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Mayanne Downs, City Attorney
City of Orlando Attorney's Office
City Hall, 2nd Floor
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City of Tampa Attorney's Office
315 E. Kennedy Avenue, 5th Florida
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Re: Legal Opinion ("**Opinion**") Regarding Limitation on Liability for the State of Florida ("**Florida**"), City of Tampa ("**Tampa**") and City of Orlando ("**Orlando**") in regard to the Tampa/Orlando High Speed Rail System Project ("**Project**")

Dear Ms. Downs and Mr. Fletcher:

You have asked us to review the proposal ("**Proposal**") being submitted by you for review by the State of Florida with respect to creating an Interlocal Entity ("**Interlocal Entity**") for the purpose of completing design, planning, construction, operation and maintenance of the above referenced Project and to provide this legal opinion regarding the possibility of limiting the liability of Florida, Tampa and Orlando for Project cost overruns ("**Cost Overruns**"), obligation to refund payments ("**Payment Refund**") and operating cost shortfalls ("**Operating Shortfalls**"), as all three terms are more clearly defined below.

Bear in mind this analysis is conceptual and will have to be tailored to the specific documents that are ultimately prepared, but it is certainly the case that such limitation on liability can be obtained. That is, this opinion is more general in nature than customary for legal opinions because we do not have specific documents, the provisions of which are being analyzed in the context of the general legal principals.

## I. Interlocal Entity Structure and Bid and Transaction Documents.

The Interlocal Entity will be created pursuant to the requirements of Chapter 163 of Florida Statutes and will be comprised initially of the Cities of Tampa, Orlando, Lakeland and Miami as its members, but the term members as used herein will include these cities and any other local governmental entities subsequently added thereto ("**Members**").

The United States Department of Transportation ("**USDOT**") will enter into an agreement with the Florida Department of Transportation ("**FDOT**") that will recognize FDOT's intention to sub-grant and assign the Federal grant and associated funds to the Interlocal Entity ("**USDOT Agreement**"). In the USDOT Agreement, USDOT will waive any rights by USDOT to seek reimbursement or other recourse against FDOT, and provide for payment to the Interlocal

Entity from the available Federal funds the draws appropriate to apply to completed portions of the Project. The balance of the USDOT Agreement provisions will address the requirements as outlined in the Proposal and as subsequently agreed between the parties.

The Interlocal Entity will also enter into a sub-grant or delegation agreement ("**Delegation Agreement**") with FDOT for the purpose of FDOT delegating its rights, obligations, and authority under the USDOT Agreement to the Interlocal Entity to undertake and complete the Project as a qualified entity under Florida Statutes §341.8225 and Florida Statutes §334.03(14).

The Interlocal Entity will enter into a contract for the completion of the Project by a private entity ("**Private Company**"). The Private Company will be selected pursuant to a request for proposals ("**RFP**") or request for qualifications ("**RFQ**") for completion of construction of the Project pursuant to a fixed price design build contract ("**Fixed Price Design Build Contract**"). The bid documents ("**Bid Documents**") will require that the Private Company enter into a separate operation and management agreement ("**Operation and Management Agreement**") for the operation, maintenance and management of the Project once completed. The obligations and requirements of the Operation and Management Agreement will be covered by a guaranty of performance ("**Performance Guaranty**") from a sufficiently financially sound entity to render the Performance Guaranty reliable. There will be a variety of other documents that will have to be executed to carry out the terms of the Bid Documents. It is anticipated those documents will include but not be limited to: (i) Completion Guaranty; (ii) Release and Indemnification Agreements; (iii) Surety Bond; and (iv) Financial Assurances Agreements. These and other documents entered into to carry out the terms hereof shall be referred to herein as "**Project Documents**".

Florida will only be a party to the sub-grant Agreement between and among USDOT, FDOT (or other state office, department or entity) and the Interlocal Entity. Florida will not be a party to the Bid Documents or the Project Documents (although FDOT may have an advisory and regulatory role) and as such has substantial insulation from any financial liability by virtue of that fact. There are other protective measures as are described herein that address potential third party liability claims.

## II. Non-Recourse Provisions, Exculpations, Limitations on Liability and Associated Indemnification and Guaranty Agreements.

As indicated, the exact transactional documents, i.e. the Project Documents, are at best conceptual at this point, but they will all parallel documentation that is legally standard and will address the concerns set out in the Proposal.

Among other things, the Bid Documents will notify all bidders that they will be assuming the obligation to pay all the Costs Overruns, which will include but not be limited to all costs, fees and expenses necessary to complete the Project in accordance with approved plans and

specifications ("**Plans & Specifications**"). The Private Company will have to enter into an Operation and Maintenance Agreement that among other things will obligate the operator to pay the Operating Shortfalls, if any, for the operation of the system for the first thirty years of its existence. Finally, the Bid Documents will also advise the competing bidders that it will be their obligation to make any Payment Refund to pay back the funding source, USDOT, any money provided for the Project by the USDOT, if such repayment is due as a consequence of the failure to meet any of the funding conditions incident to the grant. USDOT has indicated it will waive any repayment requirement. Nonetheless, the Private Company would still be required to meet any remaining repayment obligation necessary to meet any Federal grant obligations.

The Project Documents in enforcement of the Private Company's obligations for the Cost Overruns, Operating Shortfalls and the Refund Payments shall require that the Private Company exculpate, release and hold harmless Florida and the Members from any and all cost, fees, expenses and liabilities associated therewith. Such an agreement will eliminate liability to the Private Company and will be paired with further provisions intended to protect against liability to third parsons. These protections will take the form of individual and Interlocal Entity release and indemnification agreements ("**Indemnification Agreements**") running to the State, the Interlocal Entity and the Members. In addition, the Private Company must provide a guaranty ("**Exculpation Guaranty**") to this effect from an entity which has audited financial statements evidencing sufficient financial wherewithal to make that guaranty effective. In addition, the Private Company shall provide a completion guaranty ("**Completion Guaranty**") in form and substance acceptable to Florida and the Members providing for the completion of the Project pursuant to the terms of the Fixed Price Design Build Contract.

Furthermore, the Bid Documents and Project Documents will require that the Private Company provide adequate financial assurances in form and substance acceptable to Florida, and the Members sufficient to insure the enforceability of the Exculpation Guaranty and Completion Guaranty. These financial assurances will include a surety bond ("Surety Bond") for completion of the Project and/or a letter of credit ("**Letter of Credit**") or other form of financial assurances reasonably acceptable to Florida and the Members.

In order to insure that the Private Company is obligated to make the Refund Payments but that Florida and the Members are not, the agreements between USDOT, FDOT and the Interlocal Entity shall provide that such obligation shall pass through the Interlocal Entity to the Private Company solely and that the Interlocal Entity, the State and the Members shall be released and held harmless for any liability associate therewith and shall not be responsible for the failure of such performance by the Private Company in any way.

## III. Legal Analysis and Authority.

Given the limitations of time we have focused our legal analysis on the concepts addressed in our opinions to that which may be most problematic. There is ample support for the notion that an Indemnification Agreement when supported by appropriate consideration is

enforceable in accordance with its terms. Florida courts enforce the plain language of indemnity agreements. *American Home Assurance Co. v. Nat'l Railroad Passenger Corp.*, 908 So.2d 459, 466, 472-476 (Fla. 2005). The same is true for the Guaranty Agreements and Financial Assurances Agreements contemplated by the Proposal. It also is tautological that an entity that has no obligations pursuant to a contract is not liable for the performance of that contract. The USDOT Agreement and the Delegation Agreement shall place no financial obligations upon FDOT or the State of Florida. Accordingly, we will focus on the primary sources of potential financial liability and the role of the Interlocal Entity in preventing such liability of Florida and the Members.

There are several strategies designed to prevent liability to Florida and the Members for the Cost Overruns. As indicated, Florida is not a party to any of the Project Documents. Florida will nonetheless be an indemnitee under the Indemnification Documents. With respect to the Members, the Project Documents make that the responsibility of the Private Company. Also, the construction contract is going to be a Fixed Price Design Build Contract. A firm fixed price contract is not subject to adjustment based on the contractor's cost experience during performance and this places the full responsibility, in terms of profits and losses for costs above the fixed price, directly upon the awardee. *Litton Systems, Inc., Electron Tube Division*, Comp. Gen. Dec. B-215106, 84-2 CPD 317, Comp Gen 585 (1984); FAR 16.202-2; *See also Government Contract Awards: Negotiation and Sealed Bidding*, Section 4:7 (2010). Except when contract clauses allow to the contrary, this rule holds true even when the cost increases stem from abnormal increases in price of supplies or other unusual trade conditions. *Id*; J. Filiberto Sanitation, Incl, 88-3 BCA Para 21, 160 (VABCA 1988). Fixed price contracts do not permit the contractor to cease performance in the fact of an overrun situation. *Northrop Grumman Corp. v. U.S.*, 42 Fed C1 1 (1998).

The basic premise of a fixed price contract is that the contractor is obligated to complete the designated performance for a fixed amount of compensation, regardless of the costs incurred. *Information Systems & Networks Corp. v. U.S.*, 64 Fed. Cl. 599 (2005). See also, *U.S. v. White*, 765 F. 2d 1469, 1472 (11th Cir. 1985) holding that the work is done at the fixed price. If it costs more the contractor takes the loss if it costs less he increases his profit.

In addition to the protections provide by the Fixed Price Design Build Contract, the Project Documents will require a Surety Bond, a Completion Guaranty and the above mentioned Indemnification Agreements. There will be no Cost Overruns payable by Florida of the Members.

An additional increment of liability insulation accorded Florida and the Members is found in the nature of the Interlocal Entity itself. This is best understood by reviewing a couple of cases involving Interlocal Entities in litigation.

In *Poe v. Hillsborough County*, 0004 WL 527787 (Fla. Cir. Ct.) No. 96-6515 Div. C. June 20, 1997 and *State v. Florida Development Finance Corporation*, 650 So. 2d 14 (Fla. 1995), the nature of liability attendant to Interlocal Entities was made clear.

In *Poe* there were two different Interlocal Entities, Stadium Financing Interlocal Agreement, between the Tampa Sports Authority and Hillsborough County and the Community Investment Interlocal Agreement, between the City of Tampa and Hillsborough County and others. The court found there that since the entities had the authority to enter into the Interlocal Agreements it was to the documents creating them that one must look to determine the liability. The Stadium Financing Interlocal Agreement pledged State of Florida sales tax revenue due to Hillsborough County. As such a lien was created thereon "*for such purpose in the accounts, to the extent and in the manner provided in the* ***Interlocal Agreement.***" (emphasis in original) Id, p. 3. So in the Community Investment Interlocal Agreement the City of Tampa had obligated "*the use of a portion of the revenue derived from the Local Option Sales Tax to be disbursed to support construction of the Project.*" Id. p.4. The pledged revenues and the pledged revenues only were available to pay the costs of the Project and then "o*nly to the extent and in the manner described in the Bond...and in the Interlocal Agreement.*" The Bonds and financing arrangements in *Poe* were ultimately upheld by the Florida Supreme Court in *Poe v. Hillsborough County*, 695 So.2d 672 (Fla. 1997).

In *Florida Development Finance Corporation*, the Florida Supreme Court indicated that the scope of liability pursuant to the Interlocal Agreement applicable therein the financial responsibility was limited to the applicable terms in part "*neither the state nor any county or agency thereof will lend or use it taxing power or credit in contravention of the provisions of Article VII, Section 10, Florida Constitution (1968).*" In fact, in our instance, that State Constitutional provision would prevent a pledge of the State's or municipality's general taxing power or credit, which results in no pledge of general revenues above and beyond those specifically identified as pledged or to be provided in the Interlocal Agreement. This is the essence of non-recourse liability and further protects Florida and the Members from the liability concerns mentioned.

## IV. **Scope of Opinion**.

In rendering its opinion we have reviewed the above referenced structure contemplated for the Interlocal Entity, the various agreements to be executed and provided in conjunction therewith and assume the following:

A. The documents will be validly executed by appropriately authorized parties and will be valid and binding on the parties thereto in accordance with their terms;

B. That all of the entities to the various agreements are duly incorporated, organized or formed and are validly existing and in good standing under the laws of the jurisdiction formed and that each party has the requisite authority and organizational power to execute and deliver

the documents to which it is a party and to perform its obligations as described thereunder and have duly executed and delivered same;

C. That USDOT will advance the funds as and when they require pursuant to the documents it executes through the State of Florida with the Interlocal Entity; and

D. The subject documents will be governed by and construed in accordance with the laws of the State of Florida, without regard to conflicts of law principals, notwithstanding the divisions of the subject documents to the contrary.

V. **Opinions**.

On the basis of our review of the intended structure of the Interlocal Entity, the terms, provisions and covenants of the Subject Documents and our reliance upon the assumptions contained herein and our consideration of those questions of law we consider relevant, and subject to the limitations and qualifications of this opinion, we are of the opinion as of the date hereof and under existing law that:

A. Florida shall have no financial responsibility for the Cost Overruns, the Operating Shortfalls or the Refund Payments.

B. The Members shall not have any liability for the Cost Overruns, Operating Shortfalls and Refund Payments.

Very truly yours,

Gray Robinson, P.A.

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