



# COMMONWEALTH of VIRGINIA

DEPARTMENT OF TRANSPORTATION  
1401 EAST BROAD STREET  
RICHMOND, VIRGINIA 23219 2000

Gregory A. Whirley  
Commissioner

February 19, 2013

Ms. Irene Rico  
Division Administrator  
Federal Highway Administration Virginia Division  
400 North 8<sup>th</sup> Street, Suite 750  
Richmond, Virginia 23219-4825

RE: Downtown Tunnel/Midtown Tunnel/MLK Extension Project Finance Plan

Dear Ms. Rico:

The Virginia Department of Transportation (“VDOT”) has developed an updated finance plan supplement for the Downtown Tunnel/Midtown Tunnel/MLK Extension Project (“Midtown Tunnel Project”). The supplement conforms to the requirements of Section 106, Title 23 and the finance plan guidance issued by the Federal Highway Administration. The supplement provides details concerning VDOT’s financial obligations for the Midtown Tunnel Project. VDOT is requesting the Federal Highway Administration’s acceptance of VDOT’s updated finance plan supplement.

We believe the supplement provides an accurate account of VDOT’s financial obligations. VDOT will review and update the supplement annually, in conjunction with updates to the finance plan prepared by Elizabeth River Crossings Opco LLC (the concessionaire for the Midtown Tunnel Project).

To the best of our knowledge and belief, the supplement submitted herewith fairly and accurately describes VDOT’s financial obligations for the Midtown Tunnel Project. We believe the assumptions underlying the supplement are reasonable and appropriate. Further, we have made available all significant information that we believe is relevant to the supplement and, to the best of our knowledge and belief, the documents and records supporting the assumptions are appropriate.

Sincerely,

**Signature on file.**

John W. Lawson  
Chief Financial Officer

Virginia Department of Transportation

Midtown Tunnel Project

Updated Finance Plan Supplement

February 2013

## 1. **Project**

### *Overview*

The Downtown Tunnel/Midtown Tunnel/MLK Extension Project located in the cities of Portsmouth and Norfolk, Virginia (“Project”) includes (i) the development, design, construction, operation, maintenance, and tolling of a new two-lane immersed tube tunnel adjacent to the existing Midtown Tunnel; (ii) the development, design, construction, operation, maintenance, and tolling of the four-lane limited access extension of the Martin Luther King Freeway in Portsmouth, Virginia; (iii) the rehabilitation, operation, maintenance, and tolling of the existing Midtown Tunnel; (iv) the rehabilitation, operation, maintenance, and tolling of the existing Downtown Tunnel; and (v) the installation of an all-electronic tolling system that is compatible with the regional tolling network.

### *Comprehensive Agreement*

The Project is being undertaken pursuant to a Comprehensive Agreement by and between Elizabeth River Crossings Opco LLC (“ERC”) and the Virginia Department of Transportation (“VDOT”), whereby VDOT has granted ERC the exclusive right to (i) finance, develop, design, construct, manage, operate, and maintain the Project and (ii) establish, impose, charge, collect, use, and enforce payment of tolls and related charges. The Comprehensive Agreement (“CA”) commenced on December 5, 2011, and will remain in effect for 58 years from the financial close date (April 13, 2012), subject to extension or early termination in accordance with the CA.

### *Environmental Review Process*

The approved environmental documents for the Project are shown in Table 1-1 below. Pursuant to the terms of the CA, ERC must comply with all environmental documents. ERC is responsible for all costs and delays associated with updates to the environmental documents required as a result of changes to ERC’s design which are not directed by VDOT.

Table 1-1 – Environmental Documents

Downtown Tunnels National Fire Protection Association work	Programmatic Categorical Exclusion (5/13/09)
Midtown Tunnel National Fire Protection Association work	Programmatic Categorical Exclusion (5/13/09)
Rt. 58/Midtown Tunnel (Pinner's Point)	Final Environmental Impact Statement (11/8/96) and Record of Decision (3/17/97) Revised Record of Decision (7/9/07)
Martin Luther King Freeway Extension	Environmental Assessment (4/7/08) Revised Environmental Assessment/Finding of No Significant Impact (2/26/09)
Downtown Tunnel/Midtown Tunnel/Martin Luther King Freeway Extension Project	Environmental Assessment (Reevaluation) (3/24/11) /Finding of No Significant Impact (8/1/11)
Brambleton Interchange ITS	Programmatic Categorical Exclusion (5/22/09)

*Public-Private Partnership*

The Project is being undertaken as a public-private partnership, pursuant to the Public-Private Transportation Act of 1995 (Va. Code §§ 56-556 *et seq.*) (“PPTA”). In enacting the PPTA, Virginia’s General Assembly found that there is a public need for the timely development and/or operation of qualifying transportation facilities and that such public need may not be satisfied by existing procurement methods (Va. Code § 56-558). The PPTA enables VDOT to leverage investment by the private sector in developing qualifying transportation facilities. Under the PPTA, VDOT and its private partners can use a wide range of sources to finance projects, including revenues generated by user fees, debt, equity, or other securities (Va. Code §§ 56-565 and 56-567.1).

In electing to pursue a public-private partnership for the Project, VDOT determined that the levels of state and federal funds available were insufficient to enable VDOT to procure the Project in a reasonable timeframe using traditional project delivery methods. A public-private partnership would enable VDOT to leverage limited state and federal funds using private financing (including equity and debt) to fund development of the Project. In addition, the technical complexities of the Project, which include construction of approximately 4,100 feet of immersed tube tunnel and the operation of an all electronic, open-road toll collection system, created significant opportunities for VDOT to take advantage of private sector innovation and to transfer significant risk to the private sector.<sup>1</sup>

---

<sup>1</sup> The Commonwealth substantially revised its PPTA Implementation Manual and Guidelines in December 2010. The revised guidelines describe in detail the Commonwealth’s approach to selecting projects for delivery as public-private partnerships. In addition to considering factors such as the levels of funding available for a project, the

As discussed in more detail below, the sources of funding for VDOT's contribution to the Project include GARVEE bond proceeds. In 2011, the General Assembly enacted legislation as part of Governor McDonnell's transportation plan that included a revolving authorization for the issuance of GARVEE bonds (with no more than \$1.2 billion in bonds to be outstanding at any time). The Commonwealth Transportation Board issued the first series of GARVEE bonds in January 2012 in order to meet VDOT's funding commitment for the Project.

## **2. Purpose of Updated Finance Plan Supplement**

Pursuant to the terms of the TIFIA loan agreement, ERC is to provide annual updates to the Project's plan of finance. ERC first update to the Project's plan of finance is dated September 5, 2012 ("ERC Updated Finance Plan"). The purpose of this supplement is to provide further details regarding the Project costs for which VDOT is responsible.

## **3. VDOT's Funding Obligation for the Project**

VDOT's estimated obligation was approximately \$362,000,000. At financial close, VDOT's obligation was set at \$308,605,000 pursuant to the adjustment protocol set out in the CA. Following financial close, VDOT's estimated obligation increased by \$112,500,000 as a result of VDOT exercising its right, in accordance with Amendment 1 to the CA dated March 21, 2012, ("CA Amendment 1") to postpone the commencement of the imposition and collection of tolls on the existing Midtown Tunnel and existing Downtown Tunnel until January 31, 2014. The total for VDOT's contribution to the Project currently is \$421,105,000 (the "Public Funds Amount").

VDOT's contribution, including the \$112,500,000 increase related to CA Amendment 1, will be used to support design and construction work.<sup>2</sup> The sources of funding for VDOT's contribution include GARVEE bond proceeds, state maintenance funds, and funds advanced from the Commonwealth's Toll Facilities Revolving Account ("TFRA"). Funds advanced from the TFRA will be repaid with future allocations of state maintenance funds.

Table 3-1 shows the sources of funding for VDOT's contribution to the Project. The UPCs shown below relate to federal project 965-5(079). VDOT's detailed estimate for the federal project is attached as Appendix 1.

---

project's potential to generate revenues, and the technical complexity of the project (as described above), the revised guidelines call for the use of a value-for-money analysis further assess the business case for pursuing a public-private partnership structure.

<sup>2</sup> VDOT's contribution to the Project can only be used to fund activities that are eligible for reimbursement from federal-aid funds. See CA Exhibit M.

Table 3-1 – VDOT Contribution

<b>UPC</b>	<b>TFRA</b>	<b>State Maintenance*</b>	<b>GARVEE</b>	<b>Grand Total</b>
<b>101851</b>				
PE	\$5,489,590		\$147,944,324	
ROW	\$381,549	\$9,700,000	\$15,520,000	
CN	\$2,960,711		\$224,535,676	
<b>101860</b>				
Toll Gantries**		\$1,940,000		
<b>101852</b>				
PE	\$197,179		\$4,548,200	
ROW			\$791,800	
CN	\$75,971	\$300,000	\$6,660,000	
<b>101861</b>				
Toll Gantries**		\$60,000		
<b>Total</b>	<b>\$9,105,000</b>	<b>\$12,000,000</b>	<b>\$400,000,000***</b>	<b>\$421,105,000</b>

*\*State maintenance funds include dollars allocated to the Hampton Roads District for the operations and maintenance of the Midtown Tunnel and Downtown Tunnel.*

*\*\*Work related to toll gantries began in accordance with Amendment 1 to the Interim Agreement, which was prior to federal authorization for construction. As such, that work is being paid for with state funding.*

*\*\*\*Of the total GARVEE funds shown, VDOT has “advance constructed” \$277,673,000 in accordance with the federal-aid project agreement. None of those funds has been converted at this time. Conversion amounts will be described in future updates to this supplement.*

The funding for VDOT’s contribution is allocated in VDOT’s 2013-2018 Six-Year Improvement Program (“SYIP”). The Commonwealth Transportation Board (“CTB”) approved VDOT’s 2013-2018 SYIP on June 20, 2012.

VDOT anticipates use of the Public Funds Amount will proceed in accordance with the disbursement schedule shown in Table 3-3 (numbers may not add due to rounding). Additional details, including disbursements by month, are set forth in the ERC Updated Finance Plan.

Table 3-3 – Public Funds Amount Disbursement Schedule

<b>Date</b>	<b>Amount (000s)</b>
2012	\$228,471
2013	\$159,506
2014	\$26,917
2015	\$999
2016	\$4,797
<b>Total</b>	<b>\$421,105</b>

#### 4. Funding for Project Risks

During the cost estimate review process, the Federal Highway Administration (“FHWA”) identified risks that could result in additional payments being owed by VDOT should those risks occur during the construction of the Project.<sup>3</sup> Those risks, and the suggested contingency for each risk identified by the cost estimate review team, are listed in Table 4-1.

Table 4-1 – CER Review Risks

<b>Risk</b>	<b>Description</b>	<b>Estimated Costs</b>
Aggregate risks	Aggregate of less significant risks that have been allocated to VDOT	\$2.5 million
Rehabilitation work	Additional costs associated with unanticipated rehabilitation work	\$1.5 million
Fuel price adjustment	VDOT bears the risk for the price per gallon for off-road diesel fuel in excess of \$3.50 per gallon	\$4.5 million
Utility relocations	Additional costs associated with project-wide utility relocations	\$10 million
Right of way (“ROW”) acquisition work	Increased costs for damages such as business relocations and condemnations	\$1.5 million
Oversight costs	VDOT responsible for construction oversight	\$12 million

VDOT has not elected to fund a contingency to address the risks described in Table 4-1 at this time. The CTB is responsible for allocating the appropriated and projected construction funds to projects. The CTB allocates funding to projects through a rolling six-year planning process to support the funding of selected construction projects. By July 1 of each year, the CTB is required to approve an annual budget and a six-year improvement program (“SYIP”). The highway construction portion of the SYIP for FY2013-2018 totals approximately \$9 billion. During the year, the CTB may transfer funding between projects as needed.

In addition, VDOT also has the right under the CA to direct ERC to explore financing damages stemming from Compensation Events (CA § 14.01(d)) via adjustments to the toll rate schedule and/or extensions of the term. This provides VDOT with another option for funding project risks. As described in more detail below, VDOT also has mitigated the likelihood that it will be exposed to costs due to the risks identified in Table 4 via the structure of the CA. Oversight costs are discussed below in the section entitled “Funding for VDOT Oversight Costs.”

---

<sup>3</sup> The FHWA Cost Estimate Review report concludes that there is a 70<sup>th</sup> percentile level of confidence that design-build costs for the Project will not exceed \$1.693 billion. The difference in costs shown in the FHWA Cost Estimate Review report and the ERC Updated Finance Plan likely is due to assumptions made by the VDOT-FHWA team during the cost estimate review process (which was completed in advance of VDOT and ERC finalizing commercial terms and the design-build price). For example, during that exercise the VDOT-FHWA team modeled oversight costs of approximately \$112 million (which included, among other things, administrative expenses incurred during the project development process up to financial close and costs related to development of the tolling system). Those assumed costs do not necessarily correlate to a single line items shown in the ERC Updated Finance Plan (e.g., the approximately \$11.1 million shown for ERC construction oversight costs).

### *Rehabilitation Work*

ERC is solely responsible for up to \$5 million of unanticipated rehabilitation work (CA § 8.11(c)).<sup>4</sup> Any unanticipated rehabilitation work must exceed this \$5 million threshold before VDOT participates in any costs. Rehabilitation work is not scheduled to begin until late 2013/early 2014, further reducing the need for VDOT to allocate any funds at this time.

### *Fuel Price Adjustment*

ERC may make a claim to VDOT if the price per gallon for off-road diesel fuel exceeds \$3.50 per gallon.<sup>5</sup> VDOT is entitled to payment from ERC if the price per gallon is below \$3.50. VDOT's liability (and benefit) for changes in the price of fuel is capped at \$9.4 million. Upcoming construction activities for 2012 include mobilization, surveying, and utility relocations. The fuel price adjustment mechanism is more likely to be utilized by ERC and VDOT following the start of heavy construction activities. VDOT can continue to monitor fuel price trends as mobilization continues to determine whether additional funding is warranted.

### *Utility Relocations*

ERC is to provide all utility relocation work as part of the lump sum design-build price. ERC has limited recourse to VDOT in the event of cost overruns related to utility relocation work. Specifically, ERC may make a claim for 50% of cost impacts related to delays in relocation work to be performed by utilities. ERC cannot bring a claim unless the delay impacts the critical path of the construction schedule. VDOT is comfortable that no contingency for risks related to utility relocations is needed at this time given the limited scope of the risk allocated to VDOT.

### *ROW Acquisition*

The CA includes a provision that allocates the risk and the benefit of fluctuations to the expected ROW acquisition costs. ERC is solely responsible for up to 10% of increased ROW acquisition costs (as compared to a baseline ROW acquisition cost estimate) (CA § 8.05(d)). ERC is entitled to keep all of the cost savings if ROW acquisition costs are up to 10% less than the estimate.<sup>6</sup> VDOT does not believe an additional contingency is necessary at this time given that ERC bears the risk of cost overruns up to 10%.

VDOT is responsible for certain ROW acquisition costs related to property owned by railroads (CA § 8.05(f)). VDOT estimates this work will cost approximately \$6,765,795 (VDOT provided FHWA with an estimate for this work prior to financial close) and has programmed funding as part of its Project oversight budget (this estimate is shown as "child projects" to the interstate and primary oversight projects).

---

<sup>4</sup> VDOT is responsible for unanticipated rehabilitation work costing between \$5 million and \$20 million. For work that costs in excess of \$20 million, VDOT and ERC are to collaborate on potential funding solutions, including having ERC finance the cost of such work. See CA § CA 8.11(c)(ii) and (iii).

<sup>5</sup> The process and timing for determining amounts due as a result of the fuel price adjustment risk allocated are described in CA Exhibit S.

<sup>6</sup> The CA sets out a similar risk sharing arrangement for cost overruns and savings beyond 10%. See CA § 8.05(d).

## *Hazardous Substances*

In addition to the risks described in Table 4-2, FHWA has asked VDOT to describe the risk allocation for hazardous substances. ERC is responsible for managing, disposing, and remediating all hazardous substances encountered on the Project right-of-way (CA § 16.01(a)). For hazardous substances defined in the CA as Known Pre-Existing Hazardous Substances, ERC also is responsible for the costs associated with management, disposal, and remediation.<sup>7</sup> For hazardous substances that do not qualify as Known Pre-Existing Hazardous Substances, ERC is entitled to seek reimbursement from VDOT for its costs incurred in performing the management, disposal, and remediation work and schedule relief (CA § 16.02(a)).<sup>8</sup>

VDOT has not elected to fund a contingency to address the risk associated with the discovery of “unknown” hazardous substances because that risk has been mitigated via the hazardous substances investigation performed under the Interim Agreement and the risk allocation as between VDOT and ERC. The work performed under the Interim Agreement led to the development of the “Known Pre-Existing Hazardous Substances Report.” The report provides a comprehensive assessment of potential trouble spots within the construction area. The risk allocation as between VDOT and ERC bars ERC from making a claim for work related to hazardous substances identified in the report or hazardous substances ERC should have known were present as a result of the report. The breadth of the report, coupled with the “should have known standard” present a high burden of proof for any claim, further protecting VDOT from potential financial exposure.

### **6. Funding for VDOT Oversight**

VDOT estimates its oversight costs to be \$65,347,200 (excluding costs for ROW acquisition work for property owned by railroads). Those costs include the VDOT staff time and staff augmentation resources needed to oversee ERC’s design and construction work from financial close until final acceptance of the construction work (expected in 2018). The oversight UPC for the Project now includes \$52,435,236 for post financial close work. While not currently fully funded, funding of VDOT’s oversight costs includes a combination of federal and state funds, including: “Minimum Guarantee,” “National Highway System,” “Surface Transportation Program,” “Primary Formula,” and bonds. VDOT will review its oversight budget annually to assess whether oversight activities are in line with expected costs. VDOT also will work to program additional funding for oversight as part of future SYIP updates. Such funding likely will not be necessary until further into construction given the length of the schedule and the current allocations.

---

<sup>7</sup> The CA defines pre-existing hazardous substances to include hazardous substances identified in the “Known Pre-Existing Hazardous Substances Report” (CA Exhibit Q), hazardous substances ERC should have known were present as a result of the “Known Pre-Existing Hazardous Substances Report,” and hazardous substances which were actually known by ERC to be present within the Project right-of-way at the time the CA was executed (see CA Exhibit A).

<sup>8</sup> Note, ERC is not entitled to make a claim for a Compensation Event. Rather, ERC only is entitled to a reimbursement of its actual costs incurred.

**7. Finance Plan Updates**

ERC is to provide the TIFIA lender with annual updates to the finance plan until the TIFIA loan is repaid. VDOT will provide updates to this supplement (until completion of construction) in conjunction with ERC's updates to the finance plan.

# Appendix 1

## Detailed Estimate

(see attached)

