



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

Office of the Administrator
July 31, 2014

1200 New Jersey Ave., SE
Washington, D.C. 20590

In Reply Refer To:
HIN

Mr. Brian Kendro
Director Office of Policy and Public-Private Partnerships
Pennsylvania Department of Transportation
Harrisburg, PA 17105

Dear Mr. Kendro:

The Federal Highway Administration (FHWA) completed its review of the Pennsylvania Department of Transportation's (PennDOT's) "Pennsylvania Rapid Bridge Replacement Public-Private Partnership (P3) Project" (the "Project") Special Experimental Project No. 15 (SEP-15) application ("Application") that was submitted to the FHWA Pennsylvania Division Office (Division Office) on July 15, 2014. The Division Office forwarded the Application to the FHWA Office of Innovative Program Delivery which coordinated the review of the proposed SEP-15 experiment with the Office of Infrastructure; Office of Planning, Environment, and Realty; 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 conditionally accepted for administration under SEP-15. The FHWA's response to the proposed experimental features for the Project is discussed below.

The FHWA's acceptance of the Project for administration under SEP-15 does not commit Federal-aid funding for the Project. Until there is formal FHWA project approval, FHWA retains the right to declare the Project ineligible for Federal-aid funds at any time during the SEP-15 process. In addition, all Federal laws, rules, and regulations shall be applicable to the Project, 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 the National Environmental Protection Act (NEPA), except as otherwise specified herein.

The FHWA may withdraw its approval of the SEP-15 experimental features if it determines that the experimental features are not in the public interest. Prior to any such withdrawal, the FHWA will issue a written notice to PennDOT describing the FHWA's concerns and give PennDOT a reasonable period of time to address the FHWA's concerns. However, during such period of time, no further work shall be conducted based on the approval at issue until such time as FHWA determines that PennDOT has fully addressed 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.

If you wish to proceed with the Project under the SEP-15 program, the next major action will be for FHWA to work with you to draft an Early Development Agreement (EDA). The EDA will identify the specific roles of all parties, define procedures and requirements, and establish timeframes and other conditions under which the experimental features will be administered.

The EDA will also identify the performance measures that will be used to evaluate the success of the Project's experimental features.

Background

The PennDOT is pursuing a P3 project to replace 559 bridges throughout the State. By bundling similar bridges into one project, PennDOT believes it can save money on design, permitting, construction, and ultimately maintenance. If PennDOT were to replace each of these bridges individually, using its traditional procurement schedule, PennDOT estimates that the process could take 10 – 15 years. However, bringing the resources of a private sector partner to bear, or Development Entity (DE), PennDOT estimates it will be able to deliver the replacement of 99 percent of the bridges in the Project in just 42 months.

The PennDOT will compensate the DE via milestone payments during construction and performance-based availability payments over the 25 – 35 year Public Private Agreement (PPA) contract term. By incorporating long-term financing and maintenance into the procurement, the DE is also motivated to make sure that the bridges are built to last.

This Project is a key component of PennDOT's effort to address the State's systemic backlog of almost 4,800 structurally deficient bridges. The Project will be the first P3 multiasset transportation project of its kind in the United States.

The PennDOT intends to have the DE conduct environmental studies, prepare environmental documentation, and complete the required preliminary engineering for bridges covered by Level 1 or Level 2 categorical exclusion (CE), and obtain necessary permits and approvals for each bridge included in the Project. The PennDOT conducted initial screenings and scoping field reviews to make sure that the bridges selected for this Project are eligible for a Level 1 CE or Level 2 CE. This screening includes a determination that an environmental assessment or an environmental impact statement is not required under applicable law.

The U.S. Department of Transportation provided PennDOT with a conditional Private Activity Bond allocation for the Project. Per the terms of this allocation, the Project must meet all applicable Federal-aid requirements.

Experimental Features

The PennDOT intends to have the DE complete the required preliminary engineering, conduct environmental review studies, prepare environmental documentation and obtain necessary permits and approvals for each bridge included in the Project. In order to allow the DE to undertake these activities, PennDOT requests two deviations from FHWA regulations:

- (1) Deviation from 23 C.F.R. 636.109(b)(6) – “The design-builder must not prepare the NEPA document or have any decisionmaking responsibility with respect to the NEPA process.” The SEP-15 experiment will allow the DE to be responsible for preparing the supporting documentation and draft decision documents.

- (2) Deviation from 23 C.F.R. 636.109(b)(7) – “Any consultants who prepare the NEPA document must be selected and subjected to the exclusion direction and control of the contracting agency.” The SEP-15 experiment will allow the DE to select the consultant that prepares the NEPA document and retain exclusive control over the consultant.

Purpose: PennDOT requests the deviations from 23 CFR 636.109(b)(6) and 23 CFR 636.109(b)(7) in order to evaluate the efficiencies, if any, of the proposed Project—specifically accelerating the time and reducing the costs required to deliver a project by allowing a DE to conduct the environmental review process.

Deviation from FHWA Requirement(s): FHWA's Design-Build Contracting regulations currently prohibit the DE from preparing supporting documentation and draft decision documents as required for the environmental review process.

FHWA Response: The FHWA’s prohibition against a design-builder’s involvement in the NEPA decisionmaking process is intended to: (1) Insulate against conflicts of interests; (2) Ensure the integrity and objectivity of the NEPA process; and (3) Protect the public’s faith in the integrity of the NEPA process.

The proposed experiment would allow FHWA to assess whether it should undertake a rulemaking to amend the Design-Build Contracting regulations to allow greater design-builder involvement in the preparation of environmental documents and in the control of environmental consultants where the projects have limited or no potential for significant adverse environmental effects and safeguards are in place to greatly reduce or eliminate the risk of design-builder bias in the outcome of the environmental review process.

The FHWA’s acceptance of the PennDOT SEP-15 proposal is conditional and contingent on the inclusion of specific safeguards to protect the integrity of the environmental decisionmaking process. Conditions include a requirement that PennDOT’s contracting documents and the EDA contain specified mechanisms that are clearly tied to preserving the purposes of 23 CFR 636.109(b)(6) and 636.109(b)(7). These conditions will ensure that (1) there is no material risk of bias in the environmental decisionmaking process, (2) public officials and citizens have the necessary environmental impact information for federally funded actions before actions are taken, and (3) that the DE does not assume an unnecessary amount of risk in the event the NEPA process results in a significant change in one or more of the bridges included in the Project.

The FHWA’s conditional acceptance of the PennDOT SEP-15 proposal relies on the safeguards and conditions proposed by PennDOT in its Application to preserve the purposes of 23 CFR 636.109(b)(6) and 636.109(b)(7). The safeguards and conditions are as follows:

- (1) **DE NEPA Documentation.** For each bridge, the DE will prepare and provide to PennDOT the appropriate field data, impact analyses (if required for the proposed CE), and draft NEPA documentation. The DE will use PennDOT’s standard systems such as the CE Expert System, Project Path, and the Environmental Commitments and Mitigation Tracking System for the completion of the NEPA/Section 106 documents and to track the completion of the mitigation. These systems have a formal quality control and approval process executed by PennDOT.

- (2) **Section 106.**
- a) The individual(s) proposed by the DE must meet specific qualifications and must have successfully completed training with PennDOT, the Pennsylvania Historical and Museum Commission (the SHPO), and FHWA.
 - b) PennDOT will be involved in the dispute resolution process.
 - c) PennDOT will coordinate with FHWA, the SHPO, and native-American tribes to resolve adverse effects.
 - d) PennDOT will draft the required Memorandum of Agreement/Letter of Agreement and circulate for signature.
- (3) **Section 4(f).** For Section 4(f) resources, PennDOT and/or FHWA will approve any applicable checklist (i.e., Programmatic Agreements) and Individual Section 4(f) Evaluations.
- (4) **Public Involvement.** A PennDOT representative will attend all public meetings held for the individual bridges to make sure that the proceedings are properly administered and documented consistent with the PennDOT public involvement plan approved by FHWA.
- (5) **PennDOT NEPA Reviews.** PennDOT will require the DE, in accordance with the PPA, to submit each CE or other NEPA documentation, relating to CE determinations, to PennDOT for its substantive review and independent evaluation. The PennDOT will evaluate the data, analyses, and documentation necessary for the NEPA decision. The PennDOT also will compare the impacts identified by the DE to the results of the scoping-phase field screening PennDOT did for the bridge. The PennDOT will use the standard systems such as the CE Expert System, Project Path, and the Environmental Commitments and Mitigation Tracking System for purposes of reviewing and approving the NEPA documentation and assuring the completion of required mitigation.
- (6) **Penn DOT/FHWA NEPA Approval.** FHWA and/or PennDOT will make the final NEPA decisions in accordance with our delegation procedures and after independently evaluating the information and make independent judgments about the potential project impacts. The FHWA will provide oversight. The FHWA and PennDOT will take full responsibility for the scope and contents of the NEPA documents.
- (7) **No Final Design Prior to NEPA Approval.** The DE is not permitted to commence final design activities—e.g., right-of-way acquisition—until receiving NEPA approval (which is also needed to receive Design Field View approval from PennDOT to move into Final Design).
- (8) **Environmental Mitigation as a Compensation Event.** PennDOT will pay for any NEPA mitigation not already pre-defined in the DE's bid proposal. This means that the

DE will receive no financial benefit and bear no financial risk not already priced in its proposal related to environmental mitigation or project delays resulting from environmental findings in the NEPA process. The PennDOT will compensate the DE separately for the cost of NEPA-related environmental mitigation actions. This includes final design and construction tasks such as wetland replacement, Phase III Archeological data recovery excavations, associated interpretive materials, recordation of the historic bridge and associated historic district, and context sensitive design elements.

- (9) **Elimination of Pecuniary Harm to the DE for NEPA-related decisions by the relevant agencies.**
- a) Where a specific bridge becomes problematic for any reason related to the individual bridge, PennDOT, in its sole discretion, can remove that bridge from the Project provided that a new replacement bridge is designated via a change order. All change orders for the Project are subject to review and approval by FHWA.
 - b) The change order process used to remove or replace a bridge will operate so as to ensure that the DE is left in a position neither better nor worse as a result of the removal of the bridge. In other words, if the FHWA concurs, PennDOT will introduce an alternative bridge into the Project with substantially similar attributes. This will include initiation of a change order to offset any additional costs that may be associated with the new bridge, so as to maintain equilibrium of the DE's financial interest in the Project.
 - c) All design documents and work developed for a bridge that is removed from the Project will be transferred to PennDOT for its unrestricted use. The DE will be compensated for the work completed on the removed bridge via the change order.
 - d) Replacement bridges will be drawn from either a predetermined grouping of bridges or from bridges in PennDOT's regular capital improvement program.

Proposed Performance Measures and Reports

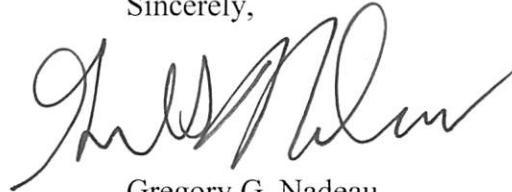
The PennDOT SEP-15 Application included proposed factors to evaluate the experimental features of the Project SEP-15. The FHWA will fully evaluate the proposed factors, listed below, for inclusion in the EDA:

- (1) Time savings for completion of the Project.
- (2) Cost savings to the public.
- (3) Integrity of the environmental review process.

The proposed initial report, periodic updates, interim reports, and a final report, described in the Application, will be reviewed during the development of the EDA and incorporated into a project timeline.

I have asked Ms. Regina McElroy, Director, Office of Innovative Program Delivery and Ms. Renee Sigel, FHWA Division Administrator for the Division Office to serve as the co-facilitators for the Project. Ms. McElroy and Ms. Sigel will establish an FHWA interdisciplinary team to work with PennDOT to develop the provisions of the EDA.

Sincerely,

A handwritten signature in black ink, appearing to read "Gregory G. Nadeau". The signature is fluid and cursive, with a large initial "G" and a long, sweeping tail.

Gregory G. Nadeau
Acting Administrator