



Oversight Procedure 39 – Review of Third-Party Agreements for Major Capital Projects

1.0 PURPOSE

The purpose of this Federal Transit Administration (FTA) Oversight Procedure (OP) is to assist the Project Management Oversight Contractor (PMOC) in identifying third-party agreements and determining which third-party agreements should be considered “critical” as a project advances through the project development process. This OP applies to Major Capital Projects and other projects as designated by the FTA. Further, this OP describes the role of the Project Sponsor, the PMOC, and FTA in the review process, and offers risk-mitigating strategies throughout the project life cycle based on best practices and lessons learned.

2.0 BACKGROUND

Failure to timely execute critical third-party agreements is highly likely to cause changes neither contemplated nor incorporated in the project’s baseline scope, budget, and schedule. This lack of executed agreements may slow the progress of design, impede the start or progress of project construction, delay start-up, or interrupt operations. Whether a third-party agreement is considered “critical” depends on a variety of factors including the type of project; the legal authority of the project sponsor; the intended project delivery method; the project schedule and where the project is in the project development process; and the decision(s) to be made by the FTA and the project sponsor. Many agreements are considered critical before grant/loan award and must generally be executed prior to receiving a grant/loan. Other agreements may not be considered critical at the grant/loan approval phase and may be executed later, such as prior to the start of service operations.

Verifying the execution of critical third-party agreements is an important part of the readiness review and is included in the PMOC’s report that becomes part of FTA decision making process for project advancement.

3.0 OBJECTIVES AND ORGANIZATION OF THE OP

The main objectives of the OP are:

1. Define third-party agreements.
2. Provide a summary of historical risks due to third-party agreements.
3. Describe the governing rules and guidance.
4. Define the review process.
5. Describe the review methodology during the project life cycle.
6. Define the PMOC’s role.

7. Define the FTA's role.
8. Define the Project Sponsor's role.
9. Describe criteria for identifying critical third-party agreements.
10. Address third-party agreements with regard to project delivery methods.

This OP is intended for use by PMOCs and their FTA counterparts in identifying those third-party agreements that are necessary for a project's development and operation, and which of those agreements will be considered "critical" at a specified time in the project development process. This document is not intended as a substitute for FTA Circulars, other related OPs, or other guidance addressing third-party agreements such as FTA's *Construction Project Management Handbook* and *Project and Construction Management Guidelines*. This procedure is intended to complement other relevant FTA publications and provide additional explanation, clarity, lessons learned, and best practices.

This OP provides guidance to the PMOC related to its review of third-party agreements, primarily in the context of various readiness reviews, or in response to other FTA requests. The body of the OP is supplemented by the following appendices: Appendix A and Appendix B to this document, respectively, list the expected Acceptable Quality Level and a typical table of contents for the PMOC report. Appendix C summarizes key steps in the methodology for review of third-party agreements during the project life cycle. Appendix D offers additional methodology for determining what constitutes a critical agreement. Appendix E lists typical third-party risks, however, the appendix is not a comprehensive representation of all potential risks and not all third-party agreements are seen as risky. Each project is, of course, unique and will experience risks unique to its environment. Appendix F offers a tabulation of typical agreements by mode and category. The purpose of these appendices is to provide references that may help readers to identify potential third-party risks on their projects. A list of acronyms is provided as Appendix G.

Clarification or information on this or other FTA guidance and OPs should be requested from the local FTA regional office and/or headquarters.

4.0 THIRD-PARTY AGREEMENTS REVIEW

The following sections address the key elements to be considered in reviewing third-party agreements.

4.1 Definitions

The term *third-party agreement* refers to those agreements entered into by the Project Sponsor with a party other than FTA and that are necessary to facilitate the financing, design, permitting, construction, and operation and maintenance of a federally funded capital transit project. This definition does not generally apply to agreements made between the Project Sponsor and primary service providers such as consultants or contractors performing project work directly for the Project Sponsor. Statutory and regulatory requirements and permits are not generally called third-party agreements; however, in many cases, permitting for construction and operations requires prior agreement with the permitting third parties.

A *critical third-party agreement* is one which has been identified by the FTA in collaboration with the Project Sponsor and any other project participant, as required before Construction – including a Letter of No Prejudice (LONP) – or Operations can begin, the absence of which may significantly change the cost, scope and schedule.

A *non-critical third-party agreement* is one that would not result in a scope increase, cost overrun, and/or schedule delay beyond the magnitude already contemplated by project management plan and sub plans.

Executed means completing all necessary steps for the agreement to legally be in effect.

Final determination as to whether an agreement is critical or non-critical is made by FTA in consultation with the PMOC and the Project Sponsor.

4.2 Risks Due to Third-Party Agreements

FTA provides grant funding to Project Sponsors to construct major capital projects under various discretionary and formula programs. FTA has observed that since the passage of the Urban Mass Transportation Act of 1964, projects funded by FTA and its predecessor, the Urban Mass Transportation Administration, occasionally experience significant delays or substantial increases in project cost as a result of the Project Sponsor's failure to timely obtain critical third-party agreements. As a result, FTA included the following requirements in its Capital Investment Grants (CIG) Program Final Interim Policy Guidance issued in June 2016:

To complete the Engineering phase, Project Sponsors must complete sufficient engineering and design to develop a firm and reliable cost, scope, and schedule for the project, obtain all non-CIG funding commitments, **complete all critical third-party agreements**, and meet other FTA readiness requirements related to technical capacity, staffing, and oversight to be eligible for a construction grant/loan agreement.

The requirement to address critical third-party agreements also applies to other federally funded programs, e.g., Transportation Infrastructure Finance and Innovation Act (TIFIA), Transportation Investment Generating Economic Recovery (TIGER), State of Good Repair (SGR) Formula Grants /Urbanized Area Formula Grants, Hurricane Sandy, and others as they are initiated.

Risks related to third-party agreements can be amongst the highest risks to project scope, cost, and schedule. A review of risk registers for more than a dozen projects across the nation and representing different modes reveals that while third-party risks may cause unexpected direct costs, the indirect costs associated with potential schedule delays threaten to increase costs substantially more.

4.3 Governing Rules

Chapter 53 of Title 49 United States Code (U.S.C.), Sec. 5327 as amended by the Fixing America's Surface Transportation (FAST) Act and the Moving Ahead for Progress in the 21st Century (MAP-21) Act, provides the statutory basis for federal assistance to public

transportation projects, including provisions to improve the development and delivery of capital projects.

To receive federal financial assistance for a major capital project for public transportation under Chapter 53 of Title 49 of the U.S.C. or any other provision of federal law, a recipient must prepare a Project Management Plan (PMP) that in turn is approved by FTA, and carry out the project in accordance with the PMP. The PMP is designed to guide and enhance the recipient's planning and implementation efforts and to assist FTA's review of the grant/loan application efforts. The organization section of the PMP addresses the structure for leadership and support of third-party agreements; the schedule and costs related to the agreements are treated in corresponding sections.

The Project Management Oversight (PMO) Rule (49 CFR 633) applies to recipients of federal financial assistance who are undertaking a major capital project. A *major capital project* is one that:

- Involves the construction of a new fixed guideway or extension of an existing fixed guideway,
- Involves the rehabilitation or modernization of an existing fixed guideway with a total project cost in excess of \$100 million, or
- The Administrator determines is a major capital project because the PMO program will benefit specifically the Agency or the recipient.

The rule describes a two-part program for major capital projects receiving assistance from the agency. First, the rule discusses project management oversight, designed primarily to aid FTA in its role of ensuring successful implementation of federally funded projects. Second, the rule discusses the PMP.

FTA provides OPs to guide its PMOCs in performing oversight of major capital projects. While task orders and work orders provide specific direction to the PMOCs on the products and services required from them, the OPs provide general guidance and ensure consistency in performing oversight. There are OPs that provide instructions on reviewing the PMP, on performing readiness reviews, and on reviewing LONP requests, among others, which provide guidance associated with third-party agreements.

Several publications provided by the FTA's Office of Capital Project Management augment FTA's OPs and contain guidance and/or best practices for managing major capital projects. These include the *Project and Construction Management Guidelines*, the *Construction Project Management Handbook*, the PMO Lessons Learned Program, papers, and presentations from FTA-sponsored workshops.

The *Project and Construction Management Guidelines* dated March 2016 (revised August 2016) discuss "Negotiation of Third-Party Agreements" in section 4.6. The Guidelines document also provides among its appendices a checklist, as well as an appendix on utility relocation agreements.

The *Construction Project Management Handbook* dated February 2016 (revised August 2016) states that the project manager, with technical support as necessary, will play a significant role in communication and negotiation with utilities and impacted third parties. Utility relocation and third-party coordination are critical parts of the construction of a project. Early and continuing coordination with the affected utilities and third parties is critical to keeping a project on schedule and budget. Utilities and third parties often need extensive lead time to reasonably schedule their work and obtain materials necessary for relocation of their facilities. Sections 5 and 6 of the Handbook provide guidance during design and construction, respectively, and Section 9 includes discussion on developing third-party agreements.

There is also a Lessons Learned publication on the FTA website entitled “Mitigating Problems of Third Party Coordination” dated 2011. An additional Lessons Learned document is being compiled that will contain case studies on third-party agreements.

Moreover, a number of FTA-sponsored workshops address lessons learned and provide information regarding third-party agreements. These include Capital Project Management and CIG workshops.

4.4 Third-Party Agreement Considerations during the Project Life Cycle

The main purpose of this OP is to address what constitutes a critical third-party agreement that must be executed prior to the FTA or the Project Sponsor taking a particular action, such as execution of the federal grant/loan agreement or at other critical project phases before the start of beginning revenue service. To this end, there is a need to proactively identify the critical agreements and to minimize or eliminate the impact of these agreements early in the project life cycle. In this section, lessons from the experiences of Project Sponsors and case studies are used to present methodologies for proactive identification, review, or minimization of third-party impacts during each project cycle. Appendix C summarizes key review methodology steps during the project life cycle.

- **Planning/ Locally Preferred Alternative (LPA) Phase** – This phase is the most critical phase of the project life cycle for identifying and efficiently mitigating the impacts of third-party agreements. Many requirements are imposed on the project without thorough evaluation of impacts on cost and schedule during the planning and environmental phase. Specifically, alternative designs are evaluated before an LPA is selected. It is important for the Project Sponsor to establish a clear screening process to identify, eliminate, or reduce conflicts between the design alternatives and railroads, major utilities or utility corridors, university property (specifically sensitive research labs), historic bridges, or airports, and also alternatives that require use of public right of way (ROW) or private real estate not owned by the Project Sponsor. Once the LPA is selected, the opportunities for minimizing these conflicts or impacts will be more limited. The Project Sponsor should conduct active outreach to identify all potentially affected utility providers. With respect to utilities, the Project Sponsor should:

- Determine those utilities having authority to be in the ROW with a franchise agreement. In many such cases, utilities are required to relocate at their own cost when required by the ROW owner. The careful review of the franchise agreement will reveal important information regarding responsibilities of the parties.
- Evaluate likely construction-related impacts to the public and private overhead and underground utility plants. Consider alternatives to locations where major high voltage lines or pipelines are present.
- Consider the cost and schedule-related impacts and risks of utility relocation, including design work, in preliminary cost and schedule calculations.
- Consider alternatives that avoid significant utility impacts when selecting the LPA.
- Meet with public and private utility providers to identify any overhead and underground utility plants located in or adjacent to the corridor or station and facility areas, including those that cross the corridor. Discuss alternatives that are being considered. Identify major or significant manholes, duct banks, switching stations, substations, and major utility customers who may have unique or critical service requirements.
- Be aware of the possibility of highly sensitive underground utility lines serving government installations such as police and fire stations, federal courthouses, and other law enforcement agencies. These lines may not be publicly documented.
- Continue the assembly of utility information with system maps.
- Determine the nature of property rights held by each utility.
- Develop preliminary ROW acquisition plans for affected utilities.
- Look for opportunities to avoid utility impacts by careful selection of alignments, facilities, and station locations.
- Develop initial parametric cost estimates for utility-related work including utility investigations, utility design, and utility relocation. Consider impacts to parallel and crossing utilities.
- Following selection of the LPA, increase attention to utilities in the selected corridor.
- Develop a detailed plan for utility identification and utility design coordination in the following design phase.

- Develop Master Utility Agreements and tracking matrices and continue discussions with utility providers.
- Initiate Project Sponsor risk workshops to develop initial risk register.

For design alternatives that require occupying an operating railroad corridor, crossing railroads, and/or interconnecting with operating railroads, the Project Sponsor should, in general, use approaches equivalent to those listed above for utilities, in particular once an LPA has been chosen. Additional important Project Sponsor considerations should include:

- Determine the need for railroad-provided access and protection for design consultants and construction contractors working for the Project Sponsor, and account for all railroad force account costs and project scheduling impacts including required track outages and track foul time.
- Develop a memorandum/agreement with the railroad that includes the scope of railroad-performed construction work and the scope of work performed by the Project Sponsor's contractor for all facilities under the railroad's jurisdiction.
- Include in the memorandum/agreement with the railroad the scope, schedule, and cost of the railroad's review and approval of designs, construction staging plans, and the Project Sponsor's contractor submittals for all work under their jurisdiction.
- Identify the need for special railroad required insurance.
- Identify appropriate resources for appraising and acquiring railroad-owned real estate. Because railroads are often not subject to eminent domain, acquiring railroad-owned real estate can be troublesome. Moreover, the appraisal of railroad-owned real estate is a specialized practice and should only be undertaken by those with appropriate experience.
- Project Design/Environmental Phase – This phase includes early design work and the completion of the environmental review. To complete this phase, the Project Sponsor must complete the environmental process and reach at least 30 percent design level of completion. The Project Sponsor must identify all anticipated third-party agreements and designate those considered to be critical third-party agreements based on the criteria described later in this OP. With this level of design development, the third-party and utility impacts should be identified and conceptual relocation plans developed. Project Sponsor staff with appropriate experience and adequate capacity and capability must be assigned for management of and liaison with third parties. Through discussions with third parties, design alternatives should be developed to minimize cost and schedule impacts. The outcome of these discussions should be adequately documented through meeting minutes and/or memoranda of understanding. Tracking or action item lists should be used to advance agreements

between parties. This type of documentation will pave the way for execution of agreements and avoid last-minute negotiations. The extent of work for or by third parties should be carefully evaluated as to the impacts on the cost and the critical path of the schedule. The agreements should be identified and tracked on the schedule and in the risk register with specific ownership, timing, and mitigation measures for reaching final agreement or specific Road Maps for receiving required permits. The Project Sponsor should continue with internal risk management and refreshing the risk register, and must develop a Risk and Contingency Management Plan (RCMP).

- **Project Design Phase (From 30% to 60%)** – This step provides the Project Sponsor an opportunity to bring agreements to closure, and perform additional engineering work if necessary. For Core Capacity and New Starts projects in the Capital Investment Grants program, this is called the Engineering Phase of the process. FTA may require that a risk workshop be conducted in the early stages of this phase. Project Sponsor’s third-party liaisons along with their counterparts should be invited to the risk workshop to weigh in on the cost and schedule impacts and potential mitigation strategies, and to take ownership in resolving the issues. The assigned risk owners must carry out the mitigation strategies. FTA may also require a specific workshop dedicated to third-party issues when the project has a significant number of third parties with complex issues. The outcome of the third-party workshop should be presented in the general risk workshop and incorporated in the overall RCMP by the Project Sponsor. The Project Sponsor must identify the critical third-party agreements based on the criteria described later in this guideline. The Project Sponsor should meet with FTA and the PMOC early to review and reach consensus on those agreements that will be considered “critical” and the timing of their execution.
- **Prior to Grant Agreement** – All critical third-party agreements that were deemed necessary prior to award of a grant/loan agreement must be executed at this stage. The review at this level should focus on the details of each agreement, an evaluation of satisfactory continuing control, and the commitments made with respect to the proposed scope, cost, and schedule. Prior to grant/loan execution, FTA, or as directed the PMOC, will need to review the critical third-party agreements and verify that the agreed-upon provisions do not introduce additional scope, cost, or schedule impacts and can be accommodated within the submitted grant/loan budget and schedule. The Project Sponsor should continue to update the list of third-party agreements and the RCMP as necessary.
- **Prior to Construction** – Certain agreements are required before construction (including construction performed in advance of a grant award under a LONP) or before the issuance of encroachment permits. Successful implementation of the agreements yields timely issuance of the required permits. The Project Sponsor should continue to update the list of third-party agreements and the RCMP as necessary.

- Prior to Revenue Service – Once construction is completed, the start of operation requires occupancy permits and/or safety certifications. The maintenance of the system may require agreements with partner agencies and/or owners of the ROW, such as railroads, in which the system is operating. These agreements may be deemed critical and FTA may require them to be executed prior to the execution of a grant/loan agreement; For such agreements, there may be a later need to update the agreements based on changes during construction. The Project Sponsor should continue to update its list of third-party agreements and the RCMP as necessary.

4.5 Roles and Responsibilities

The roles and responsibilities outlined in this section are primarily focused on determining whether an agreement is critical.

4.5.1 PMOC's Role

PMOCs are under contract by FTA to provide oversight for major capital projects. PMOC responsibility includes, but is not limited to, the oversight of a project to:

1. Determine if the project scope is adequately defined and if the project is on schedule, within budget, and proceeding in conformance with the Project Sponsor's approved plans, specifications, and grant/loan agreements.
2. Ensure that a project is being implemented efficiently, effectively, and safely.
3. Determine whether the Project Sponsor organization demonstrates the required management capacity and capability.

The above objectives involve review of third-party agreements.

The PMOC, in providing its assessment of a project's readiness to advance to the next phase of project development or other FTA action, shall consider the status of those third-party agreements that have been designated as critical for the particular action. For any third-party agreement that is designated as critical, and has not been or is unlikely to be executed prior to the anticipated date for the FTA's action, the PMOC shall assess what actions the Project Sponsor has taken to address the lack of an executed agreement(s) and the associated impacts to the project's scope, cost, and budget.

The PMOC's review of third-party agreements is guided by this OP and OPs concerning project management, project characterization, risk, and project readiness. The review starts with verifying that the individual agreements and the management of them are addressed in the PMP as per OP 20. Continued review of the Sponsor's progress related to completing the agreements is addressed in OP 25. The majority of third-party agreements fall under the Requirements Risk category as described in OP 40. The specific readiness concerns are addressed per OPs 51, 52, 53, 54 and 56. In addition, for the general scope review (OP 32), the Project Sponsor's definition of the project scope through review of drawings, specifications, narratives and plans for project delivery requires review of the related third-party agreements.

The PMOC should develop an opinion regarding which third-party agreements are considered “critical” and that becomes the focus of the requirements set forth in this procedure; this opinion should be reported as indicated in Appendix B. Appendix D presents methodology for such determinations.

4.5.2 FTA Regional Office

The ten FTA regional offices work with local transit officials in developing and processing grant applications. Besides being the direct contact with major capital project sponsors, the regional office is charged with managing the activities of the PMOC on project specific task orders. Regional engineers or transportation specialists are assigned to direct the technical effort being performed under the PMO contract and monitor the progress and quality of the PMOC’s performance. This includes assuring the PMOC is tracking and reporting the Project Sponsor’s efforts in identifying, scoping, and scheduling the negotiation of third-party agreements. The regional office also schedules and leads the quarterly progress review meetings with the Project Sponsors that review project progress, including the status of third-party agreements. For CIG projects, the regional engineer coordinates with the FTA headquarters engineer and the FTA Office of Planning and Environment (TPE) team leader to have the critical agreements formally identified and reviewed by the regional attorney of the FTA Office of Chief Counsel (TCC) to assure the legal sufficiency with respect to FTA requirements. Technical sufficiency of the critical third-party agreements is determined by the regional project manager in coordination with the headquarters counterpart in the FTA Office of Capital Project Management (TPM). For non-CIG projects, the regional engineer works directly with TCC.

4.5.3 FTA Headquarters Office

Regarding third-party agreements for CIG projects, the headquarters engineer, in coordination with the regional engineer and the Office of Planning and Environmental team leader, forms part of the FTA project team that works on the project. The team works to ensure that the critical third-party agreements are identified, that progress toward execution is reviewed as part of the PMOC’s recurring oversight, and that the status of agreements is addressed as part of scope, schedule, cost, and risk reviews and as part of the readiness reviews. The project team monitors progress in developing and executing the critical agreements through monthly calls and use of a tracking tools. Tools for tracking the progress of the agreements include the Road Map as well as established checklists, notably for Entry into Engineering, Full Funding Grant Agreement (FFGA) execution, and Letters of No Prejudice (LONP). FTA ultimately determines which third-party agreements will be designated as critical.

4.5.4 Project Sponsor’s Role

The PMOC should examine whether the Project Sponsor is undertaking appropriate activities to:

1. Assign competent leads and appropriate staff with the experience, capabilities, and adequate capacity to effectively manage third-party agreements.

2. Work with jurisdictional partners, utilities, regulatory agencies, operating railroads, and major institutions during the environmental review process and the development phase to:
 - Screen for and determine the presence of all overhead and underground utilities and critical third parties (airports and railroads, etc.) that may be affected by and/or require relocation as a result of each alignment alternative under consideration. Assess the construction impacts and cost and schedule implications of utility and critical third-party relocations as part of selecting the locally preferred alternative.
 - Identify the third-party agreements that will be necessary to implement the project and those it considers to be critical for project advancement or prior to a specific event or activity.
 - Identify the parties to the agreements, the scope, the parties' respective rights and obligations, timing, and approval requirements for the agreements.
 - With particular attention to utility agreements and other critical third-party agreements affecting right of way and real property, determine the type of property interest held by the other party, e.g., fee ownership, permanent or temporary easement, license, franchise, or other (or none).
 - Determine the cost and schedule for obtaining the agreement and for executing any work under the agreement.
 - Identify and separate out any concurrent non-project activity (CNPA) requirements from the project to minimize risks to the project.
 - Determine how long the other party will require to process and execute the agreement.
 - Conduct partnering sessions at all levels starting early in the project development process. Use tracking matrices and action item lists to measure progress, road maps for agreements leading to permits, and institute a formal comments resolution process that including resolution matrices.
3. Begin immediately to develop a framework, term sheet, or outline for each agreement with the assistance of local legal counsel and the other party with focus on FTA requirements, including Buy America and Satisfactory Continuing Control.
4. Incorporate the agreement(s) into a matrix or other mechanism to allow tracking the progress of the agreement(s).
5. Determine a "need by" date and incorporate the agreement(s), predecessor and successor activities, and schedule information as an activity in the Master Project Schedule. In assessing schedule implications of third-party agreements, consider review and approval requirements, including potential governing board of director's actions (and timing) and possible FTA reviews.

6. Determine which construction or design contracts will be influenced by each agreement and provide the details to the manager(s) of those activities.
7. If warranted, conduct a risk workshop at each phase of the project, and ensure that critical agreements are tracked on the risk register. Develop an RCMP prior to the FTA sponsor workshop.

4.6 Types of Third-Party Agreements that May be Critical

Critical agreements are those that, if not executed at the appropriate time, could cause scope increases, cost overruns, and schedule delays not contemplated in the project baseline budget and schedule, slow the progress of design, impede the start or progress of project construction, prevent the start of operations, or interrupt operations once the service has begun. Appendix D offers a methodology for determining what constitutes a critical third-party agreement. Such agreements typically relate to funding and financing, permitting, regulatory compliance, utilities, real estate, railroads, safety and security, other agencies and/or jurisdictions, and the operations and maintenance of the project as follows:

1. Funding and Financing

For CIG projects, FTA requires the Project Sponsor to have a fiscally sound budget that is approved in the Metropolitan Planning Organization's (MPO) Transportation Improvement Program (TIP) at time of Entry into Project Development and to have all non-FTA funding identified prior to Entry into Engineering, through authorization or agreement prior to execution of federal grant agreement. For example, funding from local partners is documented in inter-local agreements. This criterion also applies to funding of operations and maintenance, which should be documented in the Project Sponsor's finance plan.

For CIG projects, the PMOC is not to opine specifically on funding and financing matters as that is the role of Financial Management Oversight Contractors hired by FTA. Rather, the PMOC should discuss and track with FTA and the Project Sponsor the status of major third-party funding/financing agreements to determine what impact delays on reaching those agreements might have on the overall project cost, schedule, and risk.

2. Permitting

For a major transit project, there are numerous permits that are required prior to either the start of construction or commencement of operations. The Project Sponsor or the construction contractor needs to obtain these permits before start of construction. Any delays due to third-party permits not being issued can have a significant impact on the project schedule and cost due to extended overhead and other related claims by the contractor if the requirements for obtaining the permits is out of the contractor's control. Third-party agreements that assign responsibility for obtaining permits may be deemed critical and required to be in place prior to a specific federal action such as execution of the federal grant/loan agreement. With respect to construction contracts, particularly the use of alternate delivery methods such as design-build, responsibility and timing for

obtaining permits and approvals must be clearly described in the Request for Proposal documents and incorporated in the final construction contract.

3. Agreement for Work To Be Done by Others

Work by others includes utility relocations and other work that will need to be done by another entity to enable construction and operations to continue unimpeded. This could include owner-furnished facilities to be supplied or erected by another entity for use by the construction contractor, or equipment procured by third parties. Third-party agreements for work by others may be deemed critical and required to be in place prior to a specific federal action such as execution of the federal grant/loan agreement.

4. Right of Way (ROW) and Railroads

Construction contractors require a right of entry to perform work on property or ROW not owned by the Project Sponsor. Third-party agreements for ROW may be deemed critical and required to be in place prior to a specific federal action such as execution of the federal grant/loan agreement. Agreements with freight railroads where transit construction will take place in or adjacent to the railroad's operating corridor are particularly critical, both from the standpoint of timing and for the safety of workers.

It is important to highlight that railroad properties are a prime example of ROW deemed critical since there is no eminent domain over railroads and negotiations can be lengthy and costly.

5. Regulatory Compliance

Once construction begins, regulatory compliance measures are typically required by both the Project Sponsor and construction contractors. Compliance measures include adherence to environmental mitigation measures and civil rights requirements, some of which may require prior agreements with third parties. These agreements can involve mitigation measures dictated in environmental clearance documents, and permits from environmental, resource, regulatory and safety oversight agencies. Third-party agreements regarding regulatory compliance may be deemed critical and required to be in place prior to a specific federal action such as execution of the federal grant/loan agreement.

6. Safety and Security

Federal and state oversight agency rules and regulations govern construction and operations of many transportation projects. Preliminary agreements with these agencies on safety and security requirements may be critical to uninterrupted construction and operations. Third-party agreements related to safety and security may be deemed critical and required to be in place prior to a specific federal action such as execution of the federal grant/loan agreement.

7. Operations and Maintenance

Once construction is completed, the start of operation requires occupancy permits and/or safety certifications. The maintenance of the system may require agreements with

partner agencies and/or owners of the ROW, such as railroads, in which the system is operating. Third-party agreements related to operations and maintenance may be deemed critical and required to be in place prior to a specific federal action such as execution of the federal grant/loan agreement.

8. Interlocal/Interagency Agreements

These types of agreements may provide funding for the project and describe easements or other access agreements. Examples include: agreements with institutions that are affected by the construction of the project and need to allow construction on their ROW; agreements between the entity constructing the project versus a separate entity that might be operating the project; agreements to provide in-kind contributions such as a station at an airport or a land donation; or agreements on other multi-modal arrangements. Third-party agreements related to interlocal/interagency entities may be deemed critical and required to be in place prior to a specific federal action such as execution of the federal grant/loan agreement.

9. Governance

Agreements regarding governance, which describe ownership and the way the team will be organized, the management of the project and operation, especially when multiple entities need to come together to form a consortium to build a project are very critical. FTA may typically require that the governance agreements be signed very early in the project development process. These agreements may be deemed critical and required to be in place prior to a specific federal action such as execution of the federal grant/loan agreement.

4.7 Third-Party Agreements and Project Delivery

Key considerations regarding the selection and implementation of project delivery methods include whether a third-party risk is transferrable to the contractor, and the potential impact of the risk to scope, budget, and schedule. Generally, third-party risks are not transferrable to the contractor, and the less time allowed in the early phases for completing the required third-party agreements prior to solicitation and award of the project delivery contracts, the greater the risk to the project's scope, cost, and schedule due to an agreement not being executed in time for award of a contract or for the contract to proceed unimpeded as specified in a contract document.

The significance of third-party agreements with respect to a Project Sponsor's selected project delivery method is related to the care with which the Project Sponsor describes the implications of each agreement on the individual contracts and how risk is allocated and managed between the Project Sponsor and the contractors with respect to each relevant agreement.

1. Design-Bid-Build

The typical design-bid-build project provides the Project Sponsor and its design team significant time during the design phase to identify and negotiate all required agreements with third parties. The implications of each agreement with respect to the construction

contract(s) to be awarded can then be incorporated by the design team or procurement specialist into the contract documents.

2. Design-Build

The risk related to third-party agreements for projects using the design-build (D-B) delivery method is higher than for comparable projects delivered using either the design-bid-build or the construction manager/general contractor (CM/GC) method. This is a result of two factors: first, a D-B contract is typically advertised at a much earlier point in the project life cycle when project definition is less well developed and fewer agreements have been executed; second, the D-B proposers will rely on the Project Sponsor's description of the obligations that have been or are likely to be imposed by third-parties in developing its approach, schedule and price for the work. Any inaccuracies in the characterization of the third-party agreements that affect the D-B scope, schedule, or cost are likely to result in a Change Order. To the extent that the Project Sponsor attempts to shift the risk associated with third-party agreements to the D-B contractor, a substantial risk premium is likely to be included in pricing.

3. Construction Management/General Contractor (CM/GC)

Of all delivery methods currently in use on transit projects, the CM/GC delivery method, because of its somewhat longer design phase, may provide the greatest opportunity to complete third-party agreements prior to the start of construction. The method also offers the greatest flexibility because of the collaboration between the Project Sponsor, designer, and the CM/GC contractor, in dealing equitably with the implications of incomplete agreements.

4. Other Delivery Methods

There are a number of delivery methods such as Design-Build-Operate-Maintain (DBOM), Design-Build-Finance (DBF), and Public Private Partnerships (P3) that involve a private sector contractor or consortium providing financing, funding and/or operations and maintenance. The criticality of agreements with third parties depends on what rights and responsibilities are being delegated to the contractor and those that are being retained by the Project Sponsor. The critical agreements are those that would not allow the project, as planned, to be constructed or operated as intended.

5.0 REFERENCES

The following are the principal, but by no means the only, references to federal legislation, codification, regulation, and guidance the PMOC should review to develop a solid understanding as related to the Project Sponsor's project work under review for this OP:

5.1 United States Code

- FTA enabling statutes, 49 U.S.C. Chapter 53, Section 5327

5.2 Regulations

- Project Management Oversight, 49 Code of Federal Regulations (C.F.R.) Part 633

- Major Capital Investment Projects, 49 C.F.R. Part 611
- Joint FTA/Federal Highway Administration (FHWA) regulations, Metropolitan Planning, 23 C.F.R. Part 450
- Joint FTA/FHWA regulations, Environmental Impact and Related Procedures, 23 C.F.R. Part 771
- U.S. Department of Transportation (DOT) regulation, Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs, 49 C.F.R. Part 24
- Other federal requirements

5.3 FTA Master Agreement

5.4 FTA Circulars

- C4220.1F, Third Party Contracting Guidance
- C5010.E1E, Award Management Requirements
- C4710.1, Americans with Disabilities Act (ADA)
- FTA Guidance on the Application of 49 U.S.C. 5324(c) – Railroad Right-of-Way Acquisition (April 30, 2009)

5.5 Guidance

- Reporting Instructions for the Section 5309 New Starts, Small Starts and Core Capacity Criteria
- Interim Guidance on Design-Build
- Project and Construction Management Guidelines
- Construction Project Management Handbook
- CIG Final Interim Policy Guidance dated June 2016
- PMOC Lessons Learned Publication “Mitigating Problem of Third Party Coordination”

6.0 PROJECT SPONSOR’S SUBMITTALS

In advance of performing the review, the PMOC should obtain and study the following project documents, which depend on the stage of the development for each project:

1. Draft and final environmental documents and third-party comments and resolutions
2. The Record of Decision (ROD) or Finding of No Significant Impact (FONSI) and Required Mitigations
3. Scope, budget, and schedule
4. PMP

5. Plans and basis of design
6. Value engineering and constructability review reports
7. RCMP
8. List of required third-party agreements, including a description of the subject matter of each agreement, the timing for its execution, and the consequences of the failure to have it executed by the time needed.
9. Third-party and utility agreements tracking matrices
10. List of required permits
11. Memorandum of Understanding with third parties
12. Letters of commitment from third parties
13. Third-party agreement documents in draft
14. Project Delivery Plan

More comprehensive detail on required documents is available in FTA's OPs 20, 51, 52, 53, 54, and 56.

The PMOC reviews the status, progress, and risks related to third-party agreements relative to the Oversight Framework for the type of grant.

6.1 Scope / Project Definition

- Final environmental documents and National Environmental Policy Act (NEPA) determination and required mitigations
- Basis of design reports, design criteria reports
- Engineering project plans, drawings, design criteria, standards and specifications
- Value Engineering and Constructability Review Report
- Master Permitting Plan and Schedule
- Geotechnical Baseline Report
- Passenger level boarding design documents
- Vehicle design documentation

6.2 Project Management Plan and Sub-Plans Completed Including but not limited to:

- Signed agreements, memoranda, or letters of commitment with railroads, utilities, other third parties
- Risk assessment and register, and RCMP
- Project delivery plan, contract packaging plan, procurement policies and procedures
- Project Sponsor Management Capacity and Capability Evaluation

- Project Delivery Plan
- List of required permits
- Update of Real Estate Acquisition Management Plan (RAMP) as needed

6.3 Schedule

- Project schedule in original and Standard Cost Category (SCC) format; schedule narrative describing critical path, expected durations, and logic
- Cost
- Summary of operations and maintenance (O&M) cost assumptions/productivities
- Capital cost estimate in original and SCC format
- Before-and-After Study documentation regarding project cost and schedule (if study is required)

6.4 FFGA/ Small Starts Grant Agreement (SSGA)/Single Year Grant Agreement (SYGA)

6.5 Base documents and attachments on Scope of Project, Project Description, Baseline Cost Estimate, Project Budget, Baseline Project Schedule

7.0 SCOPE OF WORK

Except for the FFGA/SSGA/SYGA attachments, all of the Project Sponsor submittals noted in Section 6.0 should have been reviewed by the PMOC prior to final preparation of the grant/loan, and any deficiencies found as a result of those reviews should have been reconciled with and corrected by the Project Sponsor. The scope of this procedure is to confirm that all of the documentation and analysis regarding third-party agreements remain satisfactory and that there is consistency between the project documents and the third-party agreements and the project scope, budget and schedule. It is the responsibility of the PMOC to notify FTA of any deficiencies prior to the preparation of this OP report.

Appendix A lists the expected Acceptable Quality Level and Appendix B provides a sample table of contents for the PMOC report.

7.1 Qualifications of Reviewers

- Reviewer must have prior experience in managing similar projects involving third parties.
- To the extent possible, the reviewers should be the same individuals that performed the prior review of the project documents, and should be regular participants in project reviews.

7.2 Review Effort consisting of the following:

Referring to the most current versions of the Project Sponsor submittals, the PMOC shall update previous reviews of third-party agreements, if applicable. Note that FTA ultimately determines which third-party agreements will be designated as critical.

The deficiencies found as a result of those reviews should be reconciled and discussed with the Project Sponsor prior to preparation of the report.

Prior to the Project Sponsor's formal request to FTA for grant/loan agreement, the PMOC should complete its review and submit to FTA a report stating whether the sponsor meets the requirements. The statement of compliance should be included in the executive summary as described below.

The PMOC report shall (see Appendix B for sample table of contents):

- Integrate the findings and recommendations of the reviews above.
- Tabulate all identified third-party agreements required in a separate appendix.
- Include an executive summary in three pages or fewer that includes the following:
 - PMP review findings.
 - Management Capacity and Capability Review findings.
 - Methodology for designation of third-party agreements as "Critical".
 - Synthesis of findings on each significant third-party agreement with discussion on:
 - Scope
 - Schedule
 - Cost estimate
 - Satisfactory continuing control (may require coordination with FTA legal office)
 - Safety and security
 - Project Risk and Contingency Review
 - Professional opinion regarding the sufficiency of the third-party agreements and the ability of the project sponsor to manage them.
 - Conclusion with statement (if warranted) that the project meets the OP requirements based on the PMOC's determination that scope, budget, schedule, and safety and security impacts due to third-party agreements have been generally accounted for in the Sponsor's proposed baseline cost estimate and baseline schedule; and that the level of cost/schedule contingency accounts for the risk exposure.

8.0 REPORT, PRESENTATION, RECONCILIATION

The PMOC shall provide FTA with a written report limited to 20 pages that summarizes its findings, analysis, recommendations, professional opinions, and a description of the review activities undertaken. After FTA approval, the PMOC should share the report with the Project Sponsor. In the event that differences of opinion exist between the PMOC and the Project Sponsor regarding the PMOC's findings, FTA may direct the PMOC to reconcile with the

Project Sponsor and provide FTA with an updated report or addendum covering the agreed-upon modifications by the Project Sponsor and PMOC.

The report formatting requirements of OP 01 apply. When necessary, PMOC shall perform data analysis and develop data models that meet FTA requirements using Microsoft Office products such as Excel and Word and use FTA-templates when provided. The PMOC may add other software as required, but the PMOC shall make all documentation and report data available to FTA.