



## COMMONWEALTH of VIRGINIA

### *Virginia Passenger Rail Authority Board*

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### **RESOLUTION OF THE VIRGINIA PASSENGER RAIL AUTHORITY BOARD**

**May 23, 2022**

#### **MOTION**

**Made By: Ms. Bulova      Seconded By: Mr. Spore**

**Action: Motion Carried, Unanimously**

#### **Title: Adoption of Rules Governing VPRA Procurement Procedures**

**WHEREAS**, Section 33.2-299.1 of the Code of Virginia exempts the Virginia Passenger Rail Authority (“VPRA”) from the Virginia Public Procurement Act and also requires VPRA to adopt its own rules governing VPRA procurement procedures; and

**WHEREAS**, the Board has reviewed the document titled *Virginia Passenger Rail Authority Procurement Rules* attached hereto as **EXHIBIT A**, which document has been reviewed and approved for legal sufficiency by VPRA legal counsel.

**NOW THEREFORE, BE IT RESOLVED**, that the Board hereby approves and adopts the document titled *Virginia Passenger Rail Authority Procurement Rules* in the form attached hereto as **EXHIBIT A**.

**EXHIBIT A**

**[SEE ATTACHED]**

####

# Virginia Passenger Rail Authority Procurement Rules

## 1. AUTHORITY AND PURPOSE

1.1 Authority. The Virginia Passenger Rail Authority (“VPRA”) was created by the Virginia General Assembly on July 1, 2020, pursuant to [Va. Code § 33.2-287](#), *et seq.* (the “VPRA Act”). VPRA is a body corporate and political subdivision of the Commonwealth of Virginia and is governed by a 15-member board of directors (the “VPRA Board”). Pursuant to [Va. Code § 33.2-299.1](#), VPRA is exempt from the Virginia Public Procurement Act. However, the VPRA Board must develop and adopt rules governing VPRA’s procurement procedures.

1.2 Purpose. This document constitutes VPRA’s rules governing VPRA’s procurement procedures required under [Va. Code § 33.2-299.1](#). It was adopted by the VPRA Board on May 23, 2022. It establishes a framework and the general policies under which VPRA will procure Goods, Services, and Construction from private contractors. This document does not address every possible scenario. It is a flexible document intended to be construed and applied liberally by VPRA in the furtherance of its mission to promote, sustain, and expand the availability of passenger and commuter rail service in the Commonwealth. It is also intended to establish procurement policies that maximize both competition and fairness.

1.3 Future Changes to, and Deviations from, this Document. Material modifications to this document require adoption by the VPRA Board prior to their effectiveness. The VPRA Executive Director may (i) modify this document unilaterally and report such modifications to the VPRA Board when the modifications do not materially change the policies established by the VPRA Board, or (ii) authorize deviation from the policies established by this document when the VPRA Executive Director deems it is in the best interest of VPRA and the Commonwealth to do so (*e.g.*, to meet the procedural procurement requirements of a federal funding partner), provided that the VPRA Executive Director makes a written determination justifying the need for any such deviation, reports any such deviations to the VPRA Board within 30 days of the determination, and briefs the VPRA Board on any such deviations at the next-occurring regular meeting. The VPRA Executive Director will strive to minimize any such deviations from this document and may not delegate the authority to authorize deviations except to a member of the VPRA executive leadership team during a period of absence by the VPRA Executive Director.

1.4 Items not Addressed by this Document. This document establishes policies relating to VPRA’s procurement of Goods, Services, and Construction from private contractors; it does not govern VPRA’s acquisition or disposition of real property. Similarly, although VPRA is authorized to act as a responsible public entity under the Public-Private Transportation Act of 1995 ([Va. Code §§ 33.2-1800 et seq.](#)) (the “PPTA”), this document does not establish policies or procedures related to PPTA transactions undertaken by VPRA. PPTA transactions require a responsible public entity to adopt guidelines governing PPTA contracts ([Va. Code § 33.2-1819](#)), which the VPRA Board must develop and adopt separately prior to VPRA undertaking a PPTA transaction.

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1.5 Supplemental Guidance Documents. VPRA staff will develop and disseminate internal and external supplemental guidance documents to facilitate VPRA's procurement practices. Any such supplemental guidance documents shall be presented to the VPRA Executive Director for review and approval prior to being finalized, and such supplemental guidance documents shall not be inconsistent with the principles established within this document.

## 2. DEFINITIONS

"Appeal Trigger Date" means:

- (i) for a Petitioner under Section 7.3.1, the date the Petitioner receives from VPRA the initial written notice under Section 7.2.1 that VPRA is considering making a written determination disqualifying the Petitioner from participation in competitive sealed bidding or competitive negotiation;
- (ii) for a Petitioner under Section 7.3.2, the date the Petitioner receives from VPRA the initial written notice under Section 7.2.2 that VPRA is considering making a written determination that the Petitioner is not a Responsible Bidder for the contract;
- (iii) for a Petitioner under Section 7.3.3, the date the Petitioner is denied permission to withdraw its bid by VPRA under Section 4.1.1;
- (iv) for a Petitioner under Section 7.3.4, the date of the sole source posting required under Section 3.1.3;
- (v) for a Petitioner under Section 7.3.5, the date of the emergency posting required under Section 3.1.4; and
- (vi) for a Petitioner under Section 7.3.6, the date of the award of the applicable contract or the announcement of the decision to award the applicable contract, whichever occurs first;

*provided, however*, that if any Procurement Decision Appeal depends in whole or in part upon information contained in public records pertaining to the procurement transaction that are subject to inspection under Section 10, then the Appeal Trigger Date shall be the later between (a) the date those records are available for inspection by the Petitioner, and (b) the date established under (i) through (vi) above.

"Best Value" means the overall combination of quality, price, and various elements of required Services that in total are optimal relative to VPRA's needs.

"Bidder" means a person or entity that submits a bid in response to an invitation to bid.

"Construction" means building, altering, repairing, improving, or demolishing any structure, building or highway, and any draining, dredging, excavation, grading, or similar work upon real

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property. For clarity, Construction projects may be delivered using any available project delivery method (*e.g.*, design-bid-build, design-build, construction management), and may include project delivery methods that permit combined and concurrent design and construction efforts, that permit innovative financing structures (including contractor-supplied project funding), and that provide for a contractor to operate and maintain all or a portion of a project for a term of years after construction.

“DBE” means a certified disadvantaged business enterprise, as defined under 49 CFR § 26.5.

“DRPT” is the Virginia Department of Rail and Public Transportation, defined in Section 8.1.

"Goods" means all material, equipment, supplies, and printing, including information technology and telecommunications goods such as automated data processing hardware and software.

"Informality" means a minor defect or variation of a bid or proposal from the exact requirements of the invitation to bid, or the request for proposal, which does not affect the price, quality, quantity or delivery schedule for the Goods, Services, or Construction being procured.

“Offeror” means a person or entity that submits a proposal in response to a request for proposal.

“Petitioner” is defined in Section 7.3.

"Potential Bidder or Potential Offeror" means a person or entity who, at the time VPRA negotiates and awards or proposes to award a contract, is engaged in the sale or lease of Goods, or the sale of Services, or Construction, of the type to be procured under the contract, and who at such time is eligible and qualified in all respects to perform that contract, and who would have been eligible and qualified to submit a bid or proposal had the contract been procured through competitive sealed bidding or competitive negotiation.

“PPTA” means the Public-Private Transportation Act of 1995 ([Va. Code §§ 33.2-1800](#) *et seq.*) and is defined in Section 1.4.

“Procurement Decision Appeal” means a written petition delivered to the VPRA Director of Procurement stating the individual’s or entity’s status as a permitted Petitioner under Section 7.3, the purpose for the petition, and seeking an appropriate Procurement Relief.

“Procurement Relief” is defined in Section 7.5.2.

"Professional Services" means work performed by an independent contractor within the scope of the practice of accounting, actuarial services, architecture, land surveying, landscape architecture, law, dentistry, medicine, optometry, pharmacy, or professional engineering.

"Public Body" means any legislative, executive, or judicial body, agency, office, department, authority, post, commission, committee, institution, board, or political subdivision created by law to exercise some sovereign power or to perform some governmental duty and empowered by law to undertake the activities described in this document.

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"Responsible Bidder" means a person or entity who has the capability, in all respects, to perform fully the contract requirements and the moral and business integrity and reliability that will assure good faith performance.

"Responsive Bidder" means a person or entity who has submitted a bid that conforms in all material respects to the invitation to bid.

"Services" means any work performed by a contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials, and supplies.

"SWaM" means a business entity that has been certified as a small, women-owned, and/or minority-owned business by the Virginia Department of Small Business and Supplier Diversity, and as those terms are defined under [Va. Code § 2.2-1604](#).

"Transitional Legacy Contracts" is defined in Section 8.1.

"VPRA" is defined in Section 1.1.

"VPRA Act" is defined in Section 1.1.

"VPRA Board" is defined in Section 1.1.

### 3. METHODS OF PROCUREMENT

#### 3.1 Non-Competitive Procurement Methods.

- 3.1.1 **Micro Purchases.** Micro purchases are purchases under \$10,000 and may be made without formal competition, provided that (i) the price is fair and reasonable, and (ii) the purchase has been approved through VPRA's requisition process. Order splitting (*i.e.*, dividing a purchase of more than \$10,000 into multiple purchases of less than \$10,000) to avoid formal competition is prohibited. Consideration shall be given to SWaMs and DBEs, whenever practicable.
- 3.1.2 **Small Purchases.** Small purchases are purchases that are greater than \$10,000 but less than \$250,000, and may be made without formal competition, provided that (i) the price is fair and reasonable, (ii) VPRA has obtained quotes from three viable sources (to the extent three sources are available), and (iii) the purchase has been approved through VPRA's requisition process. Order splitting (*i.e.*, dividing a purchase of more than \$250,000 into multiple purchases of less than \$250,000) to avoid formal competition is prohibited. Consideration shall be given to SWaMs and DBEs, wherever practicable.
- 3.1.3 **Sole Source.** Regardless of dollar value, VPRA may negotiate and award a contract to a contractor without competitive sealed bidding or competitive negotiation when VPRA has made a determination in writing that there is only one source practicably

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available for that which is to be procured. The writing shall document the basis for this determination, and when valued in excess of \$250,000, VPRA shall issue a publicly posted, written notice stating that only one source was determined to be practicably available, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded.

3.1.4 ***Emergency.*** Regardless of dollar value, in case of emergency, VPRA may award a contract without competitive sealed bidding or competitive negotiation; however, such procurement shall be made with such competition as is practicable under the circumstances. VPRA shall make written determination of the basis for the emergency and for the selection of the particular contractor and when valued in excess of \$250,000 VPRA shall issue a publicly posted, written notice stating that the contract has been or is being awarded on an emergency basis, and identifying that which is being procured, the contractor selected, and the date on which the contract was or will be awarded.

3.1.5 ***Categorical Exemptions.*** Competitive procurement is not required, without regard to the contract value, with respect to contracts for the following categories of Goods and Services because competition is normally either not practicable (due to time constraints or specificity of need) or not available:

3.1.5.1 legal services<sup>1</sup> including, without limitation, dispute resolution services;

3.1.5.2 insurance;

3.1.5.3 advertising services;

3.1.5.4 events such as conferences, workshops, seminars, and trainings (whether provided by VPRA or attended by VPRA employees);

3.1.5.5 services that a freight or passenger railroad operator has an established legal right (contractual, statutory, or otherwise) to provide (*e.g.*, without limitation, flagging and inspection services,

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<sup>1</sup> Va. Code § 33.2-299.1 requires that professional service contracts expected to exceed \$80,000 must be procured consistently with the Virginia Public Procurement Act provisions of Va. Code §§ 2.2-4302.2, 2.2-4303.1, and 2.2-4303.2. The definition of “professional services” in the Virginia Public Procurement Act includes the practice of law. Accordingly, at first glance it may seem as though contracts for legal services expected to exceed \$80,000 must be competitively procured consistently with Va. Code §§ 2.2-4302.2, 2.2-4303.1, and 2.2-4303.2. But this is not so because the Virginia Public Procurement Act itself exempts the purchase of legal services from competitive requirements under a separate provision, Va. Code § 2.2-4344(A)(2). Accordingly, VPRA procures its legal services consistently with the Virginia Public Procurement Act by exempting such services categorically from competitive requirements.

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dispatch services, maintenance services, and/or any services provided directly to or for the benefit of rail passengers);

3.1.5.6 government-to-government contracts; and

3.1.5.7 purchases from government-regulated entities such as public utilities, which are granted market exclusivity (or similar rights) by a regulating agency.

**3.2 Competitive Procurement Methods.**

3.2.1 ***When Competitive Procurement Used.*** VPRA's general intent is to use competitive procurement methods set forth in this Section 3.2 when the facts of the procurement do not support the use of any of the non-competitive procurement methods set forth in Section 3.1. However, nothing in this Section 3.2.1 shall be construed to require VPRA to conduct its own competitive procurement if joint procurement or cooperative procurement options are available for VPRA's use, and nothing shall prevent VPRA from electing to use competitive procurement methods even if another method of procurement is available to it.

3.2.2 ***Competitive Sealed Bidding.*** Competitive sealed bidding is a method of competitive procurement under which VPRA solicits and receives sealed bids from Bidders, opens the sealed bids at a prescribed place and time, and awards the resulting contract to the lowest Responsive and Responsible Bidder. This process includes the following components:

3.2.2.1 VPRA's issuance of an invitation to bid (i) incorporating the specifications and contract terms and conditions applicable to the procurement, and (ii) a statement of any requisite qualifications of prospective contractors;

3.2.2.2 public notice of the invitation to bid at least ten (10) days prior to the date set for receipt of bids;

3.2.2.3 public opening and announcement of all bids received;

3.2.2.4 evaluation of bids based on the requirements set forth in the invitation to bid (VPRA may waive any Informality when evaluating bids);

3.2.2.5 award of the resulting contract to the lowest Responsive and Responsible Bidder, provided that when the invitation to bid contemplates multiple contract awards, contract awards may be made to more than one Bidder; and

3.2.2.6 if the bid from the lowest Responsible Bidder exceeds available funds, VPRA may negotiate with the apparent low Bidder to obtain a contract price within available funds.



3.2.3 ***Competitive Negotiation.*** Competitive negotiation is a method of competitive procurement (distinct from competitive sealed bidding) under which VPRA solicits and receives proposals from Offerors, evaluates the proposals, negotiates with one or more Offerors, and awards the resulting contract to the Offeror that has made the best proposal and offers the Best Value. This process includes the following components:

3.2.3.1 VPRA's issuance of a written request for proposal (i) indicating in general terms that which is sought to be procured, (ii) specifying the factors that will be used in evaluating the proposal, (iii) indicating whether a numerical scoring system will be used in evaluation of the proposal (and if so, the point values assigned to each of the evaluation criteria shall be included), and (iv) incorporating the other applicable contractual terms and conditions, including any unique capabilities, specifications, or qualifications that will be required;

3.2.3.2 public notice of the request for proposal at least ten (10) days prior to the date set for receipt of proposals; and

3.2.3.3 after receipt and evaluation of all proposals, VPRA will conduct negotiations with the Offeror or Offerors deemed to be fully qualified and best suited among those submitting proposals, including the negotiation of any terms and conditions proposed by VPRA to which the selected Offeror objected in writing at the time it submitted its proposal; and

3.2.3.4 after negotiations have been conducted with each Offeror so selected, VPRA will select the Offeror which, in its opinion, has made the best proposal and provides the Best Value (price being considered but not determinative), and shall award the contract to that Offeror, provided that when the terms and conditions of multiple awards are contemplated in the request for proposal, VPRA may award contracts to more than one Offeror.

3.2.3.5 When VPRA deems it useful and appropriate, it may elect to add a step to the competitive negotiation process prior to issuing a request for proposal. Under this optional step, VPRA issues a request for qualifications soliciting from prospective contractors their statements of qualifications with respect to criteria established by VPRA, which qualifications shall be relevant to that which is to be procured pursuant to a subsequent request for proposal. Upon receipt and evaluation of any statements of qualifications, VPRA will develop a short list of qualified prospective contractors permitted to submit a proposal for a subsequent, corresponding request for proposal. Thereafter, VPRA shall follow the process for competitive negotiation, as described in this Section 3.2.3, soliciting proposals from the short-listed, prospective contractors, conducting negotiations, and awarding a resulting contract to one or more Offerors. VPRA's development of a short list of qualified

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prospective contractors will be performed in VPRA's sole and absolute discretion based on a review of submitted qualifications and shall not be the basis of a Procurement Decision Appeal.

3.2.3.6 When VPRA deems it useful and appropriate, it may elect to offer a stipend (cash payment) to one or more unsuccessful Offerors that submit compliant, good faith offers. Terms of eligibility for any such stipend shall be defined with specificity within the corresponding request for proposal.

3.2.4 **Addenda.** With respect to any invitation to bid or request for proposal, at any time VPRA may issue any number of addenda to clarify, supplement, or otherwise modify the applicable invitation to bid or request for proposal. In each such a case, VPRA shall take reasonable steps to ensure that all prospective Bidders and Offerors have access to the applicable addendum and shall provide a reasonable time to such prospective Bidders and Offerors to comprehend the contents of the addendum and to adjust their bids or offers accordingly.

3.2.5 **Professional Services Contracts Expected to Exceed \$80,000.** Contracts for Professional Services expected to exceed \$80,000 constitute a unique category of VPRA contracts. Pursuant to [Va. Code § 33.2-299.1](#), these contracts must be procured by VPRA in a manner consistent with the following provisions of the Virginia Public Procurement Act: Va. Code §§ [2.2-4302.2](#), [2.2-4303.1](#), and [2.2-4303.2](#). The statutory provisions, among other things, establish a unique competitive procurement process (requiring qualifications-based ranking and one-at-a-time negotiations, among other unique requirements), and impose dollar and time limitations on certain architectural and engineering professional service contracts. Accordingly, VPRA will procure Professional Services contracts expected to exceed \$80,000 by following this document, as well as the above-cited statutes, giving priority to the above-cited statutes where the two may conflict.

3.3 **Removing Bid or Proposal from Consideration.** Any Bidder or Offeror may elect to remove its bid or proposal from consideration at any time by written notice to VPRA prior to the opening of bids or proposal due date, respectively.

3.4 **Joint and Cooperative Procurement.**

3.4.1 **Joint Procurement.** Joint procurement is not a distinct method of competitive procurement. Instead, it describes a structure where a Public Body participates in a procurement on behalf of or in conjunction with one or more other Public Bodies. VPRA may participate in, sponsor, conduct, or administer a joint procurement agreement on behalf of or in conjunction with one or more other Public Bodies, or public agencies or institutions or localities of the several states, of the United States or its territories, the District of Columbia, the U.S. General Services Administration, or the Metropolitan Washington Council of Governments, for the purpose of combining requirements to increase efficiency or reduce administrative expenses in any acquisition of Goods, Services, or Construction.

3.4.2 ***Cooperative Procurement.*** Joint procurement is not a distinct method of competitive procurement. Instead, it describes a structure where a Public Body purchases from another Public Body's contract even if it did not participate in the solicitation. VPRA may purchase from another Public Body's contract or from the contract of the Metropolitan Washington Council of Governments or the Virginia Sheriffs' Association 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 a cooperative procurement being conducted on behalf of other Public Bodies.

#### **4. BID, PROPOSAL, PAYMENT, AND PERFORMANCE SECURITY**

4.1 **Bid Security.** Except in cases of emergency, all bids for Construction containing a price greater than \$250,000 shall be accompanied by a bid bond or other security guaranteeing that the Bidder will, in fact, enter into the contract for the work mentioned in the bid. Any such security shall be in a form approved by VPRA's General Counsel, and any preapproved forms shall be made available to Bidders by appending such forms to the invitation to bid or otherwise by directing Bidders to such form. The security shall be in an amount of five percent (5%) of the corresponding bid, unless otherwise directed in the invitation to bid. If a Bidder fails to honor its bid by refusing to enter into the contract for the work mentioned in the bid, then VPRA shall be entitled to the lesser amount between (i) the difference between the bid for which the bond was written and the next low bid, and (ii) the face amount of the bid security.

4.1.1 ***Bid Withdrawal.*** After the opening of bids, a Bidder for Construction may withdraw its bid from consideration (without impact to the corresponding bid security) if the price bid was substantially lower than the other bids due solely to a mistake in the bid, provided the bid was submitted in good faith, and the mistake was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional arithmetic error or an unintentional omission of a quantity of work, labor, or material made directly in the compilation of a bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of original work papers, documents, and materials used in the preparation of the bid sought to be withdrawn. Any Bidder wishing to withdraw its bid must provide notice in writing of its claim of right to withdraw its bid within two business days after the conclusion of the bid opening procedure and shall submit original work papers with such written notice. VPRA will respond to such written request to withdraw the bid within five business days. If a bid is withdrawn in accordance with this Section 4.1.1, the lowest remaining bid shall be deemed to be the low bid.

4.2 **Proposal Security.** When VPRA deems it appropriate and beneficial, it may require Offerors to submit with proposals a proposal security in a form approved by VPRA's General Counsel. Prior to requiring any such security, VPRA shall consider under what

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circumstances the security should be returned to the Offeror if such Offeror and VPRA are unable to negotiate mutually agreeable contractual terms and conditions.

4.3 Performance and Payment Security. When VPRA deems it appropriate and beneficial, it may require prospective contractors to submit payment and performance security in a form and amount approved by VPRA's General Counsel. The purpose of a payment security is to ensure contractors and material suppliers at all tiers of a project receive payment for work and materials supplied in accordance with the contract requirements. The purpose of a performance security is to ensure the timely and proper completion of the contract work; a performance security may include more than one type of instrument (*e.g.*, a project security package may include a performance bond in addition to a letter of credit). Securities will be sized on a case-by-case basis; generally, the amount of these securities will be set at 100% of the value of the bonded contract.

## **5. CONTRACT TERMS**

### 5.1 General and Special Terms and Conditions.

5.1.1 VPRA intends to develop and make publicly available one or more documents containing general and specific contractual terms and conditions that will apply to each type of contract awarded by VPRA. VPRA will update these terms and conditions from time to time without the involvement of the VPRA Board.

5.1.2 Within each invitation to bid VPRA shall append or make available to Bidders the contractual terms and conditions that will apply to the resulting contract.

5.1.3 Within each request for proposal VPRA shall append or make available to Offerors the proposed contractual terms and conditions that VPRA proposes should apply to the resulting contract. Offerors will have the opportunity to review and object to any terms and conditions they deem unacceptable. Only those proposed terms and conditions expressly objected to by an Offeror will be subject to negotiation and revision during the negotiation phase of a competitive negotiation procurement.

### 5.2 Funding Partner Terms and Conditions.

5.2.1 From time to time, a VPRA-awarded contract may involve the expenditure of funds supplied by a non-VPRA funding partner; in some cases, the funding partner will be a federal government entity. In such a case, VPRA may be required to incorporate mandatory contractual terms and conditions imposed by its funding partner(s), which are in addition to contractual terms and conditions promulgated by VPRA. If so required, VPRA will incorporate (including by reference) into the resulting contract those requirements imposed by its funding partners.

## **6. CONTRACT MODIFICATIONS**

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6.1 Bilateral Modifications. VPRA and its contracting counterparties are free to mutually agree on any modification to a contract.<sup>2</sup> However, VPRA will strive to avoid extreme contract modifications that go far beyond the original scope. Factors that VPRA will consider when seeking a substantial modification to an existing contract will include (i) whether there is a significant change in the magnitude of work to be performed; (ii) whether the change is designed to procure a totally different item or drastically alter the quality, character, nature, or type of work contemplated by the original contract; and (iii) whether the cost of the work ordered greatly exceeds the original contract cost. In so modifying any contract, VPRA will strive to balance administrative efficiency with fairness to the applicable contracting industry.

6.2 Unilateral Modifications. As part of the contract provisions included within an invitation to bid or request for proposal, VPRA may reserve for itself the ability to impose unilateral contract modifications, as needed based on the substance of the contract.

## 7. REMEDIAL RIGHTS

7.1 Right to Cancel Solicitation. At any time prior to the award of a contract, VPRA may cancel the corresponding invitation to bid or request for proposal.

7.2 Right to Disqualify Bidders and Offerors; Determination of Non-Responsibility.

7.2.1 ***Disqualification***. VPRA may disqualify any Bidder, Offeror, Potential Bidder, or Potential Offeror from participation in competitive sealed bidding or competitive negotiation if VPRA notifies such Bidder, Offeror, Potential Bidder, or Potential Offeror in writing. Prior to the issuance of any such written determination, VPRA shall (i) notify the affected Bidder, Offeror, Potential Bidder, or Potential Offeror in writing of the results of VPRA's evaluation, (ii) disclose the factual support for the determination, and (iii) allow the affected Bidder, Offeror, Potential Bidder, or Potential Offeror an opportunity to inspect any documents that relate to the determination, if requested by the Bidder, Offeror, Potential Bidder, or Potential Offeror within five (5) business days after receipt of the notice.

7.2.2 ***Determination of Non-Responsibility***. Upon opening sealed bids, VPRA shall determine whether the apparent low Bidder is a Responsible Bidder. If VPRA determines the apparent low Bidder is not a Responsible Bidder, then prior to the issuance of a written determination of non-responsibility, VPRA shall (i) notify the apparent low Bidder in writing of the results of VPRA's evaluation, (ii) disclose the factual support for the determination, and (iii) allow the apparent low Bidder an opportunity to inspect any documents that relate to the determination, if requested by the apparent low Bidder within five (5) business days after receipt of the notice.

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<sup>2</sup> See, e.g., Amchem Prods. v. Newport News Circuit Court Asbestos Cases Plaintiffs, 264 Va. 89, 98 (2002).

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7.3 Procurement Decision Appeals.<sup>3</sup> Only the following individuals or entities (each a “Petitioner”), and only for the following purposes, may file a Procurement Decision Appeal seeking appropriate Procurement Relief:

7.3.1 a Bidder, Offeror, Potential Bidder, or Potential Offeror who is disqualified from participation in competitive sealed bidding or competitive negotiation, for the purpose of challenging the basis of such disqualification;

7.3.2 a Bidder who is determined not to be a Responsible Bidder for a particular contract, for the purpose of challenging such determination of non-responsibility;

7.3.3 a Bidder denied withdrawal of a bid under Section 4.1.1, for the purpose of challenging the denial of its request to withdraw;

7.3.4 a Potential Bidder or Potential Offeror on a contract negotiated on a sole source basis under Section 3.1.3, for the purpose of challenging the determination that there is only one source practicably available for that which is to be procured;

7.3.5 a Potential Bidder or Potential Offeror on a contract negotiated on an emergency basis under Section 3.1.4, for the purpose of challenging the basis for the emergency; and

7.3.6 an unsuccessful Bidder or Offeror, for the purpose of challenging the decision to award the contract to the successful Bidder or Offeror as contrary to the invitation to bid, request for proposal, or applicable law.

7.4 Procurement Decision Appeal Timing and Process.

7.4.1 ***Filing Deadline.*** A Procurement Decision Appeal shall be filed by the Petitioner with the VPRA Director of Procurement no later than ten (10) days after the applicable Appeal Trigger Date. Procurement Decision Appeals filed late will not be considered.

7.4.2 ***VPRA Written Decision.*** Within fifteen (15) days after receipt of a timely and complete Procurement Decision Appeal, the VPRA Director of Procurement shall issue a written decision stating the reasons for the action taken, and stating the applicable Procurement Remedy to be enacted, if any. Thereafter, if the Petitioner is not satisfied

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<sup>3</sup> The Virginia Public Procurement Act provides remedies to bidders and offerors, and potential bidders and offerors (*see, e.g.*, Va. Code §§ 2.2-4360, 2.2-4364, and 2.2-4365). The Supreme Court of Virginia has recognized these remedial rights as a waiver of sovereign immunity and in derogation of common law. (*See, Charlottesville Area Fitness Club Operators Ass’n v. Albemarle County Bd. Of Supervisors*, 238 Va. 87, 103 (2013); *Sabre Constr. Corp. v. County of Fairfax*, 256 Va. 68, 73 (1998)). Meanwhile, the Supreme Court of Virginia has also held repeatedly that only the General Assembly can abrogate the Commonwealth’s sovereign immunity. (*See, e.g., Alliance to Sate the Mattaponi v. Commonwealth*, 270 Va. 423, 455 (2005)). Importantly, the General Assembly has expressly exempted VPRA from the Virginia Public Procurement Act, inclusive of the remedies provided to bidders and offerors existing therein. Accordingly, the VPRA Board establishes the remedies within Sections 7.3, 7.4, and 7.5 of this document to provide defined aggrieved parties avenues to seek administrative relief, but VPRA cannot waive for itself its sovereign immunity not waived by the General Assembly (*see, Va. Code § 33.2-292(A)(4)*). Thus, in establishing these remedies, VPRA is without the authority to subject itself to legal actions in court relating to its procurement decisions.

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with the written decision of the VPRA Director of Procurement then the Petitioner may, within ten (10) days of receipt of such written decision, request a face-to-face meeting with the VPRA Executive Director, or his designee. This face-to-face meeting may be accomplished by video conference if circumstances so require. Any such requested face-to-face meeting with the VPRA Executive Director or his designee shall be held within thirty (30) days of Petitioner's written request, unless otherwise agreed between VPRA and the Petitioner. Within thirty (30) additional days after the face-to-face meeting, the VPRA Executive Director or his designee shall issue a final written decision with respect to the Procurement Decision Appeal, which final written decision shall be final and not subject to appeal. If the VPRA Director of Procurement, Executive Director, or his designee, fails to issue a timely written decision, then the Procurement Decision Appeal shall be deemed denied in full by VPRA.

**7.4.3 *Effect of Procurement Decision Appeal on Award.*** Pending final determination of a Procurement Decision Appeal, the validity of a contract awarded and accepted in good faith in accordance with this document shall not be affected by the fact that a Procurement Decision Appeal has been filed.

### 7.5 Burden of Proof, Standard of Review, and Relief for Procurement Decision Appeals.

**7.5.1 *Burden of Proof and Standard of Review.*** With respect to any Procurement Decision Appeal, the Petitioner must establish by the greater weight of the evidence that the challenged VPRA determination or decision was (i) arbitrary or capricious, or (ii) not in accordance with applicable law or the terms or conditions of the invitation to bid or request for proposal.

**7.5.2 *Relief for Successful Procurement Decision Appeal.*** If the Petitioner prevails on its Procurement Decision Appeal, the sole relief (each a "Procurement Relief") shall be as follows:

7.5.2.1 for a Petitioner proceeding under Section 7.3.1, restoration of the Petitioner's eligibility to participate in the competitive sealed bidding or competitive negotiation and future substantially similar competitive sealed bidding or competitive negotiation absent adequate facts to support a future disqualification;

7.5.2.2 for a Petitioner proceeding under Section 7.3.2, a finding that the Bidder is a Responsible Bidder for the contract in question and/or a directed award of the contract;

7.5.2.3 for a Petitioner proceeding under Section 7.3.3, permission for the Bidder to withdraw its bid;

7.5.2.4 for Petitioners proceeding under Section 7.3.4, Section 7.3.5, or Section 7.3.6, (i) if the written determination providing the Procurement Relief occurs prior to the award of the applicable contract or prior to the start of performance of a contract that has been awarded, then VPRA shall cancel the proposed award or contract, or

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revise the award or contract to comply with the law and this document, and (ii) if the written determination providing the Procurement Relief occurs after the award of the applicable contract and performance has begun, then VPRA may declare the applicable contract void upon a finding that this action is in the best interest of the public, and upon any such declaration, compensate the performing contractor for the cost of performance up to the date of such declaration. In no event shall the performing contractor be entitled to lost profits, and VPRA may reprocur any Goods, Services, or Construction after an awarded contract has been declared void.

### **8. TRANSITIONAL LEGACY CONTRACTS; USE OF DRPT CONTRACTS**

8.1 Transitional Legacy Contracts. Prior to the VPRA Board's adoption of this document, the Department of Rail and Public Transportation ("DRPT") conducted procurements on behalf of VPRA pursuant to [Va. Code § 33.2-299.5](#), and DRPT has assigned several contracts to VPRA for VPRA's use and administration (collectively, the "Transitional Legacy Contracts"). To facilitate VPRA's transition to begin conducting its own procurements, VPRA, may continue to use and administer the Transitional Legacy Contracts according to their terms, including any renewal terms provided for in such contracts. In addition, VPRA may, in the sole discretion of the VPRA Executive Director, extend the expiry date and increase the compensation caps within any Transitional Legacy Contract so as to avoid any undue burden on VPRA, provided that with respect to any term contract (i) no Transitional Legacy Contract shall be extended beyond its final expiry date by more than twelve months, and (ii) no compensation cap within a Transitional Legacy Contract shall be increased by more than \$10,000,000.

8.2 Use of DRPT Contracts. In addition to the rights set forth in Section 8.1 above, and pursuant to [Va. Code § 33.2-299.5](#), after the VPRA Board's adoption of this document, to the extent contracts procured and awarded by DRPT are available for VPRA's use, VPRA may continue to utilize such contracts when deemed useful or beneficial by the VPRA Executive Director.

### **9. DBE AND SWAM**

9.1 DBE and SWaM and Programs. VPRA will establish complete DBE and SWaM programs, as required by federal and state law. Annually, VPRA shall (i) recommend to the VPRA Board for its adoption prospective DBE and SWaM goals, and (ii) report to the VPRA Board, retrospectively, a comparison between VPRA's actual DBE and SWaM participation as compared to prior DBE and SWaM goals established by the VPRA Board for the relevant time period.

9.2 DBE and SWaM Participation Plans. All competitive procurements conducted by VPRA shall include a requirement for Bidders or Offerors to include within their bids or proposals a DBE and SWaM participation plan relating to DBEs and SWaMs performing work (whether as subcontractors or prime contractors) under the resulting contract.



**10. PUBLIC INSPECTION OF PROCUREMENT RECORDS**

- 10.1 Confidentiality of Certain Records. Pursuant to [Va. Code § 33.2-299.7\(B\)](#), VPRA will keep confidential procurement records during the pendency of a procurement. In addition, pursuant to [Va. Code § 33.2-299.7\(A\)](#), VPRA may keep confidential certain trade secrets or confidential proprietary information relating to contracts already awarded or otherwise entered into by VPRA, including portions relating to a financing or other financial close not yet achieved but anticipated by such contract.
- 10.2 Early Inspection for Bidders. Any competitive sealed bidding Bidder, upon request, shall be afforded the opportunity to inspect bid records within a reasonable time after the opening of all bids but prior to award, except in the event that VPRA decides not to accept any of the bids and to reopen the contract. Otherwise, bid records shall be open to public inspection only after award of the contract, subject to Section 10.1.
- 10.3 Early Inspection for Offerors. Any competitive negotiation Offeror, upon request, shall be afforded the opportunity to inspect proposal records within a reasonable time after the evaluation and negotiations of proposals are completed but prior to award, except in the event that VPRA decides not to accept any of the proposals and to reopen the contract. Otherwise, proposal records shall be open to public inspection only after award of the contract, subject to Section 10.1.
- 10.4 Reasonable Restrictions. Any inspection of procurement transaction records under this Section 10 shall be subject to reasonable restrictions to ensure the security and integrity of the records.

*[END OF VIRGINIA PASSENGER RAIL AUTHORITY PROCUREMENT RULES]*