



U.S. Department  
of Transportation

**Federal Highway  
Administration**

Office of the Administrator

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

Refer To: HOA-3

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

Dear Mr. Behrens:

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 I-69/Trans-Texas Corridor Project (Corridor or Project). The application was received by the FHWA Texas Division Office (Division Office) on February 21, and was forwarded to the SEP-15 Steering Committee (Steering Committee) on February 24. The Steering Committee coordinated the review of the application with the Office of Infrastructure; Office of Planning, Environment, and Realty; Office of Policy; Office of Chief Counsel; and the Division Office. Based on the comments provided by these offices, the Steering Committee recommended, and I concur, that the application be accepted for administration under SEP-15. The FHWA's response to each of the proposed experimental features 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. 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 key elements of the Project such as project planning and design, environmental review, right-of-way acquisition, procurement method, regulatory compliance, time lines, financing, construction, and operation. The EDA will also identify the performance measures that will be used to evaluate the success of the Project's experimental features.

### **Background**

Based on your application, we understand that the I-69/Trans-Texas Corridor is a multi-mode transportation corridor comprised of individual facilities extending from northeast Texas to the border with Mexico at Laredo and the Rio Grande Valley with a possible connection to the Gulf Coast. The individual facilities will be further defined by a tiered environmental review process, as well as other facilities that are within the Corridor Study Area that serve a connectivity or financing purpose for the Corridor.



The TxDOT would like to execute a Comprehensive Development Agreement (CDA) with a developer for pre-development services and potentially financing, design, construction, maintenance and/or operations of the Corridor. The price for pre-development services will be negotiated with the selected proposer(s) based on their proposal(s). After execution of the CDA, an initial planning and preliminary design phase will commence. During this period, the developer will work with TxDOT to complete a Master Development Plan for the Corridor. The Master Development Plan will describe the facilities within the Corridor having independent utility and logical termini and will establish a proposed program for development of the facilities. The developer will provide a project-specific finance plan for each facility included in the program, as well as an implementation plan indicating: (1) Whether the facility will be delivered using design-bid build, design-build, design-build-operate-maintain, concession or some other approach; (2) Whether the developer, an affiliate and/or third parties will be responsible for design and construction of the facility; and (3) The proposed procurement approach for the contract(s) for design and construction of the facility (i.e., negotiated terms and conditions, award based on a best value selection process, competitive bidding or a different approach). The developer's services during this period will also include provision of design services in support of the environmental review process pursuant to the National Environmental Policy Act 1969, 42 U.S.C. §§4321 et seq. (NEPA), and development of preliminary design as appropriate for the proposed delivery methods. The price for design, construction and other services for each facility may be competitively procured or negotiated with the selected developer team prior to issuance of a notice to proceed with such services.

The FHWA concurs with TxDOT that the proposed experimental features may achieve several goals, including: (1) Integrating private sector ideas and innovations into the environmental and permitting approval process allowing the NEPA analysis to proceed efficiently and effectively; (2) Reducing the time to complete the Corridor; (3) Facilitating the use of innovative financing; (4) Encouraging innovation in design and construction of the Corridor; and (5) Enhancing the quality of service provided to the public.

### **Experimental Features**

***Experimental Feature 1:*** The TxDOT requests a waiver to issue a Request for Detailed Proposals (RFDP) and execute a CDA prior to final FHWA approval pursuant to NEPA. The CDA will include provisions addressing possible changes in the scope of the Corridor or a facility arising after award of the CDA, including a provision for termination or partial termination of the CDA if a "no-build" alternative or other alternative inconsistent with the selected developer's approach is selected.

***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 CFR 636.109, because TxDOT is proposing to issue a RFDP and sign a CDA prior to the receipt of final FHWA NEPA approvals under the tiered environmental review process for the Corridor or facilities.

*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 CFR 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.

**Experimental Feature 2:** The TxDOT requests a waiver to be able to enter into negotiations with the next highest rated proposer if negotiations with the apparent best value proposer fail.

*Purpose:* The TxDOT intends to proceed with one-on-one negotiations with the selected proposer prior to award for the purpose of finalizing the terms and conditions of the CDA. Negotiations would include clarification and minor adjustments, and could address other matters as deemed advisable by TxDOT and allowed by State law. TxDOT would like to have the ability to proceed with negotiations with the next highest rated proposer if negotiations with the apparent best value proposer fail.

*Deviation from FHWA requirement(s):* The design-build regulations do not contemplate negotiations with the next highest bidder in the event negotiations with the selected proposer fails. (See 23 CFR 636.513.)

*FHWA Response:* The TxDOT sets forth a reasonable approach to dealing with the second highest proposer should negotiations with the selected proposer fail to result in the execution of a CDA. FHWA concurs with this approach. However, a modification of the price or scope of services to be provided under the CDA as a result of the negotiations would be a violation of the provisions of 23 CFR 636 Subpart (E). These regulatory requirements will be waived for this Project, subject to the same conditions discussed below regarding the disclosure of concepts submitted by unsuccessful proposers. The EDA will cover this issue more comprehensively.

The FHWA understands that it will have the opportunity to observe and/or participate in the evaluation, selection, and negotiation processes. The FHWA also understands that the request for its concurrence in the award of the contract CDA will be accompanied by a timetable showing the major steps in the procurement process, a summary of the rationale for the selection, and a description of any material changes made to the CDA during the negotiations. Following receipt of FHWA concurrence, TxDOT will then award, execute, and deliver the CDA in accordance with the RFDP. Finally, FHWA understands that TxDOT anticipates issuing a notice to proceed with the initial planning and preliminary design activities shortly after execution of the CDA.

**Experimental Feature 3:** The TxDOT requests a waiver to be able to incorporate unsuccessful proposers' ideas in the negotiation of the CDA.

*Purpose:* At the predevelopment stage in which other proposed details will be shared with the selected firm, the firm will not actually be “selected” since a contract will not be in place at that time. While sharing other proposal details could give an advantage to the selected firm, the advantage to TxDOT having leverage in negotiations is a viable experiment.

*Deviation from FHWA requirement(s):* This experimental feature deviates from FHWA’s design-build rule in that concepts submitted by unsuccessful proposers would be disclosed to the successful proposer prior to award in violation of 23 CFR 636.507.

*FHWA Response:* FHWA accepts this experimental feature on the condition that the EDA will provide specific detail on how the proposal evaluations and negotiations will be carried out (i.e., notification to the proposers in the RFDP about this feature of the evaluation and negotiation process, “fallback” provisions if negotiations fail with the predevelopment contractor, etc.). Also, detailed evaluation criteria should be included in the RFDP, as well as a statement that, by submitting a proposal, the proposer consents to sharing of proposal details to another proposer who is the selected firm. The EDA and RFDP, as appropriate, must address how TxDOT will avoid creating an unfair competitive advantage to one proposer.

***Experimental Feature 4:*** The TxDOT requests a waiver to negotiate a price for development work following award of the CDA, subject to a price reasonableness determination as specified in the SEP-15 application, without a requirement for the developer to follow Federal-aid procurement requirements in award of its contracts. The CDA will contain provisions enabling TxDOT and FHWA to determine price reasonableness in the event that the plan of finance for a facility contemplates State or Federal funding.

*Purpose:* This approach allows the negotiation of a price after a sufficient level of project design and pre-development work, including receipt of NEPA approvals, has been completed to enable determination of a lump sum price.

*Deviation from FHWA requirement(s):* Price negotiations after the selection of the developer conflict with the provisions in 23 CFR 636.119(b)(2), which requires price to be considered prior to the selection of the developer. Here, price will be established after the execution of the CDA. Section 636.119 of title 23, Code of Federal Regulations (CFR), provides for the possibility that a developer may be treated as the agent of the awarding agency under certain circumstances, subject to the requirement to follow Federal-aid procurement requirements in selection of its subcontractors. TxDOT believes that it would be appropriate for the characterization of the TxDOT/developer relationship under 23 CFR 636.119(b) to be determined on a facility-by-facility basis, after the implementation plan and plan of finance have been established for each facility. Once that occurs, a separate facility agreement will be signed, that will contain “price and an assignment of risk” under 23 CFR 636.119(b)(1). (Subcontracts executed by the developer are not subject to Federal-aid procurement requirements as long as price and an assignment of risk is established between a State and a developer.).

Although TxDOT may, under certain circumstances, wish to place restrictions on the process to be followed for subcontractor selection, TxDOT would prefer to have flexibility to determine appropriate restrictions on a case-by-case basis. Based on our interpretation of the TxDOT application, it appears that price and risk will be assigned with the developer prior to the work being

undertaken for any given facility. If so, the proposed experimental features are not a deviation from current FHWA regulations.

*FHWA Response:* Provided that price and assignment of risk are determined between TxDOT and the developer prior to work on the facilities being undertaken, then all subsequent subcontracts signed by the developer are not subject to the Federal-aid procurement requirements per 23 CFR 636.119(b)(1). Therefore, no waiver under SEP-15 is needed.

***Experimental Feature 5:*** The TxDOT requests a waiver to use a bifurcated procedure for project authorization on a facility-by-facility basis. In lieu of obtaining project authorization through FHWA's approval of the RFDP as contemplated in the design-build rule, TxDOT proposes an alternative procedure for project authorization. FHWA would review the procurement and contract documents associated with the CDA, as well as the implementation and financing plans for the facility, and determine that such documents are satisfactory for further processing. Such review and determination would be considered a preliminary action by FHWA for NEPA purposes. Project authorization for each facility would be requested following completion of the NEPA analyses for the facility.

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

*Deviation from FHWA requirement(s):* The FHWA's regulations currently provide that project authorization occurs upon FHWA approval of the request for proposals for a design-build project, based on the assumption that NEPA approval will already have been obtained prior to issuance of the request for proposals. (See 23 CFR 635.119.) As a result of TxDOT's plan to issue the RFDP and to award the CDA prior to final NEPA approval, a modified approach for project authorization is necessary.

*FHWA Response:* The FHWA accepts this experimental feature. Authorization for construction would occur only for projects that include Federal-aid funds in the plan of finance and following NEPA approval. The approach to achieve NEPA compliance and approval, and approval of the plan of finance will be finalized in the EDA.

***Experimental Feature 6:*** The TxDOT requests a waiver to include a general warranty in individual facility agreements that exceeds the period specified in 23 CFR 635.413(e)(1)(i), and allowing the developer to undertake responsibility for routine maintenance services.

*Purpose:* A long-term warranty will be critical for the facility agreements in order to ensure quality in design and construction of the facility. In addition, extended warranties could be a significant factor in determining whether TxDOT is getting the best value for the facility, could help reduce life cycle costs, and reduce TxDOT's risk.

A waiver of the prohibition on the use of Federal funds for routine maintenance is necessary due to the possibility that a long-term warranty may involve routine maintenance work as well as preventative maintenance, and it may be difficult to separate the costs of routine maintenance from the costs of preventative maintenance.

*Deviation from FHWA requirement(s):* The FHWA's design-build rule contains a maximum two-year limit on general warranties. (23 CFR 635.413(e)(1)(i).) Also, routine maintenance is not eligible for Federal-aid reimbursement. (23 U.S.C. §116.)

*FHWA Response:* The CDA may permit the developer to undertake the responsibility for routine maintenance services. However, Federal-aid funds are eligible for only those maintenance elements that will facilitate quality and life-cycle concepts in the design and construction process or will extend the life of the facility. Specific conditions on waiving the FHWA two-year limit on general warranties should be addressed in the EDA.

**Experimental Feature 7:** The TxDOT requests confirmation that the only provision of 23 CFR Part 636 that applies to the procurement process is 23 CFR 636.119 because the procurement concerns a public-private partnership.<sup>1</sup>

*Purpose:* The TxDOT seeks to streamline the procurement process for the Project.

*Deviation from FHWA Requirement(s):* Part 636 of title 23, CFR, describes the FHWA's policies and procedures for procuring design-build projects financed under title 23 of the United States Code (U.S.C.). The experimental feature limits the requirements that would be applicable to the procurement process for the Project to those concerning the award of subcontracts and would release TxDOT from its responsibility to ensure that the Project complies with all non-procurement requirements of title 23, U.S.C. (See 23 CFR 636.119(c).)

*FHWA Response:* It is our understanding, based on our review of the application, that other waivers are required under 23 CFR Part 636 in order for TxDOT to implement its proposed procurement process for the Project. (See experimental features 1, 2 and 3.) While the provisions of Part 636 Subparts B, C, D and E do not apply to the procurement of the developer, certain provisions in Subpart A do apply (organizational conflict of interest, team switching, etc.).

If TxDOT is not able to agree on a reasonable price with the developer for a particular section, then the developer is acting as an agent of the owner, and any related Federal-aid project must comply with FHWA's procurement requirements in 23 CFR Parts 172, 635 or 636. Additionally, the FHWA cannot agree to broadly waive the applicability of all title 23, U.S.C. requirements. Under the SEP-15 program, the FHWA can only waive specific experimental features.

**Experimental Feature 8:** The TxDOT requests FHWA concurrence that the procurement process described in the SEP-15 application for the Corridor constitutes a competitive process for purposes of 23 CFR 636.119.

*Purpose:* The TxDOT's proposed procurement process involves the selection of a developer using a best value evaluation process, based on considerations that include public need, technical and financial feasibility, transportation efficiency, cost effectiveness, and acceleration of project delivery. The proposals will be evaluated pursuant to State law and TxDOT will determine the value

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<sup>1</sup> TxDOT Experimental Features 7-10 request FHWA to confirm that certain Federal requirements do not apply to the Corridor or that a proposed process is acceptable. However, FHWA can concur in a proposed experimental concept for a specific project. Accordingly, FHWA has identified the requests for confirmation in Experimental Features 7-10 as experimental features.

to the public of delivery of the Project as promised in the proposal, as well as evaluating the likelihood that the proposer will be able to successfully deliver the Project.

*Deviation from FHWA requirement(s):* The design-build rule generally contemplates that a proposed lump sum price for design-build services will be a factor in contractor selection, thus allowing competing price proposals to be used as the basis for determining price reasonableness. TxDOT's proposed procurement approach contemplates negotiation of the price for design-build services and therefore requires an alternative approach to determining price. (See 23 CFR Part 636.)

*FHWA Response:* The TxDOT may conditionally proceed with this procurement process on the condition that TxDOT certifies that the competitive process complies with all applicable State and local laws. The proposed procurement process will be discussed further during the development of the EDA.

**Experimental Feature 9:** The TxDOT requests that the developer and/or a subconsultant on the developer's team may provide NEPA support services for the Project, with the understanding that: (1) A consultant not affiliated with the developer will compile the NEPA documents; (2) All developer and consultant services will be subject to control and direction by TxDOT and the FHWA; and (3) TxDOT and the FHWA will be responsible for preparation of the NEPA documents and for determining the content and conclusions thereof.

*Purpose:* The TxDOT anticipates that the developer will provide support to TxDOT during the NEPA process, which may include preliminary engineering, tests, studies, dates, analyses, and reports, supplementing the services provided by TxDOT's NEPA consultant. The ability to obtain NEPA support from the developer provides a number of advantages, including: (1) A quick turnaround time in obtaining technical information; (2) Enhancing the ability of TxDOT representatives to evaluate the impact of proposed alternatives on the design, construction, operations and maintenance of the Corridor and facilities; and (3) Allowing TxDOT to obtain innovative ideas from the developer regarding mitigation of impacts.

*Deviation from FHWA requirement(s):* This experimental feature deviates from the FHWA design-build rule in that the design-build rule does not contemplate award of a contract prior to final NEPA approval. (See 23 CFR 636.109.)

*FHWA Response:* The FHWA accepts this experimental feature. Authorization for construction would occur only for projects that will require Federal approval. Private entities are allowed to conduct an environmental analysis and help prepare NEPA documents for a project, however, if an Environmental Impact Statement (EIS) is required, a private entity may not prepare the document if it has a financial or other interest in the outcome of the project. (See 40 CFR 1506.5(c).) A developer may contribute information and conduct environmental analyses; however, TxDOT and FHWA must retain control and responsibility of the NEPA process, and appropriate safeguards must be built into any agreements to ensure that conflicts of interest are avoided. The NEPA process shall examine all reasonable alternatives and the no-build alternative. The selection of the preferred alternative shall remain the responsibility of TxDOT, with the final approval made by the FHWA. If TxDOT executes a contract for a developer to prepare an EIS, this would be a violation of the Council on Environmental Quality regulations. In order to safeguard the integrity of the NEPA process and in order for the transportation improvements proposed to meet the criteria for independent analysis under FHWA's NEPA regulation (23 CFR 771.111(f)), the FHWA would

independent analysis under FHWA's NEPA regulation (23 CFR 771.111(f)), the FHWA would expect that all reasonable alternatives be fully evaluated under TxDOT and FHWA direct oversight and that appropriate safeguards be built into the NEPA process to ensure that conflicts of interest are avoided. The approach to achieve NEPA approval and the plan of finance will be finalized in the EDA.

**Experimental Feature 10:** The TxDOT requests to include in the CDA a contract provision indicating that the provisions of 23 CFR 635.116(d) have superseded the 30% self-performance requirements of section VII in Form FHWA-1273 "Required Contract Provisions for Construction Projects" (Form 1273).

*Purpose:* The FHWA design-build rule modified 23 CFR 635.116 to provide that the self-performance requirements do not apply to design-build contracts, but did not include authorization to allow State transportation departments to modify Form 1273 by deleting the conflicting portions of section VII.

*Deviation from FHWA Requirement(s):* None.

*FHWA Response:* Under 23 CFR 635.116(d), 30 percent self-performance requirements of paragraph (a) are not applicable to design-build contracts. Therefore, a waiver of this section is not required. Form 1273 will be revised to reflect this change in the regulation in the near future. Until then, TxDOT may include a contract provision that indicates the provisions of 23 CFR 635.116(d) have superseded the 30 percent self-performance requirements of section VII of Form 1273.

### **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 I-69/TTC SEP-15 project. Mr. Gee and Mr. Alonzi will establish a FHWA interdisciplinary team to work with TxDOT to develop the provisions of the EDA.

Sincerely,



J. Richard Capka  
Acting Administrator