

**EARLY DEVELOPMENT AGREEMENT BETWEEN THE FEDERAL
HIGHWAY ADMINISTRATION AND THE STATE OF OREGON, BY AND
THROUGH THE OREGON DEPARTMENT OF TRANSPORTATION FOR THE
CONSTRUCTION OF HIGHWAY PROJECTS UNDER THE OREGON
INNOVATIVE PARTNERSHIPS PROGRAM**

THIS EARLY DEVELOPMENT AGREEMENT (hereinafter "EDA"), made and entered into this 14th day of October 2005, by and between the STATE OF OREGON, BY AND THROUGH THE OREGON DEPARTMENT OF TRANSPORTATION (hereinafter "ODOT") and the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION (hereinafter "FHWA"):

WITNESSETH:

WHEREAS, ODOT desires to develop three construction undertakings under the Oregon Innovative Partnerships Program (that program being more particularly described in Oregon Revised Statutes 367.800-367.826), which generally include a proposed widening of I-205 (the "South I-205 Corridor Undertaking"), the proposed construction of a new facility between I-205 and US 26 (the "Sunrise Undertaking"), and the proposed construction of a new bypass between the cities of Newberg and Dayton (the "Newberg-Dundee Transportation Improvement Undertaking") (collectively, the "OIPP Initiative");

WHEREAS, on October 6, 2004, the FHWA announced, in the *Federal Register* at 69 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 No. 15 (collectively, "SEP-15");

WHEREAS, on December 17, 2004, ODOT submitted an application to use an innovative procurement approach, which included certain specified modifications or deviations from the current requirements and policies contained in title 23 of the United States Code and title 23 of the Code of Federal Regulations, for the OIPP Initiative under the SEP-15, and ODOT submitted a supplement to its application dated January 25, 2005;

WHEREAS, on May 6, 2005, the FHWA approved ODOT's SEP-15 application;

WHEREAS, ODOT issued a Request for Proposals ("RFP") pertaining to the OIPP Initiative on April 29, 2005, as contemplated by the SEP-15 application, with a current proposal due date of August 29, 2005;

WHEREAS, SEP-15 is designed to permit tests and experimentation in the entire Federal-aid highway project development process 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 and policies contained in title 23 of the United States Code and title 23 of the Code of Federal Regulations; and,

WHEREAS, under SEP-15, an EDA is required in order to contain the parameters of the modifications or deviations from Federal requirements that are granted for projects within the OIPP Initiative 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, ODOT 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 and title 23, Code of Federal Regulations, for projects within the OIPP Initiative, which shall be hereinafter referred to as the “Experimental Features.” The Experimental Features identified in this EDA will apply to each project until such time (if any) as ODOT decides not to use Title 23 funds for the project. Nothing in this EDA shall be construed as a relinquishment of any Federal oversight or stewardship responsibility.

SECTION 2. DEFINITIONS

2.1 Developer

“Developer” means each entity with whom ODOT has executed a Predevelopment or Implementation Agreement for the development, design, construction, financing, operation, and maintenance of one or more projects. Depending on the context, the term “Developer” may mean all such entities, as well as affiliated entities.

Implementation Agreement

“Implementation Agreement” means an agreement, or agreements, to be entered into by ODOT with the Developer after completion of the activities contemplated in the Pre-Development Agreement, for one or more of the following activities: acquisition, financing, design, construction, operation, or maintenance of any project, and any other services relating to project development not performed under the Pre-Development Agreement. An Implementation Agreement may cover one or more projects.

NEPA

“NEPA” means the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321 to 4370f.

2.4 Predevelopment Agreement

“Predevelopment Agreement” means each agreement by and between ODOT and a Developer, which provides the framework for the Developer to collaborate with ODOT for the conceptual, preliminary and final planning for a project, along with performance of certain services relating to development of the project. A Predevelopment Agreement is expected to include all, or some, of the following activities: preparation of a pre-development plan, pre-development community outreach plan, financing plan and implementation plan, and contribution towards ODOT activities related to Oregon’s Collaborative Environmental and Transportation Agreement for Streamlining (“CETAS”), environmental approvals and public information, and related preliminary engineering. A Predevelopment Agreement may cover one or more projects.

Project

“Project” means an undertaking to design and construct all, or a particular portion of, the South I-205 Corridor Undertaking, the Sunrise Undertaking or the Newberg-Dundee Transportation Improvement Undertaking, including all improvements, amenities, and related development. Unless both parties agree otherwise, each project shall be considered a separate project for purposes of Title 23 funding requirements, even though more than one project may be included in a single Predevelopment Agreement or Implementation Agreement.

Project Agreement

“Project Agreement” means the formal instrument to be executed between the FHWA and ODOT as required by 23 U.S.C. 106.

2.7 Proposal

“Proposal” means a proposed Developer’s submission in response to the RFP.

Proposer

“Proposer” means each entity or team of entities that submitted a proposal in response to the RFP.

2.9 Request for Proposals (“RFP”)

“Request for Proposals” or “RFP” means the Request for Proposals #73000-22313-NT-5 issued by ODOT on April 29, 2005, as amended. The RFP shall constitute the request for proposals for purposes of 23 C.F.R. Part 636 with respect to each project developed pursuant to an Implementation Agreement with a Developer.

2.10 Uniform Act

“Uniform Act” means the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. §§ 4601, *et seq.*, and FHWA’s implementing regulations found at 49 C.F.R. part 24.

SECTION 3. GENERAL PROVISIONS

3.1 Applicability of Federal Law

Except as otherwise specified herein:

3.1.1 Federal laws, rules and regulations applicable to projects as a result of use of Title 23 funds for construction of the project shall be applicable to each of the projects, 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 Act, and NEPA, except as otherwise specified herein.

3.1.2 If ODOT decides not to use Title 23 funds for a project, Federal requirements applicable to projects as a result of use of Title 23 funds shall no longer be applicable to the Project.

3.1.3 With respect to title 23 of the United States Code and title 23 of the Code of Federal Regulations, ODOT may use the Experimental Features described in Sections 4 through 8. ODOT’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

3.2.1 The FHWA’s approval to use the Experimental Features identified in Sections 4 through 8 may be withdrawn from one or more of the projects at any time by the FHWA if the FHWA determines that the OIPP experiment for that project has failed and does not merit further Federal participation. In addition, the FHWA’s approval of an individual Experimental Feature may be withdrawn at any time by the FHWA, if it has determined that such feature is not in the public interest, which may be based on experience from other projects or the OIPP program or other appropriate factors, and therefore that further Federal participation in such Experimental Feature is not warranted. Under either scenario, in determining whether to withdraw approval, FHWA shall consider the current status of the projects and the implications of modifying a program that is already underway. Prior to any such withdrawal, the FHWA will issue a written notice to ODOT describing the FHWA’s concerns, consult with ODOT regarding FHWA’s concerns and the implications of modifying the program, and give ODOT a reasonable period of time to address the FHWA’s concerns. However, during such period of time, except as specified in Section 3.2.2 below, no further work shall be conducted based on the approval at issue, until such time as the FHWA determines that ODOT has fully addressed the FHWA’s concerns.

3.2.2 Upon the effective date of the withdrawal of approval of an Experimental Feature, the applicable requirements of title 23 of the United States Code and title 23 of the Code of Federal Regulations shall immediately apply. Notwithstanding the foregoing, any withdrawal of an approval under this Section 3.2 only affects Title 23 funding eligibility for projects, or elements thereof, not subject to a Project Agreement and shall not (a) invalidate or require modification of any previously executed contracts (including the Predevelopment Agreement and any Implementation Agreement) entered into in reliance upon such approval, (b) affect the obligations of the parties under a previously executed contract, and (c) otherwise apply retroactively to any completed elements or activities. Furthermore, withdrawal of an approval shall not affect ODOT's ability to issue change orders or execute modifications, amendments and supplemental agreements for previously executed contracts.

3.3 Access to Documents and Confidentiality

As provided in 23 C.F.R. 1.5, ODOT shall furnish, or make available, to the FHWA such information as the FHWA deems desirable in order to administer Title 23 funds within the OIPP Initiative and ensure compliance with any applicable Federal requirements. Any records that ODOT or a Proposer does not want to be made publicly available shall be reviewed by the FHWA on ODOT's or the Proposer's premises in accordance with the procedures outlined in the FHWA Chief Counsel's 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 Oversight Agreement

FHWA project oversight for design and construction shall be determined by a separate formal oversight Agreement between the FHWA and ODOT.

3.5 Order of Precedence

Except as otherwise specified herein, this EDA supercedes the December 17, 2004 SEP-15 application and supplement thereto and the FHWA's May 6, 2005 SEP-15 approval. The December 17, 2004 SEP-15 application (as supplemented) and the May 6, 2005 SEP-15 approval are attached to this EDA as Attachments A and B, 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 supercede any conflicting provisions of the December 17, 2004 SEP-15 application (as supplemented), the FHWA's May 6, 2005 SEP-15 approval, this EDA, and any prior modifications to this EDA.

SECTION 4. EXPERIMENTAL FEATURES: RFP PROCESS

4.1 Deviations from 23 C.F.R. 636.109 – Issuance of RFP and Executing a Predevelopment Agreement prior to completion of NEPA.

4.1.1 FHWA acknowledges and agrees to ODOT's deviation from 23 C.F.R. 636.109, as provided in the FHWA's May 6, 2005 SEP-15 approval, by issuance of the RFP and execution and delivery of the Predevelopment Agreement, prior to the conclusion of the NEPA process. FHWA acknowledges its concurrence in the issuance of the RFP. ODOT may permit the Developer to provide NEPA support services, including preliminary engineering, tests, studies, data, analyses and reports, and may permit the Developer to perform limited non-construction work under the Predevelopment Agreement prior to the conclusion of the NEPA review process.

4.1.2 The purpose of 23 C.F.R. 636.109 is to ensure that there is an unbiased NEPA decision making process, that public officials and citizens have the necessary environmental impact information for federally-funded actions before actions are taken, and that design-build proposers do not assume an unnecessary amount of risk in the event the NEPA process results in a significant change in the proposal.

4.1.3 In order to ensure that the purposes of 23 C.F.R. 636.109, as listed in Section 4.1.2, are protected, the following conditions must be met:

4.1.3.1 FHWA, with ODOT's participation, will, at all times, direct and control the NEPA process.

4.1.3.2 FHWA and ODOT will participate in all phases of the NEPA review process. FHWA is solely responsible for the project approval process under NEPA.

4.1.3.3 ODOT will include appropriate provisions in the Predevelopment Agreement to ensure that no commitment to any alternative that could be evaluated during the NEPA review process is made prior to the completion of the NEPA review process, and to allow all alternatives presented in the NEPA document, including the no-build alternative, to be equally evaluated.

4.1.3.4 The selection of any preferred alternative throughout the NEPA process must be the sole responsibility of ODOT in cooperation with the FHWA.

4.1.3.5 ODOT must ensure that no decision regarding a preferred alternative will be made before all necessary environmental impact information is available for review and comment by both the decision makers and the general public.

4.1.3.6 ODOT must ensure that any project using Title 23 funds will address how environmental commitments and mitigation measures identified during the NEPA process will be implemented.

4.1.3.7 Should ODOT engage a consultant to provide NEPA-related services on a project, ODOT shall ensure that the organizational conflict of interest requirements

of 23 C.F.R. 636.116 and 40 C.F.R. 1506.5(c) are met with respect to such consultant's participation in the Developer's activities. Moreover, any such consultant for NEPA services must be independent from the Developer.

4.1.3.8 ODOT must ensure that final design and construction of a project does not commence before the conclusion of the NEPA process for that project.

4.2 Deviations from 23 C.F.R. 636.409, 636.507, 636.509, and 636.513 – Communicating with Proposer and negotiations prior to award.

4.2.1 FHWA acknowledges and agrees to the deviation from 23 C.F.R. 636.409, 636.507, 636.509, and 636.513, as provided in FHWA's May 6, 2005 SEP-15 approval, associated with the one-on-one negotiations conducted by ODOT with the selected Proposer prior to award of the Predevelopment Agreement, allowing proposal revisions, requesting substantive supplemental information to be used in evaluating a proposal, and disclosing and using ideas from unsuccessful Proposers.

4.2.2 The purpose for the general prohibition on the activities described in Section 4.2.1 under 23 C.F.R. 636.507, 636.509, & 636.513 is to enhance competition and ensure that the procurement process is fair and transparent to all Proposers.

4.2.3 The following provisions have been included in the RFP to ensure the purpose described in Section 4.2.2 is protected:

4.2.3.1 Provisions allowing ODOT to suspend, discontinue, terminate, re-continue and/or begin new Predevelopment Agreement negotiations with any Proposer for a project at any time prior to execution of a Predevelopment Agreement by all parties for that project.

4.2.3.2 Provisions notifying Proposers of the process that will be used in awarding the Predevelopment Agreement and advising Proposers of the possibility that a Proposer's ideas may be used and disclosed by ODOT to another Proposer during negotiations, that an unsuccessful Proposer's ideas may be used by ODOT, and that substantive changes may be made to a Proposal during negotiations.

4.2.4 In order to further ensure the purpose described in Section 4.2.2 is protected, ODOT will comply with the following requirements associated with the deviation stated in Section 4.2.1:

4.2.4.1 ODOT will provide the FHWA with the opportunity to observe and participate in the evaluation, selection and negotiation process between ODOT and the selected Proposers.

4.2.4.2 ODOT will submit major amendments to the RFP and the subsequently executed Predevelopment Agreement (including any major amendments) to FHWA for review and concurrence.

4.2.4.3 Prior to award of the Predevelopment Agreement, ODOT will request FHWA concurrence accompanied by a timetable showing the major steps in the procurement process, a summary of ODOT's rationale for the selection, and a description of any material changes made to the Predevelopment Agreement during negotiations.

4.2.4.4 ODOT must obtain the consent of the unsuccessful Proposers to use their work product.

4.3 Deviation from 23 C.F.R. 636.302 – Consideration of price.

4.3.1 ODOT may deviate from the requirement in 23 C.F.R. 302 to evaluate price in the source selection process for contracts where construction is a significant component of the scope of work.

4.3.2 The purpose of the price consideration requirement in 23 C.F.R. 636.302 is to ensure that the cost of the proposals received in response to a request for proposals, as defined in 23 C.F.R. 636.103, are competitive and that a State takes the cost of a proposal into consideration whenever awarding a Federal-aid project.

4.3.3 In order to ensure that the purpose described in Section 4.3.2 is met, ODOT's selection of a Developer must be based on the evaluation process that includes a consideration of public need, technical and financial feasibility, transportation efficiency, cost effectiveness, and acceleration of project delivery, as set forth in the RFP. However, ODOT must not commit to using the Developer for the final design or construction of any project unless ODOT determines that the price for such services is reasonable. In order to determine price reasonableness, ODOT must establish a process through which this determination will be made. Upon determining that the project price is reasonable, ODOT shall request the FHWA's concurrence, as provided in Section 5.1.3.3.

SECTION 5. EXPERIMENTAL FEATURES: PROJECT AUTHORIZATION

5.1 Deviations from 23 C.F.R. 635.112(i)(1) & 635.114(k) – Project authorization.

5.1.1 ODOT may deviate from 23 C.F.R. 635.112(i)(1) and 635.114(k) to permit project authorization to occur for each project after final environmental approval by FHWA has been issued, in compliance with NEPA, for the project.

5.1.2 The purpose of the project authorization requirements in 23 C.F.R. 635.112(i)(1) and 635.114(k) is to ensure that the FHWA is involved in the project development process at a time that is sufficient to permit the FHWA to adequately review and oversee compliance with all appropriate Federal requirements and that costs are not incurred prior to authorization. Moreover, the project authorization requirements of 23 C.F.R. 635.112(i)(1) and 635.114(k) are consistent with 23 C.F.R. 636.109, which does not permit a State to issue a request for proposals until the NEPA process is complete. Here, however, as explained in Section 4.1, ODOT was permitted to issue the RFP and execute the Predevelopment Agreement prior to the completion of the NEPA process. The FHWA and ODOT do not believe issuance of the RFP or execution of the Predevelopment Agreement was the appropriate point at which to authorize Title 23

funding for the entire OIPP Initiative since the NEPA process has not yet been completed and financing decisions for each project will not be made by ODOT until the NEPA process has been completed for that project.

5.1.3 In order to ensure that the purposes described in Section 5.1.2 are satisfied, the following stipulations shall apply:

5.1.3.1 ODOT and the FHWA will develop a formal oversight agreement for the projects that will enable the FHWA to be appropriately involved in the development process for federally-funded projects and to monitor the overall effectiveness of the process. The FHWA's involvement in any design and construction of any federally-funded project is determined by this EDA, as well as a separate oversight and stewardship Agreement between ODOT and the FHWA.

5.1.3.2 ODOT shall request FHWA's concurrence in any Implementation Agreement that contemplates the use of Title 23 funds. Concurrently with such request, ODOT shall transmit to FHWA all relevant and necessary documents, including the Implementation Agreement and a summary of the process followed in developing the Implementation Agreement. ODOT shall also request FHWA concurrence in any major changes that will be made to an approved Implementation Agreement. FHWA concurrence in the Implementation Agreement shall be subject to the completion of the NEPA review process for the project underlying the Implementation Agreement and all applicable conditions listed in 23 C.F.R. 635.309 being satisfied for such project.

5.1.3.3 FHWA concurrence in an Implementation Agreement under Section 5.1.3.2 will also be conditioned upon the FHWA's review of price reasonableness as well as a determination that all applicable Federal requirements have been, and will be, complied with and that the Implementation Agreement includes all relevant Federal provisions. The Predevelopment Agreement must include provisions requiring, as a prerequisite to ODOT's entering into a federally-funded Implementation Agreement with the Developer, that the contract price of the Implementation Agreement is reasonable. The Predevelopment Agreement must include a process for determining price and verifying price reasonableness with respect to such Implementation Agreements. Upon concurrence in an Implementation Agreement, ODOT and the Developer may proceed to execute the Implementation Agreement. Once the Implementation Agreement has been executed, and the FHWA determines that all the applicable conditions have been satisfied, Federal-aid procedures governing the obligation of funds shall apply.

5.1.3.4 ODOT may proceed with a competitive procurement process or processes for the design, construction or combined design and construction of a project should ODOT choose not to enter into an Implementation Agreement with the Developer. In such case, should ODOT choose to use Title 23 funds, ODOT shall follow the Federal-aid procurement requirements in 23 C.F.R. Parts 635 and 636. Should ODOT choose to deviate from any of the requirements in 23 C.F.R. Parts 635 or 636, ODOT shall request FHWA's approval of any such deviation at least 30 days prior to the scheduled date for advertisement (for a procurement subject to Part 635) and for issuance of the request for

proposals (for a procurement subject to Part 636). FHWA will respond to such request within 30 days and, upon FHWA's approval, an appropriate modification shall be made to this EDA to provide for the approved deviation. In any Predevelopment Agreement with a Developer, ODOT shall include provisions that disqualify the Developer from participation in any competitive procurement process for an Implementation Agreement should ODOT determine that the Developer's participation in such process would give the Developer an unfair competitive advantage or would otherwise constitute an impermissible conflict of interest as provide in 23 C.F.R. 1.33. ODOT's determination with respect to the Developer's participation shall be subject to FHWA concurrence.

SECTION 6. EXPERIMENTAL FEATURES: PROCUREMENT REQUIREMENTS FOR DEVELOPER

6.1 Deviation from 23 C.F.R. 636.119(b) – Determining price and assumption of risk between ODOT and the Developer.

6.1.1 ODOT may deviate from 23 C.F.R. 636.119(b) to determine price and assignment of risk in each Implementation Agreements rather than in the Predevelopment Agreement, for purposes of determining whether the contracts to be awarded by the Developer under the Implementation Agreement are subcontracts or prime contracts.

6.1.2 The purpose of 23 C.F.R. 636.119(b) is to ensure that Federal competition requirements are followed in the procurement of services under certain public-private agreements depending upon whether such agreement establishes price and an assignment of risk. If the agreement does not establish price and an assignment of risk, then the Developer must follow the appropriate FHWA procurement requirements in procuring services under the agreement and all subsequent contracts executed by the Developer are considered to be prime contracts. However, if the agreement does establish price and an assignment of risk, then the Developer is not bound by the FHWA procurement requirements and all subsequent contracts executed by the Developer are considered subcontracts. The Predevelopment Agreement does not itself establish a price or assignment of risk for design and construction of the project, and instead establishes a framework for establishing price and an assignment of risk in the Implementation Agreement. Thus, under the process contemplated by ODOT, it will not be appropriate to look at the Predevelopment Agreement to determine whether price and risk have been assigned for purposes of 23 C.F.R. 636.119(b).

6.1.3 In order to ensure that the purpose of 23 C.F.R. 636.119(b) is met, each Implementation Agreement between ODOT and the Developer must clearly establish price and assignment of risk. The Implementation Agreement may establish the price through a requirement that the subcontracts for construction of the project be competitively procured using a procurement process approved by ODOT. Should any Implementation Agreement not establish the price and assignment of risk, then the Developer must follow the applicable FHWA procurement requirements in procuring services under the Implementation Agreement.

SECTION 7. EXPERIMENTAL FEATURES: LONG-TERM WARRANTY, ROUTINE MAINTENANCE AND FORM 1273

7.1 Deviation from 23 C.F.R. 635.413(e) – Inclusion of a long-term warranty with some routine maintenance in an Implementation Agreement.

7.1.1 ODOT may deviate from 23 C.F.R. 635.413(e) to allow a long-term warranty and to permit the Developer to undertake responsibility for both preventative and some routine maintenance services in any Implementation Agreement with the Developer.

7.1.2 The purpose for the restriction on long-term warranties and the inclusion of routine maintenance services in design-build contracts in 23 C.F.R. 635.413(e) is because a short term, 2 year warranty has been determined to be sufficient for the State to uncover most defects and to ensure that Title 23 funds do not participate in routine maintenance activities, which are not Federal-aid eligible.

7.1.3 Here, ODOT anticipates that a long-term general warranty will be a critical part of any Implementation Agreement in order to ensure quality in design and construction of the project. Due to the unique nature of ODOT's proposed approach to development of projects, the FHWA agrees that ODOT may use long-term warranties in Implementation Agreements. FHWA further acknowledges that such warranties could be a significant factor in determining whether ODOT is getting the best value for the project and that, under certain circumstances, it may not be practicable to separate the costs of routine maintenance associated with a warranty from preventive maintenance. FHWA will participate in the costs of such a warranty, including the associated maintenance costs that cannot be segregated from the underlying warranty costs, provided that FHWA concurs that such warranty is primarily focused on non-routine maintenance activities of the highway and is a factor in providing the best value to ODOT for the project.

7.1.4 The foregoing shall not preclude ODOT from entering into any agreement involving performance of routine maintenance services that will not be federally-funded.

7.2 Deviation from standard Form FHWA 1273 – Technical adjustment to update Form FHWA 1273 for conformity with current law.

7.2.1 ODOT may modify Form FHWA 1273 to provide that contractor self-performance requirements do not apply as provided in 23 C.F.R. 635.116(d).

7.2.2 The purpose of Form FHWA 1273 is to ensure that all contractors to a Federal-aid project comply with Federal requirements. One of the provisions in Form FHWA 1273 requires prime contractors to perform at least 30 percent of the work of a contract with its own forces. However, the design-build rule modified this requirement making it not applicable to design build contracts. Form FHWA 1273 has not been modified to provide for this change.

7.2.3 The FHWA will allow ODOT to use a modified Form FHWA 1273, as described in Section 7.2.1, in Implementation Agreements for the projects. This deviation is a technical change that is designed to bring Form FHWA 1273 into

conformity with current Federal requirements. Thus, the purpose of Form FHWA 1273 will continue to be met with this change.

SECTION 8. EXPERIMENTAL FEATURES: VALUE ENGINEERING

8.1 Deviation from 23 C.F.R. 627.1, 627.3, & 627.5 – Value engineering for the OIPP Initiative.

8.1.1 ODOT may deviate from the FHWA’s value engineering requirement under 23 C.F.R. 627.1, 627.3, & 627.5 by undertaking value engineering only for projects constructed with Title 23 funds where the total Implementation Agreement price is expected to exceed \$25 million and Title 23 funds are expected to exceed 30 percent of the Implementation Agreement price.

8.1.2 The purpose of this provision is to help eliminate unnecessary and costly elements of a project and, when a project is constructed in a series of segments, to ensure that features of other segments are looked at for potential cost savings in other affected segments.

8.1.3 Due to the extent of private funds that are expected to be invested in the OIPP Initiative, it is expected that the Developer will have an incentive to value engineer, or perform other cost savings analyses. Thus, the purpose described in Section 8.1.2 will be satisfied by only requiring Federal value engineering to apply where the total Implementation Agreement price is expected to exceed \$25 million and Title 23 funds are expected to exceed 30 percent of the Implementation Agreement price. Nothing in this Section shall be interpreted as discouraging ODOT from requiring value engineering provisions in Implementation Agreements, and any such provisions could be included in the discretion of ODOT, depending upon the nature of the project and any proposed Implementation Agreements.

SECTION 9. EVALUATION CRITERIA

9.1 General

The purpose of this Section is to describe the evaluation criteria that ODOT shall use in evaluating the Predevelopment Agreement procurement and development process in connection with the reports to be provided under Section 10.

9.2 Time Savings

ODOT shall:

Compare the actual schedule for delivery of projects with the estimated schedule based on a traditional procurement process;

Evaluate the effect of the Predevelopment Agreement process on delivery of the projects; and

- (c) Attempt to quantify the value of early completion.

Innovation in Project Development

ODOT shall analyze the type and nature of facilities developed through Predevelopment Agreement and the procurement approaches described in Section 4 and compare those facilities with ODOT's other projects. ODOT shall also analyze the benefits of issuing an RFP prior to the completion of the NEPA process and allowing project development work to proceed while the environmental process is still being carried out.

Innovation in Public-Private Partnership Selection

ODOT shall analyze the process used to select the Developer and report on how well that process facilitated competition in the selection of development proposals, how well that process produced a sufficient pool of qualified competitors, how well that process enabled ODOT to select a developer offering the best value, how well that process enabled ODOT to achieve the best value, how the process was perceived in the industry, and how the process was perceived by the unsuccessful competitors.

Innovation in Design and Construction

ODOT shall analyze innovative design and construction ideas and concepts used by the Developer team, which evolve as a byproduct of the Predevelopment Agreement process.

9.6 Quality and Warranty

ODOT shall analyze the ultimate quality of the work and the strength of any warranties provided for delivered projects.

9.7 Responsiveness to Local Concerns

ODOT shall evaluate the success of the process used in responding to local concerns as well as coordinating with, and responding to concerns of, Metropolitan Planning Organizations.

9.8 Price Reasonableness

ODOT shall review the price reasonableness process described above, and evaluate whether the process is cost effective and in the public interest. The evaluation shall look at whether the FHWA and ODOT are, in fact, getting the best value in terms of cost, quality, and timeliness of the work as well as the continued operations and maintenance of the project.

SECTION 10. REPORTING REQUIREMENTS

Initial Report and Updates

ODOT shall submit an initial report within 120 days after the execution of the Predevelopment Agreement, and will include a preliminary analysis of the Predevelopment Agreement procurement. This report shall:

- (a) describe the process used to select the Developer team;
- (b) identify any reaction by the industry to use of the Predevelopment Agreement concept;
- (c) document major innovations contained in the proposals received; and
- (d) discuss any major problems or issues that have occurred and how they were resolved.

ODOT shall also submit periodic updates to the initial report as appropriate during the period prior to issuance of NEPA approval, describing the progress of the environmental analysis as well as the developer's activities relating to the project(s).

Interim Reports

10.2.1 ODOT will prepare an interim report after the occurrence of a significant development relating to federally-funded projects. A significant development includes:

- (a) completion of the NEPA process for the project;
- (b) execution of an Implementation Agreement that contemplates use of Title 23 funding for the project; and
- (c) completion of construction of each federally-funded project.

10.2.2 Each interim report shall describe:

- (a) the progress of the development of each project as of the date of the interim report;
- (b) any major problems encountered and how ODOT has addressed each of the problems;
- (c) how any significant changes in the project resulting from the NEPA analysis and other permitting processes have been addressed in the Predevelopment Agreement;
- (d) an evaluation of the price reasonableness process used and whether there have been any problems determining price reasonableness and how those problems have been addressed; and

- (e) how the time and cost needed to complete the initial development as of the date of the interim report compares to past experience under design-bid-build procurement procedures.

Project Acceptance Report

A project acceptance report will be submitted within 180 days following ODOT's determination that the construction of any federally-funded project is complete. This report will be prepared by an independent consultant engaged by ODOT and shall:

- (a) provide an overall evaluation of the procurement and development processes;
- (b) provide an overall evaluation of the NEPA and right-of-way acquisition process for the project;
- (c) provide an overall evaluation of the price reasonableness process and how that process contributed to obtaining the best value in terms of cost, quality, and timeliness;
- (d) evaluate the completed project against the factors described in Section 9;
- (e) describe lessons learned, pitfalls to avoid, and suggestions for improvements on future innovative procurements and approaches to NEPA reviews;
- (f) provide an explanation of contract complications encountered and claims made during construction;
- (g) indicate and evaluate innovations in design or construction;
- (h) emphasize and focus upon the quality and timeliness and how they were affected by the OIPP Initiative;
- (i) describe the extent to which the SEP-15 program contributed to the success of the OIPP Initiative;
- (j) provide an evaluation of the Experimental Features used and the extent to which those features contributed to the OIPP Initiative's success; and
- (k) recommend any statutory or regulatory changes.

Post-Acceptance Reports

A post-acceptance report will be submitted for each federally-funded project at the end of the first two years of any long-term operations and maintenance or concession term, and at intervals thereafter as deemed appropriate by ODOT. This report will:

- (a) evaluate the overall quality and performance of the projects;

- (b) identify and evaluate warranties and document complications encountered during the period;
- (c) identify any cost- or time-intensive maintenance items and evaluate the manner and effectiveness of their resolution;

evaluate the overall safety and operation of the projects;

evaluate design requirements in the completed facilities and document any design adjustments that could improve quality; and
- (f) evaluate the private sector's responsiveness.

SECTION 11. MISCELLANEOUS PROVISIONS

11.1 Amendments

11.1.1 This EDA may be amended at any time by written agreement of the parties. Amendments to this EDA may include, but are not limited to, the addition or deletion of Experimental Features, modification of performance measures, and modification of reporting requirements. The FHWA Oregon Division Administrator shall have the authority to amend this EDA for the FHWA, subject to the concurrence of the FHWA co-facilitator.

11.1.2 The parties anticipate that this EDA will be modified over time as the projects mature. ODOT may reopen this EDA and seek modifications thereof at any time, including upon completion of negotiations with a Proposer concerning a Predevelopment Agreement or Implementation Agreement.

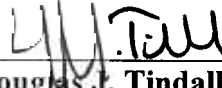
11.2 Original Copies

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



Douglas J. Tindall
Deputy Director for Highways
Oregon Department of Transportation