ITEM NO.: 11
FOR THE MEETING OF: July 14, 2022**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Authorize the Executive Director to execute a memorandum of understanding (MOU) with the City and County of San Francisco (CCSF) Office of Economic and Workforce Development (OEWD), describing the agreement of OEWD and other CCSF departments to incur certain efforts related to advancing the Downtown Rail Extension (DTX), and reimbursement from TJPA to CCSF for such efforts in an amount not to exceed \$40,000 in FY 21-22 and \$985,000 in FY 22-23, while the parties negotiate a longer term interagency cooperation agreement (ICA).

EXPLANATION:

As part of the Federal Transit Administration (FTA) Capital Investment Grants (CIG) Program, and before completion of the Engineering Phase in August 2023, FTA requires that TJPA, as Project Sponsor, complete and secure all critical third-party agreements that are necessary to facilitate the financing, design, permitting, construction, and operation and maintenance of a federally funded capital transit project. TJPA is actively engaged with the necessary third parties to timely secure the required agreements.

In particular, TJPA plans pursue an Interagency Cooperation Agreement (ICA) with CCSF to cover all CCSF agencies with which third party agreements need to be secured for the purposes of delivering the DTX. TJPA is currently working with OEWD, as well as the City Attorney's Office and other CCSF agencies, to determine the appropriate scope of the ICA.

In the interim period before the ICA can be fully negotiated and presented to the agencies' legislative bodies for approval, TJPA's ongoing design activities and the negotiation of the ICA will require time from various CCSF agency staff. In FY 21-22, CCSF incurred costs related to advancing the DTX; it seeks reimbursement of up to \$40,000 for such costs. In FY 22-23, CCSF anticipates that it will incur additional costs in support of DTX for which it seeks reimbursement; TJPA has planned reimbursement for such costs up to \$985,000. Costs incurred in support of advancing DTX in the CIG program are considered eligible local share to the grant.

TJPA and OEWD have negotiated a Memorandum of Understanding (MOU), enclosed herewith, describing certain cooperation between the parties and authorizing reimbursement from TJPA to CCSF for such efforts, while the parties negotiate a longer term ICA.

For the FY 21-22 reimbursement obligation under the MOU, TJPA has adequate remaining capacity in the FY 21-22 budget for such costs. The FY 22-23 reimbursement obligation under the MOU was contemplated in TJPA's FY 22-23 budget.

Staff continues to work with CCSF in development of the ICA and expects to bring the item before the Board in the Spring of 2023.

RECOMMENDATION:

Staff recommends that the Board authorize the Executive Director to execute an MOU with OEWD in the form attached, authorizing reimbursement from TJPA to CCSF for efforts to advance DTX in an amount not to exceed \$40,000 in FY 21-22 and \$985,000 in FY 22-23.

ATTACHMENTS:

1. Resolution
2. OEWD Reimbursement MOU with TJPA for Pre-ICA Work

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Transbay Joint Powers Authority (TJPA) is a joint powers agency organized and existing under the laws of the State of California; and

WHEREAS, Pursuant to state law and the Joint Powers Agreement creating TJPA, dated April 4, 2001, TJPA has primary jurisdiction over and will implement all aspects of the Transbay Program, including the portion of the Transbay Terminal/Caltrain Downtown Extension/Redevelopment Project commonly referred to as Phase 2/Downtown Rail Extension (DTX); and

WHEREAS, TJPA is actively engaged in developing the DTX; and

WHEREAS, As part of the Federal Transit Administration (FTA) Capital Investment Grants (CIG) Program, and before completion of the Engineering Phase in August 2023, FTA requires that TJPA, as Project Sponsor, complete and secure all critical third party agreements that are necessary to facilitate the financing, design, permitting, construction, and operation and maintenance of a federally funded capital transit project; and

WHEREAS, In furtherance of FTA's requirement, the City and County of San Francisco (CCSF) Office of Economic and Workforce Development (OEWD) is currently working with TJPA, as well as the City Attorney's Office and other City agencies, to determine the appropriate scope of an Interagency Cooperation Agreement ("Project ICA"); and

WHEREAS, In the interim period before the Project ICA can be fully negotiated and presented to the agencies' legislative bodies for approval, TJPA's ongoing design activities and the negotiation of the ICA will require time from various CCSF agency staff; and

WHEREAS, CCSF is willing to provide such support to TJPA to advance the DTX, but requires reimbursement of certain costs incurred; and

WHEREAS, TJPA and OEWD have negotiated a Memorandum of Understanding (MOU), presented herewith, describing the parties' cooperation, and authorizing reimbursement from TJPA to CCSF for such efforts, while the parties negotiate a longer term ICA; now, therefore, be it

RESOLVED, That the TJPA Board of Directors authorizes the Executive Director to execute an MOU between TJPA and OEWD, in the form presented, describing the parties' cooperation, and authorizing reimbursement from TJPA to CCSF for such efforts in an amount not to exceed \$40,000 in FY 21-22 and \$985,000 in FY 22-23, while the parties negotiate a longer term ICA.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of July 14, 2022.

Secretary, Transbay Joint Powers Authority

MEMORANDUM OF UNDERSTANDING # _____

Downtown Rail Extension Project

THIS MEMORANDUM OF UNDERSTANDING (this "MOU") dated as of _____, 2022, is made by and between the City and County of San Francisco, acting through its Office of Economic and Workforce Development ("OEWD"), and the Transbay Joint Powers Authority, a joint exercise of powers authority ("TJPA") in connection with TJPA's Downtown Rail Extension project of the Transbay Program in San Francisco.

RECITALS

This MOU is made with regard to the following facts, intentions, and understandings:

A. TJPA is a joint exercise of powers agency made up of the City and County of San Francisco ("City"), the Alameda-Contra Costa Transit District, the Peninsula Corridor Joint Powers Board, and the California High Speed Rail Authority.

B. TJPA is delivering the Transbay Program, a visionary transportation and housing project that has transformed downtown San Francisco and the San Francisco Bay Area's regional transportation system by creating a world class transportation hub in the heart of a new neighborhood. The project replaced the former Transbay Terminal at First and Mission streets in San Francisco with a modern regional transit hub connecting the Bay Area and ultimately the State of California through: AC Transit, BART, Caltrain, Golden Gate Transit, Greyhound, Muni, SamTrans, WestCAT Lynx, Amtrak, Paratransit and future High Speed Rail from San Francisco to Los Angeles/Anaheim. TJPA has completed Phase 1 of the Transbay Program, construction of the Salesforce Transit Center. TJPA is engaged in delivery of Phase 2 of the Transbay Program, the Downtown Rail Extension ("DTX" or "Project").

C. The DTX will be located on property TJPA has or will acquire from the State of California; property TJPA has or plans to acquire from private property owners; and right of way owned by the City.

D. The Transbay Program, including the DTX, has received all environmental clearances under the National Environmental Policy Act ("NEPA") and the California Environmental Quality Act ("CEQA").

E. Under state law, TJPA has primary jurisdiction with respect to all matters concerning the financing, design, development, construction, and operation of the Transbay Program. Nonetheless, the design, construction, and operation of the DTX will affect property, improvements, programs, and services of the City and, thus, TJPA requires certain permissions and approvals from the City as the entity that owns and/or has the right to control such items. Moreover, TJPA would benefit from the expertise and experience of the City in certain matters related to the design and construction of the DTX.

F. As a condition of federal funding under the Capital Investment Grants Program, the Federal Transit Administration (“FTA”) requires TJPA to secure agreements with third-parties that will be affected by the Project, including the City. TJPA’s accelerated schedule for the DTX calls for TJPA to submit a Full Funding Grant Agreement request to FTA in August 2023. Accordingly, TJPA seeks to complete its negotiations with the City regarding Project transaction and entitlement documents (such agreement, an “Interagency Cooperation Agreement” or “Project ICA”) in advance of that date.

G. OEWD is currently working with TJPA, as well as the City Attorney’s Office and other City agencies, to determine the appropriate scope of the Project ICA. This MOU is to provide a payment mechanism for TJPA to reimburse OEWD and other City agencies (including the City Attorney’s Office) for staff time and materials expended on certain components of the Project in the interim period before the Project ICA is fully negotiated and presented to the appropriate bodies for their approval.

H. TJPA receives federal, state, and local funding and all reimbursements contemplated in this MOU must meet certain federal and state requirements.

I. The terms and provisions of this MOU will not constrain OEWD and TJPA in their negotiations regarding the terms of the Project ICA.

AGREEMENT

For good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, OEWD and TJPA agree to the following:

1. Negotiations Process. OEWD shall act as the lead representative of the City in negotiating the substance of the proposed Project ICA. OEWD shall consult with staff from affected City agencies, and such City agencies shall contribute personnel and staff time as may be directed by their respective directors or department heads. Following negotiations, the Project ICA shall be subject to review and approval of TJPA's Board of Directors, applicable City agencies and the Board of Supervisors, each in their sole discretion.

2. Reimbursement of City Costs.

(a) TJPA shall reimburse OEWD for the actual costs incurred by the City for work associated with the preparing, adopting or negotiating the Project ICA, consistent with this MOU. Eligible costs shall include, without limitation, the (1) fees and expenses of the City Attorney's Office staff at the rates charged by the City Attorney's Office to City departments, (2) actual fees and expenses of any outside counsel and third party consultants, advisors, and professionals (including, but not limited to, real estate appraisers), (3) actual costs related to public outreach and information, and (4) costs of staff time for the City agencies consulted in connection with the Project ICA. Eligible costs shall not include costs that are paid or reimbursed through other agreements between TJPA and the City or between the City and third parties. Before engaging any outside counsel or consultants, OEWD shall obtain TJPA's approval regarding the proposed engagement, which approval shall not be unreasonably withheld. OEWD shall be responsible for coordinating the billing of all City agencies as described in this section. TJPA's obligation to pay the City's costs that have become due and payable will survive termination or expiration of this MOU.

(b) OEWD will provide TJPA with quarterly invoices. These invoices shall indicate the hourly rate for each OEWD or City staff member at that time, the total number of hours spent by each City staff member on the tasks during the invoice period, any additional costs incurred by the City and a brief non-confidential description of the work completed. TJPA understands that the detailed billing reports from the City Attorney's Office are confidential. As a result, OEWD will review them for reasonableness and accuracy, but will provide to TJPA only a summation of the hours billed per attorney during the invoiced period together with the applicable billing rates.

(c) Subject to the provisions of this MOU, OEWD and other City staff time to be reimbursed under sub-sections 2(a)(1)-(4) above (excluding the City Attorney's Office), shall not exceed \$1,025,000. See Appendix A for budget allocations per department and current billing rates. These rates are subject to change, provided however, OEWD will try to provide at least thirty (30) days advance notice of any changes. Due to the nature of the work of the City Attorney's Office, it cannot agree to be bound by a particular budget; nonetheless, TJPA reimbursement of City Attorney's Office expenditures under this MOU will be deducted from the budget TJPA has made available for all OEWD and other City staff time under this MOU.

(d) If the budget for any City department provided in Appendix A is exceeded or City anticipates that it will be exceeded, OEWD and other City departments may suspend any ongoing or additional work on the Project after giving notice to TJPA. TJPA may prevent City from suspending work either in full or in part in such event by approving additional budgetary amounts above those allocated in Appendix A in an amount agreed by OEWD to be sufficient to cover either all ongoing or some subset of ongoing or additional City work on the Project ICA under this MOU, as requested by the TJPA.

(e) TJPA shall pay the undisputed invoiced amount within 45 calendar days of receipt from OEWD (or as soon thereafter as possible); in no event, however, shall TJPA be liable for interest or late charges for any payments made after this time period. City may i) suspend additional work on the Project, and ii) allocate funds in the Contingency line item in Appendix A as payment for undisputed past due payments until undisputed past due payments are made unless the parties reach agreement on the timing of additional payments to be made by TJPA.

(f) If TJPA in good faith disputes any portion of an invoice, then within 45 calendar days of receipt of the invoice, TJPA shall provide written notice of the amount disputed and the reason for the dispute, and the parties shall use good faith efforts to reconcile the dispute as soon as practicable. TJPA shall have no right to withhold payment for work performed by City staff before any termination of this MOU. TJPA shall have no obligation to reimburse City for any cost that is not invoiced to TJPA within six weeks after the close of the fiscal year in which the costs were incurred (fiscal year runs July 1 - June 30), or as soon thereafter as possible.

3. City Limitation. Nothing in this MOU shall obligate OEWD or any other City department to expend funds or resources, nor shall anything in this MOU be construed as a limitation on any party's authority to contribute staff, funds or other resources to the processing, review and consideration of the Project. Nothing in this MOU shall limit the discretion to be exercised by City staff and City officials in connection with the Project.

4. No Liability; Termination. The parties are entering into this MOU in order to cooperate in negotiating the substance of the Project ICA. The parties understand and agree that the City would not be willing to enter into this MOU if it could result in any liability or cost to the City. Accordingly, in the event that TJPA believes that the City has violated any of the terms of this MOU, TJPA's sole remedy arising from this MOU shall be to terminate this MOU. TJPA shall be responsible for the eligible costs incurred by any of the City agencies before the termination notification. Notwithstanding anything to the contrary in this MOU, either party shall have the right to terminate this MOU at any time and for any reason without cost or liability by providing notice of termination to the other party, provided any such termination shall not relieve TJPA of its reimbursement obligations for eligible costs incurred with respect to work performed before the date of termination.

5. City Discretion. TJPA acknowledges and agrees that by entering into this MOU, OEWD is not committing itself or agreeing to approve any land use entitlements, including a "Proposition M" allocation, or undertake any other acts or activities relating to the subsequent independent exercise of discretion by the Planning Commission, the Board of Supervisors, the

Mayor, or any other City agency, commission or department, and that the Project ICA is subject to the prior approval of the Board of Supervisors and the Mayor (and perhaps other City agencies, as applicable), each in their sole and absolute discretion.

6. Assignment. The parties shall not assign their rights or obligations under this MOU without prior written consent of the other party, which consent may be given or withheld in each of their sole discretion.

7. Environmental Review. The Transbay Program, including the DTX, has received all environmental clearances under the National Environmental Policy Act (“NEPA”) and the California Environmental Quality Act (“CEQA”). Nothing in this MOU commits, or shall be deemed to commit, the City or any City official to approve or implement any other project or any modifications to the DTX, or to undertake any other acts or activities involving the subsequent independent exercise of its discretion, until there has been complete compliance with NEPA, CEQA, and the City’s Environmental Quality Regulations (San Francisco Administrative Code Section 31). If any modifications to the DTX are found to cause significant adverse impacts, as a precondition to continuing this MOU, the City retains absolute discretion to: (1) modify the Project to mitigate significant adverse environmental impacts, (2) select feasible alternatives which avoid significant adverse impacts of the Project, (3) require the implementation of specific measures to mitigate the significant adverse environmental impacts of the Project, (4) reject the Project as proposed if the economic and social benefits of the Project do not outweigh otherwise unavoidable significant adverse impacts of the project, or (5) approve the Project upon a finding that the economic and social benefits of the Project outweigh otherwise unavoidable significant adverse impacts. Accordingly, all references to the “DTX” and “Project” in this MOU shall mean the Project for which environmental review has already been completed.

8. Notices. Unless otherwise indicated elsewhere in this MOU, all written communications sent by the parties may be by U.S. mail or e-mail, and shall be addressed as follows:

To OEWD: Anne Taupier
Director of Development
c/o Leigh Lutenski, Project Manager
Office of Economic and Workplace Development
City Hall, Room 448
One Dr. Carlton B. Goodlett Place
San Francisco, CA 94102
Phone: (415) 554-6614
Email: kate.sofis@sfgov.org and leigh.lutenski@sfgov.org

To TJPA: Adam Van de Water
Executive Director
Transbay Joint Powers Authority
425 Mission Street, Suite 250
San Francisco, CA 94105
Phone: (415) 597-4032
Email: avandewater@tjpa.org

With a copy to: Deborah Miller, Legal Counsel
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
Phone: (415) 552-7272
Email: miller@smwlaw.com

Any notice of default must be sent by registered mail or overnight delivery through a nationally recognized overnight delivery service.

9. California Political Reform Act. The parties acknowledge that payments pursuant to this MOU from TJPA to OEWD are payments to the City, not to any individual employee or officer of the City, and that the payments therefore are not "income" to any City employee or officer under the California Political Reform Act, California Government Code Section 81000, *et seq.*

10. Notification of Prohibition on Contributions. TJPA acknowledges its obligations under Section 1.126 of the San Francisco Campaign and Governmental Conduct Code, which prohibits any person who contracts with the City, whenever such transaction would require approval by a City elective officer or the board on which that City elective officer serves, from making any campaign contribution to (1) an individual holding a City elective office if the contract must be approved by the individual, a board on which that individual serves, or a board on which an appointee of that individual serves, (2) a candidate for the office held by such individual, or (3) a committee controlled by such individual or a candidate for that office, at any time from the commencement of negotiations for the contract until the later of either the termination of negotiations for such contract or twelve (12) months after the date the contract is approved. TJPA acknowledges that the foregoing restriction applies only if the contract or a combination or series of contracts approved by the same individual or board in a fiscal year have a total anticipated or actual value of one hundred thousand dollars (\$100,000) or more. TJPA further acknowledges that (i) the prohibition on contributions applies to each prospective party to the contract; any person with an ownership interest of more than 10 percent (10%) in TJPA; any subcontractor listed in the contract; and any committee that is sponsored or controlled by TJPA; and (ii) within thirty (30) days of the submission of a proposal for the contract, the City department with whom TJPA is contracting is obligated to submit to the Ethics Commission the parties to the contract and any subcontractors. Additionally, TJPA certifies that it will have, by the time it submitted a proposal for the contract, informed each such person of the limitation on contributions imposed by such Section 1.126 and provided the names of the persons required to be informed to the City department with whom it is contracting.

11. No Conflict of Interest. The parties acknowledge that they are familiar with the provisions of Section 15.103 of the San Francisco Charter, Article III, Chapter 2 of City's Campaign and Governmental Conduct Code, and Sections 87100 *et seq.* and Sections 1090 *et seq.* of the Government Code of the State of California, and certify that they do not know of any facts which would constitute a violation of said provision, and agree that if a party becomes

aware of any such fact during the term of this MOU, such party shall immediately notify the other party.

12. No Joint Liability. Nothing in this MOU shall be construed as giving a party the right or ability to bind other parties and nothing in this MOU shall be construed to create any joint liability with regard to, or as a result of, the activities undertaken by any of the parties, their employees, officers and/or agents. All employees, officers and/or agents of a party shall remain employees, officers and/or agents of that party and shall be subject to the laws, procedures, rules and policies governing that party's employees, officers and/or agents.

13. Sunshine. The parties understand and agree that the City's Sunshine Ordinance (S.F. Administrative Code Chapter 67) and the State Public Records Law (Gov't Code section 6250 et seq.) apply to this MOU and any and all records and materials submitted to either party in connection with this MOU.

14. Miscellaneous. (a) This MOU may be modified only in writing and by mutual consent of all parties. (b) This MOU shall become effective when signed by all OEWD and TJPA. It shall remain in effect until terminated in writing by either party. (c) There are no intended third party beneficiaries of this MOU. The parties acknowledge and agree that this MOU is entered into for their benefit and not for the benefit of any other party. (d) This MOU shall be governed by the applicable laws of California. (e) This MOU contains all of the representations and the entire agreement between the parties with respect to the subject matter of this MOU. Any prior correspondence, memoranda, agreements, warranties, or written or oral representations relating to such subject matter are superseded in total by this MOU. (f) Unless otherwise prohibited by law or policy, the parties agree that an electronic copy of this agreement, or an electronically signed agreement, has the same force and legal effect as the agreement executed with an original ink signature. The term "electronic copy of this agreement" refers to a transmission by facsimile, electronic mail, or other electronic means of a copy of the original signed agreement in a portable document format. The term "electronically signed agreement" means the agreement that is executed by applying an electronic signature using technology mutually acceptable to the parties. (g) OEWD agrees to maintain and make available to TJPA, during regular business hours, accurate books and accounting records relating to work under this MOU. OEWD will permit TJPA to audit, examine, and make excerpts and transcripts from such books and records, and to make audits of all invoices, materials, and records related to work under this MOU. OEWD shall maintain such data and records in keeping with its record retention policies. The State of California or any federal agency having an interest in the subject matter of this MOU shall have the same rights conferred upon TJPA by this section.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties have executed this MOU on the date set forth herein.

City:

City and County of San Francisco, a
municipal corporation, acting by and through its
Office of Economic and Workforce Development

By: _____
Kate Sofis, Director of Office of Economic and Workforce Development

TJPA:

Transbay Joint Powers Authority, a
joint exercise of powers authority

By: _____
Adam Van de Water, Executive Director

Transbay Joint Powers Authority
Board of Directors
Resolution No. _____
Adopted: _____
Attest: _____

Secretary, TJPA Board

APPROVED AS TO FORM FOR OEWD:

DAVID CHIU, City Attorney

By: _____
Anna Parlato Gunderson, Deputy City Attorney

APPROVED AS TO FORM FOR TJPA:

By: _____
Deborah Miller, Legal Counsel

Appendix A

Budget

OEWD and other City staff time to be reimbursed under this MOU shall not exceed \$1,025,000, and the aggregate amount of the TJPA's obligations under this MOU shall not exceed this amount, unless the TJPA and OEWD agree to increase such amount as provided in Section 2(d) of this MOU.

The budget allocations per City Department for FY21-22 are as follows:

Department	Assumption	Department Subtotal
SFMTA	--	\$40,000
Contingency	--	--
	TOTAL	\$40,000

The budget allocations per City Department for FY22-23 are as follows:

Department	Assumption	Department Subtotal
SFPUC	\$40,000 per quarter	\$160,000
SFDBI/SFFD	--	\$50,000
SFMTA	\$40,000 per quarter	\$160,000
SFDPW	\$25,000 per quarter	\$100,000
SFMOD	--	\$125,000
OEWD	\$20,000 per quarter	\$80,000
Contingency		\$310,000
	TOTAL	\$985,000

Due to the nature of the work of the City Attorney's Office, it cannot agree to be bound by a particular budget; nonetheless, TJPA reimbursement of City Attorney's Office expenditures under this MOU will be deducted from the \$985,000 budget TJPA has made available for all OEWD and other City staff time under this MOU.

With the consent of TJPA, OEWD may (1) reallocate funds from one Department budget line item to another so long as the total budget amount under this MOU does not exceed \$1,025,000, or such increased amount that has been agreed upon by TJPA and OEWD, (2) allocate funds in the Contingency line item to supplement a Department budget line item, as needed, or (3) allocate funds in the Contingency line item to reimburse for City staff time incurred under this MOU in a Department not reflected in the above table, or OEWD may in its sole discretion allocate funds in the Contingency line item as payment for undisputed past due payments as described in Section 2(e).

OEWD will provide a schedule of all City staff billing rates by department and position with its first submission of quarterly billing to TJPA.

All rates are subject to change; provided however, such changes will be consistent with what City departments charge other City departments.