

**MEMORANDUM OF AGREEMENT
BY AND BETWEEN THE

CITY OF SOMERVILLE
AND
METROPOLITAN AREA PLANNING COUNCIL**

This Memorandum of Agreement ("**Agreement**") is made this 28 day of March, 2011 by and between the City of Somerville (hereinafter referred to as "**COS**"), with offices at Somerville City Hall, 93 Highland Avenue, Somerville, MA 02143, and the Metropolitan Area Planning Council (hereinafter referred to as "**MAPC**"), a regional planning agency, and a public body politic and corporate, existing pursuant to Massachusetts General Laws, Chapter 40B, Sections 24 through 29, as amended, with offices at 60 Temple Place, Boston, Massachusetts, 02111. COS and MAPC may hereafter individually be referred to as "**Party**" and collectively as "**Parties**".

WITNESSETH THAT:

WHEREAS, as part of a greater policy effort to promote healthy transportation and to create sustainable communities for all residents, COS, the City of Boston (also known hereafter as "**COB**"), other participating communities to be determined, and MAPC have jointly undertaken an initiative to launch a third generation, automated regional bike share system that complements the region's existing public transportation system (the "**Regional Bike Share System**"); and

WHEREAS, the Massachusetts Bay Transportation Authority (hereafter "**MBTA**") currently provides the majority of public transit for the region and is the designated eligible recipient of federal transit funding allocated for Greater Boston; and

WHEREAS, it is intended that the Regional Bike Share System and MBTA public transit system will work together synergistically by locating portions of the Regional Bike Share System close to bus stations and along bus routes as well as subway, commuter rail, and water transit stations, thereby increasing the density of existing public transit stops, thereby increasing the transportation options for all users and also increasing use of public transportation in the region; and

WHEREAS, Federal funds have been made available through award by the United States Federal Transit Administration ("**FTA**") through the Bus and Bus Livability Grant Program (the "**Grant**") for which MBTA has submitted an application as sponsor on behalf of COS, the City of Boston, other participating communities, and MAPC for implementation of the proposed Regional Bike Share System; and

WHEREAS, MBTA has entered into a Master Agreement with FTA containing terms and conditions governing the administration of projects supported with Federal assistance awarded by FTA through a Grant Agreement or Cooperative Agreement with MBTA, and the provisions of the Master Agreement may be modified or superseded by subsequent Federal requirements or Grant Agreements, Cooperative Agreements, or Master Agreements; and

WHEREAS, MBTA, as the "**Recipient**," in cooperation with COS and MAPC (each as a "**Subrecipient**" or "**subgrantee**") will provide to the MAPC for use by COS Federal grant monies that are received from FTA under the Grant for the Regional Bike Share System to be applied toward

certain tasks to be accomplished in connection with the creation of the infrastructure of the Regional Bike Share System as hereinafter provided in this Agreement;

NOW, THEREFORE, in consideration of the promises and mutually dependent covenants set forth herein, the Parties agree as follows:

ARTICLE I: RESPONSIBILITIES OF THE PARTIES

A. RESPONSIBILITIES OF MAPC

In connection with the siting, installation and launch of the Regional Bike Share System (the "**Project**"), MAPC shall have those responsibilities to which it agreed in the Memorandum of Agreement by and among the Massachusetts Bay Transportation Authority, City of Boston and Metropolitan Area Planning Council dated April 13, 2011, attached hereto as **Exhibit 1** and incorporated herein, and which includes the following tasks to which it hereby agrees as to the COS:

1. MBTA has secured \$3,003,051.00 in Grant funds. \$390,396.63 (or twenty-one percent) of these Grant funds will be accessed by MAPC for COS. The local match amount of \$97,599.16 shall be the responsibility of COS, as more fully set forth herein, for a total Project cost for the COS portion of the Project of \$487,995.78 under this Agreement.
2. MAPC, consistent with its oversight responsibilities as the Recipient of Federal funds from the MBTA, shall review budget analyses (actual vs. budget, Local Match income, as defined below) and projections quarterly, including quarterly benchmarking progress reports to be submitted by COS.
3. Contingent upon receipt of the Grant as stated in Article I. Section A. 1. above, MAPC shall reimburse, in a manner as described below, COS for tasks performed under Article I, Section B. of this Agreement. MAPC shall not expend more than \$3,003,051 or the amount received from FTA for the Grant, whichever is less.
4. MAPC shall review and process invoices in a timely manner. Payment invoices shall be submitted by COS, as applicable, not more often than once a month, and shall include progress reports providing information including, but not limited to, certification that Local Match funds have been received, the items for which Local Match funds have been spent and the items for which Program Income, as defined below, has been spent, the breakdown of the activities accomplished and backup detail of costs and/or expenses incurred. After all information is received and reviewed, satisfactorily documenting consistency with the Grant award and the FTA Application, as defined below, MAPC shall process payment requests in a timely manner, and in no event to exceed thirty (30) days after the MBTA has provided funds to MAPC.
5. MAPC shall review payment requests, progress reports and project-generated materials prepared by COS to ensure subgrantees comply with and follow all applicable federal, state, municipal and local statutes, laws, ordinances, regulations, directives and requirements affecting the activities covered by this Agreement or any part hereof, including, but not limited to complying with and following all applicable statutes, regulations and requirements of FTA.
6. MAPC, as the regional entity, has overseen the procurement process on behalf of the City of Boston and all municipalities in the region that have or will join the Regional Bike Share System ("**Participating Municipalities**" or collectively "**PMs**"), including COS, consistent with the provisions of MGL Chapter 30B and all applicable federal, state and local laws, ordinances, rules and

regulations, and has designated Alta Bicycle Share, Inc., at the conclusion of that process, as the vendor ("**Contractor**" or "**Contractors**") eligible to contract with Boston and all PMs, including COS, for the installation and operation of the Project within the respective municipality's jurisdiction.

7. MAPC hereby contracts with COS to act as fiduciary for COS for the purposes of receiving FTA Grant funds from the MBTA consistent with **Exhibit 1** and disbursing such funds to COS in compliance with this Agreement and all provisions applicable to subrecipient, subgrantee, and/or Purchaser, as defined below.

8. MAPC shall receive a one-time administrative fee of \$1,500.00 for its costs related to administering this agreement, specifically MAPC's responsibilities under this Section A. This fee will be incorporated into COS's FTA Budget, said term defined below, and retained by MAPC at the time of the first reimbursement to COS. See **Exhibit 2** referenced in Section B.2 below.

B. RESPONSIBILITIES OF COS

1. As a condition precedent to drawing down funds, COS must certify that it has received or appropriated funds for its required twenty percent (20%) local match as provided below ("**Local Match**") for each draw down, including how Local Match funds will be spent. The COS Local Match includes \$\$256,958.00 in City Funds to provide for first year costs not covered by the FTA 80% funding (\$\$464,823.00 over 3 years).
2. COS has prepared a budget for its respective portion of the Project specifically itemizing the sources of funds and expenditures in a format reasonably acceptable to MAPC so that MAPC can effectively monitor the Local Match and expenditures and facilitate timely processing of invoice payment requests. The COS budget is attached hereto as **Exhibit 2** and incorporated herein.
3. MAPC agrees that COS may apply for and draw up to \$390,396.63 of the Grant funds for COS's initially contemplated portion of the Project. MAPC agrees that COS may apply for additional Grant funds as available for additional COS stations.
4. COS shall be responsible for entering into a contract with the Contractor through which COS shall purchase the equipment necessary for the operation of its relative portion of the Project. COS shall retain the Contractor chosen through the procurement process for the operation of the Project. The FTA accepted Grant application ("**FTA App**"), including the "**FTA Budget**" set forth therein, is attached hereto as **Exhibit A to Exhibit 1**, and incorporated herein.
5. The Parties acknowledge and agree that any grants COS applies for and receives, and all funds donated to COS are for the exclusive use of COS in relation to the Project and that system revenue accruing to COS and municipal contributions shall be for the exclusive use of COS.
6. MAPC and COS shall work cooperatively and in good faith to facilitate timely and efficient implementation of the Project as specified in the Project scope and schedule approved by FTA in making the Grant award.
7. COS shall designate a Project Manager responsible for Project implementation tasks including:

- i. Management/Administration of vendor contracts to ensure quality project delivery and contractor/subcontractor compliance with all Federal grant requirements and with all applicable Federal, state and local laws, ordinances, rules and regulations;
 - ii. Preparation and submittal to MAPC of invoices and backup reports detailing cost and/or expense eligibility; and
 - iii. Preparation and submittal to MAPC and MBTA of Quarterly Progress/Milestone reporting documenting work task accomplishments, schedule variances/compliance and implementation issues on the Project. Quarterly reports will be prepared through the Project Duration, as defined below, and are due to MAPC and MBTA by January 1st, April 1st, July 1st and October 1st each year until Project Close-Out, which occurs on or about the end of the Project Duration. Failure to provide such reports on the form provided in advance by MBTA may result in MAPC withholding funding until such time that MAPC, in its sole reasonable discretion, has determined that COS has complied.
8. COS, MAPC, and all procured Contractors shall be required to comply with all Federal, state and local laws, ordinances, rules, and regulations applicable to the Project.
 9. COS agrees to require all of their respective designees and contractors to agree to maintain intact and readily accessible all books, records, accounts, reports, data, documents, contracts and other records and evidentiary materials under its respective contracts for a period of not less than three years after the date of termination or expiration of its said respective contract(s), except in the event of litigation or settlement of claims arising from the performance of its said respective contract(s), in which case the contractors shall agree to maintain same until the Purchaser (the entity that is the purchaser of the services and/or materials and supplies as among MBTA, COS, COB, other PMs and MAPC), FTA Administrator, the Comptroller General, MBTA and the Commonwealth of Massachusetts, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto, for three years after the date of completion of the Project or as may be longer as stated above; and, if requested, make all of such records available to MBTA at MBTA's offices at Ten Park Plaza, Boston, Massachusetts at a specific location designated by MBTA for inspection and audit at all reasonable times to representatives of MBTA, FTA, the United States Secretary of Transportation, the Comptroller General of the United States, and the Commonwealth of Massachusetts or their respective authorized representatives, and other persons or entities as may be required or deemed appropriate in connection with the Project, to inspect all Project work, materials, payrolls, and other data, and to audit the books, records, and accounts of COS, and its respective designees and contractors; and supporting materials relating to the Project and required to be submitted to FTA must be prepared and submitted in electronic and/or typewritten hard copy formats as FTA may require [and electronic submissions must comply with the electronic accessibility requirements of Subsection 15.u of the Master Agreement between MBTA and FTA (the "**Master Agreement**")]] and COS shall require all of its contractors and their contractors' respective subcontractors to the lowest tier to comply with the same requirements stated hereinabove in this paragraph. Reference is made to the applicable accessibility standards of section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794d, and U.S. ATBCB regulations, "Electronic and Information Technology Accessibility Standards", 36 C.F.R. Part 1194.
 10. COS shall comply with and follow all applicable federal, state, municipal and local statutes, laws, ordinances, regulations, directives and requirements affecting the activities covered by this Agreement or any part hereof, including, but not limited to complying with and following all applicable statutes, regulations and requirements involving FTA, and COS shall comply

with all of the requirements of the Master Agreement that pertain to subrecipients as may be applicable in the circumstances of this Agreement and COS shall require all their respective designees and contractors, and their respective contractors (all third party contractors and third party subcontractors) at every tier, to comply with the applicable provisions of the Master Agreement that apply to third party contractors and third party subcontractors, and of FTA Procurement Circular 4220.1E, and of the Best Practices Procurement Manual, including but not limited to BPPM Appendix A.1, for guidance and the required and suggested federal clauses for incorporation into contracts entered into in connection with the Project as may be appropriate with respect to the contracts entered into or to be executed in connection with the Project.

Such compliance shall include, without limitation, compliance with Section 19.a., Use of Project Property, as follows:

COS agrees to maintain continuing control of the use of Project property to the extent satisfactory to FTA. COS agrees to use Project property for appropriate Project purposes (which may include joint development purposes that generate program income, both during and after the Project's award period and used to support public transportation activities) for the duration of the useful life of that property, as required by FTA. Should COS unreasonably delay or fail to use Project property during the useful life of that property, the Subrecipients agree that it may be required to return the entire amount of the Federal assistance expended on that property. The Subrecipients further agree to notify FTA immediately when any Project property is withdrawn from Project use or when any Project property is used in a manner substantially different from the representations the Subrecipients has made in its Application or in the Project Description for the Grant Agreement or Cooperative Agreement for the Project; and

with Section 12.d., Disadvantaged Business Enterprise, as follows:

To the extent authorized by Federal law, COS agrees to facilitate participation by Disadvantaged Business Enterprises (DBEs) in the Project and assures that each subrecipient, lessee, third party contractor, or other participant at any tier of the Project will facilitate participation by DBEs in the Project to the extent applicable as follows:

(1) COS agrees and assures that they shall comply with section 1101(b) of the SAFETEA-LU, 23 U.S.C. sec. 101 note, and U.S. DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 C.F.R. Part 26.

(2) COS agrees and assures that it shall not discriminate on the basis of race, color, sex, or national origin in the award and performance of any subagreement, lease, third party contract, or other arrangement supported with Federal assistance derived from U.S. DOT in the administration of its DBE program and shall comply with the requirements of 49 C.F.R. Part 26. The Subrecipients agree to take all necessary and reasonable steps as set forth in 49 C.F.R. Part 26 to ensure nondiscrimination in the award and administration of all subagreements, leases, third party contracts, and other arrangements supported with Federal assistance derived from U.S. DOT. As required by 49 C.F.R. Part 26, the Subrecipient's DBE program approved by U.S. DOT, if any, is incorporated by reference and made part of the Grant Agreement or Cooperative Agreement for the Project. The Subrecipients agree that each of them has a legal obligation to implement its approved DBE program, and that its failure to carry out that DBE

program shall be treated as a violation of the Grant Agreement or Cooperative Agreement for the Project and this Master Agreement. Upon notification by U.S. DOT to the Subrecipients of the Subrecipient's failure to implement its approved DBE program, U.S. DOT may impose the sanctions as set forth in 49 C.F.R. Part 26 and any, in appropriate cases, refer to the matter to the appropriate Federal authorities for enforcement under 18 U.S.C. sec. 1001, or the Program Fraud Civil Remedies Act, 31 U.S.C. secs. 3801 *et seq.*, or both. Subrecipients shall provide a copy of all such notices to MBTA.

11. As applicable to the Project, COS shall comply with all applicable Federal requirements, including but not limited to all terms and conditions in all present and future Master Agreements between FTA and MBTA governing the administration of projects supported with Federal assistance awarded by FTA through Grant Agreements or Cooperative Agreements with MBTA, and COS shall comply with all provisions of the Master Agreement as such may be modified or superseded by subsequent Federal requirements or Grant Agreements, Cooperative Agreements, or Master Agreements, as such terms and conditions are applicable to COS as a subrecipient and including, but not limited to, the Federal Requirements contained in Exhibit B to Exhibit 1, attached hereto and incorporated herein. It is understood that not every provision of all present and future Master Agreements (as such may be modified or superseded by subsequent Federal Requirements or Grant Agreements, Cooperative Agreements, or master Agreements) will apply to COS as a subrecipient but COS agrees that it shall comply with, and that COS shall require all of its respective designees and contractors and all of its contractors' respective contractors and subcontractors at every tier to comply with, all applicable Federal requirements as required of COS; and, also, COS shall comply with FTA Procurement circular 4220.1E with respect to so-called "Third Party" contracts and contracting requirements as may be applicable; and also COS shall comply with the Best Practices Procurement Manual (BPPM) for guidance in awarding contracts and incorporating the required federal clauses and suggested federal clauses as applicable and as appropriate with respect to the specific type(s) of contract(s) into which COS is entering, and as the said Circular and the said BPPM may be modified or amended from time to time.
12. COS, as applicable, shall submit invoices to MAPC with supporting backup documentation representing the advancements and/or reimbursable expenditures of the Contractors and their respective subcontractors at every tier for the equipment and services provided in accordance with Section B. 7. above in Article I of this Agreement and as stated in the FTA App regarding the types of advancements and/or expenditures. All advancements requested and/or expenditures for which reimbursement is sought shall be for costs and expenses that are allowed under the Federal laws and laws of the Commonwealth of Massachusetts. Reference is made to Section 9 of FTA Master Agreement MA(16), dated October 1, 2009 form for the Costs Reimbursed, Bond Interest and Other Financing Costs, Excluded Costs and Federal Claims, Excess Payments, Disallowed Costs, including Interest and De-obligation of Funds for the appropriate applicable provisions regarding Payments.
13. COS agrees to comply with and/or perform, as may be appropriate in that COS is an intended subrecipient of the federal grant monies, the financial and compliance audits required by the Single Audit Act Amendments of 1996, 31 U.S.C. §§7501 *et seq.*, in accordance with OMB Circular A-133, Revised, "Audits of States, Local Governments, and Non-Profit Organizations", and the latest applicable OMB A-133 Compliance Supplement provisions for U.S. Department of Transportation ("U.S. DOT"), and any further revision or supplement thereto. COS also agrees to obtain any other audits required by the Federal Government and to comply with all applicable provisions of Circular A-133 as revised as said provisions are appropriate in the circumstances of this Agreement. Project closeout will not alter either COS's

or MAPC's audit responsibilities. COS agrees that audits will be conducted in accordance with U.S. General Accounting Office, (U.S. GAO) "Government Auditing Standards." COS agrees that it shall provide to MAPC, MBTA and the Federal Government a copy of a Single Audit for each year, and/or fiscal year as may be required by OMB Circular A-133 as revised, from execution of this Agreement and for each year of receipt of federal monies, as described in the Act in compliance with the Single Audit Act hereinbefore referenced, as amended, and the OMB Circular A-133, Revised, as hereinbefore referenced.

14. To the extent applicable, COS agrees to comply with the third party procurement provisions of FTA Master Agreement MA (16), dated October 1, 2009, as may be revised or modified from time to time.
15. COS agrees to comply, and assure the compliance of each third party contractor at any tier of the Project, with the employee protection requirements for nonconstruction employees of the Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 3701 et seq., in particular the wage and hour requirements of section 102 of that Act at 40 U.S.C. § 3702, and with U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)," 29 C.F.R. Part 5.
16. COS recognizes that many Federal and state laws imposing environmental and resource conservation requirements may apply to the Project. COS also recognizes that U.S. EPA, FHWA and other Federal agencies have issued, and in the future are expected to issue, Federal regulations and directives that may affect the Project. Thus, COS agrees to comply, and assure the compliance of each third party contractor, with any applicable Federal and state laws, regulations and directives of the Federal Government that are in effect now or become effective in the future, except to the extent the Federal Government determines otherwise in writing. See FTA Master Agreement MA (16), dated October 1, 2009, Section 25 entitled "Environmental Protections" for more detailed information regarding Environmental Protections.
17. To the extent U.S. DOT or FTA directs, COS agrees to use the metric system of measurement in its Project activities, in accordance with the Metric Conversion Act, as amended by the Omnibus Trade and competitiveness Act, 15 U.S.C. §§ 205a et seq.; Executive Order No. 12770, "Metric Usage in Federal Government Programs", 15 U.S.C. § 205a note; and U.S.DOT or FTA regulations and directives. As practicable and feasible, COS agrees to accept products and services with dimensions expressed in the metric system of measurement.
18. In accordance with Executive Order No. 13043, "Increasing Seat Belt Use in the United States", April 16, 1977, 23 U.S.C. § 402 note, COS is encouraged to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company-owned, rented, or personally operated vehicles, and to include this provision in any third party contract, third party subcontracts, or subagreements involving the Project.
19. To the extent applicable, COS agrees to comply with 49 U.S.C. § 401 19(b) and implementing U.S. DOT regulations, "Protection of Sensitive Security Information", 49 C.F.R. Part 15, and with 49 U.S.C. § 114(s) and implementing U.S. Department of Homeland Security, Transportation Security Administration regulations, "Protection of Sensitive Security Information", 49 C.F.R. Part 1520.

20. To the extent required by Federal law, COS agrees that, in administering the Project, any request for proposals, solicitation, grant application, form notification, press release, or other publication involving the distribution of Federal assistance for the Project shall indicate that FTA is the Federal agency that is providing the Federal assistance, the Catalog of Federal Domestic Assistance Number of the program from which the Federal assistance is authorized, as applicable, and the amount provided.

All: (i) press releases to be published in newspapers, magazines, and other news media; (ii) maps, plans, or brochures; and (iii) web content and outreach emails developed by or on behalf of COS in relation to the Program shall include attribution to acknowledge FTA's, MassDOT's, and MBTA's role in support of the Project.

21. COS agrees that upon receipt of approval of the Federal grant monies that FTA has a vested interest in the settlement of any dispute, breach, default, or litigation involving the Project. Accordingly, COS agrees to all applicable terms and to perform all activities and undertake all steps necessary to enable MBTA to comply with Section 54 of FTA Master Agreement MA(16), dated October 1, 2009.
22. COS acknowledges and agrees that if any provision of the Grant Agreement that MBTA may enter into with FTA in furtherance of the Project as anticipated by this Agreement or FTA Master Agreement with MBTA is determined invalid, the remainder of that Agreement shall not be affected if that remainder would continue to conform to the requirements of applicable Federal laws or regulations.
23. To the extent applicable, COS agrees to perform an energy assessment for any building constructed with FTA assistance, as provided in FTA regulations, "Requirements for Energy Assessments", 49 C.F.R. Part 622, Subpart C.
24. COS certifies to the following and shall require their respective contractors to certify to the following:

Byrd Anti-Lobbying Amendment, 31 U.S.C. 1352, as amended by the Lobbying Disclosure Act of 1995, P.L. 104-65 [to be codified at 2 U.S.C. § 1601, et seq.] - Contractors who apply or bid for an award of \$100,000 or more shall file the certification required by 49 CFR part 20, "New Restrictions on Lobbying." Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that Federal contract, grant or award covered by 31 U.S.C. 1352. Such disclosures are forwarded from tier to tier up to the recipient (MBTA).

Certifications shall be attached to this Agreement and shall become part of this Agreement and incorporated herein by reference.

25. Termination for Convenience or Default. The Parties may terminate this Agreement for convenience in the event the Federal funding, as set forth herein, becomes unavailable or

delayed to the extent that the Project is jeopardized as determined by the Parties. COS may terminate Contractor's contract, in whole or in part, because of the failure of the Contractor to fulfill the contract obligations in any of the Contractor's contract(s) and the Contractor shall agree to these terms in writing and such agreement shall be attached to and become part of this Agreement and such agreement is incorporated by reference herein.

COS may terminate its respective Contractor contract in whole or in part, for convenience or because of the failure of the Contractor to fulfill the contract obligations in the respective Contractor's contract and the Contractor shall agree to these terms in writing. COS shall terminate by delivering to the Contractor a Notice of Termination specifying the nature, extent, and effective date of the termination. COS shall provide MBTA, MAPC and COB a copy of any such notice of termination. Upon receipt of the notice, the Contractor shall (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to COS's contracting officer ("**Contracting Officer**", which may be the same person as the Project Manager) all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this contract, whether completed or in process. The COS shall require the Contractor to assign to COS in writing, all of the rights, title, and interest of the Contractor to any subcontracts or purchase orders, which relate to the performance of the work terminated for convenience, in which case, the COS shall have the right to settle or authorize payments on any or all claims arising out of such termination.

If the termination is for the convenience of COS, the Contracting Officer shall make an equitable adjustment in the contract price but shall allow no anticipated profit on unperformed services.

If the termination is for failure of the Contractor to fulfill the contract obligations, the COS may complete the work by contract or otherwise and the Contractor shall be liable for any additional cost incurred by the COS.

If, after termination for failure to fulfill contract obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the COS.

If the termination is for the convenience of the COS, the Contractor shall be paid its contract closeout costs, and a fee, if the contract provided for payment of a fee, in proportion to the work performed up to the time of termination.

If, after serving a notice of termination for default, COS determines that the Contractor has an excusable reason for not performing, such as strike, fire, flood, events which are not the fault of and are beyond the control of the contractor, or events which were not reasonably foreseen and provided for, the COS, after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

ARTICLE II: INDEMNIFICATION AND HOLD HARMLESS

1. To the extent permitted by law, COS shall indemnify, defend and otherwise hold harmless MAPC from and against any and all suits, claims, and any other losses, including without limitation reasonable attorneys' fees (collectively, "Claims") to the extent that such Claims arise from or in connection with (i) that portion of the Regional Bike Share System within

- COS's jurisdiction, (ii) the failure of COS to provide its 20% local match non-Federal funds, (iii) marketing activities undertaken by COS, including particularly any representations or warranties made by COS regarding the Regional Bike Share System or additional services provided by COS, or (iv) any material breach of this Agreement by COS.
2. To the extent permitted by law, MAPC shall indemnify, defend and otherwise hold harmless COS from and against any and all Claims (including, without limitation, reasonable attorneys' fees) to the extent that such Claims arise from or in connection with (i) that portion of the Regional Bike Share System under MAPC's jurisdiction or within any non-COS PM's jurisdiction, excluding the City of Boston's jurisdiction, (ii) the failure of any non-COS PM, excluding the City of Boston, to provide its 20% local match non-Federal funds, (iii) marketing activities undertaken by MAPC or any non-COS PM, excluding the City of Boston, including particularly any representations or warranties made by MAPC or any non-COS PM, excluding the City of Boston, regarding the Regional Bike Share System or additional services provided by MAPC or non-COS PM, excluding the City of Boston, or (iv) any material breach of this Agreement by MAPC or any non-COS PM, excluding the City of Boston.
 3. In the event a Party receives notice of any action or event which gives rise to the indemnification obligations contained herein, such Party shall, within twenty (20) days after receipt of such notice, notify the other Party of the occurrence of such action or event, as the case may be. If such Claim involves assertion of liability by a third party, the indemnifying Party shall have the right to undertake (through counsel of its choosing, such counsel to be reasonably acceptable to the indemnitee) the defense, compromise or settlement of such Claim on behalf of and at the risk of the indemnifying Party. In the event that the indemnifying Party does not elect (by written notice to the indemnitee) to undertake such defense, the indemnitee shall have the right to undertake (through counsel of its choosing, such counsel to be reasonably acceptable to the indemnifying Party) the defense, compromise or settlement of such Claim on behalf of and at the risk of the indemnifying Party. Neither the indemnifying Party nor the indemnitee shall compromise or settle the Claim without the consent of the other Party unless such settlement involves a release of the other Party, provided that such consent shall not be unreasonably withheld or delayed.

ARTICLE III: RESPONSIBILITIES OF BOTH OF THE PARTIES

1. Each Party agrees that it shall execute all additional necessary and/or appropriate documents to accomplish its respective tasks as stated in this Agreement in connection with the Project and to make the covenants herein effective.
2. The Catalogue of Federal Domestic Assistance (CFDA) Number is #20.500. The Federal Fiscal Year for which the Federal funds are being sought is FY10.
3. The maximum amount of funds to be expended pursuant to this Agreement is \$487,995.79, (which is, \$390,396.63 in Grant funds plus \$97,599.16 in Local Match funds) plus such additional amount of funds as the Parties may agree if any of the remaining balance of the total \$3,003,051.00 in Grant funds remains.
4. In the event that any Bike Share stations, as set forth in the FTA App, are to be located on MBTA property, then the COS and MBTA will enter an appropriate agreement related to such station(s).

5. COS and MAPC shall meet and review, no less frequently than semi-annually, budget analyses (actual vs. budget, Local Match income) and projections quarterly, including the status of the Local Match funding requirement.
6. COS, in conjunction with the MBTA and MAPC, shall monitor placement of bike share stations to ensure compliance with the Grant terms, conditions, and covenants, including, without limitation, access to bus transit and Title VI, Non-Discrimination in Federally Assisted Programs. To ensure such compliance, COS shall submit to MBTA and MAPC for review and comment the proposed general location for each station. In the event any proposed location is objectionable to any of the above mentioned Parties, such Party shall provide written notice of such objection, including a statement of the reasons therefore, to each other Party within five (5) business days of receipt of the proposed location and the interested Parties shall, within five (5) business days of receiving written notice of a Party's objection, meet and resolve such objection and/or agree to relocate such station.

COS, Phase One Bike Share Station Sites, showing the approved general location for each station in COS's initial system, is attached hereto as **Exhibit 3** and incorporated herein. Each of the following shall be submitted to each Party to this Agreement and subject to the review process set forth in the immediately preceding paragraph:

- A. all additional station locations, including, without limitation, (i) COS Phase Two additional station locations; and (ii) location of stations in non-COS jurisdictions; and/or
- B. any relocation of a station outside of its previously approved general location, including, without limitation, station locations set forth on **Exhibit 3**.

COS and MAPC acknowledge and agree that, with regard to any station site, the exact location of any station may be modified by the permitting process, based on user patterns, and/or to ensure proper functioning of the station (such as, providing for solar power), provided, the approved general location, shall not be changed by COS unless such change is submitted to MAPC and MBTA for review and comment, as set forth herein.

In furtherance of the forgoing, notwithstanding anything contained herein to the contrary:

- A. MAPC in consultation with the MBTA shall review and approve all COS station locations for the sole purpose of ensuring compliance with the Grant terms, conditions, and covenants, including, without limitation, access to bus transit and Title VI, Non-Discrimination in Federally Assisted Programs;
- B. failure by MAPC or MBTA to object to a proposed station location in writing shall be deemed an acceptance of such location by such Party; and
- C. once a station location is approved or deemed approved (as set forth herein), no such station location may be moved or relocated outside of a five hundred (500) yard radius from the approved location without further review and approval for compliance, as set forth herein.

ARTICLE IV: GENERAL PROVISIONS:

1. Term. The term of this Agreement shall commence and be coterminous with term of the Grant (“**Project Duration**”).
2. Default. A Party shall be in default hereunder if such Party fails to comply with one or more material terms of this Agreement and is so notified in writing by any other Party of the specific term(s) of non-compliance.
3. Remedies. If after notification of a default, the defaulting Party fails to commence cure within thirty (30) days of such notice or fails to pursue such cure with all due diligence, or such cure cannot be effectuated within one hundred sixty (160) days, then the non-defaulting Party(s) shall have all remedies available at law or at equity, including without limitation, specific performance and payment of all damages.
4. Restricted Benefits. No member of or delegate to the Congress of the United States shall be admitted to any share or part of this Agreement or to any benefit arising therefrom. No member, officer, or employee of MBTA or MAPC or COS during his/her tenure or for one year thereafter shall have any interest, direct or indirect, in this Agreement or the proceeds thereof.
5. Notices. Whenever in this Agreement it shall be required or permitted that notice, demand or other communication be given or served by any Party to this Agreement to or upon any other, such notice shall be deemed to have been duly given or served if in writing and forwarded by certified or registered mail, return receipt requested, postage prepaid, addressed to the Party to whom it is to be given or served at its address as follows: if to MBTA, addressed to: MBTA, Ten Park Plaza, Boston, Massachusetts 02116, Attention: General Manager and Rail & Transit Administrator, with copies to: William A. Mitchell, Jr., General Counsel, MBTA, Ten Park Plaza, 7th Floor Law Department – Suite 7760, Boston, MA 02116-3974, and Joseph M. Cosgrove, Director of Development, MBTA, Ten Park Plaza, Room 5750, Boston, MA 02116-3974; and if to COS addressed to Hayes Morrison, Director of Transportation and Infrastructure, City Hall, 93 Highland Avenue, Somerville, MA 02143, with copy to City Solicitor, City Hall, 93 Highland Avenue, Somerville, MA 02143; and if to MAPC addressed to Marc D. Draisen, Executive Director, at 60 Temple Place, Boston, Massachusetts, 02111, with copy to Jennifer R. Garcia, Legal Counsel, at 60 Temple Place, Boston, Massachusetts, 02111. Each Party may change its address for purposes of notices by giving notice to the other Parties in the manner hereinbefore provided.
6. Governing Law and Severability. This Agreement shall be governed by and interpreted in accordance with the laws of the Federal government and the Commonwealth of Massachusetts. In the event any provision of the Agreement shall be determined to be invalid or unenforceable under applicable law, such provision shall, insofar as possible, be construed or applied in such manner as will permit enforcement; otherwise this Agreement shall be construed as if such provision had never been made part hereof.
7. Equal Opportunity. With respect to its exercise of all rights and privileges herein granted, COS and MAPC shall undertake affirmative action as required by Federal and State Laws, rules and regulations pertinent to Civil Rights and Equal Opportunity unless COS and MAPC are otherwise exempted therefrom. COS and MAPC agree that they shall comply with any and all affirmative action plans submitted pursuant to the directives of any Federal agency and in accordance with Federal Law.

8. Non-Discrimination Policy. COS and MAPC shall not discriminate against any person, employee or applicant for employment because of race, color, creed, national origin, age, sex, sexual orientation, disability or Vietnam era veteran status in their activities in connection with the Project, including, without limitation, the hiring and discharging of employees, the provision or use of services and the selection of suppliers, contractors, subcontractors or trades persons.
9. Requirements of 49 C.F.R. Part 23. This Agreement is subject to the requirement of the U.S. Department of Transportation's regulations at 49 C.F.R. Part 23. COS and MAPC agree that they will not discriminate against any business owner because of the owner's race, color, creed, national origin, age sex, sexual orientation, disability or Vietnam era veteran status in connection with the award or performance of any contracts or agreement covered by 49 C.F.R. Part 23. COS and MAPC agree to include the above statements in any subsequent contracts or agreements that they enter and cause those businesses to include such statements in further agreements.
10. Minority and Female Participation. COS and MAPC shall take reasonable steps to encourage and utilize minority and female business enterprises in connection with the Project and services procured in connection with the Project.
11. No Assignment. COS and MAPC agree that they will not assign this Agreement without the written consent of MBTA and of each other.
12. Binding Agreement. This Agreement shall bind and inure to the benefit of the Parties and their respective representatives, successors or permitted assigns. This Agreement contains the entire agreement of the Parties and may not be modified except by an instrument in writing signed by all of the Parties.
13. Headings. The headings used herein are used only for convenience of reference and are not to be considered a part of this Agreement or to be used in determining the intent of the Parties.
14. Entire Agreement; Amendments. This Agreement and any attachments or documents incorporated herein by inclusion or by reference, constitute the complete and entire Agreement between COS and MAPC with respect to the subject matter hereof and supersedes any prior or contemporaneous representations, understandings, communications, commitments, agreements or proposals, oral or written, and is not intended to confer upon any person other than COS and MAPC any rights or remedies hereunder. This Agreement may only be amended or modified by a written instrument approved and signed by all of the Parties.
15. Waiver. No waiver by any of the Parties hereto of any one or more defaults by any other Party in the performance of any provision of this Agreement shall operate or be construed as a waiver of any future default, whether alike or of a different character. No failure on the part any Party hereto to complain of any action or non-action on the part of any other Party, no matter how long the same may continue, shall be deemed to be a waiver of any right hereunder by the Party so failing. A waiver of any of the provisions of this Agreement shall only be effective if made in writing and signed by the Party that is making such waiver.
16. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute a single agreement.

17. Dispute Resolution. COS and MAPC intend to resolve all disputes under this Agreement to the best of their abilities in an informal manner. To accomplish this end, the Parties will use an Alternative Dispute Resolution process to resolve disputes in a manner designed to avoid litigation. In general, the Parties contemplate that the Alternative Dispute Resolution process will include, at a minimum, an attempt to resolve disputes through communications between their staff and, if resolution is not reached at that level, a procedure for review and action on such disputes by appropriate management level officials with COS and MAPC.
18. Anti-Deficiency Act. Nothing contained in this Agreement shall be construed as binding COS to expend in any one fiscal year any sum in excess of appropriations made by its legislative body, or administratively allocated, for the purposes of this Agreement for that fiscal year, or other obligations for the further expenditure of money in excess of such appropriations or allocations.

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Each Party hereto represents and warrants that its execution of this Agreement has been authorized by all requisite action and that the person signing this Agreement on its behalf is authorized to do so.

IN WITNESS WHEREOF, the undersigned CITY OF SOMERVILLE and METROPOLITAN AREA PLANNING COUNCIL have executed this Agreement as of the date and year first above written.

CITY OF SOMERVILLE

APPROVED:

By: 

Joseph A. Curatone
Mayor

Approved as to form:

By: 

Francis X. Wright, Jr.
City Solicitor

METROPOLITAN AREA PLANNING COUNCIL

APPROVED:

By: 

Marc Draisien
Executive Director