



**Interlocal Agreement
CITY OF AUSTIN
RECOMMENDATION FOR COUNCIL ACTION**

AGENDA ITEM NO.: 23
AGENDA DATE: Thu 11/18/2004
PAGE: 1 of 1

SUBJECT: Authorize execution of an agreement with D.R. HORTON-EMERALD, LTD., (a Texas limited partnership) for adding a left turn lane on FM 1826 at the proposed Alta Maria Subdivision in Travis County, TX, in an amount not to exceed \$298,381.04.

AMOUNT & SOURCE OF FUNDING: D.R. Horton-Emerald, Ltd. has deposited \$298,381.04 in an escrow account with the City of Austin.

FISCAL NOTE: There is no unanticipated fiscal impact. A fiscal note is not required.

REQUESTING Public Works
DEPARTMENT:

**DIRECTOR'S
AUTHORIZATION:** Sondra Creighton

FOR MORE INFORMATION CONTACT: Tom Forrest, 974-2244; Laura Bohl, 974-7064

PRIOR COUNCIL ACTION: N/A

BOARD AND COMMISSION ACTION: N/A

PURCHASING: N/A

MBE / WBE: N/A

The Texas Department of Transportation (TxDOT) has established a policy whereby a request by a private entity for construction improvements in state-maintained rights-of-way must be sponsored by and paid for by a local government. This Agreement is to collect the funds from the private entities to pay for improvements within state-maintained rights-of-way.

The funds include estimated construction costs, TxDOT engineering and contingencies, administrative and indirect costs. The funds also include 5% of estimated construction costs for the City's administrative and indirect costs and 50% of the estimated construction costs for the City's contingency. The City of Austin will maintain these funds in an interest bearing account and make final payment to TxDOT upon completion of construction. Any interest earned by the funds will be paid to D.R. Horton-Emerald, Ltd.

The proposed improvement in the TxDOT right-of-way is the addition of a left turn lane on FM 1826 at the proposed Alta Maria Subdivision in Travis County. TxDOT will solicit bids for the work and award and administer the construction contract for the signalization work.

OCT 12 2004

ROADWAY IMPROVEMENT AGREEMENT

STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

This Road Improvement Agreement (Agreement) is made and entered into by and between the City of Austin (City), a home rule city and municipal corporation situated in Travis, County Texas, and D.R. Horton-F Emerald, Ltd. (Requestor).

WHEREAS, Requestor owns a certain tract of real property located at FM 1862 and Alta Mira; and

WHEREAS, in connection with the development of its property, Requestor desires certain roadway improvements within a right-of-way maintained by the State of Texas; and

WHEREAS, the Texas Department of Transportation (TxDOT) has established a system under which a request by a private entity for construction in a state-maintained right-of-way must be sponsored by a local government; and

WHEREAS, TxDOT requires that the local government sponsor enter into an agreement with TxDOT for the improvements under which TxDOT agrees to construct the improvements and the local government agrees to pay for improvements; and

WHEREAS, Requestor desires the City to serve as the local sponsor for construction of the desired improvements and desires to provide the City with all funds necessary for construction of the improvements; and

WHEREAS, the City finds that it is in the public interest for the City to serve as the local sponsor.

NOW THEREFORE, in consideration of the foregoing premises, the mutual covenants set forth in this Agreement, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the City and Requestor agree as follow:

Section 1. Improvements. The improvements to be constructed by TxDOT and for which the City shall serve as the local sponsor (Improvements) are described in Exhibit A of this Agreement.

Section 2. Responsibility of City. The City agrees to serve as the local sponsor for construction of the Improvements and agrees to enter into an Advanced Funding Agreement with TxDOT (TxDOT AFA) for construction of the Improvements. As the local sponsor, the City shall receive funds from Requestor for construction of the Improvements and shall deliver the funds to TxDOT when requested by TxDOT as payment for construction of the Improvements. The City shall only be required to make payments to TxDOT from funds provided by Requestor, pursuant to the terms and conditions of the TxDOT AFA. The City does not agree and is not required under this Agreement to make payments for the Improvements from funds other than those funds provided by Requestor.

Under the process established by TxDOT for construction of improvements in a state-maintained right-of-way, TxDOT manages both the bidding process for award of construction agreements and the construction of improvements. The City has no responsibility for these activities as they relate to construction of the Improvements.

The City shall provide Requestor with a copy of the TxDOT AFA, copies of all requests for payment by TxDOT for the Improvements as well as copies of any other documentation pertaining to the Improvements, when requested by the Requestor.

Section 3. Responsibility of Requestor.

- A. Plans and Specifications. The Requestor is responsible for providing all plans and specifications for the Improvements to TxDOT and for securing TxDOT approval of the plans and specifications. All costs associated with the plans and specifications, including engineering costs, are the responsibility of the Requestor. The City is not responsible for any of the costs associated with preparation and approval of the Improvement plans and specifications.
- B. Permits. The Requestor is responsible for securing all permits required for construction of the Improvements and for the costs associated with the permits. The City is not responsible for costs associated with permitting of the Improvements.
- C. Utility Coordination and Relocation. The Requestor is responsible for planning and coordinating construction around utilities to mitigate the need to relocate existing facilities, including determining the location of existing utilities and designing the Improvements to minimize relocation (utility coordination). The Requestor is responsible for the costs associated with the utility coordination process and the relocation of utilities necessitated by construction of the Improvements. The City is not responsible for costs associated with utility coordination and relocation required for construction of the Improvements.
- D. Improvement Costs. The Requestor shall provide the City with funds sufficient to cover all costs associated with construction of the Improvements. The funds must be provided in accordance with this section.
 - 1. Requestor has provided to the City funds equal to the amount shown on Exhibit B of the Agreement, which includes:
 - a. the "Estimated Construction Cost" approved by TxDOT, including fees and administrative costs;
 - b. an amount equal to 5 percent of the Estimated Construction Cost approved by TxDOT to cover City fees and administrative costs associated with serving as the local sponsor; and
 - c. an amount equal to 50 percent of the Estimated Construction Cost approved by TxDOT to serve as a contingency fund (see Subsection E of this section).
 - 2. If the amount of the contract awarded by TxDOT for construction of the Improvements is greater than the Estimated Construction Cost approved by TxDOT, the Requestor shall provide to the City an amount equal to the difference between the contract amount and the Estimated Construction Cost (difference amount). The Requestor shall provide the difference amount in addition to and regardless of the amount of funds provided for the contingency fund described in Subsection D.1. and Subsection E. of this section. The requestor shall provide the difference amount not later than thirty calendar days after receipt of a notice from the City requesting the difference amount. Notwithstanding the foregoing, if the amount of the bid to be accepted by TxDOT for the construction of the Improvements is greater than the Estimated Construction Cost approved by TxDOT by more than twenty percent, then the City

will, at the request of the Requestor, use reasonable efforts to cause the TxDOT AFA to be terminated and return any escrow account funds to the Requestor.

3. If the final cost of the Improvements charged to the City by TxDOT exceeds the amount of funds provided by Requestor to the City under Subsections D.1. and D.2. of this section, the Requestor shall provide to the City any additional amount required for construction of the Improvements not later than thirty calendar days after receipt of a notice from the City requesting the additional amount.
 4. Any charges assessed against the City by TxDOT for reasons other than those addressed in Subsections D.1., D.2., and D.3. of this Agreement in connection with the City's position as the local sponsor for construction of the Improvements shall be paid from funds provided by the Requestor under this section. If charges assessed by TxDOT exceed the amount of the funds provided by Requestor, Requestor shall provide to the City an amount sufficient to cover the assessed charges not later than thirty calendar days after receipt of a notice from the City requesting the additional amount.
- E. **Contingency Fund.** The Requestor shall provide to the City an amount equal to 50 percent of the *Estimated Construction Cost* approved by TxDOT to serve as a contingency fund. The Contingency fund shall be maintained by the City until completion of the Improvements to pay for any costs charged to the City by TxDOT associated with the construction of the Improvements or in any way with the City's position as local sponsor, including construction cost overruns and additional TxDOT and City administrative fees.

Section 4. Escrow Account. Funds provided by the Requestor to the City under this Agreement shall be held in an interest-bearing escrow account until the funds are delivered to TxDOT. Funds may be paid to TxDOT from the escrow account for any charges assessed in connection with construction of the Improvements. Any funds remaining in the escrow account after all costs for construction of the Improvements have been assessed by and paid to TxDOT, together with all interest earned on the account will be returned to Requestor.

Section 5. Failure of Requestor to Provide Funds. If the Requestor fails to provide funds for the construction of the Improvements as provided by this Agreement, the City is released from any obligation under this Agreement to make payments to TxDOT for the Improvements. Any charges assessed by TxDOT against the City after termination of an agreement with TxDOT shall be paid from funds provided by the Requestor under Section 3 of this Agreement, provided the City is not in default of this Agreement. If the escrow account established to hold funds for the Improvements does not contain sufficient funds to cover all assessed charges, the Requestor shall provide to the City any additional amount required for assessed charges not later than 30 calendar days after receipt of notice from the City requesting the additional amount.

Section 6. Indemnification. The Requestor shall indemnify and hold harmless the City and City officials, employees, successors and assigns from any claims, losses, damages, causes of action, suits and liability of any kind arising:

1. out of or in connection with construction of the Improvements;
2. from the failure of Requestor to provide funds to the City in accordance with this Agreement; or
3. from the termination by the City or TxDOT of any agreement between the City and TxDOT concerning construction of the Improvements, providing the City is not in default of this Agreement or the TxDOT AFA.

Section 7. Acquisition and Provision of Land. The Requestor is responsible for acquiring and providing all land that is required for construction of the Improvements. The City is not required under this Agreement to acquire property for construction of the Improvements.

Section 8. General Provisions.

- A. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns, including without limitation, any receivers, administrators, or trustees in bankruptcy.
- B. Severability. If any word, phrase, clause, sentence, paragraph, section or other portion of this Agreement is held to be invalid for any reason by a court or agency of competent jurisdiction, the remainder of the Agreement shall not be affected by the invalidity and shall be construed as if the invalid portion was not contained in the Agreement. The provisions of this Agreement are expressly deemed severable for this purpose.
- C. Cooperation. The parties to this Agreement agree to cooperate at all times in good faith to effectuate the purposes and intent of this Agreement.
- D. Entire Agreement. This Agreement contains the entire agreement of the parties and supersedes all prior or contemporaneous understandings or representations, whether oral or written, respecting the subject matter of this Agreement.
- E. Amendments. Any amendment of this Agreement must be in writing and signed by the authorized representative of each party to this Agreement.
- F. No Amendment of Other Agreements. Unless otherwise expressly stipulated in this Agreement, this Agreement is separate from and is not an amendment or modification of any other agreement between the parties.
- G. Applicable Law. This Agreement shall be construed under and in accordance with Texas law.
- H. Venue. Venue for any action arising hereunder shall be in Travis County, Texas.
- I. Notices. Notices to be provided under this Agreement is sufficient if forwarded by hand-delivery or via U.S. Postal Service, postage prepaid, to the address of a party as shown below:

CITY OF AUSTIN:

Austan Librach, P.E., AICP
Director, Transportation,
Planning & Sustainability
City of Austin

P.O. Box 1088
Austin, Texas 78767-1088

REQUESTOR:

Richard Maier
Vice Pres.

12544 Riata Vista Circle 2nd floor

Austin, Texas 78727

- J. Effective Date. This Agreement shall be effective from the date of execution by the authorized representative of each party.

APPROVED AS TO FORM:

CITY OF AUSTIN:

Assistant City Attorney

By: _____
Austan S. Librach, Director
Transportation, Planning & Sustainability

Date: _____

REQUESTOR:

D.R.Horton-Emerald, Ltd. (a Texas limited partnership)

By: D.R. Horton, Inc. (a Delaware corporation)
Its Authorized Agent

By: _____
Richard N. Maier, Vice President

Date: 8/26/2004

STATE OF TEXAS

§
§
§

COUNTY OF TRAVIS

This Roadway Improvement Agreement between the CITY OF AUSTIN and D.R. Horton-Emerald, Ltd., concerning the construction of improvements within a right-of-way maintained by the State of Texas was acknowledged before me on this ____ day of _____, by _____, as _____, of the CITY OF AUSTIN, a Texas municipal corporation, on behalf of the municipal corporation.

(SEAL)

Notary Public, State of Texas

Printed/Typed Name of Notary

My Commission Expires: _____

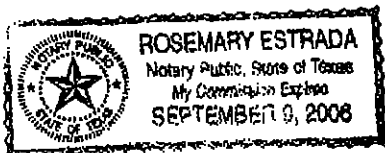
STATE OF TEXAS

§
§
§

COUNTY OF TRAVIS

This Roadway Improvement Agreement between the CITY OF AUSTIN and D.R. Horton-Emerald, Ltd., concerning the construction of improvements within a right-of-way maintained by the State of Texas was acknowledged before me on this ____ day of _____, by Richard H. Maier, as Vice President, of D.R. Horton, Inc., Authorized Agent of D.R. Horton - Emerald, Ltd., on behalf of the corporation and the partnership.

(SEAL)



Rosemary Estrada
Notary Public, State of Texas

Rosemary Estrada
Printed/Typed Name of Notary

My Commission Expires: Sept. 9, 2008

Exhibit A

The project involves constructing a left turn lane on FM 1826 at Alta Mira.

Exhibit B

Estimated Construction Cost (Bid Items)	\$162,332.06
Construction Engineering & Contingencies (14.5%)	\$23,538.15
Construction and Engineering Sub-Total	\$185,870.21
 TxDOT Administration Costs (5% of Construction and Engineering Costs)	 \$9,293.51
Construction, Engineering and Administration Sub-Total	\$195,163.72
 TxDOT Indirect Cost (7.14% of Construction, Engineering and Administration Costs)	 \$13,934.69
TxDOT TOTAL	\$209,098.41
 City of Austin Administration and Indirect Costs (5% of Estimated Construction Costs)	 \$8,116.60
 Contingency Funding (50% of Construction Costs)	 \$81,166.03
CITY OF AUSTIN TOTAL	\$89,282.63
 GRAND TOTAL	 \$298,381.04