

# Legal Research Digest 42

## TRANSIT AGENCY INTERGOVERNMENTAL AGREEMENTS: COMMON ISSUES AND SOLUTIONS

This report was prepared under TCRP Project J-5, “Legal Aspects of Transit and Intermodal Transportation Programs,” for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Larry W. Thomas, Attorney-at-Law. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

### The Problem and Its Solution

The nation’s 6,000 plus transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their business. Some transit programs involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The *Legal Research Digests* (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB’s legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

### Applications

Transit agencies often require intergovernmental agreements (IGAs), a commonly used method for transit agencies to contract with other governmental units—large and small—for a variety of purposes and projects,

and memoranda of understanding (MOUs), an arrangement with other local jurisdictions, state governments, agencies, and other transit entities in connection with land acquisition, construction projects, bus and rail operations, partnerships, third-party responsibilities (e.g., local match), and other matters. Many of these IGAs and MOUs are relatively straightforward, but some can involve intensive and time-consuming drafting and negotiation over sophisticated, transit-relevant issues.

To avoid “reinventing the wheel” and to help assure that useful innovations in other jurisdictions are not overlooked, this project panel decided that transit agencies, in general, and particularly attorneys can benefit from identification of useful examples of transit-relevant issues and how they have been addressed in past IGAs and MOUs.

The objectives of this project are to 1) discuss legal principles that distinguish IGAs and MOUs from other types of agreements, including consideration of specific federal and state laws that may apply; 2) obtain and review examples of IGAs and MOUs from transit agencies addressing such general areas; 3) provide links and references to enable access to the complete IGAs and MOUs; 4) within each general area, analyze common, transit-relevant legal issues that arise; 5) discuss specific examples including lessons learned; 6) provide samples of provisions successfully addressing such issues; and 7) provide a checklist of standard issues to address in IGAs and MOUs.

With approximately 119 of these agreements included on the enclosed CD-ROM and a checklist of items to follow when developing an agreement, this digest should be of interest to state and local legislators, transit managers, board members, state and local administrative officials, attorneys, and financial and policy officials from these units of government.

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## TRANSIT AGENCY INTERGOVERNMENTAL AGREEMENTS: COMMON ISSUES AND SOLUTIONS

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### I. INTRODUCTION

An intergovernmental agreement (IGA) is a commonly used method for transit agencies to contract with state or local governments and agencies, including other transit agencies, in connection with land acquisitions, construction projects, partnerships, and other purposes. As discussed in this digest, many such transit agency IGAs, as well as memoranda of understandings (MOUs), are in effect.<sup>1</sup>

As defined in one state, an IGA is “[a] binding contractual agreement executed by the Commonwealth [of Pennsylvania] with the federal government or its agencies, another state or its agencies, or with instrumentalities of the Commonwealth (boroughs, cities, counties, state-related institutions, etc.).”<sup>2</sup> On the other hand, an MOU is “[a] cooperative arrangement between executive agencies or...[an] arrangement between an executive agency and an independent agency...which does not create any contractual rights or obligations between the signatory agencies” and that “does not require approval by the Office of Attorney General.”<sup>3</sup>

IGAs in particular permit governments and agencies to provide a service, coordinate and manage growth in the absence of state legislation,<sup>4</sup> operate a facility,<sup>5</sup> or even create a new entity or regional organization.<sup>6</sup> In some states, localities or agencies may use IGAs to borrow and finance the cost of capital outlays when they are restricted from doing so independently because of constitutional limits, including debt limits.<sup>7</sup> Transit agencies were surveyed for the digest to determine their use of IGAs and MOUs.

<sup>1</sup> See App. A, List of and Links to IGAs, MOUs, and Similar Agreements.

<sup>2</sup> BRIAN S. GOCIAL & LAWRENCE J. BEASER, PENNSYLVANIA GOVERNMENT CONTRACT HANDBOOK § 1:9 (West 2010).

<sup>3</sup> *Id.*

<sup>4</sup> James W. Spensley, *Using Intergovernmental Agreements to Manage Growth*, 15 NAT. RES. & ENV'T. 240 (2001), hereinafter cited as “Spensley.”

<sup>5</sup> Intergovernmental Agreements, Municipal Research and Services Center of Washington (MRSC), <http://www.mrsc.org/publications/municoop.pdf> (Municipal Cooperation Guide, MRSC Report No. 27, Sept. 1993), hereinafter cited as “Intergovernmental Agreements.”

<sup>6</sup> Michael E. Libonati, *The Law of Intergovernmental Relations: IVHS Opportunities and Constraints*, 22 TRANSP. L. J. 225, 239–40 (1994), hereinafter cited as “Libonati”; Spensley, *supra* note 4, at 240–41; see also *Borough of Lewistown v. Pa. Labor Relations Bd.*, 558 Pa. 141, 735 A.2d 1240 (Pa. 1999).

<sup>7</sup> Libonati, *supra* note 6, at 225, 239–40.

Thirty-four transit agencies responded to the survey with 31 reporting that they had cooperated or were cooperating with another governmental unit or agency pursuant to an IGA or MOU or similar joint agreement. Transit agencies were asked to identify the purposes for which they use IGAs and MOUs. The 31 agencies using IGAs or MOUs reported that they relied on the agreements for bus and/or rail operations, construction projects, land acquisition, management of facilities, the ownership of facilities, partnerships, procurement, or third-party responsibilities (e.g., local match). The agencies’ uses of IGAs and MOUs for these specific purposes are listed in Table 1.

**Table 1.**  
**Transit Agencies’ Use of IGAs and MOUs**

Purpose of IGA or MOU	Number of Transit Agencies Responding
Bus and/or Rail Operation	25 (81%)
Construction Projects	20 (65%)
Land Acquisition	14 (45%)
Management of Facilities	15 (48%)
Ownership of Facilities	13 (42%)
Partnerships	17 (55%)
Procurement	17 (57%)
Third-Party Responsibilities	18 (60%)

Section II of the digest discusses state constitutional and statutory enabling authority for intergovernmental agreements. Section III discusses transit agencies’ use of IGAs and MOUs. Section IV analyzes judicial decisions and opinions of attorney generals that have interpreted either the enabling acts or IGAs. Section V consists of a checklist for IGAs and MOUs that may assist transit agencies when negotiating and drafting an agreement. Section VI discusses the results of a survey regarding the benefits derived by the agencies’ use of IGAs and MOUs; any legal issues that have arisen; how the issues have been addressed; and lessons learned from the agencies’ use of the agreements.

Appendix A lists and provides links to IGAs, MOUs, and similar agreements used by transit agencies. Appendix B is the survey used for the digest. Appendix C is a list of the transit agencies responding to the survey.

## II. STATE CONSTITUTIONAL AND STATUTORY ENABLING AUTHORITY

### A. Types of Enabling Statutes

Approximately 42 states authorize the use of cooperative IGAs.<sup>8</sup> Of the 31 transit agencies responding to the survey that are using IGAs and MOUs, 25 agencies replied that their state's law specifically allowed such agreements to be used. In addition, most states authorize municipalities to exercise "home rule" powers, meaning that "a municipality may usually take an action unless it is specifically prohibited or 'preempted.'"<sup>9</sup> Fourteen transit agencies responding to the survey also reported that cities in their state had home rule power pursuant to which they could enter into IGAs, MOUs, or similar joint arrangements.<sup>10</sup> As one source notes, "[a]ll intergovernmental cooperative efforts operate against a backdrop of state enabling authority. The possible sources of authority are wide-ranging, and may include a state constitutional provision, municipal home rule powers, a general state statute enabling intergovernmental cooperation, or a specific enabling act for a particular type of intergovernmental action."<sup>11</sup> Although there is some uniformity among the states' enabling provisions for IGAs, the constitutional provisions and enabling statutes vary considerably.

State constitutional provisions and enabling statutes that authorize agreements between or among governmental units and other parties refer to the agreements as IGAs,<sup>12</sup> joint exercise or joint exercise of powers

agreements,<sup>13</sup> or interlocal agreements,<sup>14</sup> all of which will be referred to in the digest as IGAs. As authorized by Idaho's statute, "[a]ny state or public agency may enter into agreements with one another for joint or cooperative action which includes, but is not limited to, joint use, ownership, and/or operation agreements pursuant to the provisions of this act."<sup>15</sup> Furthermore,

[a]ny power, privilege or authority, authorized by the Idaho Constitution, statute or charter, held by the state of Idaho or a public agency of said state, may be exercised and enjoyed jointly with the state of Idaho or any other public agency of this state having the same powers, privilege or authority; but never beyond the limitation of such powers, privilege or authority....<sup>16</sup>

Although transit and other agencies use MOUs, no enabling acts were located that refer specifically to MOUs. Without a provision in an MOU stating that it is a binding, enforceable agreement, the case law is clear that an MOU is not a binding agreement; it is "merely an agreement to agree, and not a contract that could be breached or rescinded."<sup>17</sup> Thus, in a case involving two MOUs in connection with a business transaction, a California court found that the MOUs failed to provide any basis for the plaintiff's claims for breach of contract, rescission, unjust enrichment, or promissory estoppel.<sup>18</sup> Although a party's actions after the execution

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§ 39.34.030(1); W. VA. CODE § 8-23-3; WIS. STAT. ANN. §§ 66.0301 and 66.0303(2).

<sup>13</sup> ARIZ. REV. STAT. ANN. § 11-952.02 (joint exercise of powers); CAL. GOV'T CODE § 6500.1 (Joint Exercise of Powers Act); IDAHO CODE § 67-2328(b); IND. CODE § 36-1-7-1; IOWA CODE §§ 28.E.1 and 28.E.3; ME. REV. STAT. ANN. tit. 30 § 2203; MASS. GEN. LAWS ANN. ch. 40 § 4A; MINN. STAT. § 471.59, subd. 1; MISS. CODE ANN. § 17-13-7; MONT. CODE ANN. § 67-11-203(3); NEB. REV. STAT. §§ 3-221 and 13-2505 (Joint Public Agency Act); NEV. REV. STAT. § 277.110; N.M. STAT. ANN. § 11-1-2 (Michie 2011) (Joint Powers Act); N.D. CENT. CODE § 54-40.3-01 (Joint Powers Agreements); S.C. CONST. art. VIII § 13(A) ("Any county, incorporated municipality, or other political subdivision may agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof."); S.C. CODE ANN. § 11-35-4810 (authorizing cooperative purchasing agreements); S.D. CODIFIED LAWS ANN. § 1-24-1, *et seq.* (authorizing joint exercise of powers); VT. STAT. ANN. tit. 24 § 4901(1).

<sup>14</sup> CONN. GEN. STAT. § 7-339a; FLA. STAT. §§ 163.01(1) and (5) (Florida Interlocal Cooperation Act of 1969); KAN. STAT. ANN. § 12-2904 (interlocal agreements by public agencies); IND. CODE § 36-1-7 (interlocal cooperation); KAN. STAT. ANN. § 12-2904(a); MICH. COMP. LAWS §§ 124.502 and 505; NEB. REV. STAT. § 13-802 (Interlocal Cooperation Act); NEV. REV. STAT. § 277.080 (Interlocal Cooperation Act); N.C. GEN. STAT. § 160A-460 (interlocal cooperation; joint exercise of powers); R.I. GEN. LAWS § 45.40.1-4; TENN. CODE ANN. § 12-9-104; TEX. GOV'T CODE ANN. § 791-001; UTAH CODE ANN. § 11-13-2.

<sup>15</sup> IDAHO CODE § 67-2328(b).

<sup>16</sup> *Id.* § 67-2328(a).

<sup>17</sup> *Waldner v. Carr*, 618 F.3d 838, 846 (8th Cir. 2010).

<sup>18</sup> *Id.* at 847-48. *See also Whalen v. Connelly*, 545 N.W.2d 284, 293 (Iowa 1996) (stating that "[a] contract is however

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<sup>8</sup> United States Advisory Commission on Intergovernmental Relations, *State Laws Governing Local Government Structure and Administration 26-27* (U. S. Advisory Commission on Intergovernmental Relations 1993), hereinafter cited as "Advisory Commission."

<sup>9</sup> Illinois Municipal League Home Rule, *Municipal Handbook 13, ch. 2* (Nov. 15, 2011), available at <http://www.impl.org/file.cfm?key=6056>.

<sup>10</sup> The responding agencies cited: ARK. CONST. amend. 55; CAL. CONST. art. XI, § 5; S.F. Charter, art. VIII A, § 8A.102(b)(1); S.F. Adm. Code, ch. 21, § 21.16; FLA. STAT. § 166.021 (the transit agency stating that the section "implicitly includes interlocal and other joint agreements"); ILL. CONST. 1970 art. VII, §§ 6 and 10; N.C. GEN. STAT. § 160A-460, *et seq.*; OHIO REV. CODE § 735.053; UTAH CODE ANN., *Interlocal Cooperation Act*, tit. 11, ch. 13; WASH. REV. CODE § 39.34.

<sup>11</sup> Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 119-22 (2003) (footnotes omitted), hereinafter cited as "Reynolds."

<sup>12</sup> COLO. REV. STAT. § 24-46.5-103 (intergovernmental agreements); ILL. CONST. art. VII § 10; 5 ILL. COMP. STAT. 220/2 (Intergovernmental Cooperation Act); N.Y. Exec. Law § 107 (McKinney 2011); OKLA. STAT. ANN. § 74-1001; MICH. CONST. art. VII § 28; MICH. COMP. LAWS § 124.2; MINN. STAT. § 471.59, subd. 1; MO. REV. STAT. § 70.220; NEB. CONST. art. XV § 18; N.Y. CONST. art. IX §§ 1 and 1(c); OKLA. STAT. ANN. § 74-1001; OHIO REV. CODE ANN. §§ 167.01, 167.03A(2) and (4); VT. STAT. ANN., tit. 24 § 4901(a); WASH. REV. CODE ANN.

of an MOU may be relevant in interpreting an MOU, the party's actions are not relevant to establish that a binding agreement has been made.<sup>19</sup>

## B. Purpose of Enabling Laws

The purpose of the enabling laws for IGAs is “to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities...to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with...the needs and development of local communities.”<sup>20</sup> The states' intent is “to increase the efficiency and effectiveness of local governments by authorizing them to contract, to the greatest possible extent, with one another and with agencies of the state.”<sup>21</sup> Many of the acts also are clear that the laws are to be construed liberally.<sup>22</sup> An Illinois court has stated that “when local governments cooperate...the courts are not to strictly construe the statutory grants of authority under which they act.”<sup>23</sup>

## C. Duration of IGAs

Most states leave it to the parties to decide on the duration or term of an IGA. Indeed, some enabling laws provide that unless restricted by the agreement, the duration of an IGA is unlimited or perpetual.<sup>24</sup>

However, some states' statutes limit an IGA's duration.<sup>25</sup> As a Georgia court has observed, under Georgia law ordinarily a municipal government may not enter into a contract that lasts longer than that government's term of office so that one council may not bind itself or

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generally not found to exist when the parties agree to a contract on a basis to be settled in the future”) (citing *Air Host Cedar Rapids v. Airport Comm'n*, 464 N.W.2d 450, 453 (Iowa 1990); *Faught v. Budlong*, 540 N.W. 2d 33, 35–36 (Iowa 1995)).

<sup>19</sup> *Waldner*, 618 F.3d at 846.

<sup>20</sup> KAN. STAT. ANN. § 12-2901.

<sup>21</sup> TEX. GOV'T CODE § 791.001. *See also* ME. REV. STAT. tit. 30, § 2201; N.H. REV. STAT. ANN. § 53-A:1; UTAH CODE ANN. § 11-13-2.

<sup>22</sup> IOWA CODE § 28E.1; ME. REV. STAT. ANN. tit. 30-A § 2203(7); NEB. REV. STAT. §§ 13-827 and 13-2550; N.Y. GEN. MUN. LAW art. 14-G § 473; WIS. STAT. § 66.0301(2).

<sup>23</sup> *County of Wabash v. Partee*, 241 Ill. App. 3d 59, 67, 608 N.E.2d 674, 679–80 (Ill. App. 1993).

<sup>24</sup> CAL. GOV'T CODE § 6510 (providing that the agreement may be continued for a definite term); FLA. STAT. ANN. § 163.01(5)(b); IND. CODE § 36-1-7-3(a)(1); ME. REV. STAT. ANN. tit. 30-A § 2203(2)(a); MISS. CODE ANN. § 17-13-9(a); N.H. REV. STAT. ANN. § 11-1-4(E); N.Y. GEN. MUN. LAW art. 14-G § 466(1); N.C. GEN. STAT. § 160A-461 (“reasonable duration”); N.D. CENT. CODE § 54-40.3-01(1)(b); OR. REV. STAT. § 190.020(e) (may be perpetual); WIS. STAT. ANN. § 66.0301(2) (duration authorized for the period of time stated in the agreement); W.VA. CODE § 8-23-3 (same).

<sup>25</sup> ALA. CODE § 11-102-2 (authorizing a 3-year term renewable for 3 years); CONN. GEN. STAT. § 7-339(f) (not to exceed 40 years); GA. CONST. art. IX, § III, para. 1(a) (not to exceed 50 years); MASS. GEN. LAWS ANN. ch. 40, § 4A (not exceeding 25 years).

its successors “so as to prevent free legislation in the matters of municipal government.”<sup>26</sup> However, political subdivisions in Georgia are allowed to contract with one another or with public agencies as long as the term of the agreement does not exceed 50 years.<sup>27</sup>

If an agreement is concluded that violates a state limitation on the duration of an IGA, it may be possible to avoid invalidating the agreement by severing the durational provision. In an Iowa case involving an IGA imposing a 24-year moratorium that was invalid under Iowa Code Section 368.4, the court severed the 24-year provision from the agreement rather than invalidate the agreement.<sup>28</sup>

## D. Mutuality of Powers Requirement

The states' enabling authority for IGAs takes one of two approaches. The first approach and the one that is most evident is the “mutuality of powers” approach. The approach permits agencies to enter into collaborative agreements as long as each agency that is a party to the agreement possesses the authority to exercise the service or function being undertaken pursuant to the agreement. For example, Colorado's Constitution provides that

[n]othing in this constitution shall be construed to prohibit the state or any of its political subdivisions from cooperating or contracting with one another or with the government of the United States to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt.<sup>29</sup> [Emphasis added.]

Furthermore, Colorado's enabling statute provides that

[g]overnments may cooperate or contract with one another to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt, only if such cooperation or contracts are authorized by each party thereto with the approval of its legislative body or other authority having the power to so approve.<sup>30</sup> [Emphasis added.]

Thus, in most states, the enabling laws authorize the state, its agencies and political subdivisions, municipalities, and other governmental units to enter into written agreements for the joint exercise of any power

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<sup>26</sup> GREENE COUNTY SCH. DIST., 278 Ga. 849, 850, 607 S.E.2d, 881, 882 (footnotes omitted), (citing GA. CONST. art. IX, § III ¶ I (a)).

<sup>27</sup> *Id.* (citing GA. CONST. art. IX, § III ¶ I (a)).

<sup>28</sup> *Heintz v. City of Fairfax*, 2007 Iowa App. LEXIS 241 (Ct. App. Iowa filed and affirmed Feb. 28, 2007).

<sup>29</sup> *Durango Transp., Inc.*, 824 P.2d 48, 49–50 (Colo. Ct. App. 1991) (quoting COLO. CONST. art. XIV, § 18(2)(a)).

<sup>30</sup> *Id.* at 50 (quoting COLO. REV. STAT. § 29-1-203(1) (1986 Repl. vol. 12A)).

or service that each agency that is a party to the agreement is authorized to exercise individually.<sup>31</sup>

As held by an Illinois court, governmental units may exercise only those powers granted to them by the state constitution or by statute, together with such implied powers as are essential to carry out their express powers.<sup>32</sup> A power to cooperate intergovernmentally may

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<sup>31</sup> ALA. STAT. § 11-102-1; ALASKA CONST. § 10.13 (stating that “[a]greements, including those for cooperative or joint administration of any functions or powers, may be made by any local government with any other local government, with the State, or with the United States, unless otherwise provided by law or charter”); ARIZ. STAT. § 11-952; ARK. STAT. §§ 19-11-206 and 207 (applicable to every expenditure of public funds by the state); ARK. STAT. § 25-20-104(a) (“which has the same powers”); ARK. STAT. § 25-20-104(b); CAL. GOV’T CODE § 6502; COLO. CONST. art. 14, §§ 18(1)(b) and (c) and 2(a), providing that

[n]othing in this constitution shall be construed to prohibit the state or any of its political subdivisions from cooperating or contracting with one another or with the government of the United States to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units, including the sharing of costs, the imposition of taxes, or the incurring of debt.

CONN. GEN. STAT. § 7-148cc (“Two or more municipalities may jointly perform any function that each municipality may perform separately....”); CONN. GEN. STAT. § 7-339b(a)(1) (permitting interlocal agreements for “transportation services”); FLA. STAT. § 163.01(4); GA. CONST. art. IX § III ¶ 1(a); IND. CODE § 36-1-7-2(a)

A power that may be exercised by an Indiana political subdivision and by one (1) or more other governmental entities may be exercised: (1) by one (1) or more entities on behalf of others; or (2) jointly by the entities. Entities that want to do this must, by ordinance or resolution, enter into a written agreement under section 3 or 9 of this chapter.

IDAHO CODE § 67-2328(a) and (b); 5 ILL. COMP. STAT. 220/3; IOWA CODE § 28E.3; KAN. STAT. ANN. §§ 12-2904(a) and 2908(b); KY. REV. STAT. ANN. § 65.240; LA. CONST. art. 7.14(C); MD. CODE ANN. STATE, FIN. & PROC. § 13-110 (intergovernmental cooperative purchasing agreement); MASS. GEN. LAWS ANN. ch. 40 § 4A; MICH. CONST. art. 7, § 28; MICH. COMP. LAWS §§ 124.2 and 124.504; MISS. CODE ANN. § 17-13-7(5); MO. REV. STAT. § 70.220(1); NEB. CONST. art. 7, § 28; NEB. REV. STAT. § 13-2505; NEV. REV. STAT. § 277.180(2)(a) (applicable to contract involving foreseeable expenditure of more than \$25,000); N.H. REV. STAT. ANN. § 53-A:3; N.Y. CONST. art. IX, § 1(c); N.C. GEN. STAT. 160A-461; N.D. CENT. CODE § 54-40.3-01; OHIO REV. CODE ANN. §§ 167.01 and 167.03(A)(2); OKLA. STAT. ANN. § 74-1004; OR. REV. STAT. § 190.010; R.I. GEN. LAWS § 45-40.1-4; S.D. CODIFIED LAWS ANN. § 1-24-2 (authorizing joint exercise of powers pursuant to which

[a]ny power or powers, privileges, or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency...to the extent that the laws of such other state or of the United States permit such joint exercise or enjoyment.

TENN. CODE ANN. § 12-9-104; TEX. GOV’T CODE ANN. §§ 11-13-4 and 791.011(b) and (g); VT. STAT. ANN. tit. 24 § 4901(a); WASH. REV. CODE §§ 39.34.030(1) and (2); W. VA. Code § 8-23-3; WIS. STAT. ANN. § 66.0303(2).

<sup>32</sup> *Rajterowski v. City of Sycamore*, 405 Ill. App. 3d 1086, 1121, 940 N.E.2d 682, 710 (2010).

not be used to authorize an agreement that contravenes statutory prohibitions or limitations that apply to the participating entities.<sup>33</sup> An enabling statute does not necessarily empower “the State and its institutions and subdivisions to enter into any and every contract which they might in their discretion deem advisable.”<sup>34</sup> An IGA must relate to the provision of services or the joint or separate use of facilities or equipment and must deal with activities, services, or facilities that the contracting parties are authorized by law to undertake or provide.<sup>35</sup>

In Illinois, non-home-rule entities may not circumvent statutory requirements or limitations by entering into IGAs.<sup>36</sup> Also, “an entity formed under an intergovernmental cooperation agreement in Illinois between home rule and non-home-rule municipalities [is] bound by statutory limitations governing its non-home-rule members.”<sup>37</sup> Although home rule members are exempt from competitive bidding statutes, non-home-rule municipalities are subject to the state’s procurement requirements.<sup>38</sup>

The second approach that a few states follow is the “power of one unit” approach that allows all governmental units or agencies that are parties to an IGA to exercise a power so long as one unit or agency has the power to do so.<sup>39</sup> For example, New York recognizes the “mutability of powers” approach,<sup>40</sup> whereas Pennsylvania recognizes the “power of one unit” approach.<sup>41</sup>

The enabling statute in California provides that it is not “necessary that any power common to the contracting parties be exercisable by each such contracting party with respect to the geographical area in which such power is to be jointly exercised.”<sup>42</sup> Similarly, the Minnesota statute provides:

Notwithstanding the provisions of subdivision 1 requiring commonality of powers between parties to any agreement, the governing body of any governmental unit as defined in subdivision 1 may enter into agreements with any other governmental unit to perform on behalf of that unit any service or function which the governmental unit pro-

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<sup>33</sup> *Id.*

<sup>34</sup> *Greene County Sch. Dist.*, 278 Ga. 849, 850–51, 607 S.E.2d 881, 882 (Ga. 2005) (quotation marks omitted) (footnotes omitted).

<sup>35</sup> *Id.*

<sup>36</sup> *Rajterowski*, 405 Ill. App. 3d at 1119, 940 N.E.2d at 709 (citing *Commonwealth Edison Co. v. City of Warrenville*, 288 Ill. App. 3d 373, 380, 680 N.E.2d 465 (1997); *Fischer v. Brombolich*, 207 Ill. App. 3d 1053, 1059, 566 N.E.2d 785 (1991) (some citations omitted)).

<sup>37</sup> *Id.* at 1120.

<sup>38</sup> *Id.*

<sup>39</sup> United States Advisory Commission on Intergovernmental Relations, *State Laws Governing Local Government Structure and Administration* 9 (U.S. Advisory Commission on Intergovernmental Relations 1993).

<sup>40</sup> N.Y. CONST. art. IX, 1(c).

<sup>41</sup> *Libonati*, *supra* note 6, at 242.

<sup>42</sup> CAL. GOV’T CODE § 6502.

viding the service or function is authorized to provide for itself.<sup>43</sup>

There are other state laws or doctrines that may limit the use of IGAs.<sup>44</sup> For example, IGAs may be limited by “general state constitutional limits on government power, such as the anti-delegation doctrine, the prohibition of special commissions, the prohibition of special legislation, restrictions on government subscription of stock, public purpose requirements, debt limitations, and the general state requirement that local governments not contract away their police power....”<sup>45</sup>

### E. Applicability of Enabling Acts to Transit Agencies

The enabling laws that were located for the digest are sufficiently broad to apply to transit agencies. The term “public agency” usually embraces the state, its departments and agencies, political subdivisions, and boards and commissions of the state and any other state; cities and towns; as well as the federal government and any of its departments.<sup>46</sup> Other statutes provide that IGAs may be entered into by a governmental unit,<sup>47</sup> a governing authority,<sup>48</sup> or a local government or local governmental unit as those terms are defined in the enabling statute.<sup>49</sup> In California the term

“public agency” includes, but is not limited to, the federal government or any federal department or agency, this state, another state or any state department or agency, a county, county board of education, county superintendent of schools, city, public corporation, public district, regional transportation commission of this state or another state, or any joint powers authority formed pursuant to this article by any of these agencies.<sup>50</sup>

In Missouri

[a]ny municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law.<sup>51</sup>

A few statutes also mention transit<sup>52</sup> or transportation services.<sup>53</sup> In Illinois, governmental units may enter into an IGA “[f]or the purpose of acquiring, constructing, owning, operating, extending, reconstructing, maintaining, improving, and subsidizing railroad passenger service, and promoting efficient transportation systems within the State....”<sup>54</sup> In Massachusetts, the term “government unit” includes regional transit authorities.<sup>55</sup> In Nevada, the statute refers to the joint use or operation of a public transportation system.<sup>56</sup> In Wisconsin, the term “municipality” includes a county or city transit commission.<sup>57</sup>

### F. Authorization to Act Beyond an Agency’s Geographical Area

An IGA may be used in some states to permit a governmental unit or agency to perform a service or function that is outside its geographical jurisdiction.<sup>58</sup> One state law provides that, unless limited by the terms of an IGA, any contracting party to an IGA may act within the jurisdiction of all contracting parties as needed to implement the agreement.<sup>59</sup> California’s statute provides that “[t]wo or more public agencies by agreement may jointly exercise any power common to the contracting parties, even though one or more of the contracting agencies may be located outside this state.”<sup>60</sup> North Dakota’s statute broadly states that

[a]ny political subdivision of this state may enter into a joint powers agreement with a political subdivision of another state or political subdivision of a Canadian province if the power or function to be jointly administered is a power or function authorized by the laws of this state for

<sup>43</sup> MINN. STAT. § 471.59, subs. 1 and 10.

<sup>44</sup> Reynolds, *supra* note 11.

<sup>45</sup> *Id.* at 121–22 (footnotes omitted).

<sup>46</sup> IND. CODE § 36-1-7-1 (stating that the term “public agency” is applicable to the state, all political subdivisions; all state agencies; public instrumentalities and public bodies; another state; political subdivisions of states other than Indiana; and federal government agencies). See also ARIZ. STAT. § 11-951; CAL. GOV’T CODE § 6500; FLA. STAT. § 163.01(3)(b); IOWA CODE § 28E.2; KAN. STAT. ANN. § 12-2903(a); KY. REV. STAT. ANN. § 65.230; ME. REV. STAT. ANN. § 2202; MICH. COMP. LAWS § 124.502(e); MONT. CODE ANN. § 67-11-203; NEB. REV. STAT. § 13-2503; NEV. REV. STAT. § 277.100(1); N.H. REV. STAT. ANN. § 53-A:2; N.M. STAT. ANN. § 11-1-2(A); N.Y. GEN. MUN. LAW art. 14-G, § 461(1); OKLA. STAT. ANN. § 74-1003(A); R.I. GEN. LAWS § 45-40.1-3(a); S.D. CODIFIED LAWS § 1-24-2; TEX. GOV’T CODE ANN. § 11-13-3(8); WASH. REV. CODE § 39.34.020; W.VA. CODE § 8-23-2(1).

<sup>47</sup> MINN. STAT. § 471.59, subd. 1.

<sup>48</sup> 5 ILL. COMP. STAT. ANN. 225/1(J); MISS. CODE ANN. §§ 31-7-1 and 17-13-5.

<sup>49</sup> 5 ILL. COMP. STAT. ANN. 225/1(e); MINN. STAT. § 471.59; NEV. REV. STAT. § 332.015.

<sup>50</sup> CAL. GOV’T CODE § 6500.

<sup>51</sup> MO. CONST. art. VI, § 16.

<sup>52</sup> 5 ILL. COMP. STAT. ANN. 225/3; see also 5 ILL. COMP. STAT. ANN. 225/4.

<sup>53</sup> CONN. GEN. STAT. § 7-339b(a)(1).

<sup>54</sup> 5 ILL. COMP. STAT. ANN. 225/3.

<sup>55</sup> MASS. GEN. LAWS ANN. ch 40, § 4A.

<sup>56</sup> NEV. REV. STAT. § 277.180(3)(g).

<sup>57</sup> WIS. STAT. ANN. § 66.0301(1)(a); see also WIS. STAT. ANN. § 66.0301(1)(b).

<sup>58</sup> MINN. STAT. § 471.59; NEB. REV. STAT. § 3-221; N.M. STAT. ANN. § 11-1-3; OHIO REV. CODE ANN. § 167.03(2); S.C. CONST. art. VIII, § 13(B) (“Nothing in this Constitution may be construed to prohibit the State or any of its counties, incorporated municipalities, or other political subdivisions from agreeing to share the lawful cost, responsibility, and administration of functions with any one or more governments, *whether within or without this State.*” (emphasis added)).

<sup>59</sup> ALA. CODE §§ 11-102-1 and 11-102-2.

<sup>60</sup> CAL. GOV’T CODE § 6502.

a political subdivision of this state and is authorized by the laws of the other state or province.<sup>61</sup>

### G. Administration of an Agreement

State law may authorize the use of an IGA to form a separate legal entity, including a nonprofit corporation,<sup>62</sup> or the creation of an “interlocal advisory board” to implement the agreement.<sup>63</sup> If so, an agreement may have to state “[t]he precise organization, composition, and nature of any separate legal or administrative entity created thereby, together with the powers delegated to it, provided that the entity may be legally created.”<sup>64</sup> The Florida attorney general’s office has concluded that a nonprofit corporation created by an interlocal agreement to carry out the duties imposed by state and federal law is a state agency under Florida law.<sup>65</sup> One agency responding to the survey notes that its governing board is a commission formed by an interlocal agreement.<sup>66</sup>

If no separate entity is created by an IGA, state law may authorize or require that an IGA include provisions for administering the parties’ joint undertaking.<sup>67</sup> The acts may authorize agencies to convey existing facilities or equipment to the state or to any public

agency, as well as to a public corporation or public authority, pursuant to the agreement.<sup>68</sup> Some statutes provide that the contracting parties may raise money by any means including the incurring of debt.<sup>69</sup>

### H. Authorized or Required Provisions of an Agreement

Some state enabling laws require that an IGA specify how the contract is to be implemented.<sup>70</sup> For example, in California, an agreement must “state the purpose of the agreement or the power to be exercised” and “provide for the method by which the purpose will be accomplished or the manner in which the power will be exercised.”<sup>71</sup>

Moreover, many of the enabling laws address the provisions that may or must be included in an IGA. The statutes usually provide that an agreement must be in writing;<sup>72</sup> that it may be amended;<sup>73</sup> and that it will state its purpose or purposes,<sup>74</sup> its duration,<sup>75</sup> and the method by which a party may or may not withdraw from an agreement.<sup>76</sup> For example, in Connecticut,

<sup>61</sup> N.D. CENT. CODE § 54-40.3-01(1).

<sup>62</sup> ARIZ. STAT. § 11-952; ARK. STAT. § 25-2-104(c)(2); COLO. CONST. art. 14, § 18(2)(b); FLA. STAT. ANN. § 163.01(5)(c); N.D. CENT. CODE § 54-40.3-01(1)(c); OR. REV. STAT. § 190.010(5).

<sup>63</sup> CONN. GEN. STAT. §§ 7-339b(a)(2) and 7-339b(a)(3).

<sup>64</sup> ARK. STAT. § 25-20-104(c)(2); CONN. GEN. STAT. §§ 7-339f(5) and (6) (specifying what an agreement must include if there is an interlocal advisory board); MISS. CODE ANN. § 17-13-9(c).

<sup>65</sup> See Fla. Att’y Gen. Op. No. AGO 97-10, dated Feb. 14, 1997, at 4, available at <http://www.myfloridalegal.com/ago.nsf/Opinions/D445A925E4C79CD585256441007BB898> (citing Fla. Att’y Gen. Op. 95-44 and FLA. STAT. § 768.28).

<sup>66</sup> Survey response of Charlotte Area Transit System (CATS).

<sup>67</sup> ARIZ. STAT. §§ 11-952.02(A) and (B); ARK. STAT. § 25-20-104(d)(1) (“In the event that the agreement does not establish a separate legal entity to conduct the joint or cooperative undertaking, in addition to the items enumerated in subdivisions (c)(1) and (c)(3)-(6) of this section, the agreement shall contain the following....” (emphasis added)); COLO. REV. STAT. § 29-20-105; IND. CODE § 36-1-7-3(a)(5) (“An agreement under this section must provide for the following....”); ME. REV. STAT. ANN. tit. 30-A § 2203; MISS. CODE ANN. § 17-13-9(f) (requiring an agreement to specify “[t]he provision for administration, through a joint board or other appropriate means, of the joint or cooperative undertaking in the event that the agreement does not or may not establish a separate legal entity to conduct the joint or cooperative undertaking”); N.H. REV. STAT. ANN. § 53-A:3(III) (same); WIS. STAT. ANN. § 66.0301(3) (stating that municipalities contracting with other municipalities may provide “a plan for administration of the function or project, which may include but is not limited to provisions as to proration of the expenses involved, deposit and disbursement of funds appropriated, submission and approval of budgets, creation of a commission, selection and removal of commissioners, and formation and letting of contracts”).

<sup>68</sup> GA. CONST. art. IX, § III, para. 1(b).

<sup>69</sup> MASS. GEN. LAWS ANN. ch. 40, § 4A (“A governmental unit, when duly authorized to do so in accordance with the provisions of law applicable to it, may raise money by any lawful means, including the incurring of debt for purposes for which it may legally incur debt, to meet its obligations under such agreement.”).

<sup>70</sup> ALA. CODE § 11-102-2; CAL. GOV’T CODE § 6503; FLA. STAT. ANN. § 163.01(6); MINN. STAT. § 471.59, subd. 2.

<sup>71</sup> CAL. GOV’T CODE § 6503.

<sup>72</sup> ALA. CODE § 11-102-2; ARK. STAT. § 25-20-104(b) and (c) (requiring a writing by implication), but see ARK. STAT. § 25-20-104(h) (authorizing joint cooperation on an informal basis without adherence to the details of the statute); IND. CODE § 36-1-7-2(a)(2); NEV. REV. STAT. §§ 277.110(3)(a)(1) and 277.180(2)(a)(4).

<sup>73</sup> ALA. CODE § 11-102-2.

<sup>74</sup> ALA. CODE § 11-102-2; ARK. STAT. § 25-20-104(c)(3); CAL. GOV’T CODE § 6503; CONN. GEN. STAT. § 7-339f(2); IDAHO CODE § 67-2332 (“Such contract shall set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties.”); IND. CODE § 36-1-7-3(a)(2); ME. REV. STAT. ANN. tit. 30-A, § 2203(2)(c); MINN. STAT. § 471.59, subd. 2; MISS. CODE ANN. § 17-13-9(b); NEV. REV. STAT. § 277.180(a)(a)(1); N.M. STAT. ANN. § 11-1-4.

<sup>75</sup> ALA. CODE § 11-102-2 (3-year renewable term); ARK. CODE § 25-20-104(c)(1); CAL. GOV’T CODE § 6510 (providing that the agreement may be continued for a definite term); CONN. GEN. STAT. § 7-339f(1) (a term not to exceed 40 years); FLA. STAT. ANN. § 163.01(5)(b); IND. CODE § 36-1-7-3(a)(1); ME. REV. STAT. ANN. tit. 30-A, § 2203(2)(a); MISS. CODE ANN. § 17-13-9(a); N.H. REV. STAT. ANN. § 11-1-4(E); N.Y. GEN. MUN. LAW art. 14-G, § 466(1); N.C. GEN. STAT. § 160A-461 (“reasonable duration”); N.D. CENT. CODE § 54-40.3-01(1)(b); OR. REV. STAT. § 190.020(e) (may be perpetual); WIS. STAT. ANN. § 66.0301(2) (authorized duration for the length of time specified in the agreement); W.VA. CODE § 8-23-3 (same).

<sup>76</sup> ALA. CODE § 11-102-2; ARK. STAT. § 25-20-104(c)(5); CONN. GEN. STAT. § 7-148cc; IND. CODE § 36-1-7-3(a)(4); MINN.

“[t]he terms of each agreement shall establish a process for withdrawal from such agreement and shall require that the agreement be reviewed at least once every five years by the body that approved the agreement to assess the effectiveness of such agreement....”<sup>77</sup> Enabling acts may provide that they are renewable,<sup>78</sup> but the extension of the term may be limited.<sup>79</sup> In at least one state the law provides that if a party refuses to renew an agreement,<sup>80</sup> the remaining parties may continue the IGA.<sup>81</sup>

Many of the enabling laws require that an IGA include provisions regarding payment for services, facilities, equipment, or other property or resources;<sup>82</sup> the apportionment of the parties’ responsibility<sup>83</sup> and of any fees or revenue owing to the parties;<sup>84</sup> and the method of holding, returning, and/or disposing of any property belonging to the parties on the agreement’s termination.<sup>85</sup> Some of the statutes mandate that an IGA provide for the transfer of personnel necessary for the agreement<sup>86</sup> while preserving employment benefits.<sup>87</sup>

Depending on a state’s enabling law, an IGA may provide for the transfer of possession or title to property;<sup>88</sup> financial support for and/or financing of the matter being undertaken by the IGA;<sup>89</sup> or the budget for the IGA.<sup>90</sup> The law may prohibit any party from incurring debt that would become the responsibility of any other party.<sup>91</sup> Under some enabling laws, an agreement may include a provision for insurance and/or the in-

demnification of participating parties and their officers and employees.<sup>92</sup> Typically, the laws authorize the parties to undertake any other matter necessary and proper to perform the agreement.<sup>93</sup>

Montana’s enabling statute is an example of what must or may be included in an IGA. As for what an IGA must cover, the Montana statute states:

Each agreement shall specify its duration; the proportionate interest which each public agency will have in the property, facilities, and privileges involved in the joint undertaking; the proportion of costs of operation, capital outlay, and maintenance to be borne by each public agency; and such other terms as are considered necessary or required by law.

As for additional provisions that may be included in an IGA, the Montana statute states:

The agreement may also provide for amendments and termination; disposal of all or any of the property, facilities, and privileges jointly owned prior to or at such times as the property, facilities, and privileges or any part thereof cease to be used for the purposes provided in this chapter or upon termination of the agreement; the distribution of the proceeds received upon any disposal and of any funds or other property jointly owned and undisposed of; the assumption of payment of any indebtedness arising from the joint undertaking which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.<sup>94</sup>

An IGA may be expected to specify what constitutes a default under the agreement<sup>95</sup> and to include a provision for “the adjudication or settlement of disputes, including negotiation of settlements, giving of notices, and any and all other matters necessary or appropriate to the performance of the...agreement.”<sup>96</sup>

## I. Approval of an Agreement

Many of the enabling acts require that an agreement be approved, for example, by the governing board of each party, either by an ordinance or resolution,<sup>97</sup> with

<sup>92</sup> CONN. GEN. STAT. § 7-339f(4) (stating that the agreement

[m]ay include indemnification of participating public agencies and their officials, officers or employees, by means of insurance or otherwise, against any losses, damages or liabilities arising out of the receiving, obtaining, furnishing or providing of services, personnel, facilities, equipment or any other property or resources pursuant to the interlocal agreement.

<sup>93</sup> ALA. CODE § 11-102-2; ARK. STAT. § 25-20-104(c)(6); FLA. STAT. ANN. § 163.01(r); ME. REV. STAT. ANN. tit. 30-A, § 2203(2)(F); MISS. CODE ANN. § 17-13-9(h); N.D. CENT. CODE § 54-40.3-01(1)(i).

<sup>94</sup> MONT. CODE ANN. § 67-11-203(3).

<sup>95</sup> FLA. STAT. ANN. § 163.01(15)(b)(2).

<sup>96</sup> CONN. GEN. STAT. § 7-339f(6); FLA. STAT. ANN. § 163.01(5)(p).

<sup>97</sup> ALA. CODE § 11-102-2; ARK. STAT. § 25-20-104(b); CAL. GOV’T CODE §§ 6501 (approval by Department of General Services or the Director of General Services); CONN. GEN. STAT. § 7-148cc (stating that “[e]ach participating municipality shall approve any agreement entered into pursuant to this section in the same manner as an ordinance is approved in such partici-

STAT. § 471.59, subd. 4; MISS. CODE ANN. § 17-13-9(e); OR. REV. STAT. § 190.020(1)(f).

<sup>77</sup> CONN. GEN. STAT. § 7-148cc.

<sup>78</sup> ALA. CODE § 11-102-2; CONN. GEN. STAT. § 7-148cc.

<sup>79</sup> ALA. CODE § 11-102-2 (3 years).

<sup>80</sup> ALA. CODE § 11-102-2.

<sup>81</sup> ALA. CODE § 11-102-2.

<sup>82</sup> CONN. GEN. STAT. § 7-339f(3); N.Y. GEN. MUN. LAW art. 14-G, § 466(3) (requiring that the agreement contain “[p]rovisions for the payment by a contracting public agency of consideration for receiving or obtaining services, personnel, facilities, equipment, other property or resources from another contracting public agency or agencies”).

<sup>83</sup> OR. REV. STAT. § 190.020(1)(a).

<sup>84</sup> COLO. REV. STAT. § 29-20-105(h); OR. REV. STAT. § 190.020(1)(b).

<sup>85</sup> ALA. CODE § 11-102-2; ARK. STAT. §§ 25-20-104(c)(5) and (d)(2); CAL. GOV’T CODE §§ 6511, 6512, and 6512.1; FLA. STAT. ANN. § 163.01(8); ME. REV. STAT. ANN. tit. 30-A, § 2203(3)(B); MINN. STAT. § 471.59, subd. 5; MISS. CODE ANN. § 17-13-9(g); N.D. CENT. CODE § 54-40.3-01(1)(e).

<sup>86</sup> OR. REV. STAT. § 190.020(1)(c).

<sup>87</sup> *Id.*

<sup>88</sup> FLA. STAT. ANN. § 163.01(5)(d); ME. REV. STAT. ANN. tit. 30-A, § 2203(2)(D); N.D. CENT. CODE § 54-40.3-01(1)(d); OR. REV. STAT. § 190.020(1)(d).

<sup>89</sup> ALA. CODE § 11-102-2; ARK. STAT. § 25-20-104(c)(4); MISS. CODE ANN. § 17-13-9(d); WIS. STAT. ANN. § 66.0301(4).

<sup>90</sup> ALA. CODE § 11-102-2; MISS. CODE ANN. § 17-13-9(d); N.D. CENT. CODE § 54-40.3-01(1)(d).

<sup>91</sup> ALA. CODE § 11-102-2.

some states requiring a public hearing as part of the approval process.<sup>98</sup>

In some states it is necessary to file an agreement with the appropriate local or state authority.<sup>99</sup> State law may require that the state attorney general approve an agreement<sup>100</sup> but provide that the attorney general's failure to approve an agreement within 30, 60, or 90 days is to be deemed to be an approval.<sup>101</sup>

## J. Use for Joint Procurement

A feature in some state codes that is of interest to transit agencies is the one allowing the use of IGAs for procurement. Some states authorize governmental units or agencies to enter into IGAs for the purpose of jointly procuring supplies and services, including professional services, or for the purpose of construction.<sup>102</sup>

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pating municipality or, if no ordinances are approved by such participating municipality, in the same manner as the budget is approved"); CONN. GEN. STAT. § 7-339c (requiring that the proposed agreement be submitted to the legislative body of each participating public agency); IDAHO CODE § 67-2328(b) ("Appropriate action by ordinance, resolution, or otherwise pursuant to law of the governing bodies of these participating public agencies shall be necessary before any such agreement may enter into force."); IND. CODE §§ 36-1-7(5)(a) and 36-1-7-10; KY. REV. STAT. ANN. §§ 65.260(3) and 65.300; ME. REV. STAT. ANN. tit. 30-A § 2205; MISS. CODE ANN. §§ 17-13-7(3) and (4); MO. REV. STAT. § 70.220(1); NEB. REV. STAT. § 13-805; NEV. REV. STAT. §§ 277.110(3)(a) and 277.150; N.H. REV. STAT. ANN. §§ 53-A:3 and A:5; N.M. STAT. ANN. § 11-1-3; N.Y. GEN. MUN. LAW art. 14-G, § 469(2); N.C. GEN. STAT. § 160A-461; WASH. REV. CODE ANN. § 39.34.030(2); W. VA. CODE § 8-23-3.

<sup>98</sup> N.Y. GEN. MUN. LAW art. 14-G, § 463(1); WIS. STAT. ANN. § 66.0301(6)(c)(1).

<sup>99</sup> FLA. STAT. ANN. § 163.01(11); IDAHO CODE § 67-2329 (filed with the Secretary of State); IND. CODE § 36-1-7-6; KY. REV. STAT. ANN. § 65.290; ME. REV. STAT. ANN. tit. 30-A, § 2204 (filed with the affected municipality and the Secretary of State); MISS. CODE ANN. § 17-13-11(3); N.H. REV. STAT. ANN. § 53-A:4 (filed with the Secretary of State); N.M. STAT. ANN. § 11-1-3; N.Y. GEN. MUN. LAW art 14-G § 469(4); N.Y. EXEC. LAW § 107; W. VA. CODE § 8-23-4.

<sup>100</sup> ARK. STAT. § 25-20-104(f); COLO. REV. STAT. § 24-46.5-103; IND. CODE § 36-1-7-4(a) and (b); KY. REV. STAT. ANN. § 65.260(2); MISS. CODE ANN. § 17-13-11(1); VT. STAT. ANN. § 4901(a); NEV. REV. STAT. §§ 277.140 and 277.180(2)(a)(3); N.H. REV. STAT. ANN. § 53-A:3(V); N.Y. GEN. MUN. LAW art. 14-G, § 469(1); WIS. STAT. ANN. § 66.0303(3).

<sup>101</sup> ARK. STAT. § 25-20-104(f)(3); IND. CODE § 36-1-7-4(b) (60 days); KY. REV. STAT. ANN. § 65.260(2) (60 days); MISS. CODE ANN. § 17-13-11(2); NEV. REV. STAT. §§ 277.140(1) (30 days); N.H. REV. STAT. ANN. § 53-A:3(V) (30 days); N.Y. GEN. MUN. LAW art. 14-G, § 469(1) (90 days); WIS. STAT. ANN. § 66.0303(3).

<sup>102</sup> ALASKA STAT. §§ 36.30.700 and 36.30.710(b); ARK. STAT. § 19-11-249 (acquisition of any commodities or services); COLO. REV. STAT. § 24-110-201, stating that

[a]ny public procurement unit may either participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of any supplies, services, or construction with one or more public procurement units, external

The acts may provide that "[c]ooperative purchasing may include joint or multiparty contracts between public procurement units and open-ended state public procurement units contracts that are made available to local public procurement units."<sup>103</sup> The purpose of the statutory authority is

to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.<sup>104</sup>

A procurement statute may grant authority that is not subject to any particular limits,<sup>105</sup> or it may provide that it does not apply to IGAs.<sup>106</sup> The agreement may or may not be exempt from public bidding requirements<sup>107</sup>

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procurement activities, or procurement consortiums which include as members tax-exempt organizations as defined by section 501 (c)(3) of the federal "Internal Revenue Code of 1986," as amended, in accordance with an agreement entered into between the participants.

DEL. CODE tit. 29, § 6933 (materiel or nonprofessional services); D.C. CODE ANN. § 2-311.02 (not applicable to "construction services or architectural and engineering services related to construction"); HAW. REV. STAT. §§ 103D-801 and 802; KY. REV. STAT. ANN. §§ 45A.295 and 45A.300; LA. REV. STAT. ANN. 39:1702(1) (acquisition of any supplies, services, major repairs, or construction); MD. CODE ANN., STATE FIN. & PROC. § 13-110; MASS. GEN. LAWS ANN. ch. 30B § 1(a); MONT. CODE ANN. § 18-4-402; NEV. REV. STAT. § 332.195(1); N.M. STAT. ANN. § 13-1-135(A); OR. REV. STAT. §§ 279A.205 and 279A.220; 62 PA. CONS. STAT. ANN. § 1902; S.C. CODE ANN. § 11-35-4810; TEX. GOV'T CODE ANN. § 791.025(b); VA. CODE ANN. § 2.2-4304(A).

<sup>103</sup> ALASKA STAT. § 36.30.700; ARK. STAT. § 19-11-249; COLO. REV. STAT. § 24-110-201; HAW. REV. STAT. § 103D-802; 62 PA. CONS. STAT. ANN. § 1902; S.C. CODE ANN. § 11-35-4810.

<sup>104</sup> FLA. STAT. § 163.01(2). *See* IDAHO CODE § 67-2326; MD. CODE ANN., STATE FIN. & PROC. § 13-110(3)(1)(3); MISS. CODE ANN. § 17-13-3; N.M. STAT. ANN. § 13-1-135.

<sup>105</sup> KY. REV. STAT. ANN. § 45A.300(2) ("Nothing in this code shall limit any public purchasing unit from selling to, acquiring from, or using any property belonging to another public purchasing unit or foreign purchasing activity independent of the requirements of KRS 45A.070 to 45A.180."); VA. CODE ANN. § 2.2-4304(B).

<sup>106</sup> MASS. GEN. LAWS ANN. ch. 30B § 1(b)(3) (stating that "[t]his chapter shall apply to every contract for the procurement of supplies, services or real property and for disposing of supplies or real property by a governmental body as defined herein" but that it does not apply to "an intergovernmental agreement subject to the provisions of section four A of chapter forty").

<sup>107</sup> MISS. CODE ANN. § 31-7-13,

Excepted from bid requirements are: (xxix) Purchases made pursuant to qualified cooperative purchasing agreements.—Purchases made by certified purchasing offices of state agencies or governing authorities under cooperative purchasing agreements previously approved by the Office of Purchasing and Travel and established by or for any municipality, county, parish or state government or the federal government, provided that the notification to potential contractors includes a clause

or provide that there must be an opportunity to comment regarding the use of an IGA rather than competitive bidding.<sup>108</sup>

## K. Use Authorized by the FTA

Part V of Federal Transit Agency (FTA) Circular 4220.1F<sup>109</sup> encourages the use of joint procurement. FTA states that “[T]he Common Grant Rule for governmental recipients encourages recipients and subrecipients to enter into agreements for shared use of property and services.”<sup>110</sup> FTA also “encourages non-governmental recipients to consider shared use if economical and feasible.”<sup>111</sup> The FTA Circular notes that “[j]oint procurements offer the advantage of being able to obtain goods and services that may match each participating recipient’s requirements better than those likely to be available through an assignment of another

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that sets forth the availability of the cooperative purchasing agreement to other governmental entities. Such purchases shall only be made if the use of the cooperative purchasing agreements is determined to be in the best interest of the government entity.

TEX. GOV’T CODE ANN. § 791.025(c) (providing that “[a] local government that purchases goods and services under this section satisfies the requirement of the local government to seek competitive bids for the purchase of the goods and services”); VA. CODE ANN. § 2.2-4304(A),

Except for contracts for professional services, a public body may purchase from another public body’s contract even if it did not participate in the request for proposal or invitation to bid, if the request for proposal or invitation to bid specified that the procurement was being conducted on behalf of other public bodies. Any public body that enters into a cooperative procurement agreement with a county, city, or town whose governing body has adopted alternative policies and procedures pursuant to subdivisions 9 and 10 of § 2.2-4343 shall comply with the alternative policies and procedures adopted by the governing body of such county, city, or town.

WASH. REV. CODE § 39.34.030(5)(b).

<sup>108</sup> OR. REV. STAT. §§ 279A.220 (applicable to interstate cooperative procurements) and 279A.220(3)(a),

If a purchasing contracting agency is required to provide notice of intent to establish a contract or price agreement through an interstate cooperative procurement under subsection (2) of this section: (a) The purchasing contracting agency shall provide vendors who would otherwise be prospective bidders or proposals on the contract or price agreement, if the procurement were competitively procured under ORS chapter 279B, an opportunity to comment on the intent to establish a contract or price agreement through an interstate cooperative procurement.

<sup>109</sup> Nov. 1, 2008.

<sup>110</sup> FTA defines a

“joint procurement” to mean a method of contracting in which two or more purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services in a fixed quantity, even if expressed as a total minimum and total maximum. Unlike a State or local government purchasing schedule, a joint procurement is not drafted for the purpose of accommodating the needs of other parties that may later want to participate in the benefits of that contract.

See FTA C 4220.1F (Nov. 1, 2008), V-1, *et seq.*, available at [http://www.fta.dot.gov/documents/FTA\\_Circular\\_4220.1F.pdf](http://www.fta.dot.gov/documents/FTA_Circular_4220.1F.pdf).

<sup>111</sup> *Id.* at V-1.

recipient’s contract rights” and that when feasible, the “FTA also participates in the costs of joint procurements by non-governmental recipients.”<sup>112</sup> When using such arrangements, “recipients participating in the joint procurement must ensure compliance with all applicable FTA and Federal requirements and include all required clauses and certifications in the joint solicitation and contract documents.”<sup>113</sup>

Although the USDOT common grant rule provides that “grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurements of common goods and services,”<sup>114</sup> FTA recognizes joint purchases to be the only type of intergovernmental agreement suitable for use by its grantees and subgrantees. FTA does not authorize grantees to consider intergovernmental purchasing schedules to be the type of state or local intergovernmental agreement to which § 18.36(b)(5) is referring. FTA does, however, authorize the use of state purchasing schedules by those grantees permitted to use state purchasing schedules because 49 C.F.R. § 18.36(a) permits states to use their own policies and procedures they use for their own purchases, not because those schedules are “State intergovernmental agreements.”<sup>115</sup>

As for compliance with federal requirements, the FTA Circular moreover informs recipients that:

When obtaining property or services in this manner, the recipient must ensure all Federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the recipient’s purchase document. *One way of achieving compliance with FTA requirements is for all parties to agree to append the required Federal clauses in the purchase order or other document that effects the recipient’s procurement.* When buying from these schedules, the recipient should obtain Buy America certification before entering into the purchase order. If the product to be purchased is Buy America compliant, there is no problem. If the product is not Buy America compliant, the recipient will need to obtain a waiver from FTA before proceeding.<sup>116</sup>

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> 49 C.F.R. § 18.36(b)(5).

<sup>115</sup> See FTA C 4220.1F, V-2. It may be noted that the FTA Circular also discusses “piggybacking,” stating that

a recipient may find that it has inadvertently acquired contract rights in excess of its needs. The recipient may assign those contract rights to other recipients if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions. Some refer to this process as “piggybacking.”

*Id.* at V-5.

<sup>116</sup> *Id.* at V-2 (emphasis added).

### III. TRANSIT AGENCIES' USE OF IGAS AND MOUS

The uses of IGAs and MOUs are quite varied. The uses include an agency serving as the host agency for the region's metropolitan planning organization (MOU),<sup>117</sup> providing public transit service in an area outside of an agency's legal service area in general or for a specific purpose,<sup>118</sup> acquiring land for streetcar expansion,<sup>119</sup> furnishing emergency replacement bus service,<sup>120</sup> and maintaining busways and link-up services for intermodal transfers.<sup>121</sup> The agreements have been used for grade separation projects, station and parking lot development, station improvement/upgrades, road development and exchanges of property,<sup>122</sup> and transportation projects<sup>123</sup> such as with the state department of transportation (DOT).<sup>124</sup> Other uses include leasing land or property, temporarily using transit assets,<sup>125</sup> and agencies' pooling to obtain liability insurance or for fuel hedging.<sup>126</sup> The Central Florida Regional Transportation Authority (LYNX) employs joint funding agreements to authorize cost-sharing responsibilities and transit license agreements to place shelters on private property.

The Tri-County Metropolitan Transportation District of Oregon (TriMet) stated that it has

used IGAs to utilize the expertise of staff employed by other jurisdictions, and to provide TriMet staff to other jurisdictions. [An] example is in planning projects....We often use MOUs preliminary to IGAs to outline each party's expectations but we do not use MOUs for binding arrangements or where payments are involved. We utilize IGAs to pass through federal funding to subrecipients and to receive grant funding obtained from other governmental entities. We use IGAs to procure governmental services for TriMet such as tax administration by the state for the agency and transit police services with other local jurisdictions in the TriMet service district area. In addition, IGAs are utilized for cooperation in various operating programs such as agreements for specialized services for State of Oregon Medicaid brokerage services, ADA paratransit services funding, special programs such as data sharing and technology development, regional telecommunications and security operations.

The Washington Transit Agency (Whatcom) states that it uses IGAs and MOUs with regard to its Internet

connection, city communication system, signal preemption system, police services, city right-of-way, ring network protocols, Public Transportation Benefit Area services, surplus property services, Unified Certification Program, and student pass program, as well as the use of vehicles.<sup>127</sup>

Transit agencies have entered into agreements with all levels of government and governmental units or agencies. For example, Whatcom named the State of Washington, Ben Franklin Transit, Lummi Nation Transit, Pierce Transit, Spokane Transit Authority, C-TRAN (Vancouver, Washington), the cities of Seattle and Bellingham, King and Whatcom Counties, the Whatcom Council of Governments, and Western Washington University.

As for other uses of IGAs and MOUs, the Capital District Transportation Agency (CDTA) said that it has MOUs with a number of institutions (primarily colleges and universities) regarding bus operations to the institutions and access of their students, faculty, and staff to CDTA's services; that it partners with a number of organizations to support development that is supportive of transit services; that it has used "piggyback" options on vehicle purchases and has allowed others the same option on their purchases; and that as for third-party responsibilities, CDTA has used MOUs with local governments for planning studies and other projects when the municipality is responsible for local match.

LYNX explained that the use of IGAs and MOUs provides LYNX with "flexibility in creating legally binding documents that define the roles and responsibilities of each party" and that some of the documents may be "linked to a procurement in which parties outside of LYNX have responsibilities such as providing a local match or in-kind contribution." The Commuter Rail Division of the Regional Transportation Authority (Metra) in Illinois stated that it is a special district that works with many municipalities in the development, operation, and maintenance of stations through IGAs. The Greater Portland Transit District in Maine said that it uses the agreements for its bus operations and Americans with Disabilities Act services, the ownership of facilities and landlord/tenant responsibilities, student ridership discounts and monthly passes in cooperation with its partners, and state participation with respect to third-party responsibilities.

The Los Angeles County Metropolitan Transportation Agency (Los Angeles MTA or LACMTA) stated that it has "used agreements and MOUs to document all understandings and agreements with other cities and agencies....LACMTA has also used [the agreements] for training with college districts." Omnitrans in California stated that it "prefers to use a cooperative agreement (i.e., IGA) for specific projects that require greater specificity, involve specific deadlines or timetables or concern complex interagency issues." Some agencies explained that IGAs are used for agreements with out-

<sup>117</sup> Survey response of CDTA.

<sup>118</sup> Survey response of Access Transp. Systems.

<sup>119</sup> Survey response of Central Arkansas Transit Auth.

<sup>120</sup> Survey response of CT Transit.

<sup>121</sup> Survey response of Metra.

<sup>122</sup> *Id.*

<sup>123</sup> Survey response of Greater Cleveland RTA.

<sup>124</sup> Survey response of Metro-North (used for joint funding, operation, and maintenance of the New Haven Line and branch line service in Connecticut and with New Jersey Transit for the Western Hudson service).

<sup>125</sup> Survey response of Rock Island County Metropolitan Mass Transit Dist. (MetroLink).

<sup>126</sup> Survey response of Stark Area Regional Transit Authority (SARTA).

<sup>127</sup> Survey response of Washington Transit Authority (WTA).

side agencies, whereas MOUs are used for nonbinding agreements between departments within the city.<sup>128</sup>

As for the reasons for favoring one form of agreement over the other, most of the transit agencies responded that they preferred IGAs because they are binding contracts, whereas MOUs are nonbinding.<sup>129</sup> Metra in Illinois stated that MOUs are used “if enforcement or shifting responsibilities are not at issue.”<sup>130</sup> Nevertheless, a few respondents stated that that they considered the two forms of agreement to be interchangeable<sup>131</sup> or that both created binding obligations.<sup>132</sup> The Los Angeles MTA stated that it

tends to treat IGAs and MOUs similarly because we treat them both as enforceable agreements. Sometimes staff or the contracting agencies believe no authority is needed to sign an MOU and therefore will request the agreement be in the form of an MOU. However, we clarify that regardless of the name of the document, if Board authority is required for an IGA, it will also be required if called an MOU. *We also include standard contracting language in all MOUs.*<sup>133</sup>

Other reasons given were that the type of agreement is dictated by the funding source or by the nature of the project,<sup>134</sup> that the use of an interlocal agreement is dictated by statute,<sup>135</sup> or that the form was specified by the FTA.<sup>136</sup> The Utah Transit Authority stated that it uses an IGA when “a more formal detail-specific agreement” is needed, whereas MOUs are being used to document less formal working relationships.<sup>137</sup> Another agency said that an MOU is preferred by the region’s MPO when the city enters into any agreements with it.<sup>138</sup> One agency explained that an MOU may be preliminary to an IGA to outline each party’s expectations but that the agency does not use MOUs for binding ar-

rangements or when payments are involved.<sup>139</sup> According to LYNX in Florida, the type of agreement depends upon the circumstances or the other party or parties. LYNX “tends to favor MOUs for procedural issues and the outline of roles and responsibilities pertinent to a particular project” and to favor “Interlocal Agreements for legally binding arrangements that involve the exchange of funds, man hours or capital equipment.”<sup>140</sup>

#### IV. JUDICIAL DECISIONS AND ATTORNEY GENERAL OPINIONS INTERPRETING ENABLING ACTS AND IGAS

##### A. Introduction

Of the 31 agencies responding to the survey that use IGAs or MOUs, 22 stated that there had been no problems that had arisen with their use.<sup>141</sup> Only two agencies reported having any claims arising out of IGAs or MOUs, with one agency stating that disputes had been resolved by staff. One agency did report that there had been two multiyear, expensive arbitrations in the 1980s and the 1990s respectively.<sup>142</sup> The results of the survey, therefore, were generally consistent with the case research for the digest, which did not disclose any legal actions involving transit agencies and IGAs or MOUs.<sup>143</sup>

Although some cases were located for the digest interpreting enabling acts or particular IGAs, there are far more opinions of attorney generals than of the courts.<sup>144</sup> It may be noted that attorney generals’ opinions exist as guidelines for public agencies, public officers, and others. The weight that the judiciary gives to attorney generals’ opinions varies somewhat from state to state. In general, an opinion of an attorney general is not binding on the courts.<sup>145</sup> Nevertheless, the courts may give such opinions “considerable weight” if a court believes that an opinion is relevant to the issue presented and is “well reasoned,” particularly when the court is “resolving a question of first impression” such

<sup>128</sup> Survey responses of Charlotte Area Transit System (CATS) and City of Phoenix Public Transit Department (Phoenix PTD).

<sup>129</sup> Survey responses of Central Arkansas Transit Auth. (noting that an interlocal agreement is both binding and backed by state law); CATS; Greater Cleveland RTA (used to make the mutual promises binding); New Jersey Transit Corp. (stating that an MOU is used for a nonbinding arrangement); and San Francisco Municipal Transportation Agency (San Francisco MTA).

<sup>130</sup> Survey response of Commuter Rail Division of the Regional Transp. Auth. (Metra).

<sup>131</sup> Survey response of WTA (“used interchangeably”).

<sup>132</sup> Survey responses of Los Angeles Metropolitan Transportation Authority (MTA) (stating that both are treated as enforceable agreements); Washington (DC) Metropolitan Area Transit Authority (WMATA) (stating that either an IGA or an MOU can be used to accomplish the same purpose).

<sup>133</sup> Survey response of Los Angeles MTA (emphasis supplied).

<sup>134</sup> Survey response of CDTA.

<sup>135</sup> Survey response of CATS.

<sup>136</sup> Survey response of Columbia Transit.

<sup>137</sup> Survey response of Utah Transit Auth.

<sup>138</sup> Survey response of Phoenix PTD.

<sup>139</sup> Survey response of TriMet.

<sup>140</sup> Survey response of LYNX.

<sup>141</sup> One agency commented that IGAs were no different from standard contracts. Survey response of Phoenix PTD. Another agency said that although there had been no issues or problems, the agreements should account for the FTA public hearing process in the event that service is reduced. Survey response of CATS. One agency reported that there had been some issues regarding liability, repairs, and revenue accounting. Survey response of Metra.

<sup>142</sup> Survey response of Los Angeles MTA.

<sup>143</sup> Survey response of Metro-North.

<sup>144</sup> As discussed, under some state enabling laws the state’s attorney general may or must give an opinion interpreting the statute or ruling on the legality of an IGA.

<sup>145</sup> *City of Springfield v. Allphin*, 74 Ill. 2d 117, 131, 384 N.E.2d 310, 316 (1978).

as the interpretation of a statute.<sup>146</sup> There are occasions when the courts do not accept the reasoning or a conclusion set forth in an attorney general's opinion.<sup>147</sup> Of course, a court will reject an attorney general's opinion when it believes that it "is not a correct statement of the law."<sup>148</sup>

According to the attorney generals' offices, an attorney general's opinion has the force of law unless it is overturned by a court. An attorney general's opinion

is similar to a legal precedent and stands until a court or later opinion overrules it, or new legislation is enacted to change the statute in question. Opinions are not binding on the courts, but they are usually given careful consideration. An Attorney General's opinion protects a public official who follows it from liability, even if a court would later disagree with the opinion.<sup>149</sup>

According to the Virginia Attorney General's office, an opinion does not create new law. These opinions represent the Attorney General's analysis of the current state of the law based on his thorough review of existing law and relevant prior court decisions. They are non-binding on the requester and the courts. However, they may be cited, and courts will give them due consideration.<sup>150</sup>

The Florida Attorney General's office advises that "[a]ll legal opinions issued by this office, whether formal or informal, are persuasive authority and not binding."<sup>151</sup> However, in the State of Washington, courts are

<sup>146</sup> *Id.* at 130 (citing *People v. Simpkins*, 45 Ill. App. 3d 202, 207, 359 N.E.2d 828, 831 (1977); *Alsen v. Stoner*, 114 Ill. App. 2d 216, 222, 252 N.E.2d 488, 491 (1969); *Strat-O-Seal Mfg. Co. v. Scott*, 72 Ill. App. 2d 480, 485, 218 N.E.2d 227, 229–230 (1966); *City of Champaign v. Hill*, 29 Ill. App. 2d 429, 442, 173 N.E.2d 839, 846 (1961); *William J. Scott, The Role of Attorney General's Opinions in Illinois*, 67 NW. U. L. REV. 643, 649–53 (1972)). See also *Kasper v. City of Edmonds*, 69 Wash. 2d 799, 805, 420 P.2d 346, 350 (1966) ("entitled to considerable weight").

<sup>147</sup> *Kasper*, 69 Wash. 2d at 805–06, 420 P.2d 346, 350–51 (citing *St. ex rel. Blume v. Yelle*, 52 Wash. 2d 158, 324 P.2d 247 (1958); *Ernst v. Kootros*, 196 Wash. 138, 82 P.2d 126 (1938); *St. ex rel. Bonsall v. Case*, 172 Wash. 243, 19 P.2d 927 (1933); *Huntworth v. Tanner*, 87 Wash. 670, 152 P. 523 (1915).

<sup>148</sup> *First Thrift and Loan Ass'n v. New Mexico*, 62 N.M. 61, 69, 304 P.2d 582, 587 (1956).

So much for opinions of the Attorney General's office over the years. We are not bound by them in any event, giving them such weight only as we deem they merit and no more. If we think them right, we follow and approve, and if convinced they are wrong, as in case of the last two mentioned, we reject and decline to feel ourselves bound.

*Id.*, 62 N.M. at 70, 304 P.2d at 588).

<sup>149</sup> Office of the Attorney General of North Dakota, *Attorney General Opinions*, <http://www.ag.state.nd.us/Brochures/FactSheet/AGOpinions.pdf>.

<sup>150</sup> Office of the Attorney General of Virginia, [http://www.oag.state.va.us/Opinions and Legal Resources/Opinions/index.html](http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/Opinions/index.html) - Section\_2.2-505 (citing VA. CODE § 2.2-505).

<sup>151</sup> Office of the Attorney General of Florida, available at <http://myfloridalegal.com/pages.nsf/4492d797dc0bd92f85256cb>

to give more than just "careful" or "due" consideration to the opinions issued: "While these formal legal opinions are not binding in any way, they have historically been given 'great respect' and 'great weight' by the courts."<sup>152</sup>

The courts and the attorney generals' offices appear to have been reasonably consistent in interpreting either the constitutional and statutory provisions applicable to IGAs or the terms of an IGA. Both judicial opinions and state attorney generals' opinions provide guidance regarding whether the use of an IGA in a particular situation is lawful under a state's enabling law authorizing governmental units to use IGAs.<sup>153</sup>

## B. Issues Addressed by Judicial and Attorney Generals' Opinions

### 1. Use of an Agreement to Extend a Governmental Unit's or Agency's Geographical Limits

Whether an IGA may be used to enlarge the geographical jurisdiction of a governmental unit or agency will depend on the enabling law that applies. An example of an IGA expanding the geographical boundaries of a transit system is *Durango Transportation, Inc. v. City of Durango*,<sup>154</sup> involving an IGA between the City of Durango and La Plata County in Colorado. The IGA provided that the City would operate a mass transit system for the two governmental units. Durango Transportation, Inc. (DTI), which had authority granted to it by the Public Utilities Commission (PUC), argued that the City could not operate beyond its jurisdiction without the PUC's authority.

The court, quoting Colorado's constitutional and statutory authority for IGAs, rejected DTI's argument that "each contracting entity must be fully authorized to perform the subject activity."<sup>155</sup> The court held that DTI's interpretation would mean that a city could only contract with a county to perform functions that a city alone could perform lawfully—namely, to operate a

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<sup>152</sup> Washington State Office of the Attorney General, available at <http://www.atg.wa.gov/AGOpinions/default.aspx>.

<sup>153</sup> See, e.g., *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 212–13 (Mo. 1986) (en banc) (holding that an IGA was a valid exercise of home rule power without independent statutory authorization); *Elk Grove Township Rural Fire Prot. Dist. v. Vill. of Mount Prospect*, 228 Ill. App. 3d 228, 233, 592 N.E.2d 549, 552 (1992) (holding that an IGA was invalid that promised to execute future tax levies because the agreement improperly denied prospective administrations and taxpayers any input into future levies); *Nations v. Downtown Dev. Auth.*, 255 Ga. 324, 326, 338 S.E.2d 240, 243 (1986) (holding that an intergovernmental contracts clause of the state constitution was limited by a separate constitutional provision requiring voter consent to a city decision to incur debt pursuant to an IGA).

<sup>154</sup> 824 P.2d 48 (Colo. Ct. App. 1991).

<sup>155</sup> *Id.*

transit system within its own boundaries but not beyond its boundaries without the PUC's consent.<sup>156</sup> The court held that Colorado's enabling authority for IGAs could only be construed to mean that "cooperation between governmental entities through intergovernmental agreements should be encouraged and that the contracting entities should be deemed to possess the powers necessary to effectuate such agreements."<sup>157</sup> The court held that IGAs could not be limited to situations in which both parties had preexisting functional and territorial authority to engage in the subject activity.<sup>158</sup> The court also held that the IGA was not inconsistent with the purposes underlying the PUC regulations.<sup>159</sup>

## 2. Appointment of an Agency as the Lead Agency

An IGA may be required or may need to provide for some type of administration of the agreement, whether by a separate entity or by a party to the agreement. The issue has arisen whether one party may be responsible for administration or management of the agreement or whether all parties must share in the administration. In *Durango Transportation, Inc.*, the court held that it was not necessary for the IGA to require that the city and county have "equal participation" in operating a transit system.<sup>160</sup> The court approved the IGA's "lead agency" concept, whereby one of the contracting entities is empowered to perform a function for the other contracting parties without any necessity that the parties' contribution be equal.<sup>161</sup> Although a state's enabling law must be consulted, it is possible in some states for a governmental unit or agency to expand its authority pursuant to an IGA by sharing in another governmental entity's or agency's authority or jurisdiction.<sup>162</sup>

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 50–51 (citing *City of Oakland v. Williams*, 15 Cal. 2d 542, 103 P.2d 168 (1940); *Sch. Dist. v. Kansas City*, 382 S.W.2d 688 (Mo. 1964) (holding that an IGA authorizing a school district to erect and operate library on city land was valid); *Kaufman v. Swift County*, 225 Minn. 169, 30 N.W.2d 34 (1947) (holding that a county and city could jointly erect a hospital within the city limits pursuant to an IGA because each individual entity had power to do so; thus, the authority of two governmental units was common to both); *Kentucky-Indiana Mun. Power Ass'n v. Public Service*, 181 Ind. App. 639, 393 N.E.2d 776 (1979) (holding that six cities from two different states may form an IGA to develop and implement a bulk power supply program)).

<sup>159</sup> *Durango Transp., Inc.*, 842 P.2d at 52.

<sup>160</sup> *Id.* at 53.

<sup>161</sup> *Id.* at 50.

<sup>162</sup> *Id.* at 51.

## 3. Limitations on the Use of IGAs

*a. State Prohibition on Transfer of Property for Less than Fair Market Value.*—The Attorney General of Illinois has determined that Illinois law does not preclude the Illinois DOT (IDOT) from entering into an IGA with an airport commission to develop and operate an airport with IDOT retaining title to the land.<sup>163</sup> However, IDOT does not have the authority without legislative approval to convey state-owned land to any entity for less than fair market value.

*b. Enabling Statute Limiting IGAs to the Providing of Services.*—In *DeKalb County v. City of Decatur*,<sup>164</sup> the court remanded the case to the trial court for a determination of whether the IGA at issue was invalid because the IGA did not relate to the providing of "services" within the meaning of Georgia's enabling authority for IGAs.<sup>165</sup> In another case, the court held that there were genuine issues of material fact regarding whether the requirement to expend the monies that were disbursed under the IGA for capital outlay projects was an agreement to provide services or an agreement for the joint or separate use of facilities or equipment.<sup>166</sup>

*c. Compliance with Competitive Bidding Requirements.*—In Illinois an entity created by an IGA that is composed of both home-rule municipalities that are exempt from competitive bidding statutes and non-home-rule municipalities that are subject to competitive bidding statutes "must fulfill the procurement requirements that govern each of its individual members," including "the statutory limitations governing its non-home rule members."<sup>167</sup>

## 4. Exercise of Common Powers by Parties to an Agreement

As discussed in Section I, in many states if an enabling statute authorizes joint action by governmental units, the power being exercised jointly must be one that is common to all parties to a joint powers agreement.<sup>168</sup> In Arizona, when "two public agencies contract for services or enter into an agreement for joint action pursuant to Ariz. Rev. Stat. § 11-952.A, each agency must have the power to perform the service or action

<sup>163</sup> See Fla. Att'y Gen. Op. No. AGO 97-10, dated Feb. 14, 1997, at 2, available at <http://www.myfloridalegal.com/ago.nsf/Opinions/D445A925E4C79CD585256441007BB898>.

<sup>164</sup> 297 Ga. App. 322, 677 S.E.2d 391 (2009).

<sup>165</sup> GA. CONST. art. IX, § III, para. 1(a).

<sup>166</sup> *City of Decatur v. DeKalb County*, 284 Ga. 434, 668 S.E.2d 247 (2008).

<sup>167</sup> See Fla. Att'y Gen. Op. No. AGO 97-10, dated Feb. 14, 1997, at 2 (quoting ARIZ. REV. STAT. § 11-952.A), available at <http://www.myfloridalegal.com/ago.nsf/Opinions/D445A925E4C79CD585256441007BB898>.

<sup>168</sup> Ariz. Att'y Gen. Op. No. I79-193, at 1, dated July 10, 1979, available at [http://azmemory.lib.az.us/cdm4/item\\_viewer.php?CISOROOT=/agopinions&CISOPTR=7462&CISOBX=1&REC=1](http://azmemory.lib.az.us/cdm4/item_viewer.php?CISOROOT=/agopinions&CISOPTR=7462&CISOBX=1&REC=1), hereinafter cited as "Ariz. Att'y Gen. Op. 179-193."

contemplated in the contract pursuant to which they agree to allocate responsibilities among them.<sup>169</sup>

Likewise, in California, a party to a joint exercise of powers agreement has the authority to exercise any common power of its constituent agencies.<sup>170</sup> Because the city and county of Irvine were authorized to contribute a portion of a highway and right-of-way for the construction of the San Joaquin Hills Transportation Corridor, there was a valid joint exercise of powers by the city and county.<sup>171</sup>

At issue in transit IGAs may be the handling and disbursement of grant funds. By state statute an agency may be designated to disburse available federal and state grant funds. If an agency “is acting only as a conduit in the transfer of available funds to qualified recipient agencies, then there is “no common power of the contracting parties [that is] being exercised....”<sup>172</sup>

### 5. An Agency’s Delegation of Authority by an IGA

The issue has arisen whether the governing body of a public agency may delegate its authority to enter into an IGA with another party. In one instance when the Arizona Attorney General expressed an opinion on the subject, the opinion set forth several principles that may or may not apply in other states. First, only those public agencies “that are legally authorized to contract may be parties to an [IGA].”<sup>173</sup> Second, a board or agency may not delegate a discretionary power that the legislature has granted to it.<sup>174</sup> Third, “if an agency is not otherwise authorized by statute to delegate its power to contract,” then the agency may not do so.<sup>175</sup> Fourth, “[i]f the power to contract rests solely with a particular body, it cannot delegate that power.”<sup>176</sup> Consequently, “a public agency may delegate its authority to enter into [IGAs] only when [the public agency] is authorized by statute, charter, or other governing law to otherwise delegate its discretionary power to contract.”<sup>177</sup>

### 6. Delegation of the Power of Eminent Domain

Whether governmental units may delegate their eminent domain powers to a joint powers agency was considered in a California case involving an airport au-

thority.<sup>178</sup> The court held that the delegation was lawful.

At issue was a 1991 joint powers agreement that created the Burbank-Glendale-Pasadena Airport Authority, which filed a complaint in eminent domain to take the entire parcel of land owned by Hensler. One of Hensler’s arguments was that it was not lawful for the cities that created the authority to transfer their power of eminent domain to an authority that is not publicly accountable.<sup>179</sup> However, the court ruled otherwise based on California Government Code Section 6506:

[P]ursuant to Government Code section 6506, the agency administering or executing a joint powers agreement may be either (1) a party to the agreement, or (2) a public agency or other entity constituted pursuant to or designated by the agreement. In the latter case, as Government Code section 6507 states, “the agency is a public entity separate from the parties to the agreement.” Government Code section 6508 authorizes that separate public entity to acquire property and to sue and be sued in its own name.<sup>180</sup>

The court held that “cities as contracting parties—the local governmental entities entering into a joint powers agreement—can create a separate joint powers agency ‘to exercise on their behalf powers they hold in common.’”<sup>181</sup> Accordingly, the court held that because the cities could delegate their power of eminent domain to the Authority, the latter had the power of eminent domain under the joint powers agreement.<sup>182</sup>

### 7. Ownership and Operation of a Transit System by an MPO

The Florida Attorney General’s office issued an opinion regarding whether the Ocala/Marion MPO may own and operate a mass transit system.<sup>183</sup> The MPO had no statutory authority to own and operate a mass transit system. The opinion concluded that an interlocal agreement could not be used to “broaden the existing authority of the parties to the agreement to include the ownership and operation of a mass transit system, when not all the parties to the agreement possess independent authority to provide transportation services.”<sup>184</sup> As the opinion explained, Florida law “limits the powers or authority exercised pursuant to an interlocal agreement to those the parties share in common and that may be exercised separately.”<sup>185</sup> Furthermore,

<sup>169</sup> *Id.* at 2.

<sup>170</sup> Cal. Att’y Gen. Op. No. 93-1205, at 3, May 12, 1994, [http://www.newportcoastdrive.com/Exihbit\\_A.pdf](http://www.newportcoastdrive.com/Exihbit_A.pdf), hereinafter cited as “Cal. Att’y Gen. Op. No. 93-1205.”

<sup>171</sup> *Id.*

<sup>172</sup> Ariz. Att’y Gen. Op. 179-193, at 3.

<sup>173</sup> Ariz. Att’y Gen. Op. 180-092, dated May 16, 1980, at 2, available at [http://azmemory.lib.az.us/cdm4/item\\_viewer.php?CISOROOT=/agopinions&CISOPTR=7783&CISOBX=1&REC=4](http://azmemory.lib.az.us/cdm4/item_viewer.php?CISOROOT=/agopinions&CISOPTR=7783&CISOBX=1&REC=4), hereafter cited as “Ariz. Att’y Gen. Op. 180-092.”

<sup>174</sup> *Id.* at 1 (citing Ariz. Att’y Gen. Op. No. 180-070).

<sup>175</sup> *Id.* (citing ARIZ. REV. STAT. § 11-951 *et seq.*).

<sup>176</sup> *Id.* at 2.

<sup>177</sup> *Id.* at 3.

<sup>178</sup> Burbank-Glendale-Pasadena Airport Auth. v. Hensler, 83 Cal. App. 4th 556, 99 Cal. Rptr. 2d 729 (2000).

<sup>179</sup> *Id.*, 83 Cal. App. 4th at 561, 99 Cal. Rptr. 2d at 733.

<sup>180</sup> *Id.*, 83 Cal. App. 4th at 563, 99 Cal. Rptr. 2d at 734 (footnotes omitted).

<sup>181</sup> *Id.* (citations omitted) (footnote omitted).

<sup>182</sup> *Id.*, 83 Cal. App. 4th at 564, 99 Cal. Rptr. 2d at 735.

<sup>183</sup> Fla. Att’y Gen. Op. No. AGO 97-10, dated Feb. 14, 1997, available at <http://www.myfloridalegal.com/ago.nsf/Opinions/D445A925E4C79CD585256441007BB898>, hereafter cited as “Fla. Att’y Gen. Op. No. AGO 97-10.”

<sup>184</sup> *Id.* at 1–2.

<sup>185</sup> *Id.* at 3.

the Attorney General's opinion stated that because the conditions under which the Florida DOT may provide transportation services are statutorily prescribed, the DOT's role "may not be circumvented through the use of an interlocal agreement."<sup>186</sup>

Nothing contained in Chapter 339 or Chapter 341, Florida Statutes, contemplates that DOT may exercise its authority to provide transportation services as part of a consortium of governmental entities. Rather, it would appear that the department's authority hinges on there being no viable alternative governmental entity to provide such service.<sup>187</sup>

### 8. IGA Representatives' Voting Rights

Officials of governmental units may serve as a voting member of an entity or governing body (e.g., a council) created by an IGA. The question has arisen whether an official, for example, of a county board of commissioners must obtain his or her board's approval of a vote to be cast by the official who is serving as a member of an IGA entity or council. In the opinion of the Michigan Attorney General's office, a member of a county board does not need his or her board's approval before the board member votes as a member of an IGA council on an IGA matter. Thus, the chairperson of the Macomb County Board of Commissioners, who served also as a member of the Regional Transit Coordinating Council (RTCC), did not need her county board's approval to vote in favor of the RTCC's participation in the Detroit Area Regional Transportation Authority.<sup>188</sup>

It should be emphasized that members of the RTCC act as officers of the RTCC, not as officers of their respective city or counties. The RTCC is an independent and separate legal entity created by statute, and the actions of the RTCC are its own actions and not the actions of any city, county, or of a county board of commissioners. There is no provision in the MTA that requires the members of the RTCC to secure the approval of the governing body of their respective city or counties in order for the actions of the RTCC to become effective.<sup>189</sup>

### 9. Res Judicata Based on an IGA and Privity of Contract

In an Illinois case, a landowner opposing condemnation of his property interest argued that an earlier decision dismissing a condemnation petition was *res judicata* as to a different party that sought later to condemn the same property because both condemnors were parties to an IGA. In *County of Wabash v. Partee*,<sup>190</sup> the City of Mount Carmel and the County of Wabash were parties to an IGA pursuant to which they exchanged

jurisdiction of certain property so that the County could complete a county highway. Partee, the owner of the life estate in the property, had been involved in a former condemnation lawsuit initiated by the city that had been dismissed by the trial court. The State Supreme Court affirmed the trial court's dismissal.<sup>191</sup> Later, after Wabash County filed a complaint for condemnation of the property, the respondents argued that the dismissal of the former suit was *res judicata* because the County and City were in privity of contract by reason of the IGA between them.<sup>192</sup> The court rejected the argument.

If this court accepted respondents' extension and distortion of the concept of privity, the consequences could be horrendous, when one considers the number of intergovernmental agreements among cities, counties, States and the Federal government. It would be absurd to hold that governmental units forfeit their powers and assume all of the limitations of other governmental bodies simply because they enter into intergovernmental-cooperation agreements and have some citizenship in common.<sup>193</sup>

The court held that the doctrine did not apply because neither the parties nor the issues were the same.<sup>194</sup>

### 10. An IGA as Evidence of Necessity for a Taking

In a condemnation proceeding, the issue of necessity for a taking was held to be supported by language in an IGA when a resolution of necessity had been passed after the petition for condemnation had been filed.<sup>195</sup>

### 11. Whether an IGA or MOU Is a Legislative Act Requiring a Voter Referendum

In an Illinois case it was held that a requirement for a voter referendum may not be circumvented by an IGA.<sup>196</sup> However, a California court held that a city's approval of an agreement such as IGA or MOU does not trigger a requirement for a voter referendum. In *Worthington v. City Council of the City of Rohnert Park*,<sup>197</sup> the City approved an MOU with a Native American tribe concerning a proposed casino. The plaintiffs filed a petition to require that the City place a referendum on the ballot for approval or rejection by the voters of the agreement.<sup>198</sup> The court held that a "referendum may be used to review only legislative acts and not executive or administrative acts of a local government."<sup>199</sup>

<sup>191</sup> *City of Mount Carmel v. Partee*, 74 Ill. 2d 371, 385 N.E.2d 687 (1979).

<sup>192</sup> *County of Wabash*, 241 Ill. App. 3d at 65, 608 N.E.2d at 678.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*, 241 Ill. App. 3d at 68, 608 N.E.2d at 680.

<sup>196</sup> *Rajterowski*, 405 Ill. App. 3d. at 1120, 940 N.E.2d at 709.

<sup>197</sup> 130 Cal. App. 4th 1132, 31 Cal. Rptr. 3d 59 (Cal. App. 2005).

<sup>198</sup> *Id.* 130 Cal. App. 4th at 1136, 31 Cal. Rptr. 3d at 61.

<sup>199</sup> *Id.* 130 Cal. App. 4th at 1140, 31 Cal. Rptr. 3d at 65 (citing *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 399, 103 Cal. Rptr. 2d 269 (2001); *DeVita v. County of Napa*, 9 Cal. 4th

<sup>186</sup> *Id.* at 4.

<sup>187</sup> *Id.*

<sup>188</sup> Mich. Att'y Gen. Op. No. 7137, dated Aug. 13, 2003, at 1, available at <http://www.ag.state.mi.us/opinion/datafiles/2000s/op10213.htm>, hereafter cited as "Mich. Att'y Gen. Op. No. 7137."

<sup>189</sup> *Id.* at 2.

<sup>190</sup> *County of Wabash v. Partee*, 241 Ill. App. 3d 59, 62, 608 N.E.2d 674, 676 (Ill. App. 1993).

When an action requires the consent of the governmental entity and another party, the action is contractual or administrative. The give-and-take involved when a government entity negotiates an agreement with a sovereign Indian tribe is not legislation, but is a process requiring the consent of both contracting parties....

The MOU in this case addresses mitigation of potential impacts of the future casino project; it does not state a policy of constructing casinos on county land or decide whether or how the casino project should proceed....The MOU sets out no rule and contains no regulatory provisions. It is a contract, not a law. The fundamental policy decision and regulation of the location of tribal land and its use for a casino is made, not by the local government, but by the Tribe and the federal authorities. Whether a local government approves or chooses to voice its disapproval is not legislation and therefore is not subject to referendum.<sup>200</sup>

The court agreed with the City that the City's approval of the MOU was an administrative act that was not subject to the referendum process.<sup>201</sup>

## 12. Miscellaneous

Besides claims for damages for breach of contract, an IGA in the State of Georgia has been the subject of mandamus and injunction proceedings.<sup>202</sup>

## V. CHECKLIST FOR NEGOTIATING AND DRAFTING AN IGA OR MOU

### A. Introduction

Of the 31 agencies using IGAs and MOUs, 16 reported that they could not identify any particular transit-related issues to avoid or resolve when negotiating or drafting an IGA or MOU. The agencies' other comments regarding the drafting of IGAs and MOUs are discussed in Section V. Based on the transit agencies' responses to the survey and on the agreements they provided, a checklist of matters to consider when drafting an agreement is set forth in Part B of this section of the digest.

As with any contract, careful drafting is important. An IGA should be clear in its delineation of duties and responsibilities, including those not assumed under the

763, 775, 38 Cal. Rptr. 2d 699, 889 P.2d 1019 (1995); *Wheelright v. County of Marin*, 2 Cal. 3d 448, 457, 85 Cal. Rptr. 809, 467 P.2d 537 (1970)).

<sup>200</sup> *Id.*, 130 Cal. App. 4th at 1143, 31 Cal. Rptr. 3d at 67. Although the court referred to the MOU as a contract, based on the court's description of the MOU at issue and on the court's opinion, there is no indication that the MOU was anything other than a nonbinding agreement.

<sup>201</sup> *Id.*, 130 Cal. App. 4th at 1140, 31 Cal. Rptr. 3d at 64.

<sup>202</sup> *Hicks v. Houry*, 283 Ga. 407, 658 S.E.2d 616 (2008) (holding that the allocation of funds in the amended IGA was not inconsistent with the purpose approved by the voters at issue in the case).

agreement.<sup>203</sup> In an Arizona case, the court stated that there was an issue regarding whether the state transportation department "may have actually ceded control of aspects of the design, operation or maintenance [of an intersection] to the city" and whether "the city accepted such responsibility through an intergovernmental agreement or otherwise...."<sup>204</sup> The court stated that the interpretation of an IGA normally is resolved based on "the four corners of the Agreement."<sup>205</sup> However, extrinsic evidence may be admissible when an IGA is ambiguous.<sup>206</sup>

### B. General Provisions

There are general provisions, some of which may be required by a state enabling act,<sup>207</sup> that typically are found in IGAs and MOUs:

#### 1. Formation

- The statutory authority for the agreement.
- A statement of authority to provide transit services.<sup>208</sup>
- The purpose(s) of the agreement.
- The parties' reasons for making an agreement that are often set forth in a series of recitals.<sup>209</sup>
- The power(s) or function(s) to be exercised jointly by the parties.
- The method by which the purpose(s) of the agreement and the parties' intent will be accomplished or the manner in which the power(s) or function(s) will be exercised.
- The procedure for amending the agreement.<sup>210</sup>

<sup>203</sup> *State v. City of Kingman*, 217 Ariz. 485, 176 P.3d 53 (Ariz. Ct. App. 2008).

<sup>204</sup> *Id.* 217 Ariz. at 489, 176 P.3d at 57. The court held that "before a city can be held liable for actual control of an intersection that is part of the state highway system absent an IGA, the city must assume responsibility for the planning or design of the intersection, or it must actually participate in maintaining or operating it." *Id.* at 59. See also *Vill. of Montgomery v. Aurora Twp.*, 387 Ill. App. 3d 353, 899 N.E.2d 567 (Ill. App. 2008) (holding that although an IGA reflected duties to plow and salt the bridge, neither municipality formally agreed to assume maintenance responsibility).

<sup>205</sup> *DeKalb County*, 297 Ga. App. at 325, 677 S.E.2d at 393.

<sup>206</sup> *E. Baton Rouge Parish Sch. Bd. v. City of Baker Sch. Bd.*, 2006 La. App. LEXIS 2005 (La. App. 2006).

<sup>207</sup> See Pt. II of this digest, *supra*.

<sup>208</sup> App. A., Item 8, CATS/Mecklenburg County, N.C. ¶ II, at 2.

<sup>209</sup> App. A, Item 13, Chicago Office of Emergency Management and Communication (Chicago OEMC)/CTA ¶ 2 (sharing of real-time data).

<sup>210</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 3 (reimbursement of prorated cost of transit services); Item 41, El Paso County, Colo./Colorado Springs, Colo. et al., at 9 (funding of roadway capital improvements and transit service).

## 2. Date and Duration

- The date of the agreement, the date it commences, or its effective date.<sup>211</sup>
- The term or duration of the agreement, including any transition period desired by the parties.<sup>212</sup>
- Whether the effective date is subject either to the voters' approval in the parties' respective jurisdictions and/or to the state attorney general's approval.<sup>213</sup>
- A clause for the agreement's extension or renewal, including renewal on an automatic basis.<sup>214</sup>

## 3. Relationship of the Parties

- The relationship of the parties, such as:
  - No party being an agent or employee of any other party because of the agreement.<sup>215</sup>
  - The agreement not creating a partnership or joint venture of the parties.<sup>216</sup>
  - An option for additional agencies to become parties and/or for additional territory to become subject to the agreement.<sup>217</sup>
  - The right of each party to withdraw before or after each phase of a project.<sup>218</sup>

## C. Scope of the Agreement

Several transit agencies responding to the survey commented that the scope of any agreement should be clearly defined. Thus, an agreement may:

- Designate the party or parties having the responsibility for developing the scope of the work.<sup>219</sup>
- Define the project.<sup>220</sup>

- State that the scope of the work includes certain milestones and deliverables.<sup>221</sup>
- Designate the types of programs being provided.<sup>222</sup>
- Define the services and any required service appointments and work authorizations.<sup>223</sup>

## D. Representations and Warranties

Many of the agreements reviewed include a statement of the parties' representations and warranties as of the time of the signing of the agreement, some of which are:<sup>224</sup>

- The parties have conducted their due diligence prior to signing the agreement.<sup>225</sup>
- The agreement describes the due diligence conducted by the parties.
- The agencies are authorized by their board or other governing authority to enter into the agreement.<sup>226</sup>
- The agencies have sufficient funds to implement the agreement and/or to participate in the described program or project.<sup>227</sup>
- The parties have performed all material obligations required by any related agreements.<sup>228</sup>
- The parties are in substantial compliance with all applicable federal, state, and local laws, orders, rules, codes, regulations, and ordinances.<sup>229</sup>
- Any assets being transferred pursuant to the agreement are in good repair and operating condition, reasonable wear and tear excepted.<sup>230</sup>
- The party or parties transferring any assets for the purpose of the agreement have good title thereto free from any and all liens, security interests, and other encumbrances except as noted in the agreement.<sup>231</sup>

<sup>211</sup> App. A, Item 11, Bend, Or./Central Oregon Intergovernmental Council (COIC), at 3 (combining of two transit systems under a single governing body).

<sup>212</sup> *Id.*, at 2.

<sup>213</sup> App. A, Item 41, El Paso County, Colo./Colorado Springs, Colo. et al., at 8 (funding of roadway capital improvements and transit service); Item 17, Sandy Springs, Colo./Oregon DOT, at 1 (integrating transportation land use planning).

<sup>214</sup> App. A, Item 11, Bend, Or./COIC, at 3; Item 48, Capital Metro. Transp. Auth. of Harris County (Harris County MTA)/TxDOT et al., at 1 (establishing structure of a regional transportation management consortium).

<sup>215</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 3 (reimbursement of prorated cost of transit services).

<sup>216</sup> App. A, Item 15, Phoenix Public Transit Dep't. (Phoenix PTD)/Tempe, Ariz. ¶ 13, at 3 (cooperative purchasing agreement).

<sup>217</sup> App. A, Item 41, El Paso County, Colo./Colorado Springs, Colo. et al., at 10.

<sup>218</sup> App. A, Item 53, Omnitrans/Chaffey Community College Dist., at 1 (transit center).

<sup>219</sup> App. A, Item 2, CDTA/Albany, N.Y., at 2 (develop transit-oriented development zoning ordinance and guidebook).

<sup>220</sup> App. A, Item 38, Metra/Vill. of Downers Grove, art. I, at 1 (e.g., changes to signal and electrical lines, drainage, and other specified facilities).

<sup>221</sup> App. A, Item 40, Metra/Western Ill. U. ¶ I(A), at 3 (university-provided consulting services).

<sup>222</sup> App. A, Item 14, City of Lincoln, Neb., Star Tran (Star-Tran)/U. of Nebraska ¶ V, at 2 (e.g., establishment of a transit pass or "no fare" program for qualified riders).

<sup>223</sup> App. A, Item 80, MetroLink/Springfield Mass Transit Dist. (SMTD) ¶ 5, at 2 (paratransit vehicles).

<sup>224</sup> App. A, Item 106, Tri-Met/Clackamas County Dev. Agency, art. 9.2, at 22–24 (LRT project preliminary engineering, final design, and construction).

<sup>225</sup> App. A, Item 11, Bend, Or./COIC, at 3.

<sup>226</sup> *Id.* at 1; Item 23, LYNX/Seminole County, Fla. § 17(a), at 16 (funding for service within county).

<sup>227</sup> App. A, Item 17, Sandy Springs, Colo./Oregon DOT, at 3–4 and 8 (integrating transportation land use planning); Item 12, Chicago/CTA § 3(d) (CTA's rehabilitation of regional transit location and other work).

<sup>228</sup> App. A, Item 11, Bend, Or./COIC, at 3.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

## E. Administration

### 1. Separate Entity for Administration

An agreement may establish or otherwise authorize a separate entity to administer the agreement, in which case the agreement may include provisions stating:

- A corporation or other entity will be or has been formed to implement the agreement.<sup>232</sup>
- The separate authority will serve the purposes and conduct the activities created or authorized by the agreement.<sup>233</sup>
- The administering entity will serve as the policy-making body for a project or projects.<sup>234</sup>
- The details regarding the separate entity's governing body, such as a commission, board of directors, officers, or otherwise, including:
  - The method of electing or appointing members, directors, and/or officers.
  - Their compensation.
  - The term of office.
  - The process for the removal of a member, director, or officer.
  - The procedure for the filling of any vacancies.
  - The disqualification of any member, director, or officer for a violation of law or ethics or for a conflict of interest.
- The administering entity is authorized in its own name:
  - To make and enter into contracts.
  - To employ agencies, employees, or others as required.
  - To acquire, construct, manage, maintain, or operate transit or related facilities.
  - To acquire, hold, or dispose of property.
  - To incur debts, liabilities, or obligations that do not constitute the debts, liabilities, or obligations of any of the parties to the agreement.<sup>235</sup>
  - To exercise, if applicable, the power of eminent domain.<sup>236</sup>
  - To exercise, if applicable, any taxing authority.<sup>237</sup>
  - To exercise, if applicable, alone or jointly, any authorized procurement functions.
  - To promulgate policies and procedures with respect to the foregoing and other powers and functions.<sup>238</sup>

<sup>232</sup> App. A, Item 15, Phoenix PTD/Tempe, Ariz. § 2.3, at 1 (light rail project); Item 93, San Francisco MTA/Santa Clara Transp. Auth. et al. § 2, at 3 (expand purposes and powers of Peninsula Corridor Study Joint Powers Bd.).

<sup>233</sup> App. A, Item 41, El Paso County, Colo./Colorado Springs, Colo. et al., at 2.

<sup>234</sup> App. A, Item 93, San Francisco MTA/Santa Clara Transp. Auth. et al. § 5, at 6 (e.g., a Joint Powers Bd.).

<sup>235</sup> See App. A, Item 41, El Paso County, Colo./Colorado Springs, Colo. et al., at 7–8.

<sup>236</sup> *Id.* at 8.

<sup>237</sup> *Id.* at 2–3, 8.

- A transit committee or other body will be created for the purpose of advising the administering entity or the parties on transit issues.<sup>239</sup>

### 2. Administration by a Party

In the absence of a separate entity for management, an agreement may state that:

- One of the parties will serve as the managing agency, implement the agreement, and oversee the objectives of a project or projects.<sup>240</sup>
- The agreement will be administered by a chief transit official<sup>241</sup> or by an executive director or executive committee.<sup>242</sup>
- A coordinator is identified or will be appointed to oversee activities authorized by the agreement.
- A single point of contact is designated for the agreement or project.<sup>243</sup>

### 3. Extent of Administrative Authority

Regardless of the type of administration, an agreement may provide for:

- The responsibility for written operating procedures, salary administration, compensation policies, office rental, consultant services, and other expenses to administer the agreement.<sup>244</sup>
- The manner in which funds will be paid to and disbursed by a party to the agreement or by any separate entity created or authorized by the agreement.
- The making and promulgation of any rules or regulations for the purpose of implementing, administering, or enforcing the agreement and/or the preparation of an operating or procedure manual that is specific to the agreement.<sup>245</sup>
- The manner in which purchases will be made and contracts entered into.
- A limit on the administrative or other expenses chargeable to a party.<sup>246</sup>
- An allocation of funds subject to the agreement for capital improvements and maintenance, as well as for future adjustments of any allocation.<sup>247</sup>

<sup>238</sup> *Id.* at 4–5.

<sup>239</sup> App. A, Item 11, Bend, Or./COIC, at 9.

<sup>240</sup> App. A, Item 93, San Francisco MTA/Santa Clara Transp. Auth. et al. § 6, at 7–8 (e.g., implementing capital programs and/or awarding operating contracts).

<sup>241</sup> App. A, Item 8, CATS/Mecklenburg County, N.C. ¶ VI, at 5 (integrated regional transit system).

<sup>242</sup> Item 48, Harris County MTA/TxDOT et al., at 7.

<sup>243</sup> App. A, Item 7, CATS/City of Charlotte, N.C. ¶ 5, at 6 (e.g., a project manager); Item 29, LYNX/Osceola County, Fla. (highway corridor alternatives analysis).

<sup>244</sup> App. A, Item 4, CDTA/Capital Dist. Transp. Comm. ¶¶ 1 and 3, at 1–3 (transit authority acting as financial agent).

<sup>245</sup> App. A, Item 48, Harris County MTA/TxDOT et al., at 8.

<sup>246</sup> App. A, Item 41, El Paso County, Colo./Colorado Springs, Colo. et al., at 3.

<sup>247</sup> *Id.* at 4–5.

- The designation and definition of the boundaries of any service area(s) subject to or affected by the agreement.<sup>248</sup>

#### 4. Implementation

Agreements often provide that:

- The parties will determine whether and when to proceed with the planning and conceptual engineering for a project.<sup>249</sup>
- Further agreements or commitments will be made regarding an implementation phase, construction phase, and/or operational phase of a project's development.<sup>250</sup>
- The implementation phase will include, for example, right-of-way needs, construction management services, and utilities.<sup>251</sup>
- The parties' representatives will meet to discuss the economic feasibility of the project after each phase.<sup>252</sup>
- When vehicles are involved, the agreement may state that:
  - Changes are authorized to the vehicles' external appearance.<sup>253</sup>
  - Vehicles will be inspected prior to or upon delivery.<sup>254</sup>
  - A party is assigned the responsibility for maintaining and insuring equipment after delivery.<sup>255</sup>
  - Any leased vehicles will comply with all federal, state, and local laws.<sup>256</sup>

#### F. Transfer or Assignment of Personnel or Assets

An agreement may provide for the assignment or sharing of personnel and/or designate equipment or assets and state:

##### 1. Personnel

- The manner of employing, engaging, compensating, transferring, or discharging necessary personnel, subject to applicable civil service rules or employment contracts.
- The appointment of an individual to perform a particular function.<sup>257</sup>

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<sup>248</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 1.

<sup>249</sup> App. A, Item 53, Omnitrans/Chaffey Community College Dist., at 2.

<sup>250</sup> App. A, Item 50, Omnitrans/Loma Linda, Cal. ¶ 3, at 3 (street corridor bus rapid transit project).

<sup>251</sup> *Id.* ¶ 4.1, at 3–4.

<sup>252</sup> App. A, Item 53, Omnitrans/Chaffey Community College Dist., at 1–2.

<sup>253</sup> App. A, Item 81, MetroLink/Rockford Mass Transit Dist., art. II ¶ 3, at 2.

<sup>254</sup> *Id.* ¶ 2, at 3.

<sup>255</sup> *Id.*, art. II ¶¶ 3 and 5, at 3.

<sup>256</sup> *Id.*, art. III, at 4.

- The designation of the persons to serve on a joint development or other committee.<sup>258</sup>

- The authorization for personnel of one party to be used in lieu of or in addition to other contributions or advances by a party.<sup>259</sup>

- The permission of a party, in lieu of a contractor, to use its own employees in the party's discretion for some of the work contemplated by an agreement.<sup>260</sup>

- The transfer of personnel of one party to another party without loss of existing employment rights or benefits.

#### 2. Assets

- The acquisition, ownership, custody, operation, maintenance, or sale or lease of real or personal property as needed in connection with the agreement.

- The parties' commitment to incur capital expenditures for equipment, facilities, or other property.<sup>261</sup>

- The transfer of any property free of or subject to any liens and encumbrances.<sup>262</sup>

#### G. Financial Relationship

##### 1. In General

When an agreement requires income or funding for a program or project, the IGAs and MOUs reviewed for the digest often include one or more of the following categories that are outlined in more detail in the sections that follow:

- The financial means to support the agreement's intended purposes.
- The payment for services by one party to the other parties.
- The parties' exchange of services or property.
- The use of grant funds.
- The payment of costs and expenses.
- The accounting and auditing of the books and records for a program or project subject to the agreement.

##### 2. Participant Contributions

An agreement may specify:

- Each party is to furnish an initial contribution.<sup>263</sup>

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<sup>257</sup> App. A, Item 92, SANDAG/Caltrans ¶¶ 5.9 and 5.12, at 11 (e.g., a corridor director).

<sup>258</sup> App. A, Item 76, MetroLink/Moline, Ill. ¶ 4, at 3 (multi-modal facility project).

<sup>259</sup> App. A, Item 11, Bend, Or./COIC, at 10.

<sup>260</sup> App. A, Item 38, Metra/Vill. of Downers Grove, art. II(3), at 2.

<sup>261</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 2.

<sup>262</sup> App. A, Item 11, Bend, Or./COIC, at 8.

<sup>263</sup> App. A, Item 15, Phoenix PTD/Tempe, Ariz. § 3.2, at 2.

- A party is contributing a design at its cost or the use or maintenance of its facilities or equipment on a cost-reimbursement or other basis.<sup>264</sup>
- The parties' obligations are contingent on state and/or FTA consent or funding.<sup>265</sup>
- A party under specified circumstances has the right to withhold funding.<sup>266</sup>
- A party is designated as the recipient of funds for a project or projects.<sup>267</sup>
- The requirement that the parties will cooperate to secure funding sources.<sup>268</sup>
- The procedures by which the parties are to make their monetary contributions.<sup>269</sup>
- If applicable, each participant is to pay its portion of the local share of the costs of a service or project, stating:<sup>270</sup>
  - The estimated funding requirements are to be provided, for example, for a 12-month period.<sup>271</sup>
  - The parties' obligation to make annual capital contributions.<sup>272</sup>
  - A party's agreement to provide enumerated services without payment and/or without any other contribution being required.<sup>273</sup>
  - A party's obligation to maintain facilities or equipment on a cost-reimbursement or other basis.
  - A party's financial obligation to be conditioned on its funding being authorized.<sup>274</sup>

### 3. Revenue

Agreements whose activities or functions are dependent on revenue may need to include one or more of the following provisions.

- The separate entity or party primarily responsible for the management and disbursement of funds will:
  - Prepare an annual operating budget.<sup>275</sup>

- Determine necessary appropriations.<sup>276</sup>
- Determine whether, how, or the order in which projects will be funded.<sup>277</sup>
- Have the responsibility for invoicing and collecting payments when they become due.<sup>278</sup>
- Establish the method or formula for allocating and financing any capital and operating costs.<sup>279</sup>
- Determine net revenue.<sup>280</sup>
- Determine any loss of revenue.<sup>281</sup>

In addition, an agreement may include clauses stating:

- The specification of the funding level required for providing transit services within an area covered by the agreement.<sup>282</sup>
- The determination of the source or sources of revenue or other financial support.
- The time and manner of payment of any funds, as well as any repayment of funds on the termination of the agreement.
- The establishment and collection of any applicable charges, rates, rents, fees, or other revenue relating to the agreement.
- The identification of any required requisition form and supporting documentation to secure payment.<sup>283</sup>
- A limit on payments or contributions.<sup>284</sup>
- A requirement for payments to be made on a monthly, quarterly, or other basis.<sup>285</sup>
- A requirement for payment on an interim basis while awaiting the receipt of grant funds or other funding.<sup>286</sup>
- Adjustment of payments for inflation.<sup>287</sup>
- The allocation of revenues from specific sources for capital improvements and maintenance.<sup>288</sup>

<sup>264</sup> App. A, Item 46, Greater Cleveland RTA/Shaker Heights ¶ 2, at 1 (Greater Cleveland RTA to provide at its cost a design of the rail signals for incorporation in the project).

<sup>265</sup> App. A, Item 76, MetroLink/Moline, Ill. ¶ 8, at 3.

<sup>266</sup> App. A, Item 28, LYNX/Orange County, Fla. § 5(A)(11), at 11.

<sup>267</sup> App. A, Item 29, LYNX/Osceola County, Fla. ¶ 3, at 1.

<sup>268</sup> *Id.*

<sup>269</sup> App. A, Item 93, San Francisco MTA/Santa Clara Transp. Auth., et al. § 7(D), at 11.

<sup>270</sup> App. A, Item 47, La Crosse Mun. Transit Utility/City of Crescent ¶ 1, at 1 (route deviation bus service).

<sup>271</sup> App. A, Item 92, SANDAG/Caltrans ¶ 4.21, at 9 (also requiring an estimated quarterly funding requirement for all activities for a 12-month period).

<sup>272</sup> App. A, Item 49, Metro-North/N.J. Transit Rail Operations (N.J. Transit), art. 8.01, at 27 (operation of rail passenger service).

<sup>273</sup> App. A, Item 46, Greater Cleveland RTA/Shaker Heights ¶ 2, at 1.

<sup>274</sup> App. A, Item 41, El Paso County, Colo./Colorado Springs, Colo. et al., at 2; Item 48, Harris County MTA/TxDOT et al., at 11.

<sup>275</sup> App. A, Item 48, Harris County MTA/TxDOT, et al., at 9.

<sup>276</sup> App. A, Item 41, El Paso County, Colo./Colorado Springs, Colo. et al., at 2.

<sup>277</sup> App. A, Item 41, El Paso County, Colo./Colorado Springs, Colo. et al., at 2.

<sup>278</sup> App. A, Item 11, Bend, Or./COIC, at 7.

<sup>279</sup> Regional Transportation District (RTA)/DUS Metropolitan District No. 1, et al. (setting forth the terms pursuant to which a certain levy on property will be used to fund RTD's services); Item 63, RTA/CDOT (relating to financing, designing, building, operation, and the processes for the RTD Fas-Track's I-225 light rail line and addressing the impacts and crossings of the corridor over portions of CDOT).

<sup>280</sup> App. A, Item 26, LYNX/Orlando, Fla. § 8, at 8 (placement of transit shelters).

<sup>281</sup> App. A, Item 49, Metro-North/N.J. Transit, art. 6.05, at 21.

<sup>282</sup> App. A, Item 29, LYNX/Osceola County, Fla., at 1.

<sup>283</sup> App. A, Item 12, Chicago/CTA § 5(a).

<sup>284</sup> *Id.* at 1.

<sup>285</sup> App. A, Item 11, Bend, Or./COIC, at 5.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

- The allocation of transit sales tax revenues, fares, fees, and rents,<sup>289</sup> including, for example:
  - The standardization of fees collected by a transit agency, a municipality, or other entity.<sup>290</sup>
  - The control of fares such as between certain destinations or stations.<sup>291</sup>
  - When applicable, whether nonresidents may be discriminated against in the setting of fees.<sup>292</sup>

#### 4. Grants

When grant funds are expected, agreements reviewed for the digest included provisions, such as:

- The identification of the party having responsibility to apply for and accept federal or state aid or grants.<sup>293</sup>
  - A party's assignment of all or part of its federal or state transit grants or funding.<sup>294</sup>
  - A designation of the recipient for federal funding,<sup>295</sup> including the designation of the entity responsible for entering into a Full Funding Grant Agreement with the FTA.<sup>296</sup>
  - A description of the responsibilities of a grant recipient.<sup>297</sup>
  - The party responsible for administering federal funding and the state match.<sup>298</sup>

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<sup>288</sup> App. A, Item 39, Metra/Vill. of New Lenox ¶ 6, at 3 (e.g., parking receipts).

<sup>289</sup> App. A, Item 8, CATS/Mecklenburg County, N.C. ¶ VIII, at 9.

<sup>290</sup> App. A, Item 39, Metra/Vill. of New Lenox ¶ 2, at 2.

<sup>291</sup> App. A, Item 49, Metro-North/N.J. Transit, art. 6.01, at 16; art. 6.02, at 18.

<sup>292</sup> App. A, Item 39, Metra/Vill. of New Lenox ¶ 2, at 2 (e.g., a municipality's setting of parking fees).

<sup>293</sup> App. A, Item 70, RTA/CDOT (pursuant to a Master IGA, RTD as the Local Agency to provide funds to CDOT to construct segment Number 1 of a transportation corridor that is part of the FasTracks plan approved by voters).

<sup>294</sup> App. A, Item 11, Bend, Or./COIC, at 18. *See also* Item 59, RTA/Special Transportation for Boulder County, Inc. (Special Transit) (relating to SAFETEA-LU funds and Special Transit's waiver of its rights to receive federal grant funds pursuant to 49 U.S.C. § 5309 and its authorization of RTD to seek those funds for eligible RTD projects with RTD agreeing to provide funds to Special Transit).

<sup>295</sup> App. A, Item 75, MetroLink/SMTD, at 2 (natural gas buses).

<sup>296</sup> As advised by the FTA, the full funding grant agreement (FFGA) is the final step of the New Starts planning and project development process. FTA and sponsors of New Starts projects enter into this multi-year contractual agreement that formally establishes the maximum level of federal financial assistance and outlines the terms and conditions of federal participation. *See* App. A, Item 106, TriMet/Clackamas County Dev. Agency ¶ M, at 2.

<sup>297</sup> App. A, Item 106, TriMet/Clackamas County Dev. Agency ¶ M, at 2.

<sup>298</sup> App. A, Item 2, CDTA/Albany, N.Y., at 2; Item 75, MetroLink/SMTD, at 2; Item 11, Bend, Or./COIC, at 7.

- The parties' agreement to cooperate and be bound by and comply with applicable federal funding requirements.<sup>299</sup>
  - A stipulation that all or part of any grant funds will be transferred for the purpose of the agreement.<sup>300</sup>
  - A requirement that preliminary engineering will be undertaken in conformity with FTA's grant requirements.<sup>301</sup>
  - The parties' obligation to renegotiate payment and related terms of the agreement if federal transit funding changes by a certain percentage or if additional grant funding becomes available.<sup>302</sup>
  - The reimbursement of FTA for any unallowable costs.<sup>303</sup>
  - The status of the project if federal funding is not awarded.<sup>304</sup>

#### 5. Expenses

The agreements frequently provide for:

- The parties' responsibility to pay their proportionate or other share of expenses incurred by reason of the agreement.<sup>305</sup>
  - The amount budgeted for a program or project and also:<sup>306</sup>
    - The handling of disbursements, cost reports, and interim payments for expenses.
    - An authorization to shift dollars from one type of service to another to balance the amount of money paid under the agreement.<sup>307</sup>
    - The effect of a party's failure to make a required payment (e.g., reimbursement of expenses).

The agreements reviewed for the digest identify other expenses for which the participants are responsible:

- Various direct costs such as expenses for utilities, maintenance, snow removal, and the like.<sup>308</sup>
- Third-party expenses that the administering agency or the parties have agreed to pay.<sup>309</sup>

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<sup>299</sup> App. A, Item 15, Phoenix PTD/Tempe, Ariz. § 4, at 2.

<sup>300</sup> App. A, Item 11, Bend, Or./COIC, at 6.

<sup>301</sup> App. A, Item 106, Tri-Met/Clackamas County Dev. Agency, art. 3.4, at 9.

<sup>302</sup> App. A, Item 11, Bend, Or./COIC, at 5.

<sup>303</sup> App. A, Item 88, SANDAG/North San Diego County Transit Dev. Bd. et al., art. II § 7(3), at 3 (management of FTA grants).

<sup>304</sup> App. A, Item 7, CATS/Charlotte, N.C. ¶ 2, at 3.

<sup>305</sup> App. A, Item 11, Bend, Or./COIC, at 10.

<sup>306</sup> App. A, Item 8, CATS/Mecklenburg County, N.C. ¶ VII, at 6.

<sup>307</sup> App. A, Item 13, LYNX/Osceola County, Fla. ¶ 2.0, at 2-3.

<sup>308</sup> App. A, Item 11, Bend, Or./COIC, at 2 and 6; Item 10, Avondale, Ariz./Tolleson, Ariz.; Item 79, MetroLink/Moline, Ill. ¶ 7, at 3.

<sup>309</sup> App. A, Item 11, Bend, Or./COIC, at 7.

- Staff and other operating expenses.<sup>310</sup>
- Costs for the state or a local government's services related to the project.<sup>311</sup>
- Costs for services provided pursuant to the agreement such as the hourly rate for bus service.<sup>312</sup>

## 6. Payments

The agreements address how and when payments are to be made, for example:

- The details regarding invoicing and payment arrangements.<sup>313</sup>
- A specified method of payment.<sup>314</sup>
- The use of reimbursement rates for an initial term and thereafter based on actual costs of service.<sup>315</sup>
- A requirement for the prefinancing of central staff operations prior to reimbursement.<sup>316</sup>
- Any dollar amount over or under budget to be distributed annually based on a cost-per-hour formula.<sup>317</sup>

## 7. Accounts, Audits, and Reports

IGAs and MOUs may state, for example:

- The manner in which strict accountability of all funds will be assured, including a periodic audit of any accounts associated with or required by the agreement.<sup>318</sup>
- The entity or party responsible for arranging an audit.
- The parties' responsibility to pay for the cost of any accounting and audits.
- The establishment and maintenance of a separate set of accounts for each project.<sup>319</sup>
- The documenting of project costs<sup>320</sup> or in-kind expenditures.<sup>321</sup>

<sup>310</sup> App. A, Item 4, CDTA/Capital Dist. Transp. Comm. ¶ 2, at 3.

<sup>311</sup> App. A, Item 91, SANDAG/North San Diego County Transit Dev. Bd. et al. ¶ 7, at 8 (e.g., processing plans, code review inspection).

<sup>312</sup> App. A, Item 52, Omnitrans/Southern California Regional Rail Auth., art. 2, at 2 (bus bridge service during service disruptions); Item 14, Star Tran/U. of Nebraska ¶ VI, at 2.

<sup>313</sup> App. A, Item 14, StarTran/U. of Nebraska ¶ III, at 1.

<sup>314</sup> App. A, Item 32, LYNX/Volusia County ¶ 8, at 3 (e.g., involving allocation of fare revenue).

<sup>315</sup> *Id.* ¶ 3, at 2–3 (commuter bus service).

<sup>316</sup> App. A, Item 4, CDTA/Capital Dist. Transp. Comm. ¶ 2, at 3.

<sup>317</sup> App. A, Item 47, La Crosse Mun. Transit Utility/City of Crescent ¶ 4, at 1.

<sup>318</sup> App. A, Item 11, Bend, Or./COIC, at 7.

<sup>319</sup> App. A, Item 88, SANDAG/North San Diego County Transit Dev. Bd. et al., art. II, § 7(a), at 2.

<sup>320</sup> App. A, Item 27, LYNX/Orlando Urban Area Metropolitan Planning Organization (Orlando Urban MPO) ¶ 5, at 6–7 (transit authority providing professional services).

<sup>321</sup> App. A, Item 2, CDTA/Albany, N.Y., at 2.

- The responsibility of an entity or a party to retain records for audit and inspection.<sup>322</sup>

- The documentation required for all income and costs for a program, project, or service.<sup>323</sup>

- The manner in which reports of all receipts and disbursements are to be prepared and presented to each party to the agreement.

- The right to inspect the books and records on reasonable prior notice.<sup>324</sup>

- A requirement for separate accountings, for example, of advertising or other revenue.<sup>325</sup>

- A requirement for a written report.<sup>326</sup>

- A requirement that technical reports, studies, and calculations be submitted.<sup>327</sup>

## H. Participants' Responsibilities

### 1. Operational Decisions

The operational decisions necessitated by an agreement may include:

- The maintenance of stations and system service.<sup>328</sup>
- The installation of park-and-ride signs on a state right-of-way.<sup>329</sup>

- The authorization of encroachment permits.<sup>330</sup>

- Other provisions appearing in IGAs and MOUs are:

- The determination of fees, rates, service areas, levels of service, and routes and route schedules.<sup>331</sup>

- The responsibility for transit facilities including those in rights-of-way.<sup>332</sup>

- The responsibility for projects that are within a city's right-of-way or that are owned, operated, and maintained by a city or other governmental entity.<sup>333</sup>

- The payment of fees and expenses for permits, right-of-way and encroachment permits, and utility relocations.<sup>334</sup>

<sup>322</sup> App. A, Item 27, LYNX/Orlando Urban MPO ¶ 3(A), at 1.

<sup>323</sup> App. A, Item 88, SANDAG/North San Diego County Transit Dev. Bd. et al., art. II, § 7(c), at 3.

<sup>324</sup> App. A, Item 48, Harris County MTA/TxDOT, et al., at 10.

<sup>325</sup> App. A, Item 26, LYNX/Orlando, Fla. § 8, at 8.

<sup>326</sup> App. A, Item 29, LYNX/Osceola County, Fla. ¶ 2.02, at 3 (e.g., quarterly reporting).

<sup>327</sup> App. A, Item 91, SANDAG/North San Diego County Transit Dev. Bd. et al. ¶ 5.2, at 5.

<sup>328</sup> App. A, Item 50, Omnitrans/Loma Linda, Cal. ¶ 4.3, at 5–6.

<sup>329</sup> App. A, Item 54, Omnitrans/Caltrans § 1(1), at 2 (maintenance of transcenter).

<sup>330</sup> *Id.* § 1(7), at 3 (e.g., to install and maintain call boxes and ticket vending machines).

<sup>331</sup> App. A, Item 11, Bend, Or./COIC, at 10.

<sup>332</sup> *Id.* at 11.

<sup>333</sup> App. A, Item 91, SANDAG/North San Diego County Transit Dev. Bd. et al. ¶ 3, at 3.

- The responsibility for project review, traffic coordination and control, and handling of hazardous materials.<sup>335</sup>
- Equipment use, landscaping and irrigation, right-of-way, street lighting, traffic control signals, transit signal priority, signage, and station location.<sup>336</sup>
- Periodic meetings of the parties to review operations.<sup>337</sup>

## 2. Coordination

Some of the agreements reviewed required the parties to coordinate and communicate in the development and review of a program or project, thus including provisions regarding:<sup>338</sup>

- A description of the coordination process.<sup>339</sup>
- The provision of technical assistance, data, consultation, and reviews and comments.<sup>340</sup>
- The authorization to use one party's structures for another party's operations.<sup>341</sup>
- The parties' obligation to cooperate:
  - To maximize funding and the reduction of costs.<sup>342</sup>
  - To obtain waivers in some instances of certain permits or other approvals.<sup>343</sup>
  - To provide construction bid plans and documents on a timely basis.<sup>344</sup>
  - To agree on the location, installation, and maintenance of all jointly-used bus stops and on the establishment of bus stops in another party's jurisdiction or service area.<sup>345</sup>
- The reservation of a party's right:
  - To approve or disapprove of the location of a facility.<sup>346</sup>
  - To require removal or relocation of a facility.<sup>347</sup>

- To enter the right-of-way as necessary to use and maintain a structure.<sup>348</sup>
- To give its prior approval for other actions.<sup>349</sup>
- A limitation on the use or content of advertising.<sup>350</sup>
- The parties' joint development of a marketing program.<sup>351</sup>
- The parties' cooperation by entering into further agreements as needed.<sup>352</sup>

## 3. Service Commitments and Standards

Besides designating representatives to meet periodically for the purpose of evaluating the adequacy of service,<sup>353</sup> the IGAs and MOUs may:

- Proscribe any material revisions to minimum levels of service in the absence of an amendment to an agreement.<sup>354</sup>
- Describe the circumstances under which a transit authority is not in default for failing to maintain minimum levels of prescribed services.<sup>355</sup>
- Designate performance standards including vehicle and facility standards<sup>356</sup> or require adherence to service standards attached to the agreement.<sup>357</sup>
- Provide for the preparation and amendment of service specifications.<sup>358</sup>

## 4. Provisions Applicable to Third Parties

Agreements also may include provisions that are applicable to a third party, such as:

- A vendor must consent to the assignment of a contract with one of the parties to an IGA or MOU.<sup>359</sup>
- Any agreement with a third-party developer must include certain provisions as specified in an IGA or MOU.<sup>360</sup>

<sup>334</sup> App. A, Item 50, Omnitrans/Loma Linda, Cal. ¶ 5.1, at 6.

<sup>335</sup> *Id.* ¶ 5.2, at 6–7.

<sup>336</sup> *Id.* ¶ 5.3, at 8–9.

<sup>337</sup> App. A, Item 49, Metro-North/N.J. Transit, art. 3.04(f), at 8 (quarterly meetings).

<sup>338</sup> App. A, Item 7, CATS/Charlotte, N.C., at 2.

<sup>339</sup> App. A, Item 56, Omnitrans/Southern California Association of Governments (SCAG) (Cal.) et al. § 1.4, at 3 (regional transportation plan).

<sup>340</sup> App. A, Item 2, CDTA/Albany, N.Y., at 2.

<sup>341</sup> App. A, Item 97, San Francisco MTA/BART ¶ 4, at 5 (free transfer tickets).

<sup>342</sup> App. A, Item 92, SANDAG/Caltrans ¶ 4.2, at 7.

<sup>343</sup> App. A, Item 91, SANDAG/North San Diego County Transit Dev. Bd. et al. ¶ 2.1, at 2 (e.g., bond estimates, building permits, construction permits).

<sup>344</sup> *Id.* ¶ 6.1, at 6.

<sup>345</sup> App. A, Item 51, Omnitrans/Riverside Transit Agency, art. 2, at 2 (coordination of route planning, scheduling, stops, transfers, and fares); Item 66, RTA/Boulder County, Colo. (installation of improvements to bus stops).

<sup>346</sup> App. A, Item 26, LYNX/Orlando, Fla. § 9, at 9 (e.g., a transit shelter).

<sup>347</sup> *Id.* § 9.1, at 9.

<sup>348</sup> App. A, Item 38, Metra/Vill. of Downers Grove, art. II, at 2–3.

<sup>349</sup> App. A, Item 39, Metra/Vill. of New Lenox ¶ 8, at 3.

<sup>350</sup> App. A, Item 28, LYNX/Orange County, Fla. § 5(A)(7); Item 26, LYNX/Orlando, Fla. § 10, at 10 (relating to transit shelters).

<sup>351</sup> App. A, Item 32, LYNX/Volusia County, Fla. ¶ 13, at 14 (commuter bus service).

<sup>352</sup> App. A, Item 30, LYNX/Altamonte Springs, Fla. ¶ 3, at 3 (other agreements needed to deploy FlexBus on-demand demand-responsive transit service).

<sup>353</sup> App. A, Item 23, LYNX/Seminole County, Fla. § 2.01(c), at 3.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* § 2.01(e), at 3 (e.g., terrorism or unusually severe weather).

<sup>356</sup> App. A, Item 32, LYNX/Volusia County ¶ 15, at 4–8.

<sup>357</sup> App. A, Item 49, Metro-North/N.J. Transit, art. 3.04(b), at 8.

<sup>358</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 2.

<sup>359</sup> App. A, Item 6, CATS/Hampton Roads Transit, et al. (options to purchase light rail vehicles).

- Access arrangements with other transit companies may be required.<sup>361</sup>

### 5. Consultants

Agreements regarding consulting services included provisions for:

- The responsibility for selecting and contracting with a consultant.<sup>362</sup>
- The parties' prior agreement to use consultants, subconsultants, or others.<sup>363</sup>
- A statement of the scope of the work and the consultant's responsibilities, as well as other details regarding a consultancy contract.<sup>364</sup>
- The consultant's compensation, as well as a statement of itemized deliverable costs, ongoing deliverable costs, and indirect cost rate.<sup>365</sup>
- On termination other than for cause of the consultant's contract, the consultant's unpaid costs to the date of termination as the consultant's sole remedy.<sup>366</sup>
- A covenant that no fees were paid to anyone for the purpose of obtaining the consulting agreement.<sup>367</sup>
- A provision for a recovery schedule in the event of missed deadlines.<sup>368</sup>
- A revolving door prohibition.<sup>369</sup>

### 6. Procurement

The agreements furnished by the responding transit agencies contained clauses regarding:

- The responsibility for adhering to federal procurement guidelines.<sup>370</sup>
- The compliance by each party with all applicable procurement rules.<sup>371</sup>
- The parties' cooperation in providing to another party warehousing, equipment, and other services to improve the efficiency of each party's procurement.<sup>372</sup>
- A nondiscrimination clause to be included in any agreement for a procurement covered by an IGA or MOU.<sup>373</sup>

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<sup>360</sup> App. A, Item 7, CATS/Charlotte, N.C. ¶ 4, at 4; Item 42, Greater Cleveland RTA/Cuyahoga County, OH ¶ 4, at 2 (contractor is to be required to construct county's communication lines in accordance with the transit agency's contract).

<sup>361</sup> App. A, Item 49, Metro-North/N.J. Transit, art. 3.01, at 6.

<sup>362</sup> App. A, Item 19, LYNX/Orlando, Fla. ¶ 4, at 6 (relating to the Downtown Orlando Transp. Plan).

<sup>363</sup> App. A, Item 40, Metra/Western Ill. U. ¶ 3(E), at 6.

<sup>364</sup> App. A, Item 17, Sandy Springs, Colo./Oregon DOT, at 7.

<sup>365</sup> App. A, Item 40, Metra/Western Ill. U. ¶ 2, at 5.

<sup>366</sup> *Id.* ¶ 5(A), at 7.

<sup>367</sup> App. A, Item 40, Metra/Western Ill. U. ¶ 7(A), at 8.

<sup>368</sup> *Id.* ¶ I(B)(4), at 4.

<sup>369</sup> *Id.* ¶ 8(E), at 11.

<sup>370</sup> App. A, Item 2, CDTA/Albany, N.Y., at 2.

<sup>371</sup> App. A, Item 15, Phoenix PTD/Tempe, Ariz. ¶ 7, at 2.

<sup>372</sup> *Id.* ¶ 8, at 2.

## I. Transportation Planning

Agreements relating in whole or in part to transportation planning that had some of the following clauses were reviewed:

- The identity of the party with the overall responsibility for comprehensive regional planning.<sup>374</sup>
- Each agency's responsibility for fulfilling state and federal transportation and land-use planning obligations and policies relating to transit.<sup>375</sup>
- The designation of the lead agency and its responsibility for the development of a regional transportation plan.
- The role of the participating agencies.
- A description of the planning process, for example, for the development of a regional transit or land-use plan.<sup>376</sup>
- The parties' intent that planning will extend beyond the role of a traditional MPO.<sup>377</sup>
- A requirement that short-term and long-term safety education, enforcement, and engineering concerns would be considered.<sup>378</sup>
- The engagement of consulting engineering services to evaluate the feasibility of a project.<sup>379</sup>
- A designation of an official project lead for any analysis of alternatives, as well as:<sup>380</sup>
  - The scope of an alternatives analysis study.<sup>381</sup>
  - The budget for a study.<sup>382</sup>
  - The engagement of a "qualified private supplier" to perform the services necessary to complete the study.<sup>383</sup>
  - The creation of a technical working group whose responsibilities include:
    - A study of various options for the alignment of a project.<sup>384</sup>

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<sup>373</sup> *Id.* ¶ 10, at 3.

<sup>374</sup> App. A, Item 56, Omnitrans/SCAG et al. § 1.1, at 2. *See also* Item 74, RTA/City and County of Denver (providing for cooperation between RTD and the city regarding that portion of the East Corridor that will be located on aviation property, the East Corridor being a commuter rail transit line connecting Denver Union Station and Denver International Airport).

<sup>375</sup> App. A, Item 11, Bend, Or./COIC, at 11.

<sup>376</sup> App. A, Item 8, CATS/Mecklenburg County, N.C. ¶ I, at 1.

<sup>377</sup> App. A, Item 5, CDTA/Capital Dist. Transp. Comm., at 2 (compliance regarding metropolitan transportation planning and programming).

<sup>378</sup> App. A, Item 34, Metra/IDOT, at 1 (e.g., regarding stations and crossings along a rail corridor).

<sup>379</sup> *Id.* ¶ II, at 2.

<sup>380</sup> App. A, Item 29, LYNX/Osceola County, Fla. ¶ 2, at 1.

<sup>381</sup> App. A, Item 19, LYNX/Orlando, Fla. ¶ 3, at 5.

<sup>382</sup> *Id.* ¶ 7, at 7.

<sup>383</sup> *Id.*, at 3.

<sup>384</sup> App. A, Item 109, Utah Transit Auth./Salt Lake City Corp., art. 6.3.1, at 14 (design and construction of downtown to airport LRT project).

- The consideration of integration alternatives.<sup>385</sup>
- An evaluation of the advantages, disadvantages, and costs associated with proposed alternatives.<sup>386</sup>
- The submission to a policy committee of a report on any findings.<sup>387</sup>
  - The creation of and consultation with a citizen transit advisory group.<sup>388</sup>
  - The participation of various stakeholders in the planning process.<sup>389</sup>
  - The parties' adherence to planning and investment principles.<sup>390</sup>
  - The state DOT's contributions to the planning process, including information, coordination, estimates, and allocation of funding.<sup>391</sup>

## J. Designing Transit Facilities and Improvements

### 1. Party Responsibilities

One agreement annexed to the digest is a master agreement for collaboration on project development of several types of transportation improvements.<sup>392</sup> Other agreements furnished by transit agencies contain specific provisions applicable to the design of transit facilities and improvements. The agreements contain provisions, for example, that require:

- The identification of the party responsible for plans and specifications, environmental conditions, public safety, and supervision of a project.<sup>393</sup>
  - A statement of the interests and objectives of each party and the establishment of minimum project requirements.<sup>394</sup>
  - The achievement of critical path milestones.<sup>395</sup>
  - A requirement that arrangements be made with persons owning facilities that are or would be affected by a project.<sup>396</sup>
  - A commitment to design and construct a project so as to prevent or minimize any disruption of service.<sup>397</sup>

<sup>385</sup> *Id.*, art. 8.2, at 22.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> App. A, Item 8, CATS/Mecklenburg County, N.C. ¶ V, at 4.

<sup>389</sup> App. A, Item 5, CDTA/Capital Dist. Transp. Comm., at 2.

<sup>390</sup> *Id.*

<sup>391</sup> *Id.* at 4.

<sup>392</sup> App. A, Item 92, SANDAG/Caltrans ¶ 1.2, at 1 (e.g., transit and multimodal facilities).

<sup>393</sup> App. A, Item 12, Chicago/CTA §§ 7 and (3)(b).

<sup>394</sup> App. A, Item 109, Utah Transit Auth./Salt Lake City Corp., art. 2.3.1, at 10.

<sup>395</sup> *Id.*, art. 2.3.4, at 11 (e.g., obtaining any necessary federal approvals).

<sup>396</sup> App. A, Item 38, Metra/Vill. of Downers Grove, art. III(5), at 3.

- The identification of deliverable elements.<sup>398</sup>
- The parties' commitment to negotiate in good faith other agreements needed to design, construct, and maintain a project.<sup>399</sup>
  - A stipulation that the parties are to approve the choice of the contractor for the update of final design documents.<sup>400</sup>
  - A stipulation to undertake public outreach, communication, and coordination.<sup>401</sup>
  - A provision for a project management group, its membership, and responsibilities.<sup>402</sup>
  - The creation and description of the duties of project integration and project execution teams.<sup>403</sup>

### 2. Preliminary Engineering and Design

Clauses in IGAs and MOUs also address:

- A preliminary engineering budget with assigned contributions for the participants.<sup>404</sup>
- The administration of funds for a project's plan or design phase.<sup>405</sup>
- The mutual development and adoption of design standards.<sup>406</sup>
  - The specification of design standards or requirements.<sup>407</sup>
  - The coordination of design review procedures.<sup>408</sup>
  - A requirement for documenting deviations from design standards in a manner approved, for example, by the city engineer.<sup>409</sup>

<sup>397</sup> App. A, Item 46, Greater Cleveland RTA/Shaker Heights ¶ 8, at 3.

<sup>398</sup> App. A, Item 7, CATS/Charlotte, N.C. ¶ 1, at 2 (e.g., surveys, environmental impact statements, feasibility studies, final designs, grant documents).

<sup>399</sup> App. A, Item 106, Tri-Met/Clackamas County Dev. Agency, art. VIII, at 21–22.

<sup>400</sup> App. A, Item 30, LYNX/Altamonte Springs, Fla. ¶ 1(b)(iii), at 3 (FlexBus transit system).

<sup>401</sup> App. A, Item 109, Utah Transit Auth./Salt Lake City Corp., art. 19.1, at 44.

<sup>402</sup> App. A, Item 106, Tri-Met/Clackamas County Dev. Agency, art. 2.1, at 4.

<sup>403</sup> App. A, Item 109, Utah Transit Auth./Salt Lake City Corp., art. 22, at 49–51.

<sup>404</sup> App. A, Item 106, Tri-Met/Clackamas County Dev. Agency, art. III, at 7. *See also* Item 57, RTA/CDOT (addressing the environmental study preliminary engineering phase of the I-225 corridor project, pursuant to a Master IGA dated Apr. 12, 2004, and RTD's Environmental Evaluation for the project).

<sup>405</sup> App. A, Item 106, Tri-Met/Clackamas County Dev. Agency, art. VI, at 12–16.

<sup>406</sup> App. A, Item 45, Greater Cleveland RTA/Cleveland, Ohio, art. 2.1, at 6 (city-provided preliminary engineering).

<sup>407</sup> App. A, Item 24, LYNX/Winter Park ¶ 10, at 6 (e.g., shelters).

<sup>408</sup> App. A, Item 45, Greater Cleveland RTA/Cleveland, Ohio, art. 2.2, at 6.

<sup>409</sup> App. A, Item 91, SANDAG/North San Diego County Transit Dev. Bd. et al. ¶ 3.2, at 3.

- The submittal and approval requirements at the end of the conceptual and preliminary design phases of the preliminary engineering.<sup>410</sup>

- The planning, designing, and funding of a system to provide general public access.<sup>411</sup>

- The identification of critical features of transit-oriented development.<sup>412</sup>

- The maintaining of vertical and horizontal clearances.<sup>413</sup>

- The identification of matters to address in the final product.<sup>414</sup>

### 3. Budget for the Project

Many of the transit agencies' IGAs and MOUs include clauses concerning the funding for approved elements of a plan or design, such as:<sup>415</sup>

- An allocation of the cost of planning, designing, constructing, and operating a program, project, or service.<sup>416</sup>

- The responsibility for the design and implementation, for example, of communication infrastructure, network interface, and software.<sup>417</sup>

- A method of handling project cost underruns and overruns.<sup>418</sup>

- A periodic review by the representatives of the budget for the project.<sup>419</sup>

- The designation of an entity or party with responsibility for ensuring that transit capital as well as operating needs are considered.<sup>420</sup>

## K. Construction and Maintenance

The agreements reviewed contain a variety of commitments relating to the construction and maintenance of transit properties or improvements.<sup>421</sup>

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<sup>410</sup> App. A, Item 45, Greater Cleveland RTA/Cleveland, Ohio, art. 2.3, at 7.

<sup>411</sup> App. A, Item 33, LYNX/Polk County ¶¶ 1 and 3, at 1–2 (e.g., to paratransit services in and near rural areas).

<sup>412</sup> App. A, Item 2, CDTA/Albany, N.Y., at 2 (e.g., pedestrian priority, mixed uses, and limited parking).

<sup>413</sup> App. A, Item 38, Metra/Vill. of Downers Grove, art. III(3), at 3.

<sup>414</sup> App. A, Item 2, CDTA/Albany, N.Y., at 3.

<sup>415</sup> App. A, Item 53, Omnitrans/Chaffey Community College Dist. § 1, at 4.

<sup>416</sup> App. A, Item 15, Phoenix PTD/Tempe, Ariz. § 3, at 1.

<sup>417</sup> App. A, Item 13, Chicago OEMC/CTA ¶ 3. *See also* Item 58, RTA/Arapahoe County (Joint occupancy of the county administration building for the use of RTA's radio communications equipment); Item 60, RTA/State of Colorado, Governor's Office of Information Technology (setting a framework for allowing RTD to share access to state-owned communication sites).

<sup>418</sup> App. A, Item 106, Tri-Met/Clackamas County Dev. Agency, arts. 7.2 and 7.3, at 17–18.

<sup>419</sup> *Id.*, art. 5.13, at 11.

<sup>420</sup> App. A, Item 56, Omnitrans/SCAG et al. § 1.2, at 2.

### 1. Construction

Among the agreements' provisions are requirements for:

- The submission of a site plan and contractor drawings for a locality's prior approval.<sup>422</sup>

- The submission of construction drawings, for example, to the city for review and comment.<sup>423</sup>

- The preparation of a traffic and access plan, traffic control plan, and construction staging plan.<sup>424</sup>

- The installation of additional signage to increase passenger awareness.<sup>425</sup>

- The timely application for permits.<sup>426</sup>

- The obligation to comply with the requirements of any land development laws.<sup>427</sup>

- A clause designating ownership of the work on its completion.<sup>428</sup>

- The need for prior approval to install and maintain additional equipment or appurtenances.<sup>429</sup>

- Any provisions that are required to be included in a contract with a contractor performing any of the work.<sup>430</sup>

- The providing by contractors of performance and payment bonds.<sup>431</sup>

- A requirement that contractors and subcontractors must permit inspections by the FTA and state DOT.<sup>432</sup>

- Provisions that must be included in subcontracts.<sup>433</sup>

- The certifications needed to demonstrate that sums owed to subcontractors and suppliers were paid from a previous progress payment made to a contractor.<sup>434</sup>

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<sup>421</sup> *See* App. A, Item 64, RTA/CDOT (allowing the perpetual use, operation, maintenance, and future modifications of the CDOT transportation facilities to allow for the construction, use, and maintenance of certain RTD-owned facilities jointly in, on, over, and under the property subject to the agreement); Item 67, RTA/CDOT (setting forth rights, duties, and obligations of the parties arising out of the ownership, operation, and maintenance of the T-Rex Project involving I-25 and I-225).

<sup>422</sup> App. A, Item 26, LYNX/Orlando, Fla. § 9.4, at 9.

<sup>423</sup> App. A, Item 91, SANDAG/North San Diego County Transit Dev. Bd. et al. ¶¶ 5, at 4.

<sup>424</sup> App. A, Item 109, Utah Transit Auth./Salt Lake City Corp., art. 18.1, at 43.

<sup>425</sup> App. A, Item 34, Metra/IDOT ¶ I, at 2.

<sup>426</sup> App. A, Item 28, LYNX/Orange County § 5(A)(4), at 9.

<sup>427</sup> *Id.*

<sup>428</sup> App. A, Item 54, Omnitrans/Caltrans § V(4), at 6.

<sup>429</sup> App. A, Item 97, San Francisco MTA/BART ¶ 3, at 5.

<sup>430</sup> App. A, Item 38, Metra/Vill. of Downers Grove, art. III(12), at 4–5; art. III(14), at 5 (e.g., fiber optic and cable lines).

<sup>431</sup> App. A, Item 53, Omnitrans/Chaffey Community College Dist. § II(2), at 6 (e.g., for 100 percent of the contract price).

<sup>432</sup> App. A, Item 27, LYNX/Orlando Urban MPO ¶ 3(A), at 1 (e.g., work, materials, payroll, and other relevant records).

<sup>433</sup> *Id.* ¶ 3(F), at 6.

<sup>434</sup> App. A, Item 27, LYNX/Orlando Urban MPO ¶ 6(A), at 7.

- The preservation of the parties' rights to any copyrights, patents, or other intellectual property.<sup>435</sup>
- The right to inspect a project.<sup>436</sup>
- The reimbursement of other parties or third parties for emergency work necessitated by the conduct of a party's contractor.<sup>437</sup>

## 2. Maintenance

As for maintenance commitments and requirements, the IGAs and MOUs referred to a transit agency's obligation to arrange for:

- The maintenance of right-of-way, equipment, transit stations, and other facilities.<sup>438</sup>
  - The maintenance of traffic control devices, street lighting, shelters and seating, and restrooms.<sup>439</sup>
  - The applicability of maintenance standards<sup>440</sup> and a requirement of inspections.<sup>441</sup>
  - An agreement to relocate a facility when necessary for county or state construction, repairs, or maintenance.<sup>442</sup>
  - The responsibility for parking facility management and maintenance.<sup>443</sup>

## L. Real Property Issues

Real property issues are often a part of transit agency IGAs and MOUs with provisions regarding:

- The parties' acquisition of property, including the use of eminent domain.<sup>444</sup>
- The acquisition of property for joint development.<sup>445</sup>
- The acquisition of surface, subsurface, and air rights.<sup>446</sup>
- Other acquisition-related activity, including appraisals, purchase negotiations, escrows, and eminent domain actions.<sup>447</sup>

<sup>435</sup> App. A, Item 13, Chicago OEMC/CTA ¶ 2(b).

<sup>436</sup> *Id.* § 7.

<sup>437</sup> App. A, Item 38, Metra/Vill. of Downers Grove, art. II(4), at 2.

<sup>438</sup> App. A, Item 22, LYNX/Winter Park Town Center § 4, at 3 (placement of transit station); Item 49, Metro-North/N.J. Transit, art. 4.01, at 12; Item 24, LYNX/Winter Park ¶ 11, at 7.

<sup>439</sup> App. A, Item 54, Omnitrans/Caltrans §§ III and II, at 3–4.

<sup>440</sup> App. A, Item 26, LYNX/Orlando, Fla. § 12, at 3.

<sup>441</sup> *Id.* § 13, at 15.

<sup>442</sup> App. A, Item 28, LYNX/Orange County, Fla. § 5(A)(10), at 10.

<sup>443</sup> App. A, Item 39, Metra/Vill. of New Lenox ¶¶ 4, at 2. *See also* Item 69, RTA/Longmont, Colo. (improvements to a parking facility and construction of additional parking).

<sup>444</sup> App. A, Item 15, Phoenix PTD/Tempe, Ariz. § 5, at 2.

<sup>445</sup> App. A, Item 78, MetroLink/Moline, Ill. ¶ 5, at 3 (community transportation center).

<sup>446</sup> App. A, Item 76, MetroLink/Moline, Ill. ¶ 1, at 2; Item 78, MetroLink/Moline, Ill. ¶ 1, at 2.

- The responsibility for planning, zoning, and permits.<sup>448</sup>
- The development of adjacent properties.<sup>449</sup>
- The exchange and development of state properties.<sup>450</sup>
  - The granting of easements for the establishment of a transit station<sup>451</sup> or the granting of rights of access to rail properties.<sup>452</sup>
  - The granting of licenses.<sup>453</sup>
  - The granting of subleasing rights.<sup>454</sup>
  - The retention of access rights.<sup>455</sup>
  - The responsibility for paying certain administrative costs associated with maintenance activities.<sup>456</sup>
  - The allocation of any tax increment if any real property is returned to the tax roles.<sup>457</sup>

## M. Compliance with Federal and State Laws

### 1. Environmental Compliance

Numerous agreements include requirements for environmental compliance, such as:

- A statement of the applicable laws and the environmental responsibilities of the parties.<sup>458</sup>
- A designation of the individuals who are to administer an agreement for environmental compliance.<sup>459</sup>
- A requirement that both proven and innovative techniques to enhance environmental protection are to be incorporated into a project.<sup>460</sup>
- The need to review and provide guidance of work involving hazardous materials or investigations of the same.<sup>461</sup>

<sup>447</sup> App. A, Item 7, CATS/Charlotte, N.C. ¶ 3, at 3; Item 55, Omnitrans/San Bernadino Associated Governments ¶ 4.02, at 2 (regional commuter transit center).

<sup>448</sup> App. A, Item 55, Omnitrans/San Bernadino Associated Governments ¶¶ 4.03, at 3.

<sup>449</sup> App. A, Item 76, MetroLink/Moline, Ill. ¶ 7, at 3.

<sup>450</sup> App. A, Item 55, Omnitrans/San Bernadino Associated Governments ¶¶ 4.05 and 4.06, at 3.

<sup>451</sup> App. A, Item 22, LYNX/Winter Park Town Center § 1, at 2.

<sup>452</sup> App. A, Item 49, Metro-North/N.J. Transit, art. 3.02, at 7.

<sup>453</sup> App. A, Item 28, LYNX/Orange County § 5(A)(1), at 8 (e.g., to install certain customer amenities at transit stops on right-of-way, subject to further required approvals).

<sup>454</sup> App. A, Item 78, MetroLink/Moline, Ill. ¶ 7, at 3.

<sup>455</sup> *Id.* ¶ 11, at 9.

<sup>456</sup> App. A, Item 55, Omnitrans/San Bernadino Associated Governments ¶ 4.02, at 2.

<sup>457</sup> *Id.* ¶ 8.02, at 5.

<sup>458</sup> App. A, Item 92, SANDAG/Caltrans ¶ 10, at 17–19.

<sup>459</sup> App. A, Item 14, StarTran/U. of Nebraska ¶ I, at 1.

<sup>460</sup> App. A, Item 109, Utah Transit Auth./Salt Lake City Corp., art. 11.2, at 27.

<sup>461</sup> App. A, Item 105, Tri-Met/Oregon ¶ 2(a), at 2 (compliance with environmental standards).

- A requirement that contractors prepare a Hazardous and Contaminated Substance Health and Safety Plan or the equivalent in the applicable jurisdiction.<sup>462</sup>
- A mandate that a transit authority perform certain prescribed actions when dictated by site conditions.<sup>463</sup>
- A statement of the approvals required by state or local environmental offices.<sup>464</sup>
- An authorization to enter sites to observe a transit authority's or contractor's work and to conduct tests.<sup>465</sup>
- The requirements to sample and progressively monitor a project for quality assurance.<sup>466</sup>
- The obligation to reimburse a state or locality for costs incurred in connection with environmental compliance for a project.<sup>467</sup>

## 2. Compliance with Civil Rights and Disadvantaged Business Enterprise Laws

The agreements often contain broad provisions to assure compliance with federal and state laws against discrimination and to promote disadvantaged business enterprises (DBE).<sup>468</sup> Clauses include:

- A statement of the applicable civil rights laws and the requirement to comply with them.<sup>469</sup>
- A requirement to comply with DBE laws, goals, or commitments.<sup>470</sup>
- A requirement that a contract with any contractor include provisions affirming that the contractor will comply with federal DOT regulations relating to non-discrimination in federally assisted programs.<sup>471</sup>

## N. Transit Pass Programs

Transit agencies have established a variety of transit pass programs. The agreements may include provisions such as:

- Establishing eligibility criteria for participation in an unlimited access, transit pass program.<sup>472</sup>

- Designating a state or other office to determine eligibility of participants.<sup>473</sup>
- Advertising and promoting an access program.<sup>474</sup>
- Monitoring an incentive program to prevent fraud and abuse.<sup>475</sup>
- Designating ridership services starting with a base-year count.<sup>476</sup>
- Paying on a per-rider basis after a card-validation system is activated.<sup>477</sup>
- Enabling the use of transit cards on other transit providers.<sup>478</sup>
- Providing for reimbursement, including the rate of reimbursement, required data, and maximum amount of reimbursement.<sup>479</sup>
- Providing for general public transportation funding.<sup>480</sup>
- Including a link on a university Web site for customer information and routing.<sup>481</sup>

The IGAs and MOUs also may include provisions such as for:

- Complying with state laws on security.<sup>482</sup>
- Creating a software package to permit issuance of passes.<sup>483</sup>
- Requiring that reports (e.g., quarterly) be provided.<sup>484</sup>
- Including a party's logo on transit cards.<sup>485</sup>
- Assigning responsibility for:
  - Printing or procurement of passes.
  - Distribution of passes, their specifications, and quality control.
  - Acquisition and maintenance of necessary equipment for a transit pass program.<sup>486</sup>
  - Providing a toll-free telephone number.<sup>487</sup>
  - Creating and maintaining a database for the program.<sup>488</sup>

<sup>462</sup> *Id.* ¶ 2(b), at 3.

<sup>463</sup> *Id.* ¶ 2(c), at 3 (underground storage tank and cleanup).

<sup>464</sup> *Id.* ¶ 2(d), at 4.

<sup>465</sup> *Id.* ¶ 4, at 4–5.

<sup>466</sup> *Id.* ¶¶ 5, 6, and 7, at 5–6.

<sup>467</sup> *Id.* ¶ 9, at 6.

<sup>468</sup> App. A, Item 14, StarTran/U. of Nebraska ¶ VIII, at 3; Item 40, Metra/Western Ill. U. ¶ 8, at 9–11.

<sup>469</sup> App. A, Item 12, Chicago/CTA § 9 (e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; 49 U.S.C. § 5332 (prohibiting discrimination on the basis of race, color, creed, national origin, sex, or age and prohibiting discrimination in employment or business opportunity); and 49 C.F.R. Pt. 21, at 21.7).

<sup>470</sup> *Id.* § 9.

<sup>471</sup> App. A, Item 27, LYNX/Orlando Urban MPO ¶ 3, at 2–4.

<sup>472</sup> App. A, Item 1, CDTA/SUNY, at 1 (unlimited access transit passes). *See also* Item 73, RTA/Denver Public Schools (To provide District students who are eligible for the free or reduced price lunch program with transit passes at a 2 percent discount).

<sup>473</sup> App. A, Item 1, CDTA/SUNY, at 2.

<sup>474</sup> *Id.* at 1.

<sup>475</sup> *Id.* at 2.

<sup>476</sup> App. A, Item 3, CDTA/SUNY ¶ 3, at 1 (provide ridership services as needed beginning with a base year count of riders).

<sup>477</sup> *Id.* ¶ 4, at 2.

<sup>478</sup> App. A, Item 37, Metra/CTA, et al. ¶ 5, at 3 (providing of transit services to Rail-Volution participants).

<sup>479</sup> App. A, Item 94, San Francisco MTA/BART § 2, at 3 (inter-operator monthly pass).

<sup>480</sup> App. A, Item 28, LYNX/Orange County, Fla. § 3(B), at 5.

<sup>481</sup> App. A, Item 3, CDTA/SUNY ¶ 5, at 2.

<sup>482</sup> *Id.* ¶ 15, at 3.

<sup>483</sup> App. A, Item 28, LYNX/Orange County, Fla. § 3(B), at 6.

<sup>484</sup> *Id.* at 6–7.

<sup>485</sup> App. A, Item 37, Metra/CTA, et al. ¶ 2, at 1.

<sup>486</sup> App. A, Item 94, San Francisco MTA/BART § 3, at 4 (FastPass®).

<sup>487</sup> App. A, Item 31, LYNX/FDOT (FlexBus transit system).

<sup>488</sup> *Id.*

- Directing that monetary damages will be sought for a contractor's, subcontractor's, or consultant's submission of false claims.<sup>489</sup>

## O. Technology

Some agreements refer to technology, stating, for instance, that the participants will:

- Commit to develop and implement programs and project management tools for transportation improvements.<sup>490</sup>
- Provide a server to enable the use of a service or equipment.<sup>491</sup>
- Require prior review and approval of any content to be downloaded to a transit agency's server.<sup>492</sup>
- Acquire compatible technology to facilitate the intent of the agreement.<sup>493</sup>

## P. Claims, Insurance, Indemnity, and Immunity

### 1. Claims

In regard to claims, an agreement may provide for:

- The identification of the party responsible for responding to any claims arising out of the agreement.
- The obligation of the parties to contribute to the cost of responding to and paying claims.

### 2. Insurance

As for insurance, agreements include clauses that:

- Identify the party having responsibility for securing insurance.
- Specify the coverage and limits.<sup>494</sup>
- Require a party to provide proof of insurance.<sup>495</sup>
- Require that facilities not be used for a purpose that would affect or invalidate an insurance policy.<sup>496</sup>
- Obligate a party to disclose that it is self-insured in whole or in part.<sup>497</sup>

<sup>489</sup> App. A, Item 94, San Francisco MTA/BART § 7(I), at 10–11.

<sup>490</sup> App. A, Item 92, SANDAG/Caltrans ¶¶ 5.14.1.1 and 5.14.12.1, at 13.

<sup>491</sup> App. A, Item 43, Greater Cleveland RTA/Cleveland St. U. ¶ 2(A), at 2 (touch-screen kiosks).

<sup>492</sup> *Id.* ¶ 2(B), at 2 (e.g., to serve as the host site for touch-screen kiosks).

<sup>493</sup> App. A, Item 33, LYNX/Polk County ¶ 3, at 2 (FTA funded demonstration project).

<sup>494</sup> App. A, Item 11, Bend, Or./COIC, at 10; Item 12, Chicago/CTA § 8; Item 53, Omnitrans/Chaffey Community College Dist. § 18, at 8–10 (stating that required insurance coverage includes commercial general liability insurance, business and automobile liability insurance, public and property damage liability insurance, workers' compensation insurance, and errors and omissions and professional liability insurance).

<sup>495</sup> App. A, Item 79, MetroLink/Moline, Ill. ¶ 4, at 3.

<sup>496</sup> App. A, Item 39, Metra/Vill. of New Lenox ¶ 9, at 4.

- Specify that self-insurance will not be limited by an indemnification clause or by any judicial limitation on an indemnity provided for by an agreement.<sup>498</sup>

- Require that property on the premises also be insured.<sup>499</sup>

### 3. Indemnity

Numerous agreements reviewed for the digest include an indemnification clause and require parties:<sup>500</sup>

- To reimburse for claims or expenses, including fines imposed by any state or local agency.<sup>501</sup>
- To require that related contracts have indemnification clauses.<sup>502</sup>

### 4. Immunity

Some agreements include a clause stating that a governmental unit or agency has not waived its immunity by entering into the agreement.<sup>503</sup>

## Q. Termination and Distribution of Property

Many agreements that were reviewed include a termination provision, but the clauses vary considerably. Termination provisions may include:

- The method by which a party to an agreement may cancel or terminate its participation.<sup>504</sup>
- The termination of an agreement for cause or for convenience.<sup>505</sup>
- The termination of an agreement without cause on 120 days prior notice.<sup>506</sup>
- The automatic renewal of an agreement for successive terms if no prior notice of termination has been given.<sup>507</sup>
- A defaulting or breaching party's 30-day right to cure a default or breach.<sup>508</sup>
- A right of withdrawal from an agreement as provided in a party's by-laws.<sup>509</sup>

<sup>497</sup> App. A, Item 12, Chicago/CTA § 8 (party's certification by letter of self-insurance).

<sup>498</sup> *Id.*

<sup>499</sup> App. A, Item 79, MetroLink/Moline, Ill. ¶ 3, at 2.

<sup>500</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 2. *See also* Item 11, Bend, Or./COIC, at 11; Item 12, Chicago/CTA § 10.

<sup>501</sup> App. A, Item 53, Omnitrans/Chaffey Community College Dist. § I(8), at 5.

<sup>502</sup> App. A, Item 28, LYNX/Orange County, Fla. § 8, at 13.

<sup>503</sup> App. A, Item 48, Harris County MTA/TxDOT et al., at 20.

<sup>504</sup> *Id.*, at 21; Item 17, Sandy Springs, Colo./Oregon DOT, at 8.

<sup>505</sup> App. A, Item 19, LYNX/Orlando, Fla. ¶ 29.1 and 2, at 13.

<sup>506</sup> App. A, Item 32, LYNX/Volusia County, Fla. ¶ 20, at 8.

<sup>507</sup> App. A, Item 49, Metro-North/N.J. Transit, art. 2.02, at 4.

<sup>508</sup> App. A, Item 23, LYNX/Seminole County, Fla. § 16(i), at 14.

- Any delays not beyond a party's or consultant's "reasonable control" as constituting a material breach.<sup>510</sup>

- A clause permitting termination of an agreement for the purpose of negotiating a new agreement.<sup>511</sup>

- The termination of an agreement for the reason that federal or state funds are not available.<sup>512</sup>

- The disposition, distribution, or return of any property that either was transferred to the agreement or was acquired during the term of the agreement.<sup>513</sup>

- The distribution of any funds or surplus money or property in proportion to the contributions made by the parties or on some other basis.<sup>514</sup>

- The survival of certain provisions of a prior but terminated agreement.<sup>515</sup>

- A stipulation that there is no monetary claim under the agreement by one party against another party.<sup>516</sup>

- A statement of the actions that are required to be completed after the termination of the contract.<sup>517</sup>

## R. Dispute Resolution

Dispute settlement procedures in agreements furnished by transit agencies provide for several methods, such as:

- The parties are to mediate any disputes informally.<sup>518</sup>

- The parties are to arbitrate any dispute.

- The parties submit to a multistage conflict resolution process and include a forum selection clause for any judicial resolution of a dispute.<sup>519</sup>

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<sup>509</sup> App. A, Item 15, Phoenix PTD/Tempe, Ariz. §§ 6 and 7, at 2.

<sup>510</sup> App. A, Item 40, Metra/Western Ill. U. ¶ I(C), at 4.

<sup>511</sup> App. A, Item 49, Metro-North/N.J. Transit, art. 2.03, at 5.

<sup>512</sup> App. A, Item 27, LYNX/Orlando Urban MPO ¶ 6(B)(6), at 8.

<sup>513</sup> App. A, Item 11, Bend, Or./COIC, at 4 and 9.

<sup>514</sup> App. A, Item 41, El Paso County, Colo./Colorado Springs, Colo. et al., at 9.

<sup>515</sup> App. A, Item 49, Metro-North/N.J. Transit, art. 2.01, at 4 (e.g., compensation for prior revenue loss).

<sup>516</sup> App. A, Item 51, Omnitrans/Riverside Transit Agency, art. 10, at 4 (coordination of route planning, scheduling, stops, transfers, and fares).

<sup>517</sup> App. A, Item 23, LYNX/Seminole County, Fla. § 16(c), at 12–13 (e.g., preparation of all necessary reports and documents, return of property); Item 27, LYNX/Orlando Urban MPO ¶ 7(B), at 9 (e.g., cease from obligating new costs and remit portions of financing or advance payments).

<sup>518</sup> App. A, Item 11, Bend, Or./COIC, at 5 (providing for renegotiation of the agreement).

<sup>519</sup> App. A, Item 17, Sandy Springs, Colo./Oregon DOT, at 9.

## S. Other Common and Concluding Provisions

The agreements furnished by transit agencies tend to include a variety of provisions or clauses that are found in other types of contracts, such as:

- An integration clause.<sup>520</sup>

- A clause regarding liability for attorney's fees,<sup>521</sup> such as a party having to bear its own attorney's fees in the event of litigation.<sup>522</sup>

- A severability clause.<sup>523</sup>

- A clause identifying any agreements that are to be assigned.<sup>524</sup>

- A clause prohibiting assignment of the agreement without the prior written consent of the other party or parties to the agreement.<sup>525</sup>

- A nonwaiver clause in the event of a breach of the agreement.<sup>526</sup>

- A statement that an agreement is in compliance with all applicable laws.<sup>527</sup>

- A clause identifying which state's law governs the agreement.<sup>528</sup>

- A forum selection clause.

- The form of any notices required by the agreement and the method(s) of service or delivery.<sup>529</sup>

- Approval of the agreement by the state's attorney general as required by some states' laws.<sup>530</sup>

- A disclaimer of warranties.<sup>531</sup>

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<sup>520</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 3 (i.e., providing that all prior discussions and documents are deemed to be merged in the agreement as the parties' only agreement).

<sup>521</sup> *Id.*

<sup>522</sup> App. A, Item 50, Omnitrans/Loma Linda, Cal. ¶ 13, at 12.

<sup>523</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 3; Item 13, Chicago OEMC/CTA ¶ 10 (providing for the survival of the remainder of the agreement even if a provision is held to be invalid).

<sup>524</sup> App. A, Item 11, Bend, Or./COIC, at 2 (e.g., grant sub-recipient agreements; property use agreements; assignments of existing contracts; documentation regarding assignment or transfers of personnel).

<sup>525</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 3; Item 11, Bend, Or./COIC, at 12; Item 13, Chicago OEMC/CTA ¶ 9 (sharing of real-time data); Item 23, LYNX/Seminole County, Fla. § 14, at 11.

<sup>526</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 3; Item 13, Chicago OEMC/CTA ¶ 18 (providing that the failure to object to a party's breach of a provision of the IGA does not constitute a waiver of the noncomplainant party's breach).

<sup>527</sup> App. A, Item 13, Chicago OEMC/CTA ¶ 11.

<sup>528</sup> App. A, Item 11, Bend, Or./COIC, at 12; Item 13, Chicago OEMC/CTA, ¶ 12.

<sup>529</sup> App. A, Item 10, Avondale, Ariz./Tolleson, Ariz., at 3–4; Item 11, Bend, Or./COIC, at 11–12; Item 12, Chicago/CTA § 11; Item 13, Chicago OEMC/CTA ¶ 19.

<sup>530</sup> App. A, Item 47, La Crosse Mun. Transit Utility/City of Crescent ¶ 11, at 2.

<sup>531</sup> App. A, Item 80, MetroLink/SMTD ¶ 8, at 3 (paratransit vehicles).

- A successor-in-interest clause.<sup>532</sup>
- A clause stipulating that no personal liability is intended or created by the agreement.<sup>533</sup>
- A commitment by the parties to resolve issues resulting from changed conditions.<sup>534</sup>
- The assumption of the risk of loss in regard to real or personal property.<sup>535</sup>

## VI. DISCUSSION OF THE TRANSIT AGENCIES' OTHER RESPONSES TO THE SURVEY

### A. Annual Ridership of Transit Agencies Responding to the Survey

As may be seen in Tables 2 and 3, the transit agencies responding to the survey varied significantly in the number of patrons for their rail and bus service in 2010 and 2011.

**Table 2.**  
**Transit Agency Ridership by Rail 2010/2011**

No. of Passenger Trips	No. of Transit Agencies Responding
100,000,000 to 250,000,000	1
50,000,000 to 99,999,999	4
10,000,000 to 49,999,999	4
1,000,000 to 9,999,999	4
100,000 to 999,999	1
0	15
No response	5

**Table 3.**  
**Transit Agency Ridership by Bus 2010/2011**

No. of Passenger Trips	No. of Transit Agencies Responding
300,000,000 to 400,000,000	1
200,000,000 to 299,999,999	0
100,000,000 to 199,999,999	4 <sup>536</sup>
50,000,000 to 99,999,999	1
25,000,000 to 49,999,999	4
10,000,000 to 24,999,999	6
1,000,000 to 9,999,999	9
500,000 to 999,999	2
100,000 to 499,999	1
0	2
No response	4

### B. Benefits Derived by Transit Agencies Using IGAs and MOUs

Transit agencies were asked to identify benefits that they have derived from their use of IGAs and MOUs. The agencies' responses were that the agreements establish a clear purpose and expectations;<sup>537</sup> identify, define, and clarify the parties' responsibilities<sup>538</sup> and areas of agreement;<sup>539</sup> set forth obligations and schedules for action; provide greater flexibility;<sup>540</sup> and are legally defensible.<sup>541</sup> Moreover, the agreements may establish broad public support<sup>542</sup> and create goodwill,<sup>543</sup> in part because the agreements may require the approval of each party's governing body or of the voters.<sup>544</sup> The agreements permit "advanced agreement on procedures and/or liability generally [and] lead to streamlining and lower risk."<sup>545</sup> Other reasons given include necessity, budgetary economies, an increase in service efficiency, an improvement in customer service, and

<sup>532</sup> App. A, Item 23, LYNX/Seminole County, Fla. § 15, at 12 (providing that the agreement is binding on successors in interest, transferees, and assigns).

<sup>533</sup> App. A, Item 24, LYNX/Winter Park ¶ 15, at 7.

<sup>534</sup> App. A, Item 50, Omnitrans/Loma Linda, Cal. ¶ 11, at 11.

<sup>535</sup> App. A, Item 49, Metro-North/N.J. Transit, art. 9.05, at 32.

<sup>536</sup> One agency's ridership includes trolley coach service.

<sup>537</sup> Survey response of LYNX.

<sup>538</sup> Survey responses of Columbia Transit, Greater Portland Transit Dist., Greater Cleveland RTA (define roles and responsibilities), Suburban Bus Division of the Regional Transp. Auth. (PACE).

<sup>539</sup> Survey response of New Jersey Transit Corp.

<sup>540</sup> Survey response of Omnitrans.

<sup>541</sup> Survey response of LYNX.

<sup>542</sup> *Id.*

<sup>543</sup> Survey response of CT Transit.

<sup>544</sup> Survey response of LYNX.

<sup>545</sup> SANDAG.

procurement savings,<sup>546</sup> such as the ability to obtain insurance, fuel, and supplies at a lower cost.<sup>547</sup>

Various transit agencies reported that the agreements allowed the agency to advance projects it could not implement on its own and to increase its relevance to the communities the agency serves by stretching available resources.<sup>548</sup> The Greater Cleveland Regional Transit Authority (RTA) uses MOUs to “tie down key deal points” before negotiating an agreement.<sup>549</sup> Metra said that IGAs may be used to manage a regional operation and also noted that it does not have eminent domain power, “but locals do.”<sup>550</sup> The Utah Transit Authority observed that MOUs may provide an agency with long-term documentation of working relationships that endure well beyond the terms of elected officials who are in office at the time of signing.<sup>551</sup>

According to the Los Angeles MTA, “[s]ometimes using an MOU will help get a project started. Most times, the parties do not want to begin unless they have a general commitment. An MOU helps to move a project along to the next stage where funding or in-kind services may be required.”<sup>552</sup>

TriMet advised that

IGAs provide enforceable agreements between the transacting parties, with clear framework/structure, including dispute resolution procedures. TriMet obtains the benefits of the authorizing authority, resources and specialized expertise from other governmental entities to assist in furthering TriMet’s business objectives and statutory mandates. The use of IGAs can result in efficiencies and cost savings to TriMet. Vital regional relationships can be established that assist in facilitating TriMet’s regional transportation planning and service goals and objectives.

MOUs are often used as [a] planning tool, i.e., the path to an IGA, and are useful to establish the intent of the parties with respect to development of further agreements.<sup>553</sup>

However, the Greater Cleveland RTA observed that agencies may have difficulty meeting their respective funding timelines and that priorities may change, thus rendering “problematic” the meeting of requirements established with third parties.

The Los Angeles MTA stated:

Usually the issues arise because staff [does] not understand what authority is needed to sign an MOU or who is authorized to sign an MOU because they believe it is a non-binding document. This is especially true if the MOU does not commit any funds, only commits in-kind services or is an agreement where LACMTA receives funds to per-

form a certain task. As stated previously, we treat MOUs as any other agreement or contract and will require the appropriate approvals prior to approving the form of the MOU.

Metro-North said that the agreements are difficult to amend and that some issues are not dealt with and left to a “political solution” that can be elusive. Similarly, Omnitrans reported that it “frequently runs into the challenge of negotiating with and coordinating projects with other public agencies as some agency’s and/or their constituents may not be as invested in a project which can may make it politically difficult to reach agreement.”

### C. Issues to Avoid or Resolve When Drafting IGAs and MOUs

Of the 31 agencies using IGAs or MOUs, 16 reported that they could not identify any particular transit-related issues to avoid or resolve when negotiating or drafting an IGA or MOU. The Capital District Transportation Agency’s response was that

[a] major purpose of these types of agreements is clarification of [the] roles and responsibilities in implementing projects. This frequently includes provisions to avoid fraud or abuse in benefit programs (like our pass subsidy MOUs), provisions on required reporting to meeting regulations governing the fund source, and mutual indemnity provisions.<sup>554</sup>

Other agencies emphasized that there may be both indemnification and coordination issues in regard to service, infrastructure, and procurement;<sup>555</sup> that the parties’ funding responsibilities should be clearly identified;<sup>556</sup> and that a transit agency should make it clear that its own service commitments take priority.<sup>557</sup> Other issues said to be important include allocating responsibility and liability;<sup>558</sup> determining the appropriate cost-allocation and payment methodologies between transit agencies and the budgetary impacts of setting fares;<sup>559</sup> defining the scope of the agreement;<sup>560</sup> and taking care to identify permitting and zoning requirements.<sup>561</sup>

Metro-North stated that the modification of funding issues is the most difficult to resolve.<sup>562</sup> Commitments must be sought to provide for the development of facilities, operation, and maintenance in accordance with the agency’s standards.<sup>563</sup> According to the Greater Cleveland RTA, establishing the federal interest in real estate agreements is sometimes difficult to accomplish,

<sup>546</sup> Survey response of San Francisco MTA.

<sup>547</sup> Survey responses of SARTA and WTA (the latter agency stating that the sharing of services between government entities results in savings).

<sup>548</sup> Survey response of CDTA.

<sup>549</sup> Survey response of Greater Cleveland RTA.

<sup>550</sup> Survey response of Metra.

<sup>551</sup> Survey response of Utah Transit Auth.

<sup>552</sup> Survey response of Los Angeles MTA.

<sup>553</sup> Survey response of TriMet.

<sup>554</sup> Survey response of CDTA.

<sup>555</sup> Survey response of Phoenix PTD.

<sup>556</sup> Survey response of Central Arkansas Transit Auth.

<sup>557</sup> Survey response of CT Transit.

<sup>558</sup> Survey response of SANDAG.

<sup>559</sup> Survey response of San Francisco MTA.

<sup>560</sup> *Id.*

<sup>561</sup> Utah Transit Auth.

<sup>562</sup> Survey response of Metro-North.

<sup>563</sup> Survey response of Metra.

such as in taking a sublease when the lease is shorter than the useful life of a structure that the agency intends to build on the subleased property.<sup>564</sup> Omnitrans stated that when “a project requires the relocation of another agency’s utility infrastructure, our agency has found it particularly challenging to reach agreement on related agreement terms such as schedule of access to the utilities”; to get approvals for work thereon and the timeframe for completion; and to secure agreement on provisions on costs and indemnification that are acceptable to all parties.” TriMet observed that when “federal funds are to be used to pay for services that Trimet procures using an IGA, the IGA must include federal provisions acceptable to FTA. TriMet’s legislative authority and scope of powers must be reflected in the development of [the] terms and conditions.”

#### D. Lessons Learned with the Use of IGAs and MOUs

Of the 31 agencies using IGAs or MOUs, 18 responded that they could not identify any solutions they had developed or lessons learned in the use of IGAs or MOUs. One agency commented that it had had very good experience in using IGAs and MOUs during the course of providing goods and/or services.<sup>565</sup> However, negotiations should commence as early as possible, particularly when there are many complicated issues to address.<sup>566</sup> The intervention of executives or policymakers may be required because staff-level discussions may not be sufficient to reach an agreement.<sup>567</sup> The objective should be to get an agreement in place as early as possible in the process of developing a project.<sup>568</sup> A signature process should be instituted because the participating agencies’ board meetings may be months apart.<sup>569</sup> The agencies responded that that it is important for the agreements to have set terms and expiration dates<sup>570</sup> and to be as specific as possible when defining the agreement’s purpose, responsibilities, obligations, and schedules.<sup>571</sup> Agencies noted that care must be taken to secure appropriate approvals prior to entering into an agreement.<sup>572</sup> Agreements should not only be reviewed periodically<sup>573</sup> but also be analyzed prior to renewal to ascertain their success in meeting stated goals.<sup>574</sup> Other agencies pointed out that it may be useful to create a master or umbrella agreement that is supplemented as

the project or relationship becomes more clearly developed.<sup>575</sup>

The Los Angeles MTA stated that it also included standard contract terms addressing issues such as indemnity, insurance, termination, and liability.<sup>576</sup> Omnitrans stated it

has found that when it is in the position of being the project proponent, before approaching the partner agency it is imperative that project goals be clearly identified and communicated early on. Experience has demonstrated that failure to do this tends to create a situation in which the partner agency attempts to drive the project negotiations.<sup>577</sup>

Other agencies commented that the agreements must be specific about which entities pay for which improvements and clearly define the area or property covered by the agreements.<sup>578</sup> One respondent observed that IGAs may be renewed on an annual or biannual basis but that year-to-year agreements do not allow the implementation of a long-term financial structure to ensure the proper management of costs.<sup>579</sup> One agency said that “[s]ometimes there can be a tendency to kick tough issues ‘down the road,’ or to trust engineers to work things out later. The better mantra is that ‘good fences make good neighbors.’”<sup>580</sup> Finally, Omnitrans stated that the enforcement of IGAs or MOUs with other public entities is a political challenge.<sup>581</sup>

As discussed, several agencies responding to the survey stressed the need for IGAs and MOUs to be as detailed as possible, in particular for there to be a thorough scope of the work covered by an agreement, and for the agencies’ executives to be involved so that an agreement will be completed and signed in a timely fashion.

## VII. CONCLUSION

Many transit agency IGAs and MOUs are in effect. Although there is some consistency among the states’ enabling laws for IGAs, the constitutional provisions and enabling statutes vary considerably. The purpose of the state statutes, however, uniformly appears to be to increase the efficiency and effectiveness of local governments by authorizing them to enter into contracts with one another and with state agencies. Consistent with judicial precedents, the agencies stated that an IGA is a binding, enforceable agreement, whereas an MOU is nonbinding but still may be suitable when a less formal agreement is preferable.

The agencies rely on IGAs and MOUs for bus and rail operations, for construction projects, to acquire land, to own and manage facilities, to form partner-

<sup>564</sup> Survey response of Greater Cleveland RTA.

<sup>565</sup> Survey response of Phoenix PTD.

<sup>566</sup> Survey response of San Francisco MTA.

<sup>567</sup> *Id.*

<sup>568</sup> Survey response of Utah Transit Auth.

<sup>569</sup> Survey response of San Joaquin Regional Transit Dist. (San Joaquin RTD).

<sup>570</sup> Survey response of CATS.

<sup>571</sup> Survey response of LYNX.

<sup>572</sup> Survey response of Los Angeles MTA.

<sup>573</sup> Survey response of CATS.

<sup>574</sup> *Id.*

<sup>575</sup> Survey response of SANDAG.

<sup>576</sup> Survey response of Los Angeles MTA.

<sup>577</sup> Survey response of Omnitrans.

<sup>578</sup> Survey response of Metra.

<sup>579</sup> Survey response of San Francisco MTA.

<sup>580</sup> Survey response of Regional Transportation District.

<sup>581</sup> Survey response of Omnitrans.

ships, and to procure goods and services, as well as to receive and administer grant funds. The specific uses of IGAs and MOUs are quite varied and range from an agency serving as the host agency for a region's MPO; to the designing, constructing, and maintaining of transit facilities; to providing public transit service in an area outside of an agency's jurisdiction. The agencies reported that the agreements allowed them to advance projects that they could not implement on their own and to increase their relevance to the communities they serve.

In response to the questions asked of them, the agencies identified some of the benefits of using IGAs and MOUs. Among other things, the agencies said that the agreements establish a clear purpose and expectations; identify, define, and clarify the parties' responsibilities and areas of agreement; set forth obligations and schedules for action; and provide for greater flexibility. At the same time, the agencies stated that when drafting an IGA or MOU there may be indemnification and coordination issues in regard to service, infrastructure, and procurement; that care should be taken to make sure that the scope of an agreement is sufficiently defined; and that a transit agency should make it clear that its own service commitments take priority. The enabling statutes, the transit agencies' responses, and the IGAs and MOUs furnished by the agencies were used to develop the checklist in Section IV of some of the points to consider when negotiating and drafting an agreement.

Finally, the transit agencies responding to the survey did not identify any particularly significant legal issues or problems that had arisen with their use of IGAs or MOUs. The responses, therefore, were consistent with case research that did not disclose any legal actions involving transit agencies and IGAs or MOUs.

## APPENDIX A

### LIST OF AND LINKS TO IGAS, MOUS, AND SIMILAR AGREEMENTS

[Links are included on enclosed CD-ROM]

NUMBER ASSIGNED	TRANSIT AGENCY	TYPE OF AGREEMENT	DESCRIPTION	PDF FILE
1	Capital District Transportation Authority/N.Y. State Office for People with Developmental Disabilities (Aug. 23, 2011)	MOU	Use of transportation demand management program funding to provide free unlimited-access transit passes to qualified homeowners	<a href="#"><u>Item 1</u></a>
2	Capital District Transportation Authority/City of Albany, N.Y. (Mar. 5, 2010)	MOU	Development of a transit-oriented development zoning ordinance and guidebook for use within the City's overall zoning ordinance pertaining to transit intensive corridors	<a href="#"><u>Item 2</u></a>
3	Capital District Transportation Authority/State University of N.Y. (Feb. 22, 2010)	Agreement	Provide ridership services as needed beginning with a base year account of riders	<a href="#"><u>Item 3</u></a>
4	Capital District Transportation Authority/Capital District Transportation Committee (Jan. 12, 2000)	MOU	Transit authority to act as financial agent by administering and paying committee's central staff and paying operating expenses and program costs	<a href="#"><u>Item 4</u></a>
5	Capital District Transportation Authority/Capital District Transportation Committee (Undated)	Agreement	Document compliance with 23 C.F.R. Part 450, subpart C and 49 C.F.R. Part 613, subpart A.	<a href="#"><u>Item 5</u></a>
6	Charlotte Area Transit System/Hampton Roads Transit (HRT) et al. (Undated)	Agreement	Assign and transfer to HRT options to purchase light rail vehicles	<a href="#"><u>Item 6</u></a>
7	Charlotte Area Transit System/City of Charlotte, N.C. (Apr. 20, 2009)	Agreement	Compliance with Federal Transit Administration (FTA) requirement that the department as codeveloper be bound to the same grant procedures as the City in connection with the construction of an intermodal transportation facility	<a href="#"><u>Item 7</u></a>

8	Charlotte Area Transit System/County of Mecklenburg, N.C. (Feb. 16, 1999)	Interlocal Agreement	Provide for an integrated regional transit system	<u>Item 8</u>
9	Charlotte Area Transit System/County of Mecklenburg, N.C. (Undated)	Amended Interlocal Agreement	Provide for an integrated regional transit system	<u>Item 9</u>
10	Avondale, Ariz./Tolleson, Ariz. (Aug. 21, 2006)	IGA	City of Avondale agrees to reimburse City of Tolleson for Tolleson's prorated cost of transit services	<u>Item 10</u>
11	Bend, Or./Central Oregon Intergovernmental Council (July 21, 2010)	IGA	Combining two transit systems under a single governing body	<u>Item 11</u>
12	City of Chicago/Chicago Transit Authority (CTA) (Jan. 13, 2011)	IGA	CTA's undertaking to rehabilitate a portion of a regional transit location and perform other work, with the City to pay not more than \$600,000 toward the CTA's costs from available incremental taxes as defined in the agreement	<u>Item 12</u>
13	City of Chicago Office of Emergency Management and Communication/CTA (2009)	IGA	Transfer of real-time data based on the collaborative deployment of an arterial performance monitoring system and sharing of the CTA's real-time automated vehicle location system and real-time database	<u>Item 13</u>
14	City of Lincoln, Neb. (StarTran)/University of Nebraska (Mar. 9, 2009)	Agreement	Provision of bus service to the university	<u>Item 14</u>
15	City of Phoenix Public Transit Department/Tempe, Ariz. (Jan. 24, 2003)	IGA	Establish a cooperative purchasing agreement	<u>Item 15</u>
16	City of Phoenix Public Transit Department/Tempe, Ariz. (Sept. 24, 2002)	Joint Powers Agreement	Planning, designing, constructing, and operating a light rail project	<u>Item 16</u>
17	Sandy Springs, Or./Oregon Department of Transportation (DOT)	IGA	Relating to the Transportation Growth Management (TGM) program and grants for the purpose of integrat-	<u>Item 17</u>

	(Undated)		ing transportation land use planning and a specific project for which the City was awarded a TGM grant	
18	Spokane, Wash./ Spokane County, Wash. (Jan. 15, 2008)	Interlocal Agreement	To provide for coordinated transportation planning; to mitigate transportation impacts resulting from development in a joint planning area; and to establish consistent development regulations and procedures governing the provision of all public facilities in the joint planning area	<u>Item</u> <u>18</u>
19	Central Florida Regional Transportation Authority/Orlando, Fla. (Undated)	Interlocal Agreement	Consideration of expansion alternatives relating to travel demand, trip patterns, model preferences, and transportation needs in connection with the Downtown Orlando Transportation Plan	<u>Item</u> <u>19</u>
20	Central Florida Regional Transportation Authority/Osceola County, Fla. (May 18, 2009)	Service Funding Agreement	Provide public transit services within the county	<u>Item</u> <u>20</u>
21	Central Florida Regional Transportation Authority/Department of Veterans Affairs (June 17, 2009)	Agreement	Conveyance of a vehicle to the Department of Veterans Affairs for use in furthering governmental or charitable purposes	<u>Item</u> <u>21</u>
22	Central Florida Regional Transportation Authority/Winter Park Town Center (Undated)	Transit Station Easement Agreement	Agreement to place a transit station on a portion of the grantor's property	<u>Item</u> <u>22</u>
23	Central Florida Regional Transportation Authority/Seminole County, Fla. (Jan. 27, 2009)	Interlocal Agreement	County funding to support the operation of a public transportation service within Seminole County	<u>Item</u> <u>23</u>
24	Central Florida Regional Transportation Authority/Winter Park, Fla. (Jan. 22, 2009)	Interlocal Agreement	Placement of transit shelters without advertising within the city limits	<u>Item</u> <u>24</u>
25	Central Florida Regional Transportation Authority/Winter Garden, Fla.	Agreement	Litter removal by the City at designated bus stops	<u>Item</u> <u>25</u>

	(Jan. 29, 2009)			
26	Central Florida Regional Transportation Authority/Orlando, Fla. (Dec. 15, 2008)	Interlocal Agreement	Placement of transit shelters (with advertising) within the city limits	<u>Item 26</u>
27	Central Florida Regional Transportation Authority/Orlando Urban Area Metropolitan Planning Organization (MPO) (Sept. 10, 2008)	Contract	Transit authority's agreement to render professional services concerning the Orlando Urban Area Unified Planning Work Program	<u>Item 27</u>
28	Central Florida Regional Transportation Authority/Orange County, Fla. (Dec. 16, 2008)	Agreement	Provision of transit services including to an organization providing recreational opportunities for youth	<u>Item 28</u>
29	Central Florida Regional Transportation Authority/Osceola County, Fla. (Sept. 2011)	MOU	Engage a consultant to conduct a highway corridor alternatives analysis	<u>Item 29</u>
30	Central Florida Regional Transportation Authority/Altamonte Springs, Fla. (Jan. 31, 2011)	MOU	Relating to the FlexBus Transit System	<u>Item 30</u>
31	Central Florida Regional Transportation Authority/Florida DOT (Aug. 9, 2010)	MOU	Van pool and transit program coordination	<u>Item 31</u>
32	Central Florida Regional Transportation Authority/Volusia County, Fla. (Sept. 2008)	Interlocal Agreement	Provision of commuter bus service	<u>Item 32</u>
33	Central Florida Regional Transportation Authority/Polk County, Fla. (Mar. 5, 2008)	MOU	Involving the FTA Rural Intelligent Transportation System Demonstration Project	<u>Item 33</u>
34	Commuter Rail Division of the Regional Transportation Authority/Illinois DOT et al. (Aug. 2010)	MOU	Collaboration to improve passenger and motorist safety at the Lake Forest Telegraph Road Train Station, etc.	<u>Item 34</u>

35	Central Lane MPO/Oregon DOT et al. (Undated draft)	IGA	Agreement among the Oregon DOT, the Lane Council of Governments, and the Lane Transit District to engage each other in the MPO planning activities as set forth in each planning project-level agreement	<u>Item 35</u>
36	Commuter Rail Division of the Regional Transportation Authority/Village of Downers Grove (Undated)	Easement Agreement	Granting nonexclusive license in connection with the construction of a pedestrian underpass	<u>Item 36</u>
37	Commuter Rail Division of the Regional Transportation Authority/CTA et al. (Nov. 5, 2006)	MOU	Cooperation in the providing of transit services to Rail-Volution participants	<u>Item 37</u>
38	Commuter Rail Division of the Regional Transportation Authority/Village of Downers Grove (Aug. 8, 2011)	Pedestrian Underpass Agreement	Improvement of the existing Belmont Metra Station at-grade crossing by constructing a new pedestrian crossing	<u>Item 38</u>
39	Commuter Rail Division of the Regional Transportation Authority/Village of New Lenox (Dec. 2008)	Agreement	Operation and maintenance of commuter parking facility	<u>Item 39</u>
40	Commuter Rail Division of the Regional Transportation Authority/Western Illinois University (Aug. 17, 2009)	Interagency Agreement	University to perform consulting services in regard to online training programs	<u>Item 40</u>
41	El Paso County, Colo./Colorado Springs, Colo. et al. (Aug. 26, 2004)	IGA	Funding of roadway capital improvements, maintenance, and operations and transit service within the boundaries of the Pikes Peak Rural Transportation Authority	<u>Item 41</u>
42	Greater Cleveland Regional Transportation Authority/Cuyahoga County, Ohio (Jan. 4, 2007)	Agreement	Installation of fiber optic conduit and cabling as part of the Euclid Corridor Project	<u>Item 42</u>
43	Greater Cleveland Regional Transporta-	MOU	Installation, use, maintenance and intellectual	<u>Item 43</u>

	tion Authority/ Cleveland State University (Sept. 2008)		property rights of public touch-screen kiosks	
44	Greater Cleveland Regional Transporta- tion Authority/City of Brunswick (June 24, 2010)	Agreement	Providing of transporta- tion services to Medina County	<u>Item</u> <u>44</u>
45	Greater Cleveland Regional Transporta- tion Authority/ Cleveland, Ohio (Jan. 14, 1999)	Interagency Agreement	Utilize the expertise and capacity of the City to carry out preliminary engineering for the Euclid Corridor Im- provement Project	<u>Item</u> <u>45</u>
46	Greater Cleveland Regional Transporta- tion Authority/Shaker Heights (May 13, 2003)	Interagency Agreement	Design, acquisition, and installation of warning de- vices for certain light rail lines	<u>Item</u> <u>46</u>
47	La Crosse Municipal Transit Utility/City of Crescent (Nov. 30, 2010)	Agreement	Route deviation bus ser- vice	<u>Item</u> <u>47</u>
48	Metropolitan Tran- sit Authority of Harris County/Texas DOT (TxDOT) et al. (Aug. 1994)	Interlocal Agreement	Establishing the organiza- tional structure and alloca- tion of responsibilities for the creation of a Regional Transportation Manage- ment Consortium with the Greater Houston area	<u>Item</u> <u>48</u>
49	Metro-North Com- muter Railroad Co./N.J. Transit Rail Operations (July 1, 2005)	Agreement	Operation by N.J. Transit Rail Operations, Inc., of cer- tain rail passenger service for Metro-North	<u>Item</u> <u>49</u>
50	Omnitrans (Cal.)/Loma Linda, Cal. (Aug. 25, 2009)	Master Coopera- tive Agreement	Development of a street corridor Bus Rapid Transit Project	<u>Item</u> <u>50</u>
51	Omnitrans/Riverside Transit Agency (Aug. 2008)	Interagency Ser- vice Agreement	Cooperate and coordinate on route planning, schedul- ing, stops, transfers, fares, and dissemination of infor- mation	<u>Item</u> <u>51</u>
52	Omnitrans/Southern California Regional Rail Authority (Sept. 1, 2010)	Cooperative Agreement	Providing bus bridge ser- vice during service interrup- tions of commuter rail ser- vice	<u>Item</u> <u>52</u>
53	Omnitrans/Chaffey Community College District	Agreement	Funding for and the de- sign, construction, mainte- nance, and operation of	<u>Item</u> <u>53</u>

	(Mar. 9, 2009)		Chaffey College Transit Center	
54	Omnitrans/Caltrans (Undated)	Cooperative Agreement	Maintenance responsibilities for Montclair Transcenter	<u>Item 54</u>
55	Omnitrans/San Bernadino Associated Governments (Dec. 16, 1991)	Cooperative Agreement	Acquisition of property to construct a regional commuter transit center	<u>Item 55</u>
56	Omnitrans/Southern California Association of Governments et al. (Mar. 2007)	MOU	Preparation, adoption, and submission of a regional transportation plan	<u>Item 56</u>
57	Regional Transportation District (RTD)/Colorado DOT (Undated)	IGA	Addressing the environmental study preliminary engineering phase of the I-225 corridor project (pursuant to a Master IGA dated Apr. 12, 2004) and RTD's Environmental Evaluation for the project	<u>Item 57</u>
58	RTD/Arapahoe County (May 5, 2011)	IGA	Joint occupancy of the county administration building for the use of RTD's radio communications equipment	<u>Item 58</u>
59	RTD/Special Transportation for Boulder County, Inc. (Oct. 22, 2010)	Agreement	Relating to SAFETEA-LU funds for Special Transportation for Boulder County, Inc. (Special Transit), whereby Special Transit waives its rights to receive federal grant funds pursuant to 49 U.S.C. § 5309 and authorizes RTD to seek those funds for eligible RTD projects, and RTD agrees to provide funds to Special Transit	<u>Item 59</u>
60	RTD/State of Colorado, Governor's Office of Information Technology (Undated)	MOU	Setting a framework for allowing RTD to share access to state-owned communication sites	<u>Item 60</u>
61	RTD/DUS Metropolitan Dist. No. 1 et al. (Feb. 11, 2010)	IGA	Setting forth the terms pursuant to which a certain levy on property will be used to fund RTD's services	<u>Item 61</u>
62	RTD/Longmont, Colo. (July 14, 2009)	Agreement	RTD to provide Call-n-Ride services	<u>Item 62</u>

63	RTD/Colorado DOT (Undated)	IGA	Relating to financing, designing, building, operating, and the processes for the RTD FasTrack's I-225 light rail line and addressing the impacts and crossings of the corridor over portions of Colorado DOT-owned right-of-way	<u>Item 63</u>
64	RTD/Colorado DOT (Undated)	Common Use Agreement	Allowing the perpetual use, operation, maintenance, and future modifications of the Colorado DOT transportation facilities to allow for the construction, use, and maintenance of certain RTD-owned facilities jointly in, on, over, and under the property subject to the agreement	<u>Item 64</u>
65	RTD/Colorado DOT (Apr. 12, 2004)	Master IGA	To ensure continued coordination and planning for transportation development in the district and the state and to ensure that proposed projects are considered and accommodated to the maximum extent possible	<u>Item 65</u>
66	RTD/Boulder County, Colo. (Undated)	IGA	Installation of improvements to bus stops	<u>Item 66</u>
67	RTD/Colorado DOT (Nov. 29, 2010)	IGA	Setting forth rights, duties, and obligations of the parties arising out of the ownership, operation, and maintenance of the T-Rex Project involving I-25 and I-225	<u>Item 67</u>
68	RTD/Highlands Ranch Metro District (Undated)	IGA	RTD agrees to permit parking of vehicles on the Highlands Ranch Town Center Park-n-Ride Civil Site Plan	<u>Item 68</u>
69	RTD/Longmont, Colo. (Jan. 12, 2012)	IGA	Improvements to a parking facility and construction of additional parking	<u>Item 69</u>
70	RTD/Colorado DOT (Undated)	Contract	Pursuant to a Master IGA, RTD as the Local Agency to provide funds to Colorado DOT to construct segment Number 1 of a transportation corridor that is part of	<u>Item 70</u>

			the FasTracks plan approved by voters	
71	RTD/Englewood, Colo. (Undated)	Agreement	Relating to the funding and operation of route circulator bus service	<u>Item 71</u>
72	RTD/Board of County Commissioners of Douglas County (Undated)	Agreement	RTD to provide Call-n-Ride service in the town of Parker and to provide other services	<u>Item 72</u>
73	RTD/Denver Public Schools (Nov. 26, 2008)	MOU	To provide District students who are eligible for the free or reduced price lunch program with transit passes at a 25 percent discount	<u>Item 73</u>
74	RTD/City and County of Denver (Mar. 16, 2010)	IGA	Providing for cooperation between RTD and the City regarding that portion of the East Corridor that will be located on aviation property, the East Corridor being a commuter rail transit line connecting Denver Union Station and Denver International Airport	<u>Item 74</u>
75	Rock Island County Metropolitan Mass Transit District/ Springfield Mass Transit District (July 19, 2004)	IGA	Procurement consortium to administer USDOT funds for procurement of five compressed natural gas buses	<u>Item 75</u>
76	Rock Island County Metropolitan Mass Transit District /Moline, Ill. (Oct. 4, 2011)	IGA	Agreement related to the City's participation in the Moline Multi-modal Facility Project and construction of certain components	<u>Item 76</u>
77	Rock Island County Metropolitan Mass Transit District/ Moline, Ill. (Apr. 6, 2005)	IGA	Funding required for constructing a bus turnaround and transit waiting platform	<u>Item 77</u>
78	Rock Island County Metropolitan Mass Transit District/ Moline, Ill. (Dec. 19, 1995)	IGA	Lease of certain surface and air rights to MetroLink in connection with the Community Transportation Center and the Moline Centre Riverfront Mixed Use Project	<u>Item 78</u>
79	Rock Island County Metropolitan Mass Transit District/ Moline, Ill.	IGA	Use of City property for a natural gas fueling station	<u>Item 79</u>

	(Mar. 5, 2002)			
80	Rock Island County Metropolitan Mass Transit District/ Springfield Mass Transit District (July 1, 2006)	Cooperation Agreement	Maintenance and repair for paratransit vehicles	<u>Item 80</u>
81	Rock Island County Metropolitan Mass Transit District/ Rockford Mass Transit District (Jan. 20, 2010)	IGA	Transit vehicle lease agreement	<u>Item 81</u>
82	San Diego Association of Governments (SANDAG)/North San Diego County Transit Development Board (NCTD) et al. (Apr. 23, 2004)	MOU	Transfer of certain functions pursuant to transition plans	<u>Item 82</u>
83	SANDAG/NCTD et al. (June 16, 2005)	Addendum No. 2 to MOU	Description of the manner in which SANDAG will provide staff assistance	<u>Item 83</u>
84	SANDAG/NCTD et al. (Nov. 17, 2006)	Amendment No. 1 to Addendum No. 2 to MOU	Description of the manner in which SANDAG will provide staff assistance	<u>Item 84</u>
85	SANDAG/NCTD et al. (Dec. 15, 2005)	Addendum No. 3 to MOU	Description of the methodology for ongoing funding of functions	<u>Item 85</u>
86	SANDAG/NCTD et al. (Dec. 22, 2010)	Addendum No. 5 to MOU	Set forth parties' intent regarding ownership of real and personal property acquired, purchased, or condemned by SANDAG but operated and maintained by the Metropolitan Transit System (MTS)	<u>Item 86</u>
87	SANDAG/NCTD et al. (Dec. 15, 2005)	Addendum No. 6 to MOU	Description of the functions and responsibilities of SANDAG and NCTD regarding improvements to an NCTD project	<u>Item 87</u>
88	SANDAG/NCTD et al. (Aug. 29, 2006)	Addendum No. 7 to MOU	Description of the manner in which SANDAG will manage FTA grants containing MTS and SANDAG projects	<u>Item 88</u>
89	SANDAG/NCTD et al. (Aug. 31, 2006)	Addendum No. 9 to an MOU	Implement the Del Mar Bluffs Stabilization Project 2—Preserving Trackbed Support	<u>Item 89</u>
90	SANDAG/NCTD	Addendum No.	Implement the Santa	<u>Item</u>

	et al. (Oct. 7, 2009)	12 to an MOU	Margarita River Bridge project, including replacement of existing railroad bridge	<u>90</u>
91	SANDAG/NCTD et al. (June 2009)	Cooperative Agreement	Replace a cooperative agreement for project review procedure	<u>Item 91</u>
92	SANDAG/Caltrans	Master Agreement	Outlining terms and conditions of collaboration to deliver transportation improvements that utilize the materials, funds, resources, or services of both parties	<u>Item 92</u>
93	San Francisco Municipal Transportation System/Santa Clara Transportation Authority et al. (Oct. 3, 1996)	Joint Powers Agreement	Expand the purposes and powers of the Peninsula Corridor Study Joint Powers Board (established in 1988)	<u>Item 93</u>
94	San Francisco Municipal Transportation Agency/San Francisco BART (Dec. 21, 2007)	Special Transit Fare (FastPass®) Agreement	Interoperator monthly pass to facilitate coordination of transit service	<u>Item 94</u>
95	San Francisco Municipal Transportation Agency/San Francisco BART (Nov. 23, 2009)	Agreement	Payment for transfer trips, i.e., payment for feeder service to the city	<u>Item 95</u>
96	San Francisco Municipal Transportation Agency/Metropolitan Transportation Commission et al. (Undated)	MOU	Relating to Clipper, an automated fare payment system for intra- and inter-operator transit trips	<u>Item 96</u>
97	San Francisco Municipal Transportation Agency/San Francisco BART (1994)	Agreement	Memorialize existing transfer arrangement between the parties with reference to Free Muni transfer tickets	<u>Item 97</u>
98	San Francisco Municipal Transportation Agency/San Francisco BART (July 1, 1986)	First Supplemental Muni/BART Joint Station Agreement	Redefinition of responsibilities regarding maintenance of BART's subways and other facilities used and occupied by the City's Municipal Railway	<u>Item 98</u>
99	San Francisco Municipal Transportation Agency/San Francisco BART et al. (Apr. 2008)	Agreement	Use of BART Plus Ticket on public transit vehicles operated by the parties	<u>Item 99</u>
100	San Joaquin Regional Transit District/	MOU	Share the use of surveillance camera technology	<u>Item 100</u>

	Stockton Police Department, Cal. (Jan. 1, 2008)			
101	San Joaquin Regional Transit District/ Stockton, Cal. (Dec. 15, 2010)	Cooperative Agreement	Joint implementation of a signal prioritization project	<u>Item 101</u>
102	San Joaquin Regional Transit District/ Stockton, Cal. (June 22, 2011)	Cooperative Agreement	Improvements along an existing bike and pedestrian trail including upgrades to existing bus stop	<u>Item 102</u>
103	Stark Area Regional Transit Authority/ Canton, Ohio (July 1, 2010)	Nonexclusive License Agreement	Use of City radio communications system	<u>Item 103</u>
104	Stark Area Regional Transit Authority/ Canton, Ohio (Undated)	MOU	Coordination and planning of enhancements utilizing SAFETEA-LU funding for transit enhancements and improvements	<u>Item 104</u>
105	Tri-County Metropolitan Transit District/State of Oregon (Jan. 26, 2006)	IGA	Collaborate to ensure that site investigations and cleanups comply with applicable standards	<u>Item 105</u>
106	Tri-County Metropolitan Transit District/Clackamas County Development Agency (Aug. 2004)	IGA	Preliminary engineering, final design, and construction for the I-205/Mall LRT project	<u>Item 106</u>
107	Tri-County Metropolitan Transit District/Hillsboro, Or. (Undated)	IGA	Initiate activities resulting in creation of a planning concept for potential high-capacity transit in the Amber Glen area.	<u>Item 107</u>
108	Tri-County Metropolitan Transit District/Portland, Or. Jan. 1, 2006	IGA	Maintenance of Interstate max light rail project facilities	<u>Item 108</u>
109	Utah Transit Authority/Salt Lake City Corporation (2008)	Interlocal Agreement	Design and construction of the downtown to airport light rail transit project	<u>Item 109</u>
110	Whatcom Transportation Authority (WTA)/Western Washington University (WWU)	Interlocal Cooperative Agreement	Establish a pass program to allow WWU students to use WTA services.	<u>Item 110</u>

	(July 16, 2009)			
111	WTA/Transportation Benefit District No. 1 (Mar. 14, 2011)	Interlocal Agreement	Provide transit service within the City of Bellingham to the general public	<u>Item 111</u>
112	WTA/Washington State DOT et al. (Sept. 19, 2011)	MOU	WTA agrees to participate in a unified certification program in re: 49 C.F.R. § 26.81 and minority and women's business enterprises	<u>Item 112</u>
113	WTA/State of Washington Office of State Procurement (Dec. 27, 2009)	IGA for State Purchasing Cooperative	To entitle the cooperative member access to state contracts for goods and services	<u>Item 113</u>
114	WTA/State of Washington Department of General Administration (Dec. 3, 2009)	Interagency Agreement	Agreement to sell vehicles, equipment, and other property	<u>Item 114</u>
115	WTA/Bellingham, Wash. (June 23, 2010)	MOU	Provide the implementation protocols for an existing area-wide network-based Ring Network Architecture	<u>Item 115</u>
116	WTA/Bellingham, Wash. (Undated)	License	Use of City right-of-way in connection with expansion of transit services	<u>Item 116</u>
117	Washington Metropolitan Area Transportation Authority (WMATA)/Maryland National Capital Park and Planning Commission et al. (Undated)	MOU	To release all rights to a permanent surface easement to land referred to as the Original Park Easement to permit construction of Silver Spring, Md., Transit Center with a grant of replacement easements	<u>Item 117</u>
118	WMATA/Alexandria, Va. (Aug. 1, 2011)	Agreement	To provide enhancements and express bus services in connection with the Pentagon	<u>Item 118</u>
119	WMATA/Montgomery County, Md. (Sept. 25, 2008)	MOU	Relating to constructing a full-service, multilevel intermodal transit facility at the Silver Spring, Md., metro rail station	<u>Item 119</u>

APPENDIX B—SURVEY

TCRP J-5, STUDY TOPIC 14-2  
TRANSIT AGENCY INTERGOVERNMENTAL AGREEMENTS:  
COMMON ISSUES AND SOLUTIONS

Agency Name: \_\_\_\_\_

Address: \_\_\_\_\_

Name of Employee: \_\_\_\_\_

Job Title: \_\_\_\_\_

Contact telephone/cell phone number: \_\_\_\_\_

E-mail address: \_\_\_\_\_

How many years have you been with the agency? \_\_\_\_\_

What was your agency's ridership for 2010?

(a) Number of passenger trips by rail \_\_\_\_\_

(b) Number of passenger trips by bus \_\_\_\_\_

Is your agency government-owned? **(Please circle) YES NO**  
\*\*\*\*\*

1. Has your agency cooperated or is it now cooperating with another governmental unit, agency, or other entity pursuant to an intergovernmental or interagency agreement (IGA) and/or a memorandum of understanding (MOU) or pursuant to some other joint arrangement? If your answer is yes, please answer questions 2 through 10. Please attach extra sheets as needed for your responses.

**(Please circle) YES NO**

2. Does your state have a constitutional and/or statutory provision(s) authorizing the use of IGAs or MOUs?

**(Please circle) YES NO**

If your answer is yes, please provide a citation or citations.

3. Do cities in your state have home rule power authorizing the use of an IGA, MOU or other joint arrangement?

**(Please circle) YES NO**

If your answer is yes, please provide a citation or citations.

4. Please state whether your agency has used IGAs or MOUs with respect to:

- (a) Bus and rail operations **(Please circle) YES NO**
- (b) Construction projects **(Please circle) YES NO**
- (c) Land acquisition **(Please circle) YES NO**

- (d) Management of facilities or otherwise **(Please circle) YES NO**  
 (e) Ownership of facilities **(Please circle) YES NO**  
 (f) Partnerships **(Please circle) YES NO**  
 (g) Procurement **(Please circle) YES NO**  
 (h) Third-party responsibilities (*e.g.*, local match) **(Please circle) YES NO**

If your answer is yes to any one or more of the above, please identify any IGAs and MOUs and provide an Internet-link or copy, as well as any comments regarding your agency's use of and experience with IGAs or MOUs for such purpose or purposes.

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5. Please identify any other purposes for which your agency has used or is now using IGAs and/or MOUs or other joint arrangements?

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6. Please identify the governmental units, agencies, or other entities with which your agency has had or now has an IGA or MOU.

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7. When your agency uses an IGA or an MOU please explain the reason(s) for favoring one form of agreement over another.

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8. Please identify and explain the benefits that your agency has derived from the use of IGAs or MOUs.

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9. Please identify and explain the legal issues or problems that have arisen with the use of IGAs and MOUs.

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10. Are there particular transit-related issues that your agency has identified that it seeks to avoid or resolve when negotiating or drafting an IGA or MOU?

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11. Please describe any solutions developed or lessons learned by your agency in the use of IGAs or MOUs.

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12. In your experience, have there been issues or problems that an IGA or MOU should have or could have addressed but did not?

**(Please circle) YES NO**

If your answer is yes, please explain why the issue(s) was (were) not addressed.

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13. Have there been any claims, disputes and/or administrative or legal actions arising out of or in connection with an IGA, MOU, or other joint arrangement signed or used by your agency?

**(Please circle) YES NO**

If your answer is yes, please explain the nature of any claim, dispute, or action; whether and how it was resolved; and provide a copy of and/or citation to any administrative or judicial decision.

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14. Please provide a copy of (and if possible an Internet-link to) IGAs and/or MOUs used or in use by your agency.

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\*\*\*\*\*

**Please return your completed survey and any attachments, preferably by e-mail, to:**

**The Thomas Law Firm  
ATTN: Larry W. Thomas  
1701 Pennsylvania Avenue, NW  
Suite 300  
Washington, D.C. 20006  
Tel. (202) 280-7769  
lwthomas@cox.net**

**APPENDIX C****TRANSIT AGENCIES RESPONDING TO THE SURVEY**

Bay Metro Transit (Mich.)  
Capital Area Transportation Authority (CATA) (Mich.)  
Capital Arkansas Transit Authority (Ark.)  
Capital District Transportation Authority (CDTA) (N.Y.)  
Capital Metropolitan Transportation Authority (Capital Metro) (Tex.)  
Capital Metropolitan Transportation Authority of Harris County (Harris County MTA) (Tex.)  
Casco Bay Island Transit District (Me.)  
Central Florida Regional Transportation Authority (LYNX) (Fla.)  
Charlotte Area Transit System (N.C.)  
City of Jackson Transportation Authority (Mich.)  
City of Lincoln/StarTran (Neb.)  
City of Phoenix Public Transit Department (Phoenix PTD) (Ariz.)  
Columbia Transit (Mo.)  
Commuter Rail Division of the Regional Transportation Authority (Metra) (Ill.)  
CT Transit (Conn.)  
Greater Cleveland Regional Transit Authority (Greater Cleveland RTA) (Ohio)  
Greater Portland Transit District (Me.)  
La Crosse Municipal Transit Utility (Wis.)  
Los Angeles County Metropolitan Transportation Agency (LACMTA) (Cal.)  
Manchester Transit Authority (N.H.)  
N.J. Transit (N.J.)  
Omnitrans (Cal.)  
Regional Transportation District (Colo.)  
Rock Island County Metropolitan Mass Transit District (MetroLink) (Ill.)  
Suburban Bus Division of the Regional Transportation Authority (PACE) (Ill.)  
San Diego Association of Governments (SANDAG) (Cal.)  
San Francisco Municipal Transportation Agency (San Francisco MTA) (Cal.)  
San Joaquin Regional Transit District (RTD) (Cal.)  
San Mateo County Transit District (Cal.)  
Stark Area Regional Transit Authority (SARTA) (Ohio)  
Tri-County Metropolitan Transportation District of Oregon (TriMet) (Or.)  
Utah Transit Authority (Utah)  
Washington Metropolitan Area Transit Authority (WMATA) (D.C.)  
Whatcom Transportation Authority (WTA) (Wash.)



**ACKNOWLEDGMENTS**

This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by **Robin M. Reitzes**, San Francisco City Attorney's Office, San Francisco, California. Members are **Rolf G. Asphaug**, Denver Regional Transportation District, Denver, Colorado; **Sheryl King Benford**, Greater Cleveland Regional Transit Authority, Cleveland, Ohio; **Darrell Brown**, Darrell Brown & Associates, New Orleans, Louisiana; **Dennis C. Gardner**, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; **Elizabeth M. O'Neill**, Metropolitan Atlanta Rapid Transit Authority, Atlanta, Georgia; and **James S. Thiel**, Wisconsin Department of Transportation, Madison, Wisconsin. **Rita M. Maristch** provides liaison with the Federal Transit Administration, **James P. LaRusch** serves as liaison with the American Public Transportation Association, and **Gwen Chisholm Smith** represents the TCRP staff.

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