



U.S. Department
of Transportation

**Federal Highway
Administration**

Office of the Administrator
September 13, 2006

400 Seventh St., S.W.
Washington, D.C. 20590

In Reply Refer To:

Michael W. Behrens, P.E.
Executive Director
Texas Department of Transportation
Dewitt C. Greer State Highway Building
125 E. 11th Street
Austin, TX 78701-2483

Dear Mr. Behrens: *Mike*

The Federal Highway Administration (FHWA) has completed its review of the Texas Department of Transportation (TxDOT) Special Experimental Project No. 15 (SEP-15) application for the US 290 East Toll Project (Project). The application was received by the FHWA Texas Division Office (Division Office) on August 4, and was forwarded to the SEP-15 Steering Committee (Steering Committee) on the same day. The Steering Committee coordinated the review of the application within FHWA and recommended, and I concur, that the application be accepted for administration under SEP-15. The FHWA's response to the proposed experimental feature for the Project is discussed below.

The FHWA's acceptance of the Project for administration under SEP-15 does not commit Federal-aid funding for the Project and does not waive any other Federal requirements applicable to the Project. Until there is formal FHWA project approval, the FHWA retains the right to deny Federal funding for the Project at anytime. If you wish to proceed with the Project under the SEP-15 program, the next major action will be to work with you to draft an Early Development Agreement (EDA) for the Project. The EDA will contain parameters to guide the administration of the Project under SEP-15. The EDA will also identify the performance measures that will be used to evaluate the success of the Project's experimental feature.

Background

Based on your application, we understand that the US 290 East Toll Project consists of upgrading US 290E in Travis County between US 183 to east of SH 130 from a four-lane divided highway to a tolled freeway facility with non-tolled frontage roads, with a total length of approximately 5.9 miles.



The TxDOT would like to execute a Comprehensive Development Agreement (CDA) with a developer in early 2007, which it anticipates would require the developer to develop, design, and construct the Project, and to possibly provide financing and maintenance services for the completed Project. You indicate in your application that the proposed CDA procurement schedule includes the release of a Request for Detailed Proposals (RFDP) in early August 2006, prior to the completion of the environmental review targeted for April 2007.

Experimental Feature

The TxDOT requests to issue a RFDP and execute a CDA prior to final approval pursuant to the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321, et seq., (NEPA) in deviation of 23 C.F.R. § 636.109. The CDA will incorporate language that indicates that the environmental process is not yet complete and that issuance of a notice to proceed with construction will be contingent on the Project receiving environmental approval from the FHWA.

Purpose: This approach provides the flexibility to involve the private sector in project development activities prior to completion of the NEPA process.

Deviation from FHWA requirements: This experimental feature deviates from FHWA's design-build rule, 23 C.F.R. § 636.109, because TxDOT is proposing to issue a RFDP and sign a CDA prior to the receipt of final NEPA approval for the Project.

FHWA Response: The TxDOT may conditionally proceed with this experimental feature. The RFDP must not commit TxDOT to a particular set of transportation improvements, but rather represent a commitment to enter into detailed negotiations with one or more prospective private partners. For each transportation improvement that meets the criteria for independent analysis in FHWA's NEPA regulation (23 C.F.R. § 771.111(f)), FHWA would expect that the CDA would be drafted to ensure that alternative solutions are fully evaluated under TxDOT and FHWA direct oversight, and that appropriate safeguards are built into both the partnership agreement and the NEPA process to ensure that conflicts of interests are avoided.

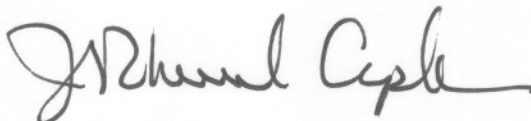
We strongly recommend that the RFDP require developers to outline the anticipated NEPA level of documentation and process, if such information is available. The RFDP should clearly state that the NEPA process could result in the selection of a no-build alternative or an alternative not originally envisioned in the CDA. The FHWA will work with TxDOT to ensure that the RFDP and CDA are properly drafted to satisfy these and any additional Federal regulatory concerns.

Proposed Performance Measures and Reports

The proposed performance measures and contents of the initial report, interim report, and a final report, described in the TxDOT application, will be reviewed during the development of the EDA and incorporated into a project timeline.

I have asked Mr. King Gee, Associate Administrator for Infrastructure, and Mr. Al Alonzi, Acting Division Administrator for the FHWA Texas Division Office, to serve as the co-facilitators for the US 290 East Toll Road Project. Mr. Gee and Mr. Alonzi will establish a FHWA interdisciplinary team to work with TxDOT to develop the provisions of the EDA.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Richard Capka". The signature is fluid and cursive, with a long horizontal stroke at the end.

J. Richard Capka
Administrator