

HUMMEL FIELD RUNWAY REALIGNMENT AND EXTENSION PROJECT INTERIM AGREEMENT

DRAFT FOR PUBLIC POSTING AND COMMENT

THIS INTERIM AGREEMENT (“Agreement”) is entered into as of _____, 2020 between **MIDDLESEX COUNTY** (“the County”), a political subdivision of the Commonwealth of Virginia, and **DELAWARE CORPORATION** (“DelCorp”), a corporation licensed to do business in the Commonwealth. The County and DelCorp are referred to individually as a “Party” and collectively as “the Parties”.

Recitals

1. On August 5, 2014, the County adopted its “Purchasing Policy Implementing Public-Private Education Facilities and Infrastructure Act of 2002 and Public-Private Transportation Act of 1995” establishing guidelines for the development of public facilities through public-private partnerships (“Implementing Procedures”), which procedures satisfy the requirements of the Public-Private Transportation Act of 1995 (“PPTA”).
2. On May 1, 2020, DelCorp submitted an unsolicited proposal (the “Proposal”) under the PPTA for the design and construction of a realignment and extension of the Hummel Field Airport runway (the “Project”), which is owned and operated by the County.
3. The County determined that, among other things, it would be advantageous for the County to accept the Proposal for conceptual-phase consideration and the County issued the required 45-day public notice for competing proposals to be received.
4. After not receiving any competing proposals, the County posted the Proposal on the County website to receive citizen comments for the required 30 days.
5. The County selected DelCorp for a more detailed phase of review with the Proposal and negotiation of an interim agreement under the PPTA (Virginia Code §33.2-1809) for the Project.
6. The County determined it to be advantageous to use procedures for competitive negotiation, rather than using sealed, competitive bids, and that doing so is likely to be advantageous to the County and the public based upon (i) the probable scope, complexity or urgency of need, and (ii) the risk sharing, added value, increase in funding or economic benefit from the

project, which would otherwise not be available.

7. The Board appointed a committee consisting of Board members, County staff, Virginia Department of Aviation staff, and citizens to make recommendations to the Board regarding the terms and conditions of an Interim Agreement and ultimately a Comprehensive Agreement between the County and DelCorp.
8. The County Administrator has determined that the Project serves the public interest pursuant to Virginia Code §33.2-1803.1 and the Board has determined that the Project serves the best interests of the public pursuant to Virginia Code § 33.2-1803(C).
9. On June 26, 2020, the County submitted grant requests to the Virginia Department of Aviation for state grant funds up to 80% of the eligible costs for the Airport Layout Plan and the Environmental Impact Review, which are both required to be completed and accepted by the Department before the construction phase of the Project can begin.
10. In order to create an opportunity to expedite the Project and leverage DelCorp's funding offer set forth in the Proposal, the County requested an exception to the state Airport Program Manual, Section 5.3.1 Eligible Projects After the Fact, which the Board of Aviation unanimously approved on September 17, 2020, thereby allowing the planning, environmental, design and construction of the Project to proceed prior to the award of state grant funding without forfeiting the County's eligibility for future grant funding. However, the grant requests were not funded at that time.
11. The County has complied with the PPTA and its Implementing Procedures related to commencing the detailed stage discussions with DelCorp.
12. The County posted this Agreement on its website for 30 days for public inspection and comment in accordance with Virginia Code § 33.2-1820 prior to approval in accordance with the PPTA and Implementing Procedures, and a public hearing has been held.

NOW, THEREFORE, in consideration of the Recitals set forth above, and good and valuable consideration as set forth below, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. SCOPE OF SERVICES

DelCorp, in conjunction with its contracted engineering firm Parrish & Partners, LLC ("Engineer"), agrees to pay for and provide all required professional architectural,

engineering, environmental, historic, and related services and to prepare all preliminary plans, including but not limited to the Airport Layout Plan and Environmental Impact Review (collectively the “Preliminary Plans”) as may be required by the Virginia Department and Board of Aviation, the Virginia Department of Environmental Quality, the Virginia Department of Historic Resources and by any other state or federal agency in order for the County to be able to commence the design and construction phase of the airport expansion project, and as shown on the attached Scopes of Work and Costs of Services for the EIR and ALP. DelCorp shall (i) be responsible for all associated costs in preparing the Preliminary Plans, as described in Exhibit A, (“Engineering Services”), (ii) seek and include County input on the Preliminary Plans, and (iii) submit the Preliminary Plans to the County for its review. Subject to County approval, which shall be in County’s sole discretion, the County shall submit the Preliminary Plans to all state and federal agencies whose approval is required. Should any state or federal agency not approve all or any portion of the Preliminary Plans, then DelCorp, at its sole expense, agrees to update or revise the Preliminary Plans, as necessary, to obtain required agency approval.

Upon submission of the Preliminary Plans to the County, DelCorp shall provide detailed invoices and payment receipts to the County for Engineering Services.

Further, DelCorp agrees to pay the County on a rolling basis for any and all reasonable attorney’s fees incurred by the County associated with the Project, including, but not limited to, the review and evaluation of the PPTA proposal and drafting and negotiating the interim and/or comprehensive agreement (“Legal Services”).

2. CONSIDERATION

In consideration of DelCorp providing and paying the costs of the Engineering Services and covering the costs of the County’s Legal Services, the County agrees to submit grant requests to the Virginia Department of Aviation for reimbursement of all eligible expenditures associated with the Preliminary Plans. The County agrees to submit applications for multiple grant rounds until such time as the County is awarded the full eligible amount of grant funds or until such time as the Department or Board of Aviation determines that no grant funding will be awarded. County further agrees to pay to DelCorp an amount equal to any and all grant funds actually awarded to the County for eligible costs related to the Preliminary Plans, and to do so within thirty days of any such grant award. The County shall not be liable for the costs of the Engineering Services beyond the commitment to pass through to DelCorp all applicable state grant funds should any be awarded to the County in accordance with this section. Upon approval by the County and all required state and federal agencies of the Preliminary Plans, the Preliminary Plans shall be owned and controlled by the County, which in no event is obligated to pay for the Engineering Services or the Preliminary Plans, except as provided in this Interim Agreement.

3. TERM AND TERMINATION

This Agreement shall commence on the Effective Date first written above and shall continue until terminated pursuant to the terms of this Agreement.

This Agreement may be terminated immediately in the event of substantial failure or default of DelCorp to perform in accordance with the terms hereof.

Upon seven (7) days written notice to DelCorp, the County may, for its convenience and without cause, elect to terminate the Agreement. In such event, the County shall pay DelCorp for all work properly performed by DelCorp in accordance with the Agreement within thirty (30) days following the date of the notice.

4. COMPREHENSIVE AGREEMENT

Should the parties both conclude that the Project is feasible and desire to proceed after the Preliminary Plans have been submitted and approved by the Department of Aviation, the parties may proceed to negotiate a comprehensive agreement under the PPTA to address the completion of design and construction of the Project. The County's participation in negotiation of a comprehensive agreement, however, shall not constitute an obligation of or commitment by the County to execute such comprehensive agreement and may be granted, denied or conditioned in County's sole discretion.

However, notwithstanding any provision to the contrary herein, pursuant to the PPTA and the Implementing Procedures, the Parties agree to proceed forthwith to the Detailed Phase for the purposes of developing a Project Design and Construction Agreement ("Comprehensive Project Agreement" or "Comprehensive Agreement"). In addition to the Project design and construction terms and conditions, and unless otherwise agreed to by the Parties, the Comprehensive Agreement shall include but not limited to provisions related to Project costs (not to exceed \$1.3 million), the County's option to purchase approximately eight acres of land from DelCorp or its principal (as applicable) as required for the Project, the County's obligations to submit grant funding requests to the Virginia Board of Aviation and to pass-through any awarded grant funds to DelCorp, DelCorp's access and use of the Airport upon Project completion, and other terms and conditions as agreed to by the Parties. In the event the County decides not to enter into the Comprehensive Agreement, then the County agrees to refund DelCorp all amounts it has paid to the County under this Interim Agreement to cover the costs of the Preliminary Plans.

5. STANDARD OF CARE

The Parties agree that the standard of care for all professional engineering and planning services performed under this Agreement shall be the care and skill ordinarily used by members of the design profession in the Commonwealth of Virginia practicing on similar projects at the time and that the work, shall be required of Engineer. Additionally, DelCorp represents and warrants that it will require of Engineer that all persons performing any work on the Project under this Agreement shall be licensed and in good standing with any applicable regulatory agency for the full duration of their work on the Project under this Agreement. The Engineering Services shall not be considered complete until such time as all appropriate state agencies and federal agencies (if applicable) have approved the Preliminary Plans and all other services as required by such agencies.

6. INDEMNIFICATIONS

DelCorp agrees to indemnify, defend and hold harmless the County, its officers, agents and employees from any claims, damages, suits, actions, liabilities and costs of any kind or nature, including attorneys' fees, arising from or caused by the provision of any services, or the use of any services or materials furnished (or made available) by DelCorp, provided that such liability is not attributable to the County's sole negligence. DelCorp shall notify the County of any suit, claim, demand, loss or action made or filed against DelCorp immediately upon DelCorp's receipt or learning of it.

DelCorp acknowledges that the County is a public entity and the Project is owned by a public entity and as such, the Project site is immune from mechanic's liens, and DelCorp hereby waives any and all mechanic's lien rights it may purport to have, and agrees that it shall neither file nor assert any such lien claims.

7. CONTRACTUAL CLAIMS

Contractual claims or disputes by DelCorp against the County shall be submitted in writing no later than sixty (60) days after final payment; provided, however, that DelCorp shall give the County written notice of its intention to file a claim or dispute within fifteen (15) days after the occurrence upon which the claim or dispute shall be based. Any written notice of DelCorp's intention to file such a claim or dispute shall state the facts and/or issues relating to the claim in sufficient detail to identify the claim, together with its character and scope. If DelCorp fails to make its claim or dispute or fails to give notice of its intention to do so as provided herein, then such claim or dispute shall be deemed forfeited.

The County's decision on contractual claims shall be final and conclusive unless DelCorp appeals within six months of the date of the final decision on the claim by instituting legal action in the General District or Circuit Court of the County of

Middlesex, Virginia or the United States District Court for the Eastern District of Virginia.

8. INSURANCE

DelCorp will maintain a general liability policy with \$2,000,000 combined single limits. Coverage is to be on an occurrence basis with an insurer licensed to conduct business in the Commonwealth of Virginia. The insurer must have an A. M. Best rating of A- or better. The insurer must list Middlesex County as an additional insured. The endorsement must be issued by the insurance DelCorp. A notation on the certificate of insurance is not sufficient.

DelCorp will maintain workers' compensation coverage in compliance with the laws of the Commonwealth of Virginia. The coverage must have statutory limits and be with an insurer licensed to conduct business in the Commonwealth of Virginia. The insurer must have an A. M. Best rating of A- or better. As an alternative, it is acceptable for DelCorp to be insured by a group self-insurance association that is licensed by the Virginia Bureau of Insurance. DelCorp will also carry employer's liability insurance with a limit of at least \$100,000 bodily injury by accident/\$500,000 bodily injury by disease policy limit/\$100,000 bodily injury by disease each employee.

DelCorp will maintain automobile liability insurance with limits of at least \$1,000,000. The coverage is to be written with a symbol "1". The insurer must be licensed to conduct business in the Commonwealth of Virginia. The insurer must have an A. M. Best rating of A- or better.

DelCorp will maintain professional liability insurance with a limit of at least \$1,000,000. It is preferred that the coverage be on an occurrence basis. If the policy is on a *claims made* basis, this should be noted. If DelCorp has professional liability insurance on a *claims made* basis, agreement must be made that coverage will be maintained for at least three years beyond the expiration date of the policy in force at the time of this contract. Coverage is to be with a DelCorp licensed to conduct business in the Commonwealth of Virginia and have an A. M. Best rating of A- or better. County of Petersburg should be listed as an additional insured on the policy. The endorsement must be issued by the insurer. A notation on the certificate of insurance is not sufficient.

With all policies listed above, the insurer or agent of the insurer must issue a certificate of insurance to show evidence of coverage and provide copies of applicable policies along with applicable endorsements, including but not limited to additional insured endorsements. All wording limiting the insurer responsibility to notify the County of any cancellation or non-renewal of the coverage must be removed.

9. INDEPENDENT CONTRACTOR

The parties understand and agree that DelCorp, in performing its obligations under this Agreement, shall be deemed an independent contractor and not an agent, employee or partner of the County.

10. GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia.

11. COUNTERPARTS

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all such counterparts together shall be deemed to be one and the same instrument. It shall not be necessary in making proof of this Interim Agreement or any counterpart hereof to produce or account for the other counterparts.

12. ENTIRE AGREEMENT

This Agreement contains the entire agreement of the parties, and all prior communications, oral or written, are without any force and effect as it is the specific intent of the parties that this Agreement alone sets forth the terms on which the parties have mutually agreed.

SIGNATURE PAGE(S) TO FOLLOW

IN WITNESS WHEREOF the undersigned have executed this contract on the dates set forth beside their respective signatures.

MIDDLESEX COUNTY, VIRGINIA

By: _____
Wayne Jessie, Chairman
Middlesex County Board of Supervisors

Approved as to Form:

County Attorney

DELAWARE CORPORATION

By: _____
Oscar Barber, President

EXHIBIT A

Engineering Services / Preliminary Plans Scopes of Work and Costs