



U.S. Department
of Transportation
Federal Highway
Administration

Office of the Administrator

April 22, 2008

1200 New Jersey Avenue, SE.
Washington, DC 20590

In Reply Refer To:
HOA-3

Ms. Stephanie Kopelousos
Secretary
Florida Department of Transportation
604 Suwannee Street
Tallahassee, FL 32399-0450

Dear Ms. Kopelousos:

Stephanie

The Federal Highway Administration (FHWA) has completed its review of the Florida Department of Transportation's (FDOT) Special Experimental Project No. 15 Application (SEP-15 Application) for waivers of the Transportation Infrastructure Finance and Innovation Act (TIFIA) program procedures for the I-595 Corridor Roadway Improvements Project in Broward County, Florida (I-595) and three projects to be named in the future (Projects) that was submitted to the FHWA Florida Division Office (Division Office) on March 24. The Division Office forwarded the SEP-15 Application to the SEP-15 Steering Committee, which coordinated the review of the proposed TIFIA waivers with the TIFIA Joint Program Office (JPO); Office of Infrastructure; Office of Planning, Environment, and Realty; Office of Policy and Governmental Affairs; Office of Chief Counsel; Office of the Chief Financial Officer; and the Division Office. Based on the comments provided by these offices, the SEP-15 Steering Committee recommended, and I concur, that the I-595 project and three projects to be named be accepted for administration under SEP-15. FHWA's response to each of the proposed experimental features for the TIFIA waivers is discussed below.

The FHWA's acceptance of the SEP-15 Application for administration under the SEP-15 program does not constitute approval of the Projects for TIFIA credit assistance, which assistance is subject in all respects to complying with TIFIA requirements and terms and conditions acceptable to the U.S. Department of Transportation (DOT) before a commitment of funds can be made. If you wish to proceed with the TIFIA waivers under the SEP-15 program, our next major action will be to work with you to draft an Early Development Agreement (EDA). The EDA will contain parameters to guide such key elements as the TIFIA application requirements, terms and conditions for conditional approval, the provision of detailed term sheets, specific TIFIA requirements to be addressed in FDOT's procurements for the Projects, meetings with the pre-qualified proposers, and timelines. The EDA will also identify the performance measures that will be used to evaluate the success of the TIFIA experimental features.

Background

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The FDOT is developing the Projects through public-private partnerships. Pursuant to a procurement process and execution of a concession agreement for each Project, a private entity will have the right and obligation to develop, design, construct, finance, operate, and maintain the Project. To encourage price competition in the procurements for the Projects, FDOT would like for the proposers' anticipated use of TIFIA credit assistance to become part of the competition. However, FDOT recognizes that it would be unduly burdensome for the TIFIA JPO to process separate TIFIA credit assistance applications for each proposer during the proposal preparation period, when, ultimately FDOT will award only one proposer a contract for a Project.

The Florida DOT would like each pre-qualified proposer to have full and equal access to the TIFIA JPO through the solicitation process. Specifically, FDOT seeks to allow its SEP-15 Application to serve as the TIFIA Letter of Interest and TIFIA application on behalf of any proposer wishing to include TIFIA credit assistance as part of its proposed financial plan for a Project. Through a request for proposals (RFP), FDOT will notify the proposers of the opportunity to meet one-on-one with the TIFIA JPO to negotiate a conditional term sheet prior to the proposers submitting proposals. Each potential proposer that elects to use TIFIA credit assistance must identify the amount, as well as the terms and conditions of available TIFIA credit assistance prior to making a financial offer to FDOT. The proposed experimental process would allow FDOT to compare the value to the State of each financial proposal, and assure that the winning concessionaire could execute all financing documents within approximately 3 months after award. For the first project, I-595, and potentially for the other three projects to be named, the proposers will be required to submit firm, fixed price offers to FDOT that would not otherwise be possible without use of the experimental features proposed in FDOT's SEP-15 Application.

The current TIFIA loan process begins when a private developer submits an application for Federal credit assistance to the TIFIA JPO after its selection by the public owner. Working with this single applicant, the TIFIA JPO evaluates the application and, if approved, issues a term sheet, negotiates detailed terms and conditions, and executes a TIFIA credit agreement.

Utilizing the existing TIFIA loan process would require the TIFIA JPO to evaluate and establish credit terms for the plans of finance of all the short-listed bidders with the knowledge that only one would be selected to move forward. Waiting for the selection process to conclude prior to accepting an application from the winning concessionaire would add substantial time and uncertainty to FDOT's proposed procurement process, and could possibly result in precluding access to TIFIA credit assistance. By reducing the risk to the proposers that TIFIA credit assistance may not be available or secured in a timely fashion, FDOT believes that proposers will be encouraged to submit more detailed and complete financial proposals that do not price this risk. The end result should be more competitive financial packages that translate into a reduced need for public funding. Furthermore, the TIFIA JPO will not have to negotiate full credit agreements with multiple potential borrowers. Thus, FDOT expects the SEP-15 experiment proposed herein will produce time savings and innovation in project development and financing.

The FHWA concurs with you that the proposed TIFIA experiment will serve several goals, including: (1) Expediting delivery of transportation facilities; (2) maximizing the use of public-private partnerships and private equity; and (3) encouraging flexible, innovative and alternative approaches to project financing. Given the growing interest in advancing major projects as

private concessions, an experiment with an alternative TIFIA loan process would provide valuable information to assist DOT in reconfiguring the TIFIA program to accommodate non-traditional project procurement and financing schemes.

Experimental Features

The FDOT would like to first apply the proposed experimental features to the I-595 project. The I-595 project has received environmental clearance from the Division Office and FDOT has short-listed three proposer teams for the I-595 and anticipates issuing the final RFP for I-595 on April 18, 2008. The remaining Projects and experiments would begin only upon acceptable progress of the I-595 project, submission of a written request to advance the next Project, and receipt of FHWA's notice to proceed with the issuance of a RFP.

The FDOT requests the right to supplement its SEP-15 Application to seek approval of other experimental features relating to the Projects including features relating to the design and construction of the Projects.

Experimental Feature 1: FDOT requests that the SEP-15 Application be considered the Letter of Interest for the Projects. Under the proposed procurement process, FDOT will be the initial applicant for TIFIA credit assistance.

Experimental Feature 1a: Waiver of Information Relating to Final Project Sponsor.

Experimental Feature 1b: Waiver of Proposed Plan of Finance.

Purpose: FDOT requests a waiver of information required to be submitted in the Letter of Interest because such information is not available at this stage of the FDOT procurement process.

Deviation from FHWA Requirement(s): The proposed experimental features deviate from the requirements of the 2007 TIFIA Program Guide (TIFIA Program Guide), Chapter 4, Section 4-1, Initial Submission: Letter of Interest. The SEP-15 Application does not include items of information that should be submitted in a Letter of Interest including background information on the project sponsor and the proposed sources and uses of funds for the project, including the type of credit assistance sought from DOT.

FHWA Response: The Letter of Interest serves three purposes. First, it familiarizes DOT with the basic parameters of the project and its sponsor. Second, it permits DOT to ensure that the project meets the eligibility requirements for TIFIA credit assistance. Third, it allows DOT to refer the project to a modal agency (i.e., FHWA, Federal Transit Administration, Federal Railroad Administration, or an inter-agency working group) to assist the sponsor with its application for credit assistance.

The FHWA understands that FDOT will not be able to submit a complete Letter of Interest with all of the information required by the TIFIA Program Guide. However, for the I-595 project, the SEP-15 Application includes sufficient information to allow the TIFIA JPO to assess whether the I-595 project meets the basic eligibility criteria for TIFIA credit assistance. Thus, FHWA accepts experimental feature 1a and 1b on the condition that FDOT submits its request to proceed with the next Project no later than 90 days before issuance of an RFP. The request shall

provide information regarding the prospective proposers, their qualifications and their legal structures, information about the payment mechanism and limited pro forma data based upon the Major Project Financial Plan, and the status of the environmental review process for each Project. The FDOT also will seek input from prospective proposers concerning plan of finance information such as project cost and revenue estimates.

Experimental Feature 2: FDOT proposes that the SEP-15 Application serve as the application for TIFIA credit assistance for the Projects. In connection with submission of a TIFIA application, FDOT requests two waivers.

Experimental Feature 2a: Waiver of Information Relating to the Final Project Sponsor.

Purpose: Under current TIFIA procedures, an application for TIFIA credit assistance is submitted after the completion of the procurement process. However, FDOT does not possess information about the final sponsors for the Projects because the TIFIA application will precede final selection of the Projects' sponsors.

Deviation from FHWA Requirement(s): The proposed experimental feature deviates from 49 C.F.R. § 80.7 which requires applicants for TIFIA credit assistance to submit an application to the DOT in order for approval by the Secretary. This experimental feature also deviates from requirements in the TIFIA Program Guide, Chapter 4, Section 4-2 – Application Sections A and E. Specifically, information on where and how to contact the project sponsor, and the organizational structure, experience, and legal authority of the ultimate project sponsor will not be available at the time the TIFIA application is submitted to the TIFIA JPO.

FHWA Response: FHWA accepts this experimental feature. The FDOT will be required to submit the nonrefundable application fee of \$30,000 for each Project as it is advanced under the terms and conditions of the EDA. The EDA will require that the FDOT's RFP include information and certifications from the proposers that address all applicable TIFIA requirements. As the procurement process proceeds, FDOT will keep the TIFIA JPO informed concerning the prospective proposers and their qualifications, organizational structure, and legal authority to carry out the activities described in the application.

Experimental Feature 2b: Waiver of Requirement to Submit a Detailed Financial Plan, Preliminary Rating Opinion, and other Financing Documents.

Purpose: FDOT is not able to provide the TIFIA JPO with required financial information in the SEP-15 Application because its submission precedes FDOT's receipt of the proposers' detailed financial plans and the final concession award. Recognizing that each proposer is likely to have a different project financial plan, FDOT will submit an Initial Financial Plan (IFP) for each Project 60 days before issuance of an RFP for a Project. The IFP shall include sufficient data for the TIFIA JPO to conduct an initial evaluation and to give the TIFIA JPO a sense of the detailed financing plans Project proposers may submit to the TIFIA JPO. The IFP will demonstrate to the reasonable satisfaction of DOT that the Project's future revenue will be sufficient to support repayment of the Federal credit assistance to the U.S. Department of the Treasury and that it will follow the FHWA's Financial Plan Guidance. Further, FDOT will not be able to provide other required application elements, such as a compliance monitoring plan and operation information.

Deviation from FHWA Requirement(s): This experimental feature deviates from 49 C.F.R. § 80.7(b) which requires a TIFIA applicant to provide current financial information concerning both the project and the applicant. A project sponsor must submit a detailed financial plan and proposed terms with its application pursuant to Section 4-2 of the TIFIA Program Guide - Application Section D. In addition, as specified in Section 4-2 of the TIFIA Program Guide - Application Section B, an application for TIFIA credit assistance must include comprehensive information on the project, including a project description, schedule, information on required permits and approvals, a project management and compliance monitoring plan, and a description of project operations and maintenance. Also, pursuant to 23 U.S.C. § 602(b)(2)(B), 49 C.F.R. §§ 80.11(a) and 80.15(b), and the TIFIA Program Guide, Chapter 3, Section 3-5, a project applicant is required to provide a preliminary rating opinion letter from at least one rating agency indicating that the project's senior obligations have the potential to achieve an investment grade rating.

FHWA Response: FHWA accepts FDOT's request for a waiver regarding a project compliance monitoring plan and operations and maintenance description provided FDOT's RFP requires proposers to submit these documents. However, FDOT must ultimately demonstrate that each Project meets eligibility and project selection criteria as set forth in 23 U.S.C. § 602(a) and (b)(2)(A).

The FDOT shall submit a pro forma plan of finance for each Project. FDOT may defer providing a preliminary rating opinion letter, conditioned on FDOT demonstrating that the Project's financing can be structured such that the senior obligations have the potential to achieve an investment grade rating. Sufficient information must be provided in FDOT's request to proceed with the next Project to enable the DOT to determine the maximum amount of TIFIA credit assistance based on eligible project costs and the likelihood that project revenues will repay the TIFIA and other debt obligations with the requested financing terms. In approving the waivers, it is understood that DOT will adhere to the same credit standards applied to any project seeking assistance. The short-listed proposers will have to provide a preliminary rating opinion letter to the TIFIA JPO indicating their senior lien debt has the potential to achieve an investment grade rating at the time that they present their plans of finance and meet one-on-one with the TIFIA office. The proposer selected by FDOT as a result of the procurement process will submit to the TIFIA JPO an investment grade letter for their senior lien debt and provide a model reflecting that the terms the proposer negotiated with the TIFIA JPO in the conditional term sheet are met.

Experimental Feature 3: Request for issuance of conditional project selection; for TIFIA to meet one-on-one with the pre-qualified proposers and issue a conditional term sheet.

Purpose: FDOT expects the selected proposer for each Project to complete its financing arrangements within 3 months after award. The FDOT requests the TIFIA JPO to meet individually with the pre-qualified proposers to negotiate a term sheet for TIFIA credit assistance. Pre-qualified proposers would be allowed to meet with TIFIA for a period starting not later than 60 days before the due date for proposals set by FDOT. The FDOT requests that the TIFIA JPO negotiate and agree to a term sheet for TIFIA credit assistance with each pre-qualified proposer interested in pursuing such assistance no later than 15 days before the proposal due date stated in the RFP for a Project. Pre-qualified proposers could then base their final proposal on the substantially negotiated credit terms with the TIFIA JPO. The TIFIA JPO

would not participate in FDOT's review of the proposal submissions. If TIFIA credit assistance is sought by the winning concessionaire, the TIFIA JPO would then negotiate the final credit agreement after FDOT's selection. To preserve and maximize competition, FDOT is asking that the TIFIA JPO keep all information and financial negotiations pertaining to the one-on-one meetings with the pre-qualified proposers confidential according to the terms of a confidentiality agreement.

Deviation from FHWA Requirement(s): Proposed Experimental Feature 3 deviates from certain term sheet prerequisites specified in Chapter 6, Section 6-1 of the TIFIA Program Guide. This proposed experimental feature deviates from current policy regarding issuance of a conditional term sheet. The TIFIA regulations published in 1999 specifically provided for issuance of a conditional term sheet, if certain requirements had not been met. However, subsequent Federal Register notices of funding availability and the TIFIA Program Guide in Section 6.1 have narrowed the circumstances that would necessitate a conditional commitment.

FHWA Response: On an exception basis, DOT has issued conditional term sheets as a means to administratively reserve funds for a specific project, subject to meeting specified conditions by a certain date. Budget authority is not legally obligated until conditions are met. The FHWA accepts proceeding with conditional project selection and conditional term sheets for the I-595 project, subject to approval by the DOT Credit Council. The conditional term sheet would include the terms and conditions offered to each competing entity. This would enable proposers to factor TIFIA credit assistance into their financial plans with the assurance that a credit agreement could be executed shortly (i.e., within 120 days) after the FDOT selection. The conditional term sheet will require the successful concessionaire to reimburse DOT for credit processing costs (outside financial and legal consultant costs) in connection with the evaluation of the proposals, negotiation of final terms, and execution of the TIFIA credit agreement.

The acceptance of Experimental Feature 3 is predicated on the pre-qualified concessionaires' adherence to all TIFIA program requirements, including any terms and conditions which may be pre-negotiated with FDOT. The procedures for reviewing and protecting confidential information will be addressed in the EDA.

Proposed Performance Measures and Reports

You propose to evaluate and report on the experimental features of the TIFIA program waivers. The FHWA will fully evaluate the proposed factors, listed below, for inclusion in the BDA:

1. Time Savings.

You propose the following to measure time savings: (1) Compare the actual schedule for receiving TIFIA credit approval and execution of a credit agreement with the concessionaire with the estimated schedule based on a traditional approval process as well as its previous experience with the Miami Intermodal Center TIFIA loan; (2) evaluate the effect of the experiment on the receipt of final proposals and financial close; and (3) attempt to quantify the value of the streamlined TIFIA credit approval approach described herein.

2. Innovation in Financing.

The FDOT will analyze the financing structures and methods developed in connection with the Projects and how those structures and methods compare to historical experience with project financing structures and methods for comparable projects. As part of this analysis and comparison, FDOT will particularly focus upon the levels of financing and project risk shifted to the private sector and strategies employed to minimize the public sector's risk.

3. Reports.

You anticipate filing an initial report and post-acceptance report as described below:


Initial Report. The initial report will be filed within 120 days after the award of a concession for a Project and will include a preliminary analysis of the Project procurement. This report will: (1) Describe the process used to select the concessionaire; (2) identify any reaction by the industry to use of the TIFIA approval process as described herein; (3) document major innovations contained in the proposals received; and (4) discuss any major problems or issues that have occurred and how they were resolved.

Post Acceptance Report. A post acceptance report will be submitted within 180 days following financial close for a Project. This report will provide an overall evaluation of the role of the TIFIA approval process for that particular Project procurement, including its impact on executing the concession agreement and arriving at financial close.

The proposed performance measures and reports described in the SEP-15 Application will be reviewed during the development of the EDA and incorporated into a Project timeline.

I have asked Mr. Marcus J. Lemon, Chief Counsel, and Mr. David Gibbs, Acting Division Administrator for the FHWA Florida Division Office, to serve as the co-facilitators for the SEP-15 for TIFIA Credit Program Waivers. Mr. Lemon and Mr. Gibbs will establish an FHWA interdisciplinary team to work with you to develop the provisions of the EDA.

Sincerely,


James D. Ray
Acting Administrator