



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

1200 New Jersey Avenue, SE.
Washington, DC 20590

June 6, 2007

In Reply Refer To: HOA-2

Mr. John MacKinnon
Deputy Commissioner
Alaska Department of Transportation
P.O. Box 112500
Juneau, AK 99811

Dear Mr. MacKinnon:

The Federal Highway Administration (FHWA) has completed its review of the Special Experimental Project No. 15 Application (SEP-15 Application) you submitted on behalf of the Knik Arm Bridge and Toll Authority (KABATA) for waivers of the Transportation Infrastructure Finance and Innovation Act (TIFIA) program procedures for the Knik Arm Crossing in Anchorage, Alaska (Project), that was submitted to the FHWA Alaska Division Office (Division Office) on March 30, 2007. The Division Office forwarded the SEP-15 Application to the SEP-15 Steering Committee, which coordinated the review of the proposed TIFIA waivers with the TIFIA Joint Program Office (JPO); Office of Infrastructure; Office of Planning, Environment, and Realty; Office of Policy; Office of Operations; Office of Chief Counsel; and the Division Office. Based on the comments provided by these offices, the SEP-15 Steering Committee recommended, and I concur, that the Project be accepted for administration under SEP-15. FHWA's response to each of the proposed experimental features for the TIFIA waivers is discussed below.

FHWA's acceptance of the SEP-15 Application for administration under the SEP-15 program does not constitute approval of the Project for TIFIA credit assistance, which assistance is subject in all respects to complying with TIFIA requirements and terms and conditions acceptable to the United States Department of Transportation (DOT) before a commitment of funds can be made. If you wish to proceed with the TIFIA waivers under the SEP-15 program, our next major action will be to work with you to draft an Early Development Agreement (EDA). The EDA will contain parameters to guide such key elements as the TIFIA application requirements, terms and conditions for conditional approval, the form of TIFIA credit agreement, specific TIFIA requirements to be addressed in KABATA's procurement, meetings with the pre-qualified proposers, and timelines. The EDA will also identify the performance measures that will be used to evaluate the success of the TIFIA experimental features.

Background

KABATA is a public corporation and instrumentality of the State of Alaska organized under the laws of the State of Alaska. KABATA intends to develop the Knik Arm Crossing connecting

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the municipality of Anchorage with the Matanuska-Susitna Borough through a public-private partnership. It is our understanding that KABATA intends to conduct a two-phase competitive procurement resulting in a public-private agreement (PPA) with a single concessionaire who has the right and obligation to develop, design, construct, finance, operate and maintain and charge users fees with respect to the Project. In March, KABATA pre-qualified two consortia to bid on the final concession and now requests deviations from the existing TIFIA loan process so that each of the consortia has full and equal access to TIFIA through the solicitation process. Specifically, KABATA seeks to make a conditional TIFIA commitment available to both firms prior to the final proposal deadline. KABATA's next step will be to issue a Request for Proposals (RFP) asking the pre-qualified proposers to submit final detailed proposals for the Project that include financial proposals with commitments for all funding sources, including loans and equity. Each potential concessionaire that elects to use TIFIA must identify the amount, as well as the terms and conditions of available TIFIA credit assistance prior to making a financial offer to KABATA. This process would allow KABATA to compare the value to the State of each financial proposal, and assure that the winning concessionaire could execute all financing documents shortly after award.

The current TIFIA loan process begins when a private developer submits an application for Federal credit assistance to the TIFIA JPO after its selection by the public owner. Working with this single applicant, the TIFIA JPO evaluates the application and, if approved, issues a term sheet, negotiates detailed terms and conditions, and executes a TIFIA credit agreement.

Utilizing the existing TIFIA loan process would require DOT to evaluate and establish credit terms for both plans of finance of the short-listed bidders with the knowledge that only one would be selected to move forward. Waiting for the selection process to conclude prior to accepting an application from the winning concessionaire would add substantial time and uncertainty to KABATA's proposed procurement process, and could possibly result in precluding access to TIFIA assistance. KABATA seeks to take the lead in obtaining conditional approval of a TIFIA credit instrument at the time the final RFP is issued.

FHWA concurs with you that the proposed TIFIA experiment will serve several goals, including: (1) Expediting delivery of transportation facilities; (2) Maximizing the use of public-private partnerships and private equity; and (3) Encouraging flexible, innovative and alternative approaches to project financing. Given the growing interest in advancing major projects as private concessions, an experiment with an alternative TIFIA loan process would provide valuable information to assist DOT in reconfiguring the TIFIA program to accommodate non-traditional project procurement and financing schemes.

Experimental Features

Experimental Feature 1: KABATA requests that the SEP-15 Application be considered the letter of interest (LOI). Under the proposed procurement process, KABATA will be the initial applicant for TIFIA credit assistance.

Experimental Feature 1a: Waiver of Information Relating to Final Project Sponsor.

Experimental Feature 1b: Waiver of Proposed Plan of Finance.

Purpose: KABATA requests a waiver of information required to be submitted in the LOI because such information is not available at this stage of the KABATA procurement process.

Deviation from FHWA Requirement(s): The proposed experimental features deviate from the requirements of the 2007 TIFIA Program Guide (TIFIA Program Guide), Chapter 4, Section 4-1, Initial Submission: Letter of Interest. The SEP-15 Application does not include items of information that should be submitted in a LOI including background information on the project sponsor and the proposed sources and uses of funds for the project, including the type of credit assistance sought from DOT.

FHWA Response: The LOI serves three purposes. First, it familiarizes DOT with the basic parameters of the project and its sponsor. Second, it permits DOT to ensure that the project meets the eligibility requirements for TIFIA credit assistance. Third, it allows DOT to refer the project to a modal agency (i.e., FHWA, FTA, FRA, or an inter-agency working group) to assist the sponsor with its application for credit assistance.

FHWA understands that KABATA will not be able to submit a complete LOI with all of the information required by the TIFIA Program Guide. However, for the Project, the SEP-15 Application includes sufficient information to allow the TIFIA JPO to determine that the Project meets the basic eligibility criteria for TIFIA credit assistance. Thus, FHWA accepts experimental feature 1 on the condition that the EDA will provide more detailed information on the Project, including the status of the environmental review process. Further, the EDA will set forth the minimum plan of finance components to be included in the KABATA TIFIA application submission (discussed below). KABATA will keep the TIFIA JPO informed about the short-listed proposers, their qualifications and their legal structures. KABATA also will seek input from prospective proposers concerning plan of finance information such as Project cost and revenue estimates.

Experimental Feature 2: KABATA proposes to submit the initial application for TIFIA credit assistance for the Project. The TIFIA application will provide more detailed information regarding the Project description and delivery schedule. In connection with submission of an initial application, KABATA requests two waivers.

Experimental Feature 2a: Waiver of Information Relating to the Final Project Sponsor.

Purpose: Under current TIFIA procedures, an application for TIFIA credit assistance is submitted after the completion of the procurement process. However, KABATA will not have information about the final Project sponsor because the TIFIA application will precede final selection of the Project sponsor.

Deviation from FHWA Requirement(s): Proposed Experimental Feature 2a deviates from requirements in the TIFIA Program Guide, Chapter 4, Section 4-2 – Application Sections A and E. Specifically, information on where and how to contact the project sponsor, and the organizational structure, experience, and legal authority of the ultimate project sponsor will not be available at the time the TIFIA application is submitted to the TIFIA JPO.

FHWA Response: FHWA accepts this experimental feature for administration under SEP-15. KABATA will be required to submit the nonrefundable application fee of \$30,000 for the Project. The EDA will require that KABATA's RFP include information and certifications from

the proposers that address all applicable TIFIA requirements. As the procurement process proceeds, KABATA will keep the TIFIA JPO informed concerning the prospective proposers and their qualifications, organizational structure, and legal authority to carry out the activities described in the TIFIA application.

Experimental Feature 2b: Waiver of Requirement to Submit a Detailed Financial Plan, Project Management Plan, Preliminary Rating Opinion, and other Financing Documents.

Purpose: KABATA will not be able to provide the TIFIA JPO with required financial information in the TIFIA application because its submission will precede KABATA's receipt of the proposers' detailed financial plans and the final selection of the Project sponsor. Recognizing that each proposer is likely to have a different Project financial plan, KABATA proposes to submit a pro forma financial plan as part of its TIFIA application, including a financial model and forecast of revenues prepared by Wilbur Smith Associates (WSA). Included with the pro forma financial plan will be reasonably sufficient data to support the WSA revenue forecasting methodology enabling TIFIA to conduct a formal risk assessment. The goal will be to provide the pre-qualified proposers with the forecasted revenues that have been approved by TIFIA. If the structure the proposers submit represents that at least the pre-negotiated terms are met using the approved forecasted revenues, TIFIA would not need to conduct an additional formal risk assessment. KABATA will submit an initial plan of finance (based on internal assumptions and input from prospective proposers) addressing Project costs, forecast revenues, the senior lien debt, principal amount of TIFIA credit assistance and repayment terms. The initial plan will demonstrate to the reasonable satisfaction of DOT that the Project's future revenue will be sufficient to support repayment of the Federal credit assistance to the U.S. Department of the Treasury and that it will endeavor to follow the FHWA's Mega Project Finance Plan guidelines. Further, KABATA will not be able to provide other required application elements, such as a Project management plan, compliance monitoring plan and operation information.

Deviation from FHWA Requirement(s): This experimental feature deviates from the requirement that the project sponsor must submit a detailed financial plan and proposed terms with its application pursuant Section 4-2 of the TIFIA Program Guide - Application Section D. In addition, as specified in Section 4-2 of the TIFIA Program Guide – Application Section B, an application for TIFIA credit assistance must include comprehensive information on the project, including a project description, schedule, information on required permits and approvals, a project management and compliance monitoring plan, and a description of project operations and maintenance. Also, pursuant to 23 U.S.C. § 182(b)(2)(B), 49 C.F.R. 80.11(a) and 80.15(b), and the TIFIA Program Guide, Chapter 3, Section 3-5, a project applicant is required to provide a preliminary rating opinion letter from at least one rating agency indicating that the project's senior obligations have the potential to achieve an investment grade rating.

FHWA Response: FHWA accepts KABATA's request for a waiver regarding a Project management plan, compliance monitoring plan, and operations and maintenance description, provided KABATA's RFP requires proposers to submit these documents. However, the KABATA TIFIA application must demonstrate that the Project meets eligibility and project selection criteria as set forth in 23 U.S.C. § 602(a) and (b)(2)(A).

FHWA accepts KABATA's request to submit a pro forma financial plan as part of the TIFIA application and defer providing a preliminary rating opinion letter, conditioned on KABATA demonstrating in its TIFIA application that the Project's financing can be structured such that the senior obligations have the potential to achieve an investment grade rating. Sufficient information must be provided in the TIFIA application to enable DOT to determine the maximum amount of TIFIA credit assistance based on eligible Project costs and the likelihood that Project revenues will repay the TIFIA and other debt obligations with the requested financing terms. The EDA would specify minimum financial plan requirements at the time of application and further specify that KABATA's RFP mirror the financial plan requirements in the TIFIA Program Guide. Further, the EDA would require each proposer seeking TIFIA credit assistance to provide a preliminary rating opinion letter in its final response to KABATA. In approving the waivers, it is understood that DOT will adhere to the same credit standards applied to any project seeking assistance.

Experimental Feature 3: KABATA requests the TIFIA JPO to provide a conditional Project selection, conditional term sheet, and to provide a substantially negotiated form of credit agreement for the Project to be included in the RFP.

Purpose: KABATA expects the selected proposer to complete its financing arrangements within two months after award. Therefore, KABATA requests DOT to make a conditional Project selection and issue a conditional term sheet for TIFIA credit assistance based on the KABATA TIFIA application. After the Project has been approved and the term sheet has been issued, TIFIA would provide a substantially final form of the credit agreement not later than 90 days before the due date for proposals set by KABATA. KABATA and TIFIA would negotiate the majority of the terms of the credit agreement, leaving open a few key terms to be discussed with the pre-qualified proposers. KABATA would then include the term sheet and the negotiated credit agreement as part of its RFP package. This would provide the pre-qualified proposers certainty regarding availability, terms, and conditions of TIFIA credit assistance and allow each potential Project proposer to incorporate TIFIA into its financial proposal to KABATA.

Deviation from FHWA Requirement(s): Proposed experimental feature 3 deviates from certain term sheet prerequisites specified in Chapter 6, Section 6-1 of the TIFIA Program Guide. Specifically, KABATA will not have met the requirements for a preliminary rating opinion letter and its pro forma financial plan will not define the financial structure for the Project. Also, the borrower will not be known at this step in the process. This proposed experimental feature also deviates from current policy regarding issuance of a conditional term sheet. The TIFIA regulations published in 1999 specifically provided for issuance of a conditional term sheet, if certain requirements had not been met. However, subsequent Federal Register notices of funding availability and the TIFIA Program Guide in Section 6.1 have narrowed the circumstances that would necessitate a conditional commitment.

In regards to issuance of a substantially negotiated form of credit agreement, neither the TIFIA statutes nor rules prohibit DOT from providing a potential concessionaire with this agreement prior to being granted control of the project. However, it has been the practice of the TIFIA JPO to provide a draft credit agreement when negotiations begin, following issuance of a term sheet.

FHWA Response: On an exception basis, DOT has issued conditional term sheets as a means to administratively reserve funds for a specific project, subject to meeting specified conditions by a certain date. Budget authority is not legally obligated until conditions are met. FHWA accepts proceeding with conditional Project selection and a conditional term sheet for the Project, subject to approval by the DOT Credit Council. The conditional term sheet (and the subsequent substantially negotiated credit agreement) would include the terms and conditions agreed to between TIFIA and KABATA. This would enable proposers to factor TIFIA into their financial plans with the assurance that agreements could be executed shortly (i.e., within 60 days) after the KABATA selection.

No waiver is necessary for DOT to provide a substantially negotiated form of credit agreement. If KABATA's TIFIA application meets the requirements specified in the EDA, all applicable Federal statutory and regulatory requirements, and complies with the TIFIA Program Guide provisions, then FHWA could, subject to approval by the TIFIA Credit Council and the Secretary of DOT, issue a conditional term sheet to KABATA. The provisions of the conditional term sheet would be incorporated into the TIFIA substantially negotiated credit agreement, which would be provided to KABATA for inclusion in its RFP.

With regard to the substitution of the selected concessionaire as the Project sponsor, the conditional term sheet issued to KABATA can either provide for assignment of rights to a third party acceptable to DOT or the issuance of an amended and restated term sheet with the selected concessionaire. The term sheet and credit agreement will require the successful concessionaire to reimburse DOT for credit processing costs (outside financial and legal consultant costs in connection with the evaluation of the proposal, negotiation of final terms, and execution of the TIFIA credit agreement). In the event that a credit agreement is not executed, KABATA will be required to reimburse DOT for expenses incurred in connection with the Project.

Experimental Feature 4: KABATA requests the TIFIA JPO to meet one-on-one with the pre-qualified proposers.

Purpose: KABATA requests the TIFIA JPO to meet individually with the pre-qualified proposers to discuss a specific, limited list of terms in the credit agreement (the credit agreement would have already been substantially negotiated between KABATA and the TIFIA JPO). KABATA and the TIFIA JPO would develop this list during discussion of the conditional term sheet. No other terms of the credit agreement would be open for negotiation with the TIFIA JPO. Pre-qualified proposers would be allowed to meet with the TIFIA JPO for a period starting not later than 90 days before the due date for proposals set by KABATA, and continuing until the submission deadline. Pre-qualified proposers could then base their final proposal decisions on the substantially negotiated credit agreement included in the RFP and their discussions with the TIFIA JPO. The TIFIA JPO would not participate in KABATA's review of the proposal submissions. If TIFIA credit assistance is sought by the winning concessionaire the TIFIA JPO would then negotiate the final credit agreement after KABATA's selection. To preserve and maximize competition, KABATA is asking that the TIFIA JPO keep all information and financial negotiations pertaining to the one-on-one meetings with the pre-qualified proposers confidential according to the terms of a confidentiality agreement.

Deviation from FHWA Requirement(s): None. Neither the TIFIA statutes nor rules prohibit DOT from meeting with potential concessionaires.

FHWA Response: The acceptance of experimental feature 4 is predicated on the pre-qualified concessionaires' adherence to all TIFIA program requirements, including the terms and conditions pre-negotiated with KABATA. The procedures for reviewing and protecting confidential information will be addressed in the EDA.

Proposed Performance Measures and Reports

You propose to evaluate and report on the experimental features of the TIFIA program waivers. FHWA will fully evaluate the proposed factors, listed below, for inclusion in the EDA:

1. Time Savings.

You propose the following to measure time savings: (1) Compare the actual schedule for receiving TIFIA credit approval and execution of a credit agreement with the concessionaire with the estimated schedule based on a traditional approval process; (2) Evaluate the effect of the experiment on the receipt of final proposals and financial close; and (3) Attempt to quantify the value of the streamlined TIFIA credit approval approach described herein.

2. Innovation in Financing.

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

3. Reports.

You anticipate filing an initial report and post-acceptance report as described below:

Initial Report. The initial report will be filed within 120 days after the award of the PPA for the Project and will include a preliminary analysis of the PPA procurement. This report will: (1) Describe the process used to select the concessionaire; (2) Identify any reaction by the industry to use of the TIFIA approval process as described herein; (3) Document major innovations contained in the proposals received; and (4) Discuss any major problems or issues that have occurred and how they were resolved.

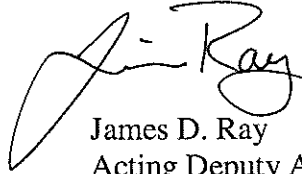
Post Acceptance Report. A post acceptance report will be submitted within 180 days following execution of the PPA and financial close for the Project. This report will provide an overall evaluation of the role of the TIFIA approval process in the procurement of proposals and the execution of the final PPA for the Project.

The proposed performance measures and reports described in the SEP-15 Application will be reviewed during the development of the EDA and incorporated into a Project timeline.

I have asked Mr. Edward V.A. Kussy, Deputy Chief Counsel, and Mr. David Miller, Division Administrator for the FHWA Alaska Division Office, to serve as the co-facilitators for the

SEP-15 for the Knik Arm Bridge Crossing. Mr. Kussy and Mr. Miller will establish an FHWA interdisciplinary team to work with you to develop the provisions of the EDA.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Ray". The signature is fluid and cursive, with a large initial "J" and a stylized "R".

James D. Ray
Acting Deputy Administrator and
Chief Counsel