

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF TRANSPORTATION
INNOVATIVE PROJECT DELIVERY
DIVISION MEMORANDUM

GENERAL SUBJECT:	Steering Committee and Working Groups for Contract Negotiations and Development of PPTA and Design-Build projects	NUMBER:	<u>IPD 07-01.1</u>
		DATE:	<u>July 2, 2007</u>
SPECIFIC SUBJECT:	Defining the purpose and membership of the Steering Committee and Working Groups for negotiation and development of PPTA and Design-Build contracts	SUPERSEDES:	<u>IPD 07-01.0</u>
		SUNSET/ EXPIRES:	<u>In effect until superseded</u>

Original Signature on File
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Director, Innovative Project Delivery
Division

PURPOSE: To provide guidance for the establishment, administration and roles for membership on Steering Committees and working groups assigned to PPTA and/or Design-Build (D/B) projects. Steering Committees and working groups will be established, as needed, for the negotiation and development of contract provisions or to complete contract procurement.

OBJECTIVE: To provide clarification on the purpose and membership of the Steering Committee and working groups for contract negotiations and development.

BACKGROUND: Steering Committees and working groups have been utilized in previous PPTA procurements to provide a critical and focused review of specific issues related to the negotiation, development, and procurement of PPTA and D/B projects.

Each working group will be comprised of project or discipline specific members as assigned by the Innovative Project Delivery Division (IPD) and its assigned Project Manager and approved by the Chair of the Steering Committee. The nomination of optional members, as described under Working Group Members, will be initiated by members of the working group. The IPD Project Manager will determine the participation of optional members, subject to approval by the Chair of the Steering Committee, or by the Director of IPD for D/B projects.

Steering Committee:

Purpose: The group will be focused on executive level business issues related to policies of the agency; priorities of the Commonwealth; the commitment of funds to be used toward the

project and the resolution of issues presented by the Chairs of the working groups, primarily for PPTA projects.

Members:

VDOT: Chief Engineer (Chair), Chief Financial Officer, Chief of System Operations and IPD Project Manager
Developer: Principal Sponsor(s) and/or Executive Staff

For Design-Build Projects:

VDOT Chief Engineer, Director of IPD, Assistant Director of IPD for Design-Build Program

Working Groups:

Purpose: A working group may be established, if needed, to identify, develop and resolve project and discipline specific issues related to the negotiation and development of contract provisions, project definition or scope refinement. All resolutions or recommendations from the working groups are subject to the review and approval by the Steering Committee. A D/B working group will mainly focus on development of requests for qualifications or proposals (RFQs and RFPs), and contract procurement (an evaluation panel). Working Groups for D/B projects will be limited to VDOT staff, unless otherwise approved by the Chief Engineer.

Members:

VDOT and Developer Staff (for PPTA Projects)

Optional Members:

- FHWA (if Federal oversight is anticipated)
- DRPT (if the proposals contain a transit component)
- VPA (if the proposals include port facilities)

In particular for PPTA projects, members of the working groups shall include only parties to the anticipated agreement(s). Other entities shall not participate in the proceedings of the working group meetings, unless invited by the Chair to provide information to the working group members.

If other entities, such as local governments or regional transportation groups, have an interest in the development of the agreement, a subcommittee may be proposed to exchange information with such outside entities. The IPD Project Manager will consult with the Chair of the working group to determine whether to establish a subcommittee, and identify the Subcommittee Chairman and membership. Documentation of the subcommittee meetings will be recorded and the Subcommittee Chair will report all issues to the full working group for discussion and resolution.

The types and numbers of working groups will be based on the characteristics, complexity and required disciplines identified in the detailed proposal or RFP. The following is a list of anticipated working groups for PPTA procurements:

- Scoping
- Contract/Agreement

- Financial
- Environmental/Planning
- Operations (if applicable)

Working Group Chairperson:

The IPD Project Manager, with the approval of the chair of the Steering Committee, will select a Chairperson for each working group. The role of the Chair will be as follows:

1. Coordinate and schedule each of the working group meetings;
2. Provide leadership in the administration and facilitation of the meetings;
3. Document or select a working group member to document the recommendation and conclusions of the group;
4. Provide updates to the IPD and District Project Managers; and
5. If requested or if issues cannot be resolved by the working group, present issues to the Steering Committee and/or other working groups for discussion

This memorandum covers those Steering Committee and working group activities necessary to execute an Interim, Comprehensive, or D/B Agreement while the project is being managed within the procurement process by the IPD Project Manager. These procedures may also be utilized by the District PPTA or D/B Project Manager, when management of the project is transferred to the Districts.

Confidentiality:

Members of the working groups, including subcommittees, shall protect the negotiating position of the public agency by maintaining confidentiality of documents and negotiation topics. Confidential materials would include memoranda, working papers, meeting minutes or recommendations made to the Steering Committee or any related confidential and proprietary discussions or decisions specific to the business of the working groups. Members of working groups or subcommittees may not discuss confidential information with any person outside the working group or Steering Committee.

Members of working groups shall sign and comply with the attached Confidentiality Agreement. The purpose of this pledge of confidentiality is to protect the integrity of the competitive procurement and negotiation process. If confidential or proprietary records were made public, either the financial interests of the public or private entity involved, or the process of competition or bargaining may be adversely affected. If a member of a working group or subcommittee discloses confidential or proprietary information, that person will be removed from the working group or subcommittee and a new member may be named to replace the expelled member. If the person is a VDOT employee, that employee may be subject to appropriate disciplinary action.

Confidentiality Agreement

This Confidentiality Agreement ("Agreement") is made and entered into as of _____, 200__ (Effective Date) by and between the Virginia Department of Transportation (VDOT), the address of which Department is 1401 East Broad Street, Richmond, Virginia 23219, and [RECIPIENT] ("Recipient") with its principal place of business at_____.

WHEREAS, VDOT is the owner of confidential & proprietary records and other information relative to [PROJECT NAME]_____ (hereinafter "Records");

WHEREAS, such Records have been determined by VDOT to be exempt from disclosure under the Freedom of Information Act (FOIA - §2.2-3700 et seq.) and are being disclosed to Recipient only under the terms and conditions of this Agreement;

WHEREAS, both parties to this Agreement consider the disclosure of Records to Recipient to be necessary and desirable for the purpose of facilitating discussion and evaluation of proposals filed under the Public-Private Transportation Act of 1995 (§ 56-556 et seq.) as amended (PPTA) and/or other related activities; and

WHEREAS, this Agreement is being entered into by and between the parties in order to protect the confidentiality and non-disclosure of Records by Recipient.

NOW, THEREFORE, the parties agree as follows:

1. Records.

A. VDOT and/or its consultant, contractor, offeror, etc., propose to disclose certain of its Records to Recipient. Records shall include (i) memoranda, staff evaluations, or other records prepared by or for VDOT for the evaluation and negotiation of proposals filed under the PPTA; (ii) trade secrets of the private entity as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.); (iii) financial records of the private entity, including balance sheets and financial statements, that are not generally available to the public through regulatory disclosure or otherwise; or (iv) other information submitted by the private entity where if such records were made public prior to their disclosure as required by § 56-573.1:1 the financial interest or bargaining position of the public or private entity would be adversely affected.

B. Records shall also include such information disclosed or submitted, orally, in writing, or by any other media, to Recipient by VDOT and/or consultants. Nothing herein shall require VDOT to disclose any of its information.

2. Recipient's Obligations.

A. Recipient agrees that the Records are to be considered confidential and proprietary to VDOT and Recipient shall hold the same in confidence, shall not use the Records other than for the purposes of its business with VDOT, and shall disclose it only to its officers, directors, or employees with a specific need to know. Recipient will not disclose, publish or otherwise reveal any of the Records received from VDOT and/or its agent to any other party whatsoever except with the specific prior written authorization of VDOT.

B. Ownership of the Records. All Records are and remain the property of VDOT. Records furnished in tangible form shall not be duplicated by Recipient except for purposes of this Agreement. Upon VDOT's written request, Recipient shall return all Records received in written or tangible form, including copies, or reproductions and any notes or memoranda of conversations relating thereto, including any copies thereof or other media containing such Records, within ten (10) calendar days of such request. At Recipient's option and VDOT's approval, any documents or other media developed by Recipient containing Records may be destroyed by Recipient. Recipient shall provide VDOT's authorized Point of Contact (POC) a notarized affidavit certifying destruction of such Records within ten (10) calendar days thereafter.

3. Term of Agreement and Termination Requirements.

The obligations of Recipient under this Agreement shall begin on the Effective Date of this agreement. Obligations will be in effect in continuum unless terminated earlier by both parties, with written and signed notice of termination executed. Upon expiration or termination of this Agreement, Records as defined in Section 1 of this agreement and all copies thereof made by Recipient will be returned to VDOT within ten (10) calendar days. Further, the obligation not to disclose shall not be affected by bankruptcy, receivership, assignment, attachment or seizure procedures, whether initiated by or against Recipient, nor by the rejection of any agreement between VDOT and Recipient, by a trustee of Recipient in bankruptcy, or by the Recipient as a debtor-in-possession or the equivalent of any of the foregoing under the Code of Virginia.

4. Governing Law and Equitable Relief.

This Agreement shall be governed and construed in accordance with the laws of the Commonwealth of Virginia and Recipient consents to the exclusive jurisdiction of the State courts located there for any dispute arising out of this Agreement. Recipient agrees that in the event of any breach or threatened breach by Recipient, VDOT in coordination with the Office of the Attorney General (OAG) may obtain, in addition to any other legal remedies which may be available, such equitable relief as may be necessary to protect VDOT against any such breach or threatened breach.

5. Limitations on Confidentiality.

A. Nothing in this Agreement shall be interpreted as placing any obligation of confidentiality and nonuse by Recipient with respect to any information that:

1. is or becomes publicly available to Recipient without breach of this Agreement; if rightfully received by Recipient without obligations of confidentiality;
2. can be demonstrated to have been in the public domain as of the effective date of this agreement, or legitimately comes into the public domain through no fault of the Recipient;
3. can be demonstrated to have been known to the Recipient prior to execution of this Agreement and was not acquired, directly or indirectly, from VDOT or from a third party under a continuing obligation of confidentiality;
4. is required to be disclosed pursuant to law or court order; provided that Recipient provides prior notice to VDOT and provides sufficient time to VDOT to assert any exclusions or privileges that may be available by law; or
5. is developed by Recipient without breach of this Agreement; provided, however, such Records shall not be disclosed until thirty (30) days after written notice of intent to disclose is given to VDOT's POC along with the asserted grounds for disclosure.

B. The Recipient will forward all written or oral requests for disclosure of Records to VDOT immediately upon receiving said request. VDOT will disclose Recipient's participation in this PPTA or the Records in accordance with the FOIA.

C. This Agreement terminates and supersedes all prior understandings or agreements, oral or written, between VDOT and Recipient relating to the subject matter of this Agreement. This Agreement may not be changed, modified, or discharged, released, abandoned, or otherwise terminated in whole or in part, except by an instrument in writing signed by a duly authorized representative of VDOT and Recipient.

D. Recipient may not sell, assign, or transfer, either voluntarily or by operation of law this Agreement or any interest herein without VDOT's express prior written consent. This Agreement shall inure to the benefit of and shall be binding upon VDOT and Recipient and VDOT and Recipient respective successors and permitted assigns.

6. Severability.

If any term of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, then this Agreement, including all of the remaining terms, will remain in full force and effect as if such invalid or unenforceable term had never been included.

7. **Notices.**

Any notice required by this Agreement or given in connection with it, shall be in writing and shall be given to the designated VDOT POC by personal delivery or by certified mail, postage prepaid, or recognized overnight delivery services.

VDOT POC

VDOT's Address

[Recipient]

[Recipient's Address]

8. **No Implied Waiver.**

Either party's failure to insist in any one or more instances upon strict performance by the other party of any of the terms of this Agreement shall not be construed as a waiver of any continuing or subsequent failure to perform or delay in performance of any term hereof.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the Effective Date above written.

VDOT's Designated Representative

Date

Recipient's Designated Representative

Date