

**EARLY DEVELOPMENT AGREEMENT  
BETWEEN  
THE FEDERAL HIGHWAY ADMINISTRATION  
AND  
THE TEXAS DEPARTMENT OF TRANSPORTATION  
FOR  
WAIVERS OF THE TIFIA CREDIT PROGRAM PROCEDURES**

THIS EARLY DEVELOPMENT AGREEMENT (hereinafter "EDA"), made and entered into this 9th day of June 2006, by and between the TEXAS DEPARTMENT OF TRANSPORTATION (hereinafter "TxDOT") and the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, (hereinafter "FHWA"):

WITNESSETH:

WHEREAS, TxDOT is considering the development of the I-635 Project (Lyndon B. Johnson Freeway) in the Dallas-Fort Worth metropolitan area, the SH 161 Project through Irving and Grand Prairie, and the SH 121 in Denton and Collin Counties (the "Projects") as toll facilities using TxDOT's Comprehensive Development Agreement ("CDA") Program;

WHEREAS, TxDOT seeks to obtain conditional credit assistance for three of the Projects under the Transportation Infrastructure Finance and Innovation Act Program ("TIFIA Credit Program");

WHEREAS, on October 6, 2004, the FHWA announced, in the Federal Register at 60 Fed. Reg. 59983, a new special experimental project to explore alternative and innovative approaches to the overall project development process known as Special Experimental Project Number 15 (collectively, "SEP-15") pursuant to the authority in 23 U.S.C. § 502(b)(1)(B);

WHEREAS, in an effort to more effectively use and streamline the TIFIA Credit Program approval process, on December 20, 2005, TxDOT submitted an application to use an innovative financing approach, which included certain specified modifications or deviations from the current requirements and policies contained in title 23 of the United States Code, title 23 of the Code of Federal Regulations, and the TIFIA Program Guide, to advance the Projects under SEP-15;

WHEREAS, on February 21, 2006, the FHWA approved TxDOT's SEP-15 application;

WHEREAS, SEP-15 is designed to permit tests and experimentation in the project development process for title 23 projects that are specifically aimed at attracting private investment and lead to increased project management, flexibility, more innovation, improved efficiency, timely project implementation, and new revenue streams;

WHEREAS, under SEP-15, in order to facilitate tests and experimentation in the project development process, the FHWA may grant modifications or deviations from the current requirements contained in title 23 of the United States Code, title 23 of the Code of Federal Regulations, and the TIFIA Program Guide; and,

WHEREAS, under SEP-15, an Early Development Agreement (“EDA” or “Agreement”) between TxDOT and FHWA is required in order to specify the conditions relating to the modifications or deviations from Federal requirements that are granted for the Projects as well as to identify the reporting requirements that will be used to evaluate the extent to which the modifications or deviations contributed to the success of the process;

NOW THEREFORE, TxDOT and FHWA hereby agree as follows:

## **SECTION 1. SCOPE OF EARLY DEVELOPMENT AGREEMENT**

This EDA is intended to identify and establish the parameters of the modifications or deviations from title 23 of the United States Code, title 23 Code of Federal Regulations, and the TIFIA Program Guide in connection with the use of TIFIA credit assistance to provide financing for the Projects, which shall be hereinafter referred to as the “experimental features.” The experimental features identified in this Agreement will apply to each of the Projects for which TxDOT decides to use the TIFIA Credit Program. Nothing in this EDA shall be construed as a relinquishment of any Federal oversight or stewardship responsibility.

## **SECTION 2. DEFINITIONS**

### **2.1 Applicant**

“Applicant” means the Texas Department of Transportation.

### **2.2 Comprehensive Development Agreement**

“Comprehensive Development Agreement” means an agreement entered into between TxDOT and a Developer, which among other matters may include the design, construction, financing, and operation of a Project and the right to collect tolls from the users of the Project.

### **2.3 Conditional Term Sheet**

“Conditional Term Sheet” means a contractual agreement between the United States Department of Transportation (“DOT”) and TxDOT by which DOT reserves TIFIA funding for a specific project and commits to providing Federal credit assistance to that project at a future point in time upon satisfaction of specified conditions and subject to the future availability of obligation authority.

### **2.4 Credit Agreement**

“Credit Agreement” means the definitive agreement between DOT and the borrower that specifies all terms and conditions of the credit assistance and authorizes funding of the TIFIA credit instrument.

## **2.5 Developer**

“Developer” means the Proposer that is awarded the CDA by TxDOT for a particular Project.

## **2.6 DOT**

“DOT” means Department of Transportation.

## **2.7 DOT Credit Council**

“DOT Credit Council” means the nine-member body which provides policy direction and make recommendations to the Secretary regarding the selection of projects for TIFIA credit assistance composed of representatives of the Department of Transportation Offices of Budget, General Counsel, Policy, and Small and Disadvantaged Business Utilization, and the Administrators of the FHWA, Federal Railroad Administration, Federal Transit Administration, and the Maritime Administration.

## **2.8 Preliminary Rating Opinion Letter**

“Preliminary Rating Opinion Letter” means the conditional credit assessment from a nationally recognized credit rating agency that provides a preliminary indication of the project’s overall creditworthiness and that specifically addresses the potential of the project’s senior debt obligations to achieve an investment grade rating.

## **2.9 Plan of Finance**

“Plan of Finance” means the comprehensive document reflecting the cost and revenue structure of a Project that includes, but is not limited to, estimated project costs and activity breakdowns, sources and uses of funds descriptions, and cash flow pro forma, as specified in Appendix D of the TIFIA Program Guide.

## **2.10 Final Project Sponsor**

“Final Project Sponsor” means the Developer.

## **2.11 Project**

“Project” means each of the following: the I-635 Project (Lyndon B. Johnson Freeway) in the Dallas-Fort Worth metropolitan area; the SH 161 Project through Irving and Grand Prairie, as described in TxDOT’s SEP-15 Application; and the SH 121 Project in Denton and Collin Counties as described in Exhibit A.

## **2.12 Proposer**

“Proposer” means each entity or team of entities that submits a proposal in response to a Request for Detailed Proposals.

### **2.13 Request for Detailed Proposals**

“Request for Detailed Proposals” (“RFDP”) means a Request for Detailed Proposals issued by TxDOT in connection with each Project.

### **2.14 TIFIA**

“TIFIA” means the Transportation Infrastructure Finance and Innovation Act of 1998 as amended by section 1601 of Public Law 109-59 (codified as 23 U.S.C. § 601 et. seq.).

### **2.15 TIFIA JPO**

“TIFIA JPO” means the Joint Program Office, which administers the TIFIA Credit Program, on behalf of the Secretary of the DOT.

### **2.16 TIFIA Program Guide**

“TIFIA Program Guide” means the 2003 TIFIA Program Guide (or a subsequent edition) that supplements the TIFIA regulations (49 C.F.R. Part 80) and describes how the DOT administers the TIFIA Credit Program, covering the application, evaluation, and selection process that DOT will use to determine who receives credit assistance.

## **SECTION 3. GENERAL PROVISIONS**

### **3.1 Applicability of Federal Law**

A. All Federal laws, rules and regulations shall be applicable to any Project using Federal funds, including, but not limited to, the requirements set forth in titles 23 and 49 of the United States Code, and titles 23 and 49 of the Code of Federal Regulations, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. §§ 4601, *et seq.*, and the FHWA’s implementing regulations found at 49 C.F.R. Part 24, and the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321 to 4370f, with respect to any related facility, except as otherwise specified herein.

B. With respect to title 23 of the United States Code and title 23 of the Code of Federal Regulations, TxDOT may apply to the Projects the SEP-15 experimental features described in Sections 4, 5, and 6 of the EDA. TxDOT’s use of such experimental features shall be deemed to be in full compliance with Federal law, rules and regulations.

### **3.2 Withdrawal of Approval for Experimental Features**

The FHWA’s approval of any or all of the SEP-15 experimental features identified in Sections 4, 5, and 6 may be withdrawn at any time by the FHWA if the FHWA determines that the experimental features are not in the public interest. Prior to any such withdrawal, the FHWA will issue a written notice to TxDOT describing the FHWA’s findings and provide TxDOT a reasonable period of time address the FHWA’s concerns. However, during such period of time, except as

specified below, no further work shall be conducted based on the approval at issue until such time as the FHWA determines that TxDOT has fully addressed the FHWA's concerns. Upon withdrawal of approval of an experimental feature, the applicable requirements of title 23 of the United States Code, titles 23 and 49 of the Code of Federal Regulations, and the TIFIA Program Guide shall immediately apply. Notwithstanding the foregoing, any withdrawal of an approval under this paragraph only affects TIFIA eligibility for Projects not subject to a Conditional Term Sheet and shall not (a) invalidate or require modification of any previously executed Conditional Term Sheets or Credit Agreements entered into in reliance upon such approval, (b) affect the obligations of the parties under a previously executed Conditional Term Sheets or Credit Agreements, and (c) otherwise apply retroactively to any completed elements or activities.

### **3.3 Access to Documents**

As provided in 23 C.F.R. § 1.5, TxDOT shall furnish, or make available, to the FHWA such information as the FHWA deems necessary, as more particularly described in this Agreement, to administer the TIFIA Credit Program in connection with a Project and ensure compliance with any applicable Federal requirements. Any records that a private party does not want to be made publicly available shall be reviewed by the FHWA in accordance with the procedures outlined in the FHWA January 26, 2005, memorandum concerning "Pre-submission Evaluation of Information under the Freedom of Information Act." The confidentiality of any records obtained by the FHWA shall be determined in accordance with 49 C.F.R. Part 7.

### **3.4 Order of Precedence**

Except as otherwise specified herein, this EDA supersedes the December 22, 2005, TxDOT SEP-15 application and the FHWA February 21, 2006, SEP-15 acceptance letter. The December 22, 2005, TxDOT SEP-15 application and the February 21, 2006, FHWA SEP-15 acceptance letter are attached to this EDA as Exhibits B & C, and may be used for historical and interpretive purposes, *provided that* this EDA shall be given effect to the extent there is any conflict. Any modifications to this EDA shall supersede any conflicting provisions of the December 22, 2005, SEP-15 application, the February 21, 2006, SEP-15 acceptance letter and any prior modifications to the EDA.

## **SECTION 4. EXPERIMENTAL FEATURES – INITIAL APPLICATION PROCESS**

### **4.1 Deviations from the TIFIA Program Guide, Section Chapter 4, Section 4-2 – SEP-15 Application serves as the Letter of Interest (LOI) for the Projects advanced under the EDA**

A. The FHWA acknowledges and agrees to TxDOT's deviation from Section Chapter 4, Section 4-2 of the TIFIA Program Guide, as provided in the FHWA February 21, 2006, SEP-15 acceptance letter, by waiving the LOI submission and the requirement that TxDOT provide information about the Final Project Sponsor and a proposed Plan of Finance.

B. The LOI serves three purposes. First, it familiarizes the DOT with the basic information relating to the project and sponsor. Second, it permits the DOT and the sponsor to ensure

that the project meets the most basic eligibility requirements for participation. Third, it allows the DOT to designate an appropriate evaluation team for the project.

C. Each potential TIFIA applicant must first submit a detailed LOI describing the project and outlining the proposed plan of finance, including the requested credit assistance. The LOI should contain a description of the project, information about proposed financing for the project, background on the project sponsor, a discussion of the benefits of the proposed project and its use of TIFIA assistance, and a summary of the project's status in the environmental review process.

D. In order to ensure that the purposes and requirements of Chapter 4, Section 4-2, as listed in 4.1.B and 4.1.C, are protected, the following conditions must be met:

(i) Prior to submitting an application for a Project, TxDOT will submit to the FHWA Texas Division Office a Letter of Intent to proceed with submission of an application for a Project pursuant to the EDA. The Letter of Intent will identify the Project and will include a development schedule, a summary of the project's status in the environmental review process, and information about the proposed financing. The letter should be accompanied by a timetable showing the major steps and dates in the procurement process. The TIFIA JPO will determine whether the project meets the conditions of the EDA and, if so, will notify the TxDOT that it may submit an application for TIFIA credit assistance.

(ii) As the procurement process proceeds, TxDOT shall provide timely notice to the FHWA Texas Division Office and the TIFIA JPO concerning the Proposers, their qualifications, and their legal structures.

(iii) Further, TxDOT will seek input from prospective Proposers concerning plan of finance information such as project costs and revenues and will keep the FHWA Texas Division Office and the TIFIA JPO informed concerning the Proposers' plans to use TIFIA credit assistance, the type of credit assistance, any special terms that may pertain to the credit agreement, and their proposed plans of finance.

(iv) At the time of application, TxDOT will confirm that the FHWA has approved the Project with a Finding of No Significant Impact or Categorical Exclusion, or that a draft Environmental Impact Statement has been circulated.

## **SECTION 5. EXPERIMENTAL FEATURES – APPLICATION PROCESS**

### **5.1 Deviations from TIFIA Program Guide, Chapter 4, Section 4-3 Application Requirements A and E – Contact, Organizational, and Legal Information about the Project Sponsor**

A. The FHWA acknowledges and agrees to the deviation from Chapter 4, Section 4-3 Application Requirements A and E of the TIFIA Program Guide, as provided in the FHWA February 21, 2006, SEP-15 acceptance letter, by waiving the requirement that when an application for TIFIA credit assistance is submitted the Applicant provide information about where and how to contact the

Final Project Sponsor, its organizational structure, experience, and legal authority to carry out the activities described in the application.

B. The purpose of Chapter 4, Section 4-3 Application Requirements A and E is to determine whether the project sponsor (or borrower) has the qualifications, financial resources, legal authority, and demonstrated capabilities to develop a project and can comply with TIFIA requirements.

C. In order to ensure that the purposes of Chapter 4, Section 4-3 Application Requirements A and E of the TIFIA Program Guide are fulfilled, the following conditions must be met:

(i) TxDOT will pay to the DOT the nonrefundable application fee of \$30,000 for each Project identified in the SEP-15 application as they are advanced under the terms and conditions of the EDA.

(ii) TxDOT's RFDP will require Proposers that desire to use TIFIA credit assistance to submit information and certifications with their proposals that address all applicable TIFIA requirements as set forth in the TIFIA Program Guide.

(iii) As the procurement process proceeds, the TxDOT will timely inform the FHWA Texas Division Office and the TIFIA JPO concerning the Proposers and their qualifications, organizational structure, and legal authority to carry out the activities described in the application.

(iv) Prior to the release of the RFDP, TxDOT will transmit the draft RFDP documents to the FHWA Texas Division Office and the TIFIA JPO for review and concurrence on TIFIA-related provisions to ensure that TIFIA requirements are addressed. The FHWA Texas Division Office will be notified of all industry meetings. The FHWA Texas Division Office and the TIFIA JPO will participate in all informational meetings with Proposers during which TIFIA-related matters are discussed.

#### **5.2.1 Deviation from TIFIA Program Guide, Chapter 4, Section 4-3 Application Requirement D – Requirement to Submit a Detailed Financial Plan**

A. FHWA acknowledges and agrees to TxDOT's deviation from Chapter 4, Section 4-3 Application Requirement D of the TIFIA Program Guide, as provided in the FHWA February 21, 2006, SEP-15 acceptance letter, by waiving the requirement that when an application for TIFIA credit assistance is submitted the Applicant submit a detailed plan of finance, including estimated project costs and activity breakdowns, sources and uses of funds descriptions, cash flow pro forma, supplementary narratives on borrowed funds and revenue sources, proposed terms for the requested TIFIA credit instrument, and risk and mitigation strategies.

B. The purpose of Chapter 4, Section 4-3 Application Requirement D of the TIFIA Program Guide is to determine a Project's overall creditworthiness and provide reasonable assurance

that there will be sufficient financial resources available to implement and complete the project as planned, and repay all borrowed funds, including TIFIA credit assistance.

C. In order to ensure that the purposes of Chapter 4, Section 4-3 Requirement D of the TIFIA Program Guide are protected, the following conditions must be met:

(i) The TxDOT TIFIA credit application for each Project must demonstrate that the project meets eligibility and project selection criteria set out in 23 U.S.C. §§ 602(a) and (b)(2)(A).

(ii) The TxDOT TIFIA application will include a pro forma plan of finance based on internal TxDOT assumptions and input from the Proposers. The pro forma plan of finance will include preliminary information on estimated project costs with activity breakdowns, projected revenues, the senior lien debt, the type and amount of TIFIA credit assistance, repayment terms, and amortization schedules for all project debt with coverage calculations. Sufficient information must be provided in the pro forma plan of finance to enable the DOT to determine the maximum amount of TIFIA credit assistance based on eligible project costs.

(iii) The pro forma plan of finance for a Project must demonstrate to the satisfaction of the TIFIA JPO that (a) the Project's future revenue stream will be sufficient to support repayment of TIFIA credit assistance and (b) the Project's financing can be structured such that the senior obligations have the potential to achieve an investment grade rating.

(iv) The TxDOT TIFIA application will include a preliminary traffic and revenue study for the Project to provide a basis for the projected revenues.

(v) The TxDOT RFDP will require Proposers that plan to use TIFIA credit assistance to submit with their proposals a Plan of Finance that contains all of the required elements specified in the TIFIA Program Guide.

(vi) TxDOT will evaluate Proposers' Plans of Finance and as soon as practical, following its evaluation, will transmit to the TIFIA JPO Plans of Finance which include TIFIA credit assistance for those proposals deemed responsive to the RFDP.

### **5.3 Deviation from 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, Rating Opinions – Requirement to Submit a Preliminary Rating Opinion Letter**

A. FHWA acknowledges and agrees to TxDOT's deviation from 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, as provided in the FHWA February 21, 2006, SEP-15 acceptance letter, by waiving the requirement that when an application for TIFIA credit assistance is submitted the Applicant 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.

B. The purpose of the preliminary rating opinion letter in 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, is to provide



a preliminary assessment of the project's proposed financing structure indicating the project's potential for senior obligations to receive an investment grade rating, a statutory requirement for receiving TIFIA credit assistance.

C. In order to ensure that the purposes of 23 U.S.C. § 602(b)(2)(B), 49 C.F.R. §§ 80.11(a) and 80.15(b), and the TIFIA Program Guide, Section 3-5, are protected, the following conditions must be met:

(i) The pro forma plan of finance in the TxDOT TIFIA application must demonstrate to the satisfaction of the TIFIA JPO that the Project's financing can be structured such that the senior obligations have the potential to achieve an investment grade rating.

(ii) The TxDOT RFDPs will require each Proposer that plans to use TIFIA credit assistance to provide a preliminary rating opinion letter at the time it submits its final development proposal to TxDOT.

#### **5.4 Deviation from TIFIA Program Guide, Chapter 4, Section 4-3 Application Requirement B – Requirement to Submit a Project Management and Compliance Monitoring Plan and a Description of Project Operations and Maintenance.**

A. FHWA acknowledges and agrees to TxDOT's deviation from the TIFIA Program Guide, Chapter 4, Section 4-3, as provided in the FHWA February 21, 2006, SEP-15 acceptance letter, by waiving the requirement that when an application for TIFIA credit assistance is submitted the Applicant provide a project management and compliance monitoring plan and a description of project operations and maintenance.

B. The purpose of these requirements in Chapter 4, Section 4.3 Application Requirement B of the TIFIA Program Guide is to assure the DOT of the project sponsor's ability to deliver the project as planned, fulfill all project commitments, ensure compliance with all terms of the credit agreement including all applicable regulations and provisions of law, and effectively operate/maintain the project to minimize risk of operational default.

C. In order to ensure that the purposes of the TIFIA Program Guide, Chapter 4, Section 4.3 Application Requirement B are protected, the following conditions must be met:

(i) The TxDOT RFDP will require Proposers that plan to use TIFIA credit assistance to submit with their proposals a project management and compliance monitoring plan and a description of project operations and maintenance.

(ii) The TIFIA JPO will review the project management and compliance monitoring plan and description of project operations and maintenance submitted by each Proposer in response to the RFDP for the Project for compliance with TIFIA requirements.

### **SECTION 6. EXPERIMENTAL FEATURES – CONTRACTUAL DOCUMENTS AND COMMITMENT PROCEDURES**

## **6.1 Review of Multiple Project Proposals**

A. The TxDOT requests and the FHWA acknowledges and agrees to participate in the review all of the final development proposals which include TIFIA credit assistance as described in subparagraph 6.1.C. below.

B. The purpose for FHWA's review of the final development proposals, which include TIFIA credit assistance, is to determine if the Proposers satisfy the eligibility requirements for TIFIA credit assistance and meet the terms and conditions set forth in the Conditional Term Sheet, prior to TxDOT's decision on the successful Proposer.

C. In order to ensure that the purpose described in 6.1.B is satisfied, the following stipulations shall apply:

(i) Following its determination of responsive proposals, TxDOT will transmit to the TIFIA JPO copies of preliminary rating opinions, financial plans, and all other documents which would otherwise be required in connection with submission of an application for TIFIA credit assistance, that have been provided by each proposer who intends to seek TIFIA credit assistance. TxDOT must transmit these documents in their entirety together with any related documents provided by Proposers on a timely basis to provide the TIFIA JPO sufficient time for its review and due diligence of all financial-related documents. The FHWA Texas Division Office and the TIFIA JPO reserves the right to request additional information necessary for the administration of the Federal-aid Highway program and the TIFIA Credit Program.

(ii) TxDOT and FHWA will establish a mutually acceptable schedule to ensure that the review process can be completed within the timeframe established for financial close.

(iii) TxDOT will advise the TIFIA JPO of any proposed changes to the TIFIA terms of credit assistance as a result of negotiations between TxDOT and the proposers. DOT will evaluate such changes, which, if approved, would be provided to all proposers.

## **6.2 Form of Credit Agreement**

A. The TxDOT requests and the FHWA acknowledges and agrees to provide a form of credit agreement for inclusion by TxDOT in the RFDP for each Project.

B. The purpose of the credit agreement, which is a contractual agreement between DOT and project sponsor, is to formalize all final terms and conditions of the credit assistance and authorize the funding of the TIFIA credit instrument. The contents of the credit agreement include both standard TIFIA provisions and transaction-specific provisions. Prior to execution of a credit agreement, the project sponsor must satisfy all program requirements.

C. In order to ensure that the purpose described in 6.2.B is satisfied, the following stipulations shall apply:

(i) The TxDOT TIFIA application for a Project must meet the requirements specified in the EDA, all applicable Federal statutory and regulatory requirements, and the TIFIA Program Guide requirements not waived under the EDA.

(ii) The form of credit agreement will resemble TIFIA's standard credit agreement template and will include all business terms and conditions that must be satisfied by a Proposer to receive TIFIA credit assistance, including the terms and conditions set forth in the Conditional Term Sheet.

(iii) The DOT Credit Council must approve the form of credit agreement.

**Comment [F1]:** Page: 11  
Do we need to define "DOT Credit Council?" We use the term twice in the document.

### **6.3 Deviation from TIFIA Program Guide Chapter 6, Section 6-1 Approval and Term Sheet Prerequisites – Project Selection and Conditional Term Sheet**

A. The FHWA acknowledges and agrees to the deviation from Chapter 6, Section 6-1 Term Sheet Prerequisites of the TIFIA Program Guide, as provided in the FHWA February 21, 2006, SEP-15 acceptance letter, by waiving certain prerequisites for project selection and issuance of a Conditional Term Sheet, including the preliminary rating opinion letter and detailed information on the financial structure and the Final Project Sponsor.

B. The purpose of the term sheet is to set forth key business terms and conditions of TIFIA credit assistance for a project, binding the DOT and the project sponsor to the specified terms. Further, the term sheet obligates budget authority for the project. A conditional term sheet reserves TIFIA funding for a project and commits to providing credit assistance to a project at a future point in time upon satisfaction of specified conditions by the project sponsor and subject to the future availability of obligation authority.

C. In order to ensure that the purpose described in 6.3.B is satisfied, the following stipulations shall apply:

(i) Project selection and issuance of a Conditional Term Sheet for each Project is subject to DOT Credit Council approval and a final determination by the Secretary of the DOT.

(ii) The TIFIA JPO will incorporate the terms and conditions set forth in the Conditional Term Sheet in the form of credit agreement to be provided to TxDOT to include in the RFDP.

(iii) TxDOT will make the Conditional Term Sheet and the form of credit agreement available to each qualified proposer and include a provision in the RFDP, or addendum to the RFDP, notifying the proposer that they would be expected to be bound by these documents if they want to use TIFIA credit assistance. TxDOT shall also notify proposers in the RFDP that non-material modifications to the Credit Agreement may be possible and that they must submit any proposed modifications to the Credit Agreement to TxDOT along with their proposals. Any proposed modifications are subject to DOT approval. If approved, the modifications would be provided to all proposers. TxDOT shall

also notify proposers in the RFDP that they will be expected to reimburse the DOT for all credit processing costs (e.g. outside financial and legal consultant costs in connection with the evaluation of proposals which include TIFIA credit assistance, negotiation of final terms, and execution of the TIFIA credit agreement) if they are the successful proposer.

(iv) The Conditional Term Sheet issued to the TxDOT can either provide for assignment of rights to a third party acceptable to the DOT or the issuance of an amended and restated term sheet with the Final Project Sponsor. The term sheet and credit agreement will require the Final Project Sponsor to reimburse the 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).

(v) Following the DOT's determination that the final development proposal meets the requirements for TIFIA credit assistance, the DOT will issue a final term sheet obligating budget authority and will finalize negotiations with respect to TIFIA credit assistance with the Developer.

(vi) To facilitate the CDA process, within two weeks of execution of the EDA, the TIFIA JPO will provide to TxDOT its standard business terms for inclusion in TxDOT's Requests for Interest for the Projects. DOT reserves the right to change these terms, in connection with negotiation and issuance of the Conditional Term Sheet for a Project.

## **SECTION 7. EVALUATION CRITERIA**

### **7.1 Time Savings**

TxDOT will evaluate the following to measure time-savings:

(1) Compare the actual schedule for receiving TIFIA credit assistance approval and execution of a credit agreement with the Developer with the estimated schedule based on a traditional procurement process and TIFIA standard process;

(2) Evaluate the effect of the SEP-15 experiments on the receipt of final proposals and financial close; and

(3) Attempt to assess the value of the streamlined TIFIA credit approval approach described herein.

### **7.2. Innovation in Financing**

TxDOT will analyze the financing structures and methods developed in connection with the projects and how those structures and methods compare to TxDOT's historical project financing structures and methods. As part of this analysis and comparison, the TxDOT will particularly focus upon the levels of financing and project risk shifted to the private sector and strategies employed to minimize risk to the State of Texas and the TxDOT.

TxDOT shall also analyze how the experimental process for TIFIA was perceived by the industry and by the Proposers.

TxDOT shall attempt to measure the extent to which the experimental process for TIFIA encouraged additional private participation in the CDA procurement.

## **SECTION 8. REPORTING**

### **8.1 Initial Report**

TxDOT will submit an initial report within 120 days after the execution of the CDA for each Project and will include a preliminary analysis of the CDA procurement. This report will:

- (1) Describe the process used to select the Developer team;
- (2) Identify any reaction by the industry to use of the TIFIA experimental 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.

### **8.2 Post Acceptance Reports**

A. TxDOT shall contract with a third-party to draft a post acceptance report within 180 days following execution of the CDA and financial close for each Project. This report will provide an overall evaluation of the role of the TIFIA experimental process in the procurement of detailed proposals and the execution of the CDA for each of the Projects. The post acceptance report will include:

- (1) An overall evaluation of the process used to obtain TIFIA Credit Program assistance as described in this agreement in the procurement of detailed proposals and the execution of the final CDA for each of the Projects;
- (2) A description of lessons learned, including problems to avoid and suggestions for improvements on future innovative procurements and approaches utilizing the TIFIA Credit Program;
- (3) An evaluation of the SEP-15 experimental features used and the extent to which those features contributed to the Project's success; and
- (4) A recommendation on any statutory or regulatory change or change in standard TIFIA procedures or policies.

## SECTION 9. MISCELLANEOUS PROVISIONS

### 9.1 Sequence of Projects

The TxDOT will sequence the Projects under this Agreement in accordance with its CDA procurement schedule. Modifications to the experimental features may be considered as each Project is advanced.

### 9.2 Project Substitution or Change in Project Sequence

Prior to submitting an application for TIFIA credit assistance for a Project, TxDOT may request a change in project sequence or a project substitution. The request should be submitted to the FHWA Texas Division Administrator with a copy to the TIFIA JPO and the FHWA PPP Program Manager and should document the reasons for the change and the benefits to the experiment that would be derived from the change.

### 9.3 Amendments

This EDA may be amended at any time by written agreement of the FHWA and the TxDOT. Amendments to this EDA may include, but are not limited to, the addition or deletion of SEP-15 experimental features, modification of performance measures, and modification of reporting requirements. The FHWA Texas Division Administrator shall have the authority to amend this EDA for the FHWA, subject to the concurrence of TxDOT and the TIFIA JPO.

### 9.4 Original Copies

This EDA shall be prepared in duplicate original copies so that each signatory has an original copy.

IN WITNESS THEREOF, the parties hereto have caused this EDA to be duly executed in duplicate as of the day and year first written above.

J. Richard Capka  
Acting Administrator  
Federal Highway Administration

Michael W. Behrens  
Executive Director  
Texas Department of Transportation