



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

Office of the Administrator
February 21, 2006

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

Reply to: HOA-3

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

Dear Mr. Behrens:

The Federal Highway Administration (FHWA) has completed its review of the Texas Department of Transportation's (TxDOT) Special Experimental Project No. 15 (SEP-15) application for waivers of the Transportation Infrastructure Finance and Innovation Act (TIFIA) program procedures (Application) for the I-635 (Lyndon B. Johnson Freeway) in the Dallas-Fort Worth metropolitan area, US 281/Loop 1604 Toll Project in San Antonio, and the SH 161 project through Irving and Grand Prairie that was submitted to the FHWA Texas Division Office (Division Office) on December 22, 2005. The Division Office forwarded the 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 Application be accepted for administration under SEP-15. The FHWA's response to each of the proposed experimental features for the TIFIA waivers is discussed below.

The FHWA's acceptance of your Application for administration under the SEP-15 Program does not constitute approval of the projects 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. Further, the FHWA retains the right to withdraw the second and third projects from the experiment, after the first project (I-635) depending on the outcome of the evaluation.



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 TxDOT's procurements, participation in the proposal review process by the TIFIA JPO, and timelines. The EDA will also identify the performance measures that will be used to evaluate the success of the TIFIA experimental features. Finally, the EDA will address conditions regarding substitution of other projects for the US 281/Loop 1604 and the SH 161 projects after the I-635 project experiment is underway.

Background

The TxDOT is undertaking a major initiative to construct transportation infrastructure projects through public-private partnerships, specifically private concessions. Pursuant to a Comprehensive Development Agreement (CDA), a private entity would have the right and obligation to develop, design, construct, finance, operate and maintain, and charge user fees with respect to the projects. Because many prospective private partners have indicated their intent to seek TIFIA credit assistance, the TxDOT approached the DOT requesting a modification to the existing TIFIA loan process so that each prospective partner has full and equal access to TIFIA through the State's solicitation process.

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.

The proposed TxDOT procurement process would accelerate the loan process by pre-qualifying several potential private concessionaires. Following pre-qualification, the TxDOT would issue a Request for Detailed Proposals asking proposers to submit final detailed proposals for the project that include financial proposals with loan and equity commitments. Each potential concessionaire that elects to use TIFIA must identify the amount, terms and conditions of available TIFIA credit assistance prior to making a financial offer to the TxDOT. This process would allow the TxDOT 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.

Utilizing the existing TIFIA loan process would require the DOT to evaluate and establish credit terms for multiple plans of finance (depending on the number of proposers) 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 TxDOT's proposed procurement process, and could possibly result in precluding access to TIFIA assistance.

The FHWA concurs with the TxDOT that the proposed TIFIA experiments 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 interest in Texas and several other States in advancing major projects as private concessions, an experiment with an alternative TIFIA loan process would provide valuable information to assist the DOT in reconfiguring the TIFIA program to accommodate non-traditional project procurement and financing schemes.

Experimental Features

The TxDOT would like to first apply the proposed experimental features to the I-635 project. The second and third project experiments would begin only upon acceptable progress of the I-635 project. The I-635 project has received environmental clearance from the Division Office and the TxDOT is currently reviewing Qualifications Statements from four proposers received in response to its Request for Proposals and Qualifications issued in September 2005.

The TxDOT requests the right to supplement its Application to seek approval of other experimental features relating to the TxDOT's CDA program for these projects, including features relating to their design and construction.

Experimental Feature 1: The TxDOT requests that its Application be considered its letter of interest (LOI) for each of the 3 projects. Under the TxDOT's proposed procurement process, it 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: The TxDOT requests a waiver of information required to be submitted in the LOI because such information is not available at this stage of the TxDOT procurement process.

Deviation from FHWA Requirement(s): The proposed experimental features deviate from the requirements of the 2003 TIFIA Program Guide (TIFIA Program Guide), Chapter 4, Section 4-2, Initial Submission: Letter of Interest. The 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 the DOT.

FHWA Response: The LOI serves three purposes. First, it familiarizes the DOT with the basic parameters of the project and its sponsor. Second, it permits the DOT to ensure that the project meets the eligibility requirements for TIFIA credit assistance.

Third, it allows the DOT to refer the project to a modal agency (i.e., FHWA, FTA, FRA, or an inter-agency working group) to assist the sponsor to prepare an application for credit assistance.

The FHWA understands that the TxDOT will not be able to submit a complete LOI with all of the information required by the TIFIA Program Guide. However, for the I-635 project, the SEP-15 application includes sufficient information to allow the TIFIA JPO to determine that the I-635 project meets the basic eligibility criteria for TIFIA credit assistance. Thus, the FHWA accepts experimental features 1a and 1b on the condition that the EDA will provide more detailed information on each of the 3 projects, including the status of the environmental review process for the US 281/Loop 1604 and the SH 161 projects. Further, the EDA should set forth the minimum plan of finance components to be included in the TxDOT project application submissions (discussed below). The TxDOT will keep the TIFIA JPO informed about the prospective proposers, their qualifications and their legal structures. The TxDOT also will seek input from prospective proposers concerning plan of finance information such as project cost and revenue estimates.

Experimental Feature 2: The TxDOT proposes to submit a separate application for TIFIA credit assistance for each of the 3 projects. The applications will provide more detailed information regarding project descriptions and schedules.

In connection with submission of an initial application, the TxDOT 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, the TxDOT will not have information about the final project sponsor because project applications 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 4-3 – 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 application is submitted to the TIFIA JPO.

FHWA Response: The FHWA accepts this experimental feature for administration under SEP-15. The TxDOT will be required to submit the nonrefundable application fee of \$30,000 for each of the 3 projects identified in the SEP-15 application as they are advanced under the terms and conditions of the EDA. The EDA will require that the TxDOT's Request for Detailed Proposals include information and certifications from the proposers that address all applicable TIFIA requirements. As the procurement process proceeds, the TxDOT 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 application.

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

Purpose: The TxDOT will not be able to provide the TIFIA JPO with required financial information in the application because the project applications will precede submission 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, the TxDOT proposes to submit a pro forma 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 pro forma plan will demonstrate to the reasonable satisfaction of the 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.

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 4-3 of the TIFIA Program Guide - Application Section D.

In addition, as specified in Section 4.3 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 CFR 80.11(a) & 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: The FHWA accepts the TxDOT's request for a waiver regarding the project management plan, the compliance monitoring plan and operations and maintenance description, provided the TxDOT's Request for Detailed Proposals requires proposers to submit these documents. However, the TxDOT TIFIA credit application for each project advanced under the SEP-15 Application and EDA 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).

The FHWA accepts the TxDOT's request to submit a pro forma plan of finance as part of the TIFIA application and defer providing a preliminary rating opinion letter, conditioned on the TxDOT 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 application to enable the 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 TIFIA JPO would review and evaluate the detailed financial plans submitted in the final development proposals. The EDA would specify minimum financial plan requirements at the time of application and further specify that the TxDOT's Request for Detailed Proposals mirror the financial plan requirements in the TIFIA Program Guide. Further, the EDA would require each proposer seeking TIFIA assistance to provide a preliminary rating opinion letter in its final response to the TxDOT. In approving the waivers, it is understood that the DOT will adhere to the same credit standards applied to any project seeking assistance.

Experimental Feature 3: The TxDOT requests variances with respect to completing the procurement process.

Experimental Feature 3a: Request for review of multiple project proposals.

Purpose: The TxDOT is requesting the TIFIA JPO to participate in the review of all the final development proposals, which will allow the TIFIA JPO to evaluate the proposals to determine if the requirements have been met for TIFIA credit assistance prior to the TxDOT's decision on the successful proposer. To preserve and maximize competition, the TxDOT is asking that those who review the information on behalf of the TIFIA JPO keep all information and financial negotiations confidential according to the terms of a confidentiality agreement.

Deviation from FHWA Requirement(s): None. Neither the TIFIA statutes nor rules prohibit the DOT from reviewing multiple project proposals.

FHWA Response: The acceptance of experimental features 1 and 2 is predicated on the TIFIA JPO and its outside advisors being involved in the review and evaluation of the final development proposals to ensure that TIFIA requirements are met, including the terms and conditions. The TxDOT and the FHWA will address the procedures for reviewing and protecting confidential information in the EDA.

Experimental Feature 3b: Request the TIFIA JPO to provide a form of credit agreement.

Purpose: Under existing procedures, the TIFIA JPO would not begin credit negotiations until issuance of the term sheet. The TxDOT believes it is critical to the procurement process that prospective proposers have a draft credit agreement to review in order to prepare final financial plans.

Deviation from FHWA Requirement(s): None. Neither the TIFIA statutes nor rules prohibit the DOT from providing a project applicant a draft credit agreement, prior to approval by the Secretary of the DOT. 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. No waiver is necessary for this experimental feature. If the TxDOT's TIFIA applications meet the requirements specified in the EDA, all applicable Federal statutory and regulatory requirements, and the TIFIA Program Guide, the FHWA could,

subject to approval by the TIFIA Credit Council and Secretary of DOT, issue a conditional term sheet to the TxDOT. (A conditional term sheet is addressed in Experimental Feature 3c.) The provisions of the conditional term sheet would be incorporated into TIFIA's standard credit agreement, which would be provided to the TxDOT for inclusion in the Request for Detailed Proposals.

Experimental Feature 3c: Request for issuance of conditional project selection and term sheet.

Purpose: The TxDOT expects the selected proposer for each project to complete its financing arrangements within 4 months after award. Therefore, the TxDOT requests the DOT to make a conditional project selection and issue a conditional term sheet for TIFIA credit assistance based on the TxDOT TIFIA credit assistance applications for each project. This would provide certainty regarding the availability, terms, and conditions of TIFIA credit assistance and allow each potential project proposer to incorporate TIFIA into its financial proposal to the TxDOT.

Deviation from FHWA Requirement(s): This proposed experimental feature deviates from certain term sheet prerequisites specified in Chapter 6, Section 6-1 of the TIFIA Program Guide. Specifically, the TxDOT 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 1999 TIFIA rule 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 6.3 have narrowed the circumstances that would necessitate a conditional commitment.

FHWA Response: On an exception basis, the 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. The FHWA accepts proceeding with conditional project selection and conditional term sheets for each project, subject to approval by the DOT Credit Council. The conditional term sheet (and the subsequent draft credit agreement) would include the terms and conditions offered to each competing entity. This would enable proposers to factor TIFIA into their financial plans with the assurance that agreements could be executed shortly (i.e., within 120 days) after the TxDOT selection. The TIFIA JPO would expect negotiations with the selected concessionaire to produce only modest changes to the draft credit agreement included in the final TxDOT Request for Detailed Proposals.

With regard to the substitution of the selected concessionaire as the project sponsor, the conditional term sheet issued to the TxDOT can either provide for assignment of rights to a third party acceptable to the DOT or the issuance of an amended and restated term

sheet with the selected concessionaire. The term sheet and credit agreement will require the successful concessionaire to reimburse the DOT for credit processing costs (outside financial and legal consultant costs in connection with the evaluation of the proposals, negotiation of final terms, and execution of the TIFIA credit agreement).

Proposed Performance Measures and Reports

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

1. Time Savings.

The TxDOT proposes the following to measure time savings: (1) Compare the actual schedule for receiving TIFIA credit approval and execution of a credit agreement with the finalist with the estimated schedule based on a traditional procurement 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.

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

3. Reports.

The TxDOT anticipates 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 a CDA for each project and will include a preliminary analysis of the CDA procurement. This report will: (1) Describe the process used to select the developer team; (2) Identify any reaction by the industry to use of the TIFIA 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 CDA and financial close for each Project. This report will provide an overall evaluation of the role of the TIFIA approval process in the procurement of detailed proposals and the execution for each of the projects.

The proposed performance measures and reports described in the TxDOT application will be reviewed during the development of the EDA and incorporated into a project timeline.

I have asked Mr. Edward V.A. Kussy, Acting Chief Counsel, and Mr. Robert Callan, Acting Division Administrator for the FHWA Texas Division Office, to serve as the co-facilitators for the SEP-15 for TIFIA Credit Program Waivers. Mr. Kussy and Mr. Callan will establish an FHWA interdisciplinary team to work with the TxDOT to develop the provisions of the EDA.

Sincerely,

A handwritten signature in cursive script that reads "Rick Capka" followed by a horizontal flourish.

J. Richard Capka
Acting Administrator