

**EARLY DEVELOPMENT AGREEMENT BETWEEN THE FEDERAL HIGHWAY  
ADMINISTRATION AND THE TEXAS DEPARTMENT OF TRANSPORTATION FOR  
THE DEVELOPMENT AND CONSTRUCTION OF A STATE-WIDE OPEN-ROAD  
ELECTRONIC TOLL COLLECTION SYSTEM**

THIS EARLY DEVELOPMENT AGREEMENT (hereinafter "EDA"), made and entered into this 10<sup>th</sup> day of February 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 desires to construct an interoperable statewide open-road toll collection system (hereinafter "System") on one or more TxDOT owned and/or operated toll roads;

WHEREAS, on March 3, 2005, TxDOT 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 projects utilizing open-road electronic toll collection, under the FHWA's Special Experimental Project No. 15 (hereinafter "SEP-15");

WHEREAS, on May 19, 2005, the FHWA approved TxDOT's SEP-15 application;

WHEREAS, TxDOT issued a Request for Detailed Proposals ("RFDP") on May 20, 2005, as contemplated by the SEP-15 application, and two addenda thereto, and obtained FHWA concurrence regarding the same;

WHEREAS, TxDOT received proposals in response to the RFDP on July 15, 2005;

WHEREAS, on or after August 25, 2005, TxDOT anticipates entering into a comprehensive development agreement (hereinafter "CDA") with the selected Proposer, to develop the System;

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 Early Development Agreement between TxDOT and FHWA is required in order to contain the parameters of the modifications or deviations from Federal requirements that are granted for the System 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 Early Development Agreement (“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 the System which shall be hereinafter referred to as the “experimental features.” The experimental features identified in this Agreement will apply to all Projects for which TxDOT decides to use Federal funds. Nothing in this EDA shall be construed as a relinquishment of any Federal oversight or stewardship responsibility.

## **SECTION 2. DEFINITIONS**

### **Comprehensive Development Agreement**

“Comprehensive Development Agreement” (“CDA”) means the agreement executed on January 27, 2006 and any amendments thereto (including Project Segment Supplements), by and between TxDOT and the Developer, which provides the framework for the Developer to collaborate with TxDOT for the development, design, construction, installation and maintenance of an interoperable open-road toll collection system on one or more TxDOT owned and/or operated toll roads.

### **Developer**

“Developer” means Raytheon Company.

### **NEPA**

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

### **2.4 Project**

“Project” means an undertaking, pursuant to the CDA, to design, construct, install and/or maintain the System on a Segment, including the initial Segments identified as pilot projects and any other Segments identified in Project Segment Supplements.

### **2.5 Project Agreement**

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

## **Project Segment Supplement**

“Project Segment Supplement” means each supplement to the CDA to be entered into by TxDOT with the Developer for a Project other than the pilot system projects described in the CDA.

## **Proposer**

“Proposer” means each person or entity that submitted a proposal in response to the RFDP.

## **Request for Detailed Proposals**

“Request for Detailed Proposals” (“RFDP”) means the Request for Detailed Proposals issued by TxDOT on May 24, 2005, as amended. The RFDP shall constitute the request for proposals for purposes of 23 C.F.R. Part 636 with respect to each Project developed pursuant to the CDA.

## **Segment**

“Segment” means each toll road facility identified by TxDOT on which the System is to be constructed and installed.

## **System**

“System” means the interoperable open-road toll collection system to be developed pursuant to the CDA. The System may initially be installed on three pilot Segments, as described in the CDA, and may be installed on additional Segments pursuant to Project Segment Supplements.

## **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**

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 Act and NEPA, with respect to any related toll facility, except as otherwise specified herein. Except as specified in this EDA, Federal requirements applicable to Projects as a result of use of Federal funds shall not be applicable to Projects constructed without federal funds.

B. With respect to title 23 of the United States Code and title 23 of the Code of Federal Regulations, TxDOT may use the SEP-15 experimental features described in Section 4. 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 Section 4 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 concerns and give TxDOT a reasonable period of time to 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 and title 23 of the Code of Federal Regulations shall immediately apply. Notwithstanding the foregoing, any withdrawal of an approval under this paragraph only affects Federal funding eligibility for Projects not subject to a Project Agreement and shall not (a) invalidate or require modification of any previously executed contracts entered into in reliance upon such approval (including the CDA, as it may have been modified and supplemented as of such date), (b) affect the obligations of the parties under a previously executed contract, and (c) otherwise apply retroactively to any completed elements or activities.

#### **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 desirable in order to administer Federal funds 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'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 Order of Precedence**

Except as otherwise specified herein, this EDA supercedes the March 3, 2005 TxDOT SEP-15 application and the FHWA's May 19, 2005 SEP-15 approval. The March 3, 2005 TxDOT SEP-15 application and May 19, 2005 FHWA SEP-15 approval are attached to this EDA as **Exhibits A & 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 March 3, 2005 SEP-15 application, the May 19, 2005 SEP-15 approval and any prior modifications to the EDA.

## **SECTION 4. EXPERIMENTAL FEATURES**

### **I. EXECUTION OF THE CDA**

#### **Deviations from 23 C.F.R. 636.109 – Executing a CDA prior to completion of NEPA**

A. FHWA acknowledges and agrees to TxDOT's deviation from 23 C.F.R. 636.109, as provided in the FHWA May 19, 2005 SEP-15 approval, by issuance of the RFDP and execution and delivery

of the CDA, prior to the conclusion of the NEPA process for all of the Segments that may be included in the CDA, provided that no Notice To Proceed (NTP) will be issued for any Project without NEPA approval for the related Segment.

B. 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.

C. In order to ensure that the purposes of 23 C.F.R. 636.109, as listed in 4.1.B, are protected, the following conditions must be met:

- (i) FHWA, with TxDOT's participation, will, at all times, direct and control the NEPA process.
- (ii) FHWA and TxDOT will participate in all phases of the NEPA review process. FHWA is solely responsible for the Project approval process under NEPA.
- (iii) TxDOT has included appropriate provisions in the CDA 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 allowing all alternatives presented in the NEPA document, including the no-build alternative, to be equally evaluated.
- (iv) TxDOT 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.
- (v) TxDOT must ensure that any environmental commitments and mitigation measures identified during the NEPA process will be implemented.
- (vi) Should TxDOT engage an independent NEPA consultant, or other consultant, to provide services for a Segment, TxDOT 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.

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

A. FHWA acknowledges and agrees to the deviation from 23 C.F.R. 636.507, 636.509, and 636.513, associated with the one-on-one negotiations conducted by TxDOT with the selected Proposer prior to award of the CDA.

B. The purpose for the general prohibition on the activities described in 4.2.A 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.

C. FHWA acknowledges and agrees that TxDOT complied with the following requirements associated with the deviation from 23 C.F.R. 636.507, 636.509, and 636.513, for the purpose of protecting the purposes of said requirements listed in 4.2.B., including:

(i) TxDOT provided the FHWA with the opportunity to observe and participate in the evaluation, selection and negotiation process between TxDOT and the short-listed Proposers;

(ii) TxDOT submitted major amendments to the RFDP, as well as the executed CDA, to FHWA for concurrence;

(iii) Prior to award of the CDA, TxDOT provided the FHWA with a summary regarding the process followed, the rationale for the selection, the substantive changes made to the CDA during the negotiations, and requested the FHWA's concurrence in the award;

(iv) The RFDP preserved TxDOT's ability to terminate negotiations with the selected Proposer if the negotiations were not successful and proceed to the Proposer determined to provide the next best value; and

(v) TxDOT included appropriate provisions in the RFDP notifying proposers of the process that was used in awarding the CDA, including the possibility that a proposer's ideas may be used or disclosed by TxDOT to another proposer during negotiations and that a unsuccessful proposer's ideas may be used by TxDOT (subject to the proposer's agreement to accept payment for work product as specified in the RFDP), and that substantive changes may be made to a proposal during negotiations.

#### **4.3 Deviation from 23 C.F.R. 636.302 – Use of price.**

A. FHWA acknowledges and agrees to TxDOT's deviation from 23 C.F.R. 636.302, as provided in FHWA's May 19, 2005 SEP-15 approval, to award and execute a CDA before price is established.

B. 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.

C. FHWA acknowledges and agrees that TxDOT complied with the purpose described in section 4.3.B. through TxDOT's selection of a developer based on a best value evaluation process that included a consideration of public need, technical and financial feasibility, transportation efficiency, cost effectiveness, and acceleration of project delivery. However, TxDOT must not commit to using the developer for the design, construction, installation and/or maintenance of any Project unless TxDOT determines that the price for

such services is reasonable or, as appropriate, conducts a price analysis to ensure that the unit prices for the project are valid. The CDA includes provisions for determining price reasonableness. Upon determining that the project price is reasonable or valid, TxDOT shall request the FHWA's concurrence, as provided in 4.4.C.

## **II. PROJECT AUTHORIZATION**

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

A. TxDOT may deviate from 23 C.F.R. 635.112(i)(1) and 635.114(k) to obtain project authorization for certain Projects after a final environmental approval by FHWA has been issued in compliance with NEPA for the Project.

B. 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, TxDOT was permitted to issue the RFDP and execute the CDA prior to the completion of the NEPA process for certain Segments upon which the System may be installed and constructed. The FHWA and TxDOT do not believe issuance of the RFDP or execution of the CDA is the appropriate point at which to authorize Federal funding for such Segments.

C. In order to ensure that the purposes described in 4.3.B are satisfied, the following stipulations shall apply:

(i) TxDOT 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 Segments. The FHWA's involvement in any design and construction of any Federally funded Segment is determined by this EDA, as well as a separate oversight and stewardship agreement between TxDOT and the FHWA.

(ii) TxDOT shall request FHWA concurrence prior to execution of a Project Segment Supplement if TxDOT anticipates using Federal funding for such Project. In requesting concurrence, TxDOT shall transmit to FHWA all relevant and necessary documents, including the Project Segment Supplement and a summary of the process followed in developing the Project Segment Supplement. TxDOT shall also request FHWA concurrence in any major changes that will be made to an approved Project Segment Supplement. FHWA concurrence in the Project Segment Supplement shall be subject to the FHWA's review of price reasonableness (or price analysis as appropriate) for the Project, completion of the NEPA review process for the Project, all applicable conditions listed in 23 C.F.R. 635.309 being satisfied for the Project, and the FHWA's determination that all Federal requirements have been satisfied. To the extent that the established price is based on escalated unit prices included in the Developer's proposal, the price reasonableness analysis

may be based on a price analysis. Upon concurrence in a Project Segment Supplement, TxDOT and the Developer may proceed to execute the Project Segment Supplement. Once the Project Segment Supplement 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.

D. The FHWA and TxDOT shall review the price reasonableness and price analysis process used by TxDOT in deciding whether to enter into a Project Segment Supplement with the Developer, and evaluate whether the process is cost effective and in the public interest. This evaluation shall take place after the execution of 2 Project Segment Supplements based on a price reasonableness determination, with respect to the price reasonableness process, and after the execution of 2 Project Segment Supplements based on a price analysis determination, with respect to the price analysis process. The evaluation shall look at whether the FHWA and TxDOT 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 System. The process used for Federally funded and the process used for non-Federally funded projects shall both be evaluated. The evaluation shall also review the impact on the competitive environment in Texas. The evaluation may make recommendations for improving the price reasonableness determination process. If, as a result of this evaluation, the FHWA determines that the process for awarding Project Segment Supplements is not providing the best value or unduly impacts the competitive environment, FHWA may withdraw its approval for experimental features as described in Section 3.2.

### **III. MODIFICATION OF FORM FHWA 1273**

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

A. TxDOT may modify Form FHWA 1273 to provide that contractor self-performance requirements do not apply as provided in 23 CFR 635.116(d).

B. 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.

C. The FHWA will allow TxDOT to use a modified Form FHWA 1273, as described in 4.5.A, for any Project Segment Supplement performed by the design-build method. 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.

### **IV. PROCUREMENT REQUIREMENTS FOR DEVELOPER**

#### **4.6 Deviation from 23 C.F.R. 636.119(b) – Determining price and assumption of risk between TxDOT and the Developer.**



A. TxDOT may deviate from 23 C.F.R. 636.119(b) to determine price and assignment of risk on a Project-by-Project basis, rather than in the CDA for purposes of determining whether the Project Segment Supplements to be awarded by the Developer are subcontracts or prime contracts.

B. 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. Except for the Segments identified as pilot projects, the CDA does not itself establish a price or assignment of risk, and instead establishes a framework for establishing price and an assignment of risk with the Developer at a future date on a Project-by-Project basis whenever a Segment is ready for design, construction, and installation. Thus, under the process contemplated by TxDOT, it will not be appropriate to look at the CDA to determine whether price and risk have been assigned for purposes of 23 C.F.R. 636.119(b).

C. In order to ensure that the purpose of 23 C.F.R. 636.119(b) is met, each Project Segment Supplement between TxDOT and the Developer for a project must clearly establish price and assignment of risk.

## **SECTION 5. EVALUATION CRITERIA**

### **5.1 Innovation in Public-Private Partnership Selection**

TxDOT shall analyze the process used to select a Developer for the System 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 TxDOT to select a Developer offering the best value, how well that process enabled TxDOT to achieve the best value, how the process was perceived in the industry, and how the process was perceived by the unsuccessful competitors.

### **5.2 Innovation in Design and Construction**

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

#### **Quality**

TxDOT shall analyze the ultimate quality of the work for delivered Projects.

## **SECTION 6. REPORTING**

### **Initial Report**

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

- A. Describe the process used to select the System developer;
- B. Identify any reaction by the industry to the use of the CDA 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.

## **6.2 Interim Reports**

During the period following submittal of the initial report and prior to submittal of the final report, TxDOT will submit interim reports upon completion of the prototype and each subsequent Project. TxDOT may provide consolidated interim reports covering multiple Projects. Each report will:

- A. Describe the progress as of the date of the report;
- B. Discuss any major problems or issues that have occurred and how they were resolved.
- C. Describe lessons learned, pitfalls to avoid and suggestions for improvements on future innovative procurements;
- D. Document contract complications encountered and claims made;
- E. Indicate and evaluate innovations in design or construction; and
- F. Emphasize and focus upon the quality of the System and timeliness of delivery and how these aspects were affected by the CDA concept.

## **6.3 Final Report**

A. TxDOT shall contract with a third party to assess and draft a final written report on each experimental feature described in this agreement. TxDOT will submit the final written report to FHWA within 180 days following the expiration of the initial ten-year term.

- B. The final report shall include:
  - (i) an overall evaluation of the CDA procurement and process for the development of the System;
  - (ii) an evaluation of the overall quality and performance of the System;

- (iii) identification and evaluation of document complications encountered during the period;
- (iv) identification of any cost- or time-intensive maintenance items and evaluation of the manner and effectiveness of their resolution;
- (v) an evaluation of the overall System operation; and
- (vi) an evaluation of the private sector's responsiveness as maintenance provider.

## **SECTION 7. MISCELLANEOUS PROVISIONS**

### **7.1 Amendments**

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 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.


### **7.2 ITS Project Architecture**


Since there is no statewide Intelligent Transportation System Architecture for Texas, TxDOT shall develop an ITS Project Architecture for the System in accordance with 23 CFR Part 940.

### **7.3 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  
Deputy Administrator  
Federal Highway Administration

  
\_\_\_\_\_  
Michael W. Behrens  
Executive Director  
Texas Department of Transportation

# Attachment A

## **WORK PLAN FOR THE TXDOT TOLL ROADS STATEWIDE OPEN-ROAD TOLL COLLECTION SYSTEM PROJECT (Texas Department of Transportation Application for SEP-15 Approval)**

### **A. INTRODUCTION**

This work plan is submitted by the Texas Department of Transportation (“TxDOT”) for review and approval by FHWA under Special Experimental Project No. 15 (SEP-15), with respect to the proposed Comprehensive Development Agreement (“CDA”) for the TxDOT Toll Roads Statewide Open-Road Toll Collection System Project (the “Project”). The procurement described herein will proceed under the same enabling legislation and implementing regulations as the IH-35 Corridor (Chapter 361 of the Texas Transportation Code and Title 43, Texas Administrative Code, Sections 27.1-27.5). Please refer to SEP-14 application for the IH-35 Corridor for copies of the legislation and regulations.

The potential scope of work under the CDA will include concept development, design, construction, installation, integration services and maintenance of an integrated statewide open-road toll collection system (the “System”) on one or more TxDOT owned and/or operated toll roads, and potentially the operation of a customer service center for toll processing and collection activities, and customer account maintenance and enforcement activities. The System would likely incorporate a “modified barrier” design with a gantry located every 5 to 10 miles along the highway and at certain on-ramps and off-ramps. Because the estimated cost of the System exceeds \$5 million, the proposed Project falls within the definition of a qualified ITS design-build project set forth in FHWA’s design-build rule.

TxDOT is in the process of determining the System requirements and the scope of services to be provided under the CDA. TxDOT currently anticipates that the CDA will require the developer to develop, design, construct and install components of the System on individual toll road segments identified by TxDOT (“Segments”) and to provide maintenance services for completed Segments. The CDA would have an initial 10-year term. TxDOT would have the right to issue notices to proceed for separate Segments at any time during the initial five years of the CDA. The first notice to proceed would obligate the developer to develop the overall System concept and to design and install a prototype of the System, potentially on one or more initial Segments. Segments could be located anywhere within the State of Texas and will likely involve several different roadway configurations. The developer’s maintenance obligation for the System components on each Segment would commence on completion of each Segment and would continue until the end of the initial ten-year term. TxDOT would potentially hold options to extend the operations and maintenance obligation on a Segment-by-Segment basis for subsequent one-year terms, up to an additional five years. Construction work would constitute a small fraction of the services to be provided under the CDA.

## **B. SCOPE OF SEP-15 REQUEST**

TxDOT requests approval of the following experimental features deviating from requirements contained in the design-build rule (please note that all of these experimental features were previously approved by FHWA for the IH-35 Corridor):

- Use of a procurement process as described herein, notwithstanding any conflict between the process described herein and the provisions of 23 CFR Part 636, including: (a) the ability to accept and review proposal modifications requested by TxDOT, (b) the ability to enter into negotiations with the selected firm prior to award including the ability to incorporate ideas from unsuccessful proposers, and (c) the ability to issue the RFDP and enter into the CDA without having received final approval under the National Environmental Policy Act (“NEPA”) for all of the individual highway Segments on which the System will be installed.
- A modified approach with regard to project authorization, whereby such authorization would be sought from FHWA on a Segment-by-Segment basis after execution of the CDA, after issuance of the applicable NEPA approvals, if any, for those Segments. In other words, TxDOT anticipates that NEPA approval for the different highway Segments on which the System will be installed will contemplate tolling and therefore that it will not be necessary to obtain approval for the System separate from the NEPA approval for the Segment. The developer will be selected before NEPA approval has been issued for individual Segments, and certain preliminary work on the System components for a particular Segment may proceed prior to issuance of NEPA approval, but TxDOT would issue a notice to proceed with final design and installation of the System components for a particular Segment only after NEPA approval has been issued for that Segment.

Establishing subcontractor selection requirements that are different from Federal-aid procurement procedures applicable to State Transportation Departments.

In addition, to the extent that the scope of services under a CDA includes construction work, TxDOT requests FHWA concurrence with the modification of Form 1273, Required Contract Provisions For Construction Projects, to strike out the portion of Section VII that requires a specified percentage of work to be self-performed. (Please note that FHWA previously provided concurrence for this item for the IH-35 Corridor.)

## **C. SCHEDULE**

On December 3, 2004, TxDOT issued a request for qualifications (“RFQ”) for firms interested in entering into a CDA with TxDOT for the Project. The RFQ (including exhibits and addenda) is available for review on TxDOT’s website at:

[http://www.dot.state.tx.us/tta/profserv/documents/tolls/RFQ\\_tollroads.pdf](http://www.dot.state.tx.us/tta/profserv/documents/tolls/RFQ_tollroads.pdf).

TxDOT anticipates carrying out the first phase of the procurement process contemplated hereby in accordance with the following schedule:

Qualification Submittal Due Date	January 19, 2005
Shortlisting	Winter 2005
Issuance of Request for Detailed Proposals	Spring 2005
Proposal Due Date	Spring/Summer 2005
Award/Negotiation/Execution of CDA	Summer 2005

#### **D. GOALS**

TxDOT believes that use of a CDA as described herein will serve the following goals:

- Expedite System delivery;
- Encourage flexibility, innovation and alternative approaches to System design, construction, operation and maintenance;
- Obtain a well-designed, innovative, efficient, high quality System; and
- Create a process that encourages private sector competition.

In addition, TxDOT believes that use of a CDA and the procurement approach described herein will allow TxDOT to develop and deploy an interoperable/compatible toll collection system on a statewide basis in a logical and comprehensive manner, allowing the System concept to be integrated into the design of future Segments.

#### **E. DESCRIPTION OF PROPOSED PROCUREMENT APPROACH**

The proposed procurement approach will generally follow shortlisting, industry review and request for detailed proposals (“RFDP”) issuance processes that are consistent with FHWA’s design-build rule. Proposed experimental features are generally the same as those previously approved by FHWA for the IH-35 Corridor under the SEP-14 program and are described below.

(a) Issuance of RFDP. Upon conclusion of the industry review process, TxDOT will submit the proposed RFDP, including draft contract terms and conditions, to FHWA for review and determination as to whether the document is “satisfactory for further processing.” Such a determination means that FHWA has reviewed the document and has determined that it is in acceptable form for the purpose of allowing the Project to remain eligible for federal funding. Following receipt of such determination, TxDOT will issue the RFDP to the shortlisted firms.

Inasmuch as TxDOT has not yet identified which facilities will be tolled and/or where the System would be deployed, it is not now possible to determine what NEPA analysis will be required in connection with installation of the System.

*(This step of the process deviates from FHWA's design-build rule in that the RFDP will be issued prior to the receipt of final NEPA approvals for any specific highway Segment that may be further developed as a turnpike facility.)*

(b) Evaluation of Proposals, Negotiations and Award. The proposals will be evaluated in accordance with the process and evaluation factors described in the RFDP, with selection based on a best value determination. TxDOT will have the right to ask the proposers to submit clarifications (limited by the design-build rule to "minor or clerical revisions") to their proposals, and will also have the right to ask proposers to submit supplemental information that TxDOT wishes to consider in making the best value determination. At TxDOT's option, such additional information may be requested through a process involving discussions and revised proposals, or it may be requested as a supplement to the initial proposal. A decision to ask for supplemental information will be made only if TxDOT determines that such request will not create an unfair competitive advantage.

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 could include the incorporation of unsuccessful proposers' ideas, clarifications and minor adjustments, and could address other matters as deemed advisable by TxDOT and allowed by State law. TxDOT would have the right to proceed with negotiations with the next highest rated proposer if negotiations with the apparent best value proposer fail. FHWA previously approved use of this process for the IH-35 program under SEP-14.

FHWA will have the opportunity to observe and/or participate in the evaluation, selection and negotiation processes. The request for FHWA's 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, the CDA would be awarded, executed and delivered in accordance with the RFDP. TxDOT anticipates issuing a notice to proceed for the design and development of a working prototype shortly after execution of the CDA.

*(This step deviates from FHWA's design-build rule in that (i) TxDOT may ask for supplemental information from proposers, without discussions and requests for revised proposals, and may consider such information in making the selection; (ii) concepts submitted by unsuccessful proposers would be disclosed to the successful proposer prior to award; and (iii) other issues addressed in the negotiations might require a modification in the price or scope of services to be provided under the CDA.)*

(c) Project Pricing. TxDOT anticipates that proposals will include a lump sum fixed price for initial services under the CDA, including development of the prototype. For future services (e.g., Segments as and when identified), it may be possible to obtain unit prices in the proposals, and provide a mechanism in the CDA for adjusting such prices based on changes in conditions or pricing assumptions. However, due to the uncertainties inherent in the development process, TxDOT may decide that it would

make more sense to negotiate the price for future services once the parties are able to ascertain the true scope. TxDOT would use an approach similar to that adopted for the IH-35 project in such negotiations.

*(This approach allows a price reasonableness determination to be made for initial services, consistent with federal requirements, and may require an alternative price reasonableness process to be used for future services.)*

(d) CDA Terms and Conditions. The terms and conditions of the CDA (a) will be subject to review and concurrence by FHWA, (b) will incorporate federal-aid requirements applicable to the types of services to be provided, (c) for construction work will include FHWA Form 1273 modified to strike out self-performance requirements, (d) may place restrictions on the method of procurement used by the developer in selecting subcontractors, as deemed appropriate by TxDOT, (e) will contain terms and conditions relating to performance of work, whether self-performed by the developer or performed by subcontractors, as deemed appropriate by TxDOT, (f) will contain provisions enabling TxDOT and FHWA to determine price reasonableness in the event that the plan of finance for a Segment contemplates state or federal funding, and (g) may provide for an extended warranty and will provide for the developer to perform routine maintenance work.

With regard to subcontracting requirements, TxDOT requests the same authorization that was provided for the IH-35 project, allowing the characterization of the TxDOT/developer relationship under 23 CFR 636.119(b) to be determined on a Segment-by-Segment basis, once the price has been established for each Segment and the CDA has been revised (or a separate agreement or change order signed) that will contain “price and an assignment of risk” under 23 CFR 636.119(b)(1). In all cases, TxDOT will include provisions in the CDA to ensure that an appropriate approach is taken to subcontracting, and will submit the planned approach to FHWA in advance of execution of the CDA for review and a determination that it is satisfactory for further processing.

*(FHWA’s design-build rule modified 23 C.F.R. 635.116 to provide that self-performance requirements do not apply to design-build contracts, but did not include authorization to allow State Transportation Departments to modify FHWA Form 1273 by deleting the conflicting portions of Section VII. A deviation is necessary with regard to 23 CFR 636.119(b)(1) since, as drafted, that section does not contemplate the possibility that the price for a project will be determined post-award.)*

## **F. DESCRIPTION OF PROPOSED PROJECT AUTHORIZATION APPROACH**

In lieu of obtaining project authorization through FHWA’s approval of the RFDP as contemplated by the design-build rule, TxDOT proposes that FHWA adopt the same modified procedure for project authorization that is being used for the IH-35 project. This would involve FHWA initial review of the Project’s procurement and contract documents and subsequent review of change orders and other relevant documentation relating to work to be performed. FHWA would then determine whether such documents are satisfactory for further processing. This review and determination would be considered a preliminary action by FHWA for NEPA



purposes. Authorization to proceed with final design and installation of System components on a Segment would only be provided following final NEPA approvals for that particular Segment (including any approvals associated with installation of System components on that Segment).

(This approach deviates from FHWA's design-build rule in that the rule contemplates project authorization prior to issuance of the RFDP. 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.)

## **G. EVALUATION OF PROCUREMENT AND SYSTEM DEVELOPMENT PROCESS**

TxDOT will evaluate the procurement process to determine whether it achieved the desired results, including a review of factors such as the level of competition for the CDA and the quality of the proposals received. Upon completion of the prototype, each Segment and at intervals during the maintenance phase, TxDOT will consider the pros and cons of use of the CDA approach, including an analysis of the quality of the product and services received.

## **H. REPORTING**

TxDOT anticipates filing an initial report, interim reports and a final report as described below

- **Initial Report:** The initial report will be filed within 120 days after the execution of the CDA and will include a preliminary analysis of the procurement process. This report will:
  - Describe the process used to select the System developer;
  - Identify any reaction by the industry to the use of the CDA concept;
  - Document major innovations contained in the proposals received; and
  - Discuss any major problems or issues that have occurred and how they were resolved.
- **Interim Reports:** Interim reports will be prepared upon completion of the prototype and subsequent Segments, and at appropriate intervals during the maintenance phase of the CDA. TxDOT may provide consolidated interim reports covering multiple Segments. Each report will:
  - Describe the progress as of the date of the report; and
  - Discuss any major problems or issues that have occurred and how they were resolved.
  - Describe lessons learned, pitfalls to avoid and suggestions for improvements on future innovative procurements;

- Document contract complications encountered and claims made;
- Indicate and evaluate innovations in design or construction; and
- Emphasize and focus upon the quality of the System and timeliness of delivery and how these aspects were affected by the CDA concept.

**Final Report:** A final report regarding the Project will be submitted within 180 days following the expiration of the initial ten-year term. This report will:

- Provide an overall evaluation of the CDA procurement and process;
- Evaluate the overall quality and performance of the System facilities;
- Identify and evaluate warranties and document complications encountered during the period;
- Identify any cost- or time-intensive maintenance items and evaluate the manner and effectiveness of their resolution;
- Evaluate the overall System operation; and
- Evaluate the private sector's responsiveness as maintenance provider.

## **I. CONCLUSION**

TxDOT believes use of the experimental procedures for which approval is requested hereunder will have beneficial effects as described above. We look forward to working with FHWA as the program progresses and to providing you and others with the benefits of our experience.

# Attachment B



U.S. Department  
of Transportation  
**Federal Highway  
Administration**

Office of the Administrator  
May 19, 2005

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

Refer to: HCC-1

Michael W. Behrens, P.E.  
Executive Director  
Texas Department of Transportation  
Austin, TX 78701-2483

Dear Mr. Behrens:

*M. Jee*

The Federal Highway Administration (FHWA) has completed its review of the Texas Department of Transportation (TxDOT) "Texas Toll Roads Statewide Open-Road Toll Collection System Project" (System) Special Experimental Project No. 15 (SEP-15) application. The application was submitted to the FHWA Texas Division Office (Division Office) on March 8, and was forwarded to the SEP-15 Steering Committee on March 14. The Office of Chief Counsel was tasked with the lead for reviewing the application and coordinated the review with the Office of Planning, Environment, and Realty, Office of Infrastructure, Office of Policy, and the Division Office. Based on the comments provided by these offices, the SEP-15 Steering Committee recommended, and I concur, that the System be accepted for administration under SEP-15. FHWA's response to each of the proposed experimental features for the System is discussed below

FHWA's acceptance of the System for administration under SEP-15 does not commit Federal-aid funding for the System. Until there is formal FHWA project approval, FHWA retains the right to deny Federal funding for the System at anytime. If you wish to proceed with the System under the SEP-15 program, the next major action will be to work with you to draft an Early Development Agreement (EDA) for the System. The EDA will contain parameters to guide key elements of the System such as project planning and design, environmental review, right-of-way acquisition, procurement method, regulatory compliance, timelines, financing, construction, and operation. The EDA will also identify the performance measures that will be used to evaluate the success of the System's experimental features.

We will also work with you to address any Intelligent Transportation System (ITS) National Architecture conformance issues. Pursuant to Section 5206 of the Transportation Equity Act for the 21<sup>st</sup> Century, any ITS project carried out with funds made available from the Highway Trust Fund must conform to the national ITS architecture. Since Texas does not have a statewide ITS architecture, an architecture for the System will need to be developed. Developing an ITS architecture would require that TxDOT implement standards, or be prepared to incorporate future standards, to ensure the System will be part of a uniform, nationwide, system of toll tags and transponders.



## **Background**

Based on your application, we understand that TxDOT would like to execute a Comprehensive Development Agreement (CDA) with a developer which will include concept development, design, construction, installation, integration services, and maintenance of an integrated statewide open-road toll collection system (System) on one or more toll roads. The CDA also may include the operation of a customer service center for toll processing, collection activities, customer account maintenance, and enforcement activities. The estimated cost of the System exceeds \$5 million and thus falls within the definition of a qualified ITS design-build project.

It is FHWA's understanding that the System would be implemented on State-owned and operated toll roads, including the 22 miles of existing toll roads, 72 miles of toll roads under construction, and 250 additional miles of toll roads that are expected to come on line over the next 5 years. We understand that you are in the process of determining the System's requirements and the scope of services to be provided under the CDA. We also understand that you currently anticipate that the CDA will require the developer to develop, design, construct, and install components of the System on individual toll road segments identified by TxDOT (Segments) and to provide maintenance services for the completed Segments. Construction work would constitute a small fraction of the services to be provided under the CDA.

The CDA would have an initial 10-year term and give TxDOT the right to issue notices to proceed with separate Segments at any time during the initial 5 years of the CDA. The first notice to proceed would obligate the developer to develop the overall System concept and to design and install a prototype of the System, potentially on one or more initial Segments. Segments could be located anywhere within the State and will likely involve several different roadway configurations. The developer's maintenance obligation for the System components on each Segment would commence on completion of each Segment and would continue until the end of the 10-year term. Your application also indicated that you would potentially hold options to extend the operations and maintenance obligation on a Segment-by-Segment basis for subsequent 1-year terms, up to an additional 5 years.

## **Experimental Features**

**Experimental Feature 1:** TxDOT requests a waiver to use a modified procurement approach. The subfeatures, discussed below, include: (a) the ability to ask for supplemental information after opening the initial responses to the request for detailed proposals (RFDP) that could be considered in the evaluation of a proposal; (b) the ability to enter into negotiations with the selected firm(s) prior to award; (c) the ability to incorporate ideas from unsuccessful proposers; and (d) the ability to issue an RFDP and enter into the CDA without having received final approval under the National Environmental Policy Act (NEPA) for all, or any, of the individual highway Segments on which the System will be installed.

**Experimental Feature 1a:** TxDOT requests a waiver to ask proposers for supplemental information that could be considered in evaluating a proposal, without following the procedures for exchanges of information, communications, or discussions which are set forth in the design-build regulations.

*Purpose:* The proposals would be evaluated in accordance with the process and evaluation factors that will be set forth in the RFDP, with selection based on a best value determination. TxDOT wishes to enhance the value of the winning proposal by being permitted to seek supplemental information after opening the responses to the RFDP. TxDOT would like to be able to allow the proposer to modify its proposal in response to this supplemental information. A decision to ask for supplemental information will be made only if TxDOT determines that such a request will not create an unfair competitive advantage.

*Deviation from FHWA Requirement(s):* Under the current design-build regulations, TxDOT can (1) ask for clarifications (minor or clerical revisions) of proposals or engage in communication with a proposer that would enhance the State's understanding of the proposal (23 CFF 636.403 and 406); (2) engage in communications with a proposer to address issues which might prevent a proposer from being placed in the competitive range; however, communications may not be used to cure proposal deficiencies and shall not provide an opportunity for an offeror to revise its proposal (See 23 CFR 636.407, 408 and 409); and (3) conduct discussions with proposers after determination of the competitive range (23 CFR Subpart E).

*FHWA Response:* TxDOT may conditionally proceed with this experimental feature. The proposed procedures for obtaining additional information should be approved by FHWA prior to inclusion in the RFDP. The circumstances under which TxDOT may need to ask proposers for supplemental information and procedures on how to obtain this information will be set forth in the EDA. Such procedures must address information on how TxDOT will avoid creating an unfair competitive advantage to one proposer.

**Experimental Feature 1b:** TxDOT requests a waiver to have the ability to enter into negotiations with the next highest rated proposer if negotiations with the apparent best value proposer fail.

*Purpose:* 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 requirements:* The design-build regulations do not contemplate negotiations with the next highest bidder in the event negotiations with the selected proposer fail. (See 23 CFR 636.513)

*FHWA Response:* 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 negotiations with a proposer 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.

FHWA understands that we will have the opportunity to observe and/or participate in the evaluation, selection, and negotiation processes. We also understand that the request for FHWA's 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. We understand that TxDOT anticipates issuing a notice to proceed for the design and development of a working prototype shortly after execution of the CDA.

**Experimental Feature 1c:** TxDOT requests a waiver to incorporate concepts submitted by unsuccessful proposers in the award for a Segment.

*Purpose:* At the predevelopment stage in which other proposal 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 of TxDOT having leverage in negotiations is a viable experiment.

*Deviation from FHWA regulations:* This request 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.<sup>1</sup>

*FHWA Response:* Experimental feature 1(c) is approved 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 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.

---

<sup>1</sup> A State may not engage in conduct that: (1) favors one offeror over another; (2) reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror; (3) Reveals an offeror's price without that offeror's permission; (4) reveals the names of individuals providing reference information about an offeror's past performance; (5) knowingly furnishes source selection information which could be in violation of State procurement integrity standards.

**Experimental Feature 1d:** TxDOT requests a waiver to issue a RFDP and execute a CDA without having received final approval under NEPA for all of the individual highway Segments on which the System will be installed.

*Purpose:* TxDOT's proposed procurement approach would generally follow shortlisting, industry review, and RFDP issuance processes that are consistent with FHWA's design-build rule.<sup>2</sup> Upon conclusion of the industry review process, TxDOT will submit the proposed RFDP, including draft contract terms and conditions, to FHWA for review and determination as to whether the document is satisfactory for further processing. Such a determination means that FHWA has reviewed the document and has determined that it is in acceptable form for the purpose of allowing the System to remain eligible for Federal-aid funding. Following receipt of such determination, TxDOT will issue the RFDP to the shortlisted firms. Inasmuch as TxDOT will not have identified which facilities will be tolled and/or where the System would be deployed, it will not be possible to determine what NEPA analysis will be required in connection with installation of the System.

*Deviation from FHWA Requirement(s):* This step of the process 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 NEPA approvals for any specific highway Segment that may be further developed as a turnpike facility.

*FHWA Response:* 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 interest 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 the TxDOT to ensure that the RFDP and CDA are properly drafted to satisfy these and any additional Federal regulatory concerns.

**Experimental Feature 2:** TxDOT requests a modified approach with regard to FHWA project authorization, whereby such authorization would be sought from FHWA on a Segment-by-Segment basis after execution of the CDA, and after issuance of the applicable NEPA approvals, for those Segments.

---

<sup>2</sup> Shortlisting is a process of narrowing the field of offerors through the selection of the most qualified offerors who have responded to a request for qualifications. (See 23 CFR 636.103 – design-build definitions).

*Purpose:* TxDOT anticipates that NEPA approval for the different highway Segments on which the System will be installed will contemplate tolling and, therefore, that it will not be necessary to obtain approval for the System separate from the NEPA approval for the Segment. The developer will be selected before NEPA approval has been issued for individual Segments, and certain preliminary work on the System components for a particular Segment may proceed prior to issuance of NEPA approval. TxDOT would issue a notice to proceed with final design, construction, and installation of the System components, for a particular Segment only after NEPA approval has been issued for that Segment.

*Deviation from FHWA requirements:* FHWA 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 of 23 CFR 636.119) 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:* 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. NEPA compliance is necessary for other actions that require FHWA approval. The approach to achieve NEPA approval and the plan of finance will be finalized in the EDA.

**Experimental Feature 3:** TxDOT anticipates that proposals will include a lump-sum, fixed-price contract for initial services (e.g., development of a prototype, information for NEPA, and preliminary design of the System) under the CDA. For future services (e.g., final design, construction, operation, and maintenance for Segments of the System) it may be possible to obtain unit prices in the proposals, and provide a mechanism in the CDA for adjusting such prices based on changes in conditions or pricing assumptions. However, due to the uncertainties inherent in the development process, TxDOT may decide that it would make more sense to negotiate the price for future services once the parties are able to ascertain the true scope. This approach would allow TxDOT to negotiate a reasonable price prior to execution of a contract for the initial services and retain the ability to negotiate prices for future services when the scope of these services is determined.

*Purpose:* The purpose of this experimental feature is to allow TxDOT the flexibility to negotiate pricing with the developer at points in which sufficient details of the services are identified. By doing so, the risk assumed by the developer and TxDOT would be reduced since the costs will be based on a more definitive scope and content of work.

*Deviation from FHWA Requirements:* Price negotiations after the selection of best the proposer conflict with the provisions of 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.



*FHWA Response:* One of the fundamental aspects of the TxDOT SEP-15 application for the System is the ability for TxDOT to experiment with the concept of contracting with a developer early in the project development process. By doing so, TXDOT has the ability to work with the developer to identify the best composition of the project by utilizing the ideas and expertise of that developer (e.g., development of a prototype). As such, certain elements of the contract may not be well-defined at the time of soliciting and evaluating the proposals. FHWA recognizes the potential benefits of including the same developer in the formation of project in actual implementation (design and construction). This experimental feature is approved with the understanding that the CDA will include cancellation clauses if subsequent negotiations with the developer fail to result in a mutually agreeable cost for services.

**Experimental Feature 4:** TxDOT requests the ability to establish subcontractor selection requirements that are different from Federal-aid procurement procedures applicable to State departments of transportation.

*Purpose:* There may be a cost benefit to allow the selected developer to utilize their own subcontracting procurement procedures rather than following Federal-aid procurement procedures.

*Deviation from FHWA Requirements:* Under the provisions of 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 the developer. 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 Segment of the project. If so, the proposed experimental feature is 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 Segments being undertaken, then all subsequent subcontracts signed by the developer are not subject to the Federal-aid procurement requirements per 23 C.F.R. 636.119(b)(1). Therefore, no waiver under SEP-15 is needed.

**Experimental Feature 5:** TxDOT may modify Form 1273, "Required Contract Provisions for Construction Projects" to strike out the portion of Section VII that requires a specified percentage of work to be self-performed.

*Purpose:* FHWA's 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 departments of transportation to modify Form FHWA 1273 by deleting the conflicting portions of Section VII.

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

*FHWA Response:* Under 23 CFR 635.116(d), percent self-performance requirements of paragraph (a) are not applicable to design-build contracts. Therefore, a waiver of this section is not required. FHWA will revise Form FHWA-1273 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 superceded the percent self-performance requirements of Section VII of form FHWA-1273.

**Experimental Feature 6:** TxDOT requests the ability to place restrictions on the method of procurement used by the developer in selecting subcontractors, as deemed appropriate by TxDOT.

*Purpose:* The CDA for the System will establish price and assignment of risk for each segment before a notice to proceed is issued. Therefore, TxDOT requests confirmation that 23 CFR 636.119(b)(1) applies.<sup>3</sup>

*Deviation from FHWA requirement(s):* The provisions of 23 CFR 636.119(b)(1) provide that subsequent contracts executed by the developer are considered to be subcontracts and, thus, not subject to the Federal-aid procurement requirements if the underlying public-private agreement establishes price and an assignment of risk between TxDOT and the developer. However, the requirements of 23 CFR 635.117 - Labor and Employment (which includes EEO compliance and prohibition from putting unfair restrictions on competition) as well as the subcontracting requirements in 23 CFR 635.116(d) would still apply.

*FHWA Response:* It is our understanding that TxDOT does not intend to apply the Federal-aid procurement requirements to this project; but, rather, place TxDOT's own restrictions on the method of procurement used by a developer in selecting subcontractors for this project. Since TxDOT anticipates establishing price and an assignment of risk with the developer in the CDA for the System, Federal-aid procurement requirements will not apply to subsequent contracts executed by the developer, in accordance with 23 CFR 636.119(b)(1). Therefore, a SEP-15 waiver is not necessary.

**Experimental Feature 7:** The CDA may provide for an extended warranty and will provide for the developer to perform routine maintenance work.

*FHWA Response:* This request was subsequently withdrawn from the application and is no longer part of the System SEP-15 application.

**Experimental Feature 8:** TxDOT requests that the characterization of the TxDOT/developer relationship under 23 CFR 636.119(b) be determined on a Segment-by-Segment basis, once the price has been established for each Segment and the CDA has

---

<sup>3</sup> FHWA cannot confirm that a process is acceptable. However, FHWA can concur in a proposed experimental concept for a specific project. Accordingly, FHWA has identified the request for confirmation as experimental feature 6.

been revised (or a separate agreement or change order signed) to include price and an assignment of risk.

*Purpose:* This experimental feature provides a mechanism for characterizing the relationship between TxDOT and the developer on a Segment-by-Segment basis after pricing negotiations and assignment of risk are made. By doing so, this mechanism provides an opportunity for the benefits provided in 23 CFR 636.119(b)(1) to be given to the developer (i.e., relief from Federal procurement requirements on subcontracting).

*Deviation from FHWA Requirements:* Similar to Experimental Feature 3, establishment of price and assignment of risk are evaluation factors that need to be established prior to selection of the developer in order to determine the lowest evaluated price of the proposals in accordance with 23 CFR 636.302. As such, a determination of the applicability of 23 CFR 636.119 should be determined at the time of selection of the developer. However, under this proposed experimental feature, such a determination would not be made until a developer is selected for a Segment.

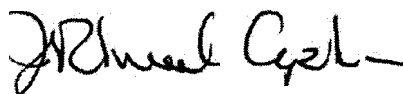
*FHWA Response:* In conjunction with Experimental Feature 3, characterization of the TxDOT/developer relationship under 23 CFR 636.119(b)(1) on a Segment-by-Segment basis (once the price has been established for each Segment) is important to the successful experimentation of the project development process proposed by TxDOT in this application. FHWA recognizes the potential benefits of project development process (i.e., including the same developer in the formation of project in actual implementation). As such, this experimental feature is approved.

#### **Proposed Performance Measures and Reports**

The proposed contents of the initial report, interim reports, 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. DJ Gribbin, Chief Counsel and Mr. Dan Reagan, Division Administrator for the FHWA Texas Division Office to serve as the co-facilitators for the Project. Mr. Gribbin and Mr. Reagan will establish an FHWA interdisciplinary team to work with the TxDOT to develop the provisions of the EDA.

Sincerely



J. Richard Capka  
Deputy Administrator