

**EARLY DEVELOPMENT AGREEMENT  
BETWEEN  
THE FEDERAL HIGHWAY ADMINISTRATION  
AND  
THE FLORIDA DEPARTMENT OF TRANSPORTATION  
FOR  
WAIVERS OF THE TIFIA CREDIT PROGRAM PROCEDURES**

THIS EARLY DEVELOPMENT AGREEMENT (hereinafter "EDA"), made and entered into this 28<sup>th</sup> day of July 2008, by and between the FLORIDA DEPARTMENT OF TRANSPORTATION (hereinafter "FDOT"), and the FEDERAL HIGHWAY ADMINISTRATION, UNITED STATES DEPARTMENT OF TRANSPORTATION, (hereinafter "FHWA").

**WITNESSETH**

WHEREAS, on March 24, 2008 FDOT submitted an application under Special Experimental Project Number 15 ("SEP-15") for waivers of the Transportation Infrastructure Finance and Innovation Act ("TIFIA") program procedures to obtain conditional credit assistance under the TIFIA credit program for the I-595 Corridor Roadway Improvements Project ("I-595") and three projects to be named in the future ("Projects");

WHEREAS, on October 6, 2004, FHWA announced, in the Federal Register at 60 Fed. Reg. 59983, a new special experimental project to explore alternative and innovative approaches to the overall project development process known collectively as SEP-15 pursuant to the authority in 23 U.S.C. § 502(b)(1)(B);

WHEREAS, in an effort to more effectively use and streamline the TIFIA credit program approval process, FDOT's SEP-15 application proposes the use of an innovative financing approach for procuring the Projects, which included certain specified modifications or deviations from the current requirements and policies contained in title 23 of the United States Code, title 23 of the Code of Federal Regulations, and the TIFIA Program Guide, to advance the Projects under SEP-15;

WHEREAS, SEP-15 is designed to permit tests and experimentation in the project development process for title 23 projects 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, FHWA may grant modifications or deviations from the current requirements contained in title 23 of the United States Code, title 23 of the Code of Federal Regulations, and the TIFIA Program Guide; and,

WHEREAS, on April 22, 2008, FHWA accepted FDOT's SEP-15 application for the I-595 project and three projects to be named in the future;

WHEREAS, under SEP-15, an EDA between FDOT and FHWA is required in order to specify the conditions relating to the modifications or deviations from Federal requirements that are granted for the Projects 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, FDOT and FHWA hereby agree as follows:

## **SECTION 1. SCOPE OF EARLY DEVELOPMENT AGREEMENT**

1.1 This EDA is intended to identify and establish the parameters of the modifications or deviations from title 23 of the United States Code, title 23 Code of Federal Regulations, and the TIFIA Program Guide in connection with the use of TIFIA credit assistance to provide financing for the Project, which shall be hereinafter referred to as the "experimental features." Nothing in this EDA shall be construed as a relinquishment of any Federal oversight or stewardship responsibility.

1.2 The experimental features in Sections 4, 5, and 6 of this EDA shall apply to the I-595 project. Application of the experimental features described in Sections 4, 5, and 6 for the three projects to be named, shall be conditioned upon FDOT's submission of a written request to proceed with the next Project which shall include a statement explaining the benefit of repeating the experimental features.

## **SECTION 2. DEFINITIONS**

### **2.1 Applicant**

"Applicant" means the FDOT.

### **2.2 Conditional Term Sheet**

"Conditional Term Sheet" means contractual agreement between the United States Department of Transportation ("DOT") and each of the short listed proposers containing the key terms and conditions that will be incorporated into the final Credit Agreement by which DOT reserves TIFIA funding for a specific project and commits to providing Federal credit assistance to that project at a future point in time upon satisfaction of specified conditions and subject to the future availability of obligation authority.

### **2.3 Credit Agreement**

"Credit Agreement" means the definitive agreement between DOT and the borrower that specifies all terms and conditions of the credit assistance and authorizes funding of the TIFIA credit instrument.

### **2.4 Developer**

"Developer" means the Proposer that is awarded the contract for a Project.

## **2.5 DOT**

“DOT” means United States Department of Transportation.

## **2.6 DOT Credit Council**

“DOT Credit Council” means the nine-member body which provides policy direction and makes recommendations to the Secretary regarding the selection of projects for TIFIA credit assistance composed of representatives of the DOT Offices of Budget, General Counsel, Policy, and Small and Disadvantaged Business Utilization, and the Administrators of the FHWA, Federal Railroad Administration, Federal Transit Administration, and the Maritime Administration.

## **2.7 Preliminary Rating Opinion Letter**

“Preliminary Rating Opinion Letter” means the conditional credit assessment from a nationally recognized credit rating agency that provides a preliminary indication of a project’s overall creditworthiness and that specifically addresses the potential of the project’s senior debt obligations to achieve an investment grade rating.

## **2.8 Plan of Finance**

“Plan of Finance” means the comprehensive document reflecting the cost and revenue structure of a project that includes, but is not limited to, estimated project costs and activity breakdowns, sources and uses of funds descriptions, and cash flow pro forma, as specified in Appendix D of the TIFIA Program Guide.

## **2.9 Projects**

“Projects” means the I-595 project as described in FDOT’s March 24, 2008 SEP-15 application and three additional projects to be named in the future.

## **2.10 Proposer**

“Proposer” means each entity or team of entities that submits a proposal in response to a Request for Final Proposals.

## **2.11 Request for Final Proposals**

“Request for Final Proposals” (“RFP”) means a Request for Final Proposals issued by FDOT in connection with each Project.

## **2.12 TIFIA**

“TIFIA” means the Transportation Infrastructure Finance and Innovation Act of 1998, 23 U.S.C. § 601-609.

## **2.13 TIFIA JPO**

“TIFIA JPO” means the Joint Program Office, which administers the TIFIA credit program, on behalf of the Secretary of the DOT.

## **2.14 TIFIA Program Guide**

“TIFIA Program Guide” means the 2007 TIFIA Program Guide that supplements the TIFIA regulations (49 C.F.R. Part 80) and describes how the DOT administers the TIFIA credit program, covering the application, evaluation, and selection process that DOT will use to determine who receives credit assistance.

# **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 Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. §§ 4601 to 4655, and the FHWA’s implementing regulations found at 49 C.F.R. Part 24, and the National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321 to 4370(f), with respect to any related facility, except as otherwise specified herein.

B. With respect to title 23 of the United States Code and title 23 of the Code of Federal Regulations, FDOT may apply to the I-595 project the SEP-15 experimental features described in Sections 4, 5, and 6 of the EDA. FDOT’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**

FHWA’s approval of any or all of the SEP-15 experimental features identified in Sections 4, 5, and 6 may be withdrawn at any time by FHWA if FHWA determines that the experimental features are not in the public interest. Prior to any such withdrawal, FHWA will issue a written notice to FDOT describing the FHWA’s findings and provide FDOT 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 FHWA determines that FDOT 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, titles 23 and 49 of the Code of Federal Regulations, and the TIFIA Program Guide shall immediately apply. Notwithstanding the foregoing, any withdrawal of an approval under this paragraph shall not (a) invalidate or require modification of any previously executed Conditional Term Sheet entered into in reliance upon such approval, (b) affect the obligations of the parties under a previously executed Conditional Term Sheet, and (c) otherwise apply retroactively to any completed elements or activities.

### **3.3 Access to Documents**

As provided in 23 C.F.R. § 1.5, FDOT shall furnish, or make available, to FHWA such information as the FHWA deems necessary, as more particularly described in this Agreement, to administer the TIFIA credit program in connection with the Projects and ensure compliance with any applicable Federal requirements. Any records that a Proposer or other private party does not want to be made publicly available shall be reviewed by FHWA in accordance with the procedures outlined in the FHWA January 26, 2005, memorandum concerning "Pre-submission Evaluation of Information under the Freedom of Information Act." (Attached as Exhibit A) 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 supersedes the March 24, 2008, FDOT SEP-15 application and the FHWA April 22, 2008, SEP-15 acceptance letter. The March 24, 2008, FDOT SEP-15 application and the April 22, 2008, FHWA SEP-15 acceptance letter are attached to this EDA as Exhibits B & C, 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 supersede any conflicting provisions of the March 24, 2008 SEP-15 application, the April 22, 2008 SEP-15 acceptance letter and any prior modifications to the EDA.

## **SECTION 4. EXPERIMENTAL FEATURES – INITIAL APPLICATION PROCESS**

### **4.1 Deviations from the TIFIA Program Guide, Section Chapter 4, Section 4-2 – SEP-15 Application serves as the Letter of Interest (LOI) for the Projects advanced under this EDA**

A. FHWA acknowledges and agrees to FDOT's deviation from Section Chapter 4, Section 4-2 of the TIFIA Program Guide, as provided in the FHWA April 22, 2008, SEP-15 acceptance letter, by waiving the LOI submission and the requirement that FDOT provide information about the Developer and a proposed Plan of Finance.

B. The LOI serves three purposes. First, it familiarizes the DOT with the basic information relating to the project and sponsor. Second, it permits the DOT and the sponsor to ensure that the project meets the most basic eligibility requirements for participation. Third, it allows the DOT to designate an appropriate evaluation team for the project.

C. Each potential TIFIA applicant must first submit a detailed LOI describing the project and outlining the proposed plan of finance, including the requested credit assistance. The LOI should contain a description of the project, information about proposed financing for the project, background on the project sponsor, a discussion of the benefits of the proposed project and its use of TIFIA assistance, and a summary of the project's status in the environmental review process.

D. In order to ensure that the purposes and requirements of Chapter 4, Section 4-2, as listed in 4.1.B and 4.1.C, are protected, the following conditions must be met:

(i) Prior to issuance of a RFP for a Project, FDOT will submit to the FHWA Florida Division Office a request to proceed with the next Project no later than 90 days before the issuance of a RFP. The request will identify the Project and will include a development schedule, a summary of the project's status in the environmental review process, information regarding the prospective proposers including their qualification and legal structures, and information about the payment mechanism and limited pro forma data based upon the Major Project Financial Plan. The request should be accompanied by a timetable showing the major steps and dates in the procurement process. This requirement does not apply to the I-595 project as the SEP-15 Application contains sufficient information for the TIFIA JPO to assess whether the project meets the basic eligibility requirements for TIFIA credit assistance. The FHWA Florida Division Office and the TIFIA JPO will determine whether the Project meets the conditions of this EDA, and if so, will notify FDOT that it may proceed with the issuance of a RFP.

(ii) As the procurement process proceeds, FDOT shall provide timely notice to the FHWA Florida Division Office and the TIFIA JPO concerning the Proposers, their qualifications, and their legal structures.

(iii) Further, FDOT will seek input from prospective Proposers concerning Plan of Finance information such as project costs and revenues and will keep the FHWA Florida Division Office and the TIFIA JPO informed concerning the Proposers' plans to use TIFIA credit assistance, the type of credit assistance, any special terms that may apply to the Credit Agreement, and their proposed Plan of Finance before the issuance of a RFP. After issuance of the RFP, Proposers may negotiate a Conditional Term Sheet directly with the TIFIA JPO.

(iv) At the time FDOT requests to proceed with the next Project, it will provide written confirmation that the FHWA has approved the Project with a Finding of No Significant Impact or Categorical Exclusion, or that a Draft Environmental Impact Statement has been circulated.

## **SECTION 5. EXPERIMENTAL FEATURES – APPLICATION PROCESS**

### **5.1 Deviations from 49 C.F.R. § 80.7(b) – Application Process and TIFIA Program Guide, Chapter 4, Section 4-2 Application Requirements A and E – Contact, Organizational, and Legal Information about the Project Sponsor – SEP-15 Application serves as the TIFIA Application for the Projects Advanced under this EDA**

A. FHWA acknowledges and agrees to the deviation from 49 C.F.R. § 80.7(b) – Application Process and Chapter 4, Section 4-2 Application Requirements A and E of the TIFIA Program Guide, as provided in the FHWA April 22, 2008, SEP-15 acceptance letter, by waiving the requirement that when an application for TIFIA credit assistance is submitted the Applicant provide information about where and how to contact the Developer, its organizational structure, experience, and legal authority to carry out the activities described in the application.

B. The purpose of 49 C.F.R. § 80.7(b) and Chapter 4, Section 4-2 Application Requirements A and E is to determine whether the project sponsor (or borrower) has the qualifications, financial resources, legal authority, and demonstrated capabilities to develop a project and can comply with TIFIA requirements.

C. In order to ensure that the purposes of Chapter 4, Section 4-2 Application Requirements A and E of the TIFIA Program Guide are fulfilled, the following conditions must be met:

(i) FDOT will pay to DOT the nonrefundable application fee of \$30,000 for each Project advanced under the terms of this EDA.

(ii) FDOT's RFP for each Project will require Proposers that desire to use TIFIA credit assistance to submit to the TIFIA JPO information and certifications that address all applicable TIFIA requirements as set forth in the TIFIA Program Guide prior to submitting their proposals.

(iii) As the procurement process proceeds for each Project, FDOT will timely inform the FHWA Florida Division Office and the TIFIA JPO concerning the Proposers and their qualifications, organizational structure, and legal authority to carry out the activities described in the application. Once the RFP for each Project has been issued, the pre-qualified proposers may negotiate a Conditional Term Sheet directly with the TIFIA JPO. The Proposers will be required to directly provide all information pre-negotiated with the TIFIA JPO in the submittal of their proposals.

(iv) Prior to the release of the RFP for each Project, and in accordance with 23 C.F.R. § 635.112, FDOT will transmit the draft RFP documents to the FHWA Florida Division Office and the TIFIA JPO for review and concurrence on TIFIA-related provisions to confirm that TIFIA requirements are addressed. The FHWA Florida Division Office will be notified of, and allowed to participate in, all industry meetings. The FHWA Florida Division Office and the TIFIA JPO will participate at their discretion in all informational meetings with Proposers during which TIFIA-related matters are discussed.

## **5.2 Deviation from TIFIA Program Guide, Chapter 4, Section 4-2 Application Requirement D – Requirement to Submit a Detailed Financial Plan**

A. FHWA acknowledges and agrees to FDOT's deviation from Chapter 4, Section 4-2 Application Requirement D of the TIFIA Program Guide, as provided in the FHWA April 22, 2008, SEP-15 acceptance letter, by waiving the requirement that when an application for TIFIA credit assistance is submitted the Applicant provide a detailed plan of finance, including estimated project costs and activity breakdowns, sources and uses of funds descriptions, cash flow pro forma, supplementary narratives on borrowed funds and revenue sources, proposed terms for the requested TIFIA credit instrument, and risk and mitigation strategies.

B. The purpose of Chapter 4, Section 4-2 Application Requirement D of the TIFIA Program Guide is to determine a project's overall creditworthiness and provide reasonable assurance that there will be sufficient financial resources available to implement and complete the project as planned, and repay all borrowed funds, including TIFIA credit assistance.

C. In order to ensure that the purposes of Chapter 4, Section 4-2 Requirement D of the TIFIA Program Guide are protected, the following conditions must be met:

(i) FDOT must demonstrate that each Project meets eligibility and project selection criteria set out in 23 U.S.C. § 602(a) and (b)(2)(A).

(ii) For each Project, FDOT will submit to the TIFIA JPO 60 days before issuance of a RFP for a Project a pro forma plan of finance based on internal FDOT assumptions which includes a financial model and forecast of revenues. The pro forma plan of finance will include preliminary information on estimated project costs with activity breakdowns, projected revenues, the senior lien debt, the type and amount of TIFIA credit assistance, repayment terms, and amortization schedules for all project debt with coverage calculations. Sufficient information must be provided in the pro forma plan of finance to enable DOT to conduct a formal risk assessment and to determine the maximum amount of TIFIA credit assistance based on eligible Project costs. The pro forma plan must 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 DOT and that it will follow the FHWA's Major Project Finance Plan guidelines.

(iii) The pro forma plan of finance for the Project must demonstrate to the satisfaction of the TIFIA JPO that the financing can be structured such that the senior obligations have the potential to achieve an investment grade rating.

(iv) The FDOT RFP for each Project will require Proposers that plan to use TIFIA credit assistance to submit with their proposals a Plan of Finance that contains all of the required elements specified in the TIFIA Program Guide. Once the FDOT RFP has been issued Proposers that desire to use TIFIA credit assistance will negotiate directly with the TIFIA JPO and will be required to directly provide to the TIFIA JPO and the FHWA Florida Division Office a Plan of Finance that contains all of the required elements specified in the TIFIA Program Guide.

**5.3 Deviation from 23 U.S.C. § 602(b)(2)(B), 49 C.F.R. §§ 80.11(a) and 80.15(b) and the TIFIA Program Guide, Chapter 3, Section 3.5, Rating Opinions – Requirement to Submit a Preliminary Rating Opinion Letter**

A. FHWA acknowledges and agrees to FDOT's deviation from 23 U.S.C. § 602(b)(2)(B), 49 C.F.R. §§ 80.11(a) and 80.15(b), and the TIFIA Program Guide, Chapter 3, Section 3-5, as provided in the FHWA April 22, 2008, SEP-15 acceptance letter, by waiving the requirement that when an application for TIFIA credit assistance is submitted the Applicant 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.

B. The purpose of the Preliminary Rating Opinion Letter in 23 U.S.C. § 602(b)(2)(B), 49 C.F.R. §§ 80.11(a) and 80.15(b), and the TIFIA Program Guide, Chapter 3, Section 3-5, is to provide a preliminary assessment of the project's proposed financing structure indicating the project's potential for senior obligations to receive an investment grade rating, a statutory requirement for receiving TIFIA credit assistance.

C. In order to ensure that the purposes of 23 U.S.C. § 602(b)(2)(B), 49 C.F.R. §§ 80.11(a) and 80.15(b), and the TIFIA Program Guide, Section 3-5, are protected, the following conditions must be met:

(i) FDOT may defer providing a Preliminary Rating Opinion Letter if the plan of finance submitted for each Project demonstrates to the satisfaction of the TIFIA JPO that the Project's financing can be structured such that the senior obligations have the potential to achieve an investment grade rating.

(ii) The FDOT RFP will require each Proposer that plans to use TIFIA credit assistance to provide to the TIFIA JPO a Preliminary Rating Opinion Letter to supplement the Plan of Finance submitted by the Proposer to the TIFIA JPO.

**5.4 Deviation from TIFIA Program Guide, Chapter 4, Section 4-2 Application Requirement B – Requirement to Submit a Project Management and Compliance Monitoring Plan and a Description of Project Operations and Maintenance.**

A. FHWA acknowledges and agrees to FDOT's deviation from the TIFIA Program Guide, Chapter 4, Section 4-2, as provided in the FHWA April 22, 2008, SEP-15 acceptance letter, by waiving the requirement that when an application for TIFIA credit assistance is submitted the Applicant provide a project management and compliance monitoring plan and a description of project operations and maintenance.

B. The purpose of these requirements in Chapter 4, Section 4-2 Application Requirement B of the TIFIA Program Guide is to assure DOT of the project sponsor's ability to deliver the project as planned, fulfill all project commitments, ensure compliance with all terms of the credit agreement including all applicable regulations and provisions of law, and effectively operate/maintain the project to minimize risk of operational default.

C. In order to ensure that the purposes of the TIFIA Program Guide, Chapter 4, Section 4-2 Application Requirement B are protected, the following conditions must be met:

(i) The FDOT RFP for each Project will require Proposers that plan to use TIFIA credit assistance to submit with their proposals a project management and compliance monitoring plan and a description of project operations and maintenance.

(ii) If the Proposer decides to submit to the TIFIA JPO a project management plan prior to selection of a Developer, the TIFIA JPO will review the project management and compliance monitoring plan and description of project operations and maintenance submitted by the Proposer for compliance with TIFIA requirements.

(iii) If the selected Proposer did not already submit to the TIFIA JPO a project management plan, it must provide a project management plan in its proposal and upon selection, the TIFIA JPO will review the project management and compliance monitoring plan and description of project operations and maintenance for compliance with TIFIA requirements.

## **SECTION 6. EXPERIMENTAL FEATURES – CONTRACTUAL DOCUMENTS AND COMMITMENT PROCEDURES**

### **6.1 Deviation from TIFIA Program Guide Chapter 6, Section 6-1 Approval and Term Sheet Prerequisites – Project Selection and Conditional Term Sheet**

A. FDOT requests and FHWA acknowledges and agrees to the deviation from Chapter 6, Section 6-1 Term Sheet Prerequisites of the TIFIA Program Guide, as provided in the FHWA April 22, 2008, SEP-15 acceptance letter, by waiving certain prerequisites for project selection and issuance of a Conditional Term Sheet, including the Preliminary Rating Opinion Letter and detailed information on the financial structure and the Developer.

B. The purpose of the term sheet is to set forth key business terms and conditions of TIFIA credit assistance for a project, binding the DOT and the project sponsor to the specified terms. Further, the term sheet obligates budget authority for the project. A conditional term sheet reserves TIFIA funding for a project and commits to providing credit assistance to a project at a future point in time upon satisfaction of specified conditions by the project sponsor and subject to the future availability of obligation authority.

C. In order to ensure that the purpose described in 6.1.B is satisfied, the following stipulations shall apply:

(i) Project selection and issuance of a Conditional Term Sheet for the Project is subject to DOT Credit Council approval and a final determination by the Secretary of the DOT.

(ii) FDOT shall also notify Proposers in the RFP for each Project that they will be required to reimburse DOT for all credit processing costs (e.g., outside financial and legal consultant costs in connection with the evaluation of all proposals which include TIFIA credit assistance, negotiation of Conditional Term Sheets, negotiation of final terms in the Credit Agreement, and execution of the TIFIA Credit Agreement) if they are the successful Proposer. In the event that a TIFIA Credit Agreement is not executed for the Project, FDOT agrees to reimburse DOT for all such credit processing expenses incurred by DOT in connection with the Project.

(iii) The Conditional Term Sheet will require the Developer to reimburse the DOT for all credit processing costs (e.g., outside financial and legal consultant costs in connection with the evaluation of all proposals, negotiation of Conditional Term Sheets, negotiation of final terms in the Credit Agreement, and execution of the TIFIA Credit Agreement) related to the Project.

(iv) Following DOT's determination that the Developer has met the requirements for TIFIA credit assistance, DOT will issue a final term sheet obligating budget authority and will finalize negotiations with respect to TIFIA credit assistance with the Developer.

## **6.2 One-on-One Meeting with Pre-qualified Proposers**

A. FDOT requests and FHWA acknowledges and agrees that the TIFIA JPO may participate in one-on-one meetings with the Proposers once the FDOT RFP has been issued for the I-595 and for the three projects to be named prior to the submission of proposals pursuant to the FDOT RFP.

B. TIFIA JPO's participation in one-on-one meetings is predicated on the Proposer's adherence to all TIFIA program requirements, including any terms and conditions pre-negotiated with FDOT, and the following stipulations:

(i) Pre-qualified Proposers will be allowed to meet with TIFIA JPO for a period starting not later than 60 days before the due date for proposals set by FDOT, and continuing until the submission deadline.

(ii) The TIFIA JPO may discuss the terms of TIFIA credit assistance that the Proposers are considering, as well as the other provisions of their proposed financial proposals to determine if the Proposers satisfy the eligibility requirements for TIFIA credit assistance.

(iii) The TIFIA JPO will not participate in FDOT's review of the proposal submissions. If TIFIA credit assistance is sought by the Developer selected by FDOT, the TIFIA JPO will then negotiate a Credit Agreement directly with such Developer.

(iv) In connection with such meetings, Proposers must provide, upon request, to the TIFIA JPO financial models, documents, reports, and other written information necessary to inform the TIFIA JPO concerning the proposed terms of TIFIA credit assistance and other aspects of the proposed financial plan, including project cost information, operating expenses, sources and uses of funds, repayment schedules, coverage ratios, traffic and revenue studies, and lender commitments.

(vi) The confidentiality of any documents, reports, or other written information provided by the Proposers to FHWA shall be determined in accordance with 49 C.F.R. Part 7. Prior to the submission of any documents, reports, or other written information that a Proposer or the Developer does not want to be made publicly available, the Proposer may request FHWA to conduct a review of the information in accordance with Section 3.3.

## **SECTION 7. EVALUATION CRITERIA**

### **7.1 Time Savings**

FDOT will evaluate the following to measure time-savings:

(1) Compare the actual schedule for receiving TIFIA credit assistance approval and execution of a credit agreement with the Developer with the estimated schedule based on a traditional procurement process and TIFIA standard process;

(2) Evaluate the effect of the SEP-15 experiments on the receipt of final proposals and financial close; and

(3) Attempt to assess the value of the streamlined TIFIA credit approval approach described herein.

## **7.2. Innovation in Financing**

FDOT will analyze the financing structures and methods developed in connection with the Project and how those structures and methods compare to historical project financing structures and methods for comparable projects. As part of this analysis and comparison, FDOT will particularly focus upon the levels of financing and project risk shifted to the private sector and strategies employed to minimize risk to the State of Florida. FDOT will also evaluate the benefits and value of the inclusion of a pro forma financial plan in the RFP.

FDOT shall also analyze how the experimental process for TIFIA was perceived by the industry. FDOT will collect and evaluate the final Proposers' observations about the experiments carried out pursuant to this EDA, including the process used to develop the pro forma financial plan in the RFP.

FDOT shall attempt to measure the extent to which the experimental process for TIFIA encouraged additional private participation in each Project procurement.

## **SECTION 8. REPORTING**

### **8.1 Initial Report**

FDOT will submit an initial report within 120 days after the execution of the contract for the Project and will include a preliminary analysis of the public-private partnership 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 experimental 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.

### **8.2 Post Acceptance Reports**

A. FDOT shall prepare or commission a third-party to prepare a post acceptance report within 180 days following execution of the contract and financial close for each Project. This report will provide an overall evaluation of the role of the TIFIA experimental process in the procurement of detailed proposals and the execution of the procurement process for the Project. The post acceptance report will include:

(1) An overall evaluation of the process used to obtain TIFIA credit program assistance as described in this agreement in the procurement of detailed proposals and the execution of the final contract for the Project;

(2) A description of lessons learned, including problems to avoid and suggestions for improvements on future innovative procurements and approaches utilizing the TIFIA credit program;

(3) An evaluation of the SEP-15 experimental features used and the extent to which those features contributed to the Project's success; and

(4) A recommendation on any statutory or regulatory change or change in standard TIFIA procedures or policies.

## **SECTION 9. MISCELLANEOUS PROVISIONS**

### **9.1 Amendments**

This EDA may be amended at any time by written agreement of FHWA and FDOT. 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 Florida Division Administrator shall have the authority to amend this EDA for the FHWA, subject to the concurrence of the TIFIA JPO and FDOT.

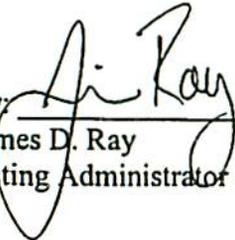
### **9.2 Original Copies**

This EDA shall be prepared in duplicate so that each signatory has an original copy.

**SIGNATURE PAGE FOLLOWS**

IN WITNESS THEREOF, the Parties hereto have caused this Early Development Agreement to be duly executed in duplicate as of the day and year first written above, either on one original document or via multiple counterparts through facsimile, which, when taken together, shall constitute one and the same instrument.

**FEDERAL HIGHWAY ADMINISTRATION**

By:  \_\_\_\_\_  
James D. Ray  
Acting Administrator

**FLORIDA DEPARTMENT OF TRANSPORTATION**

By:  \_\_\_\_\_  
Stephanie Kopelousos  
Secretary



U.S. Department  
of Transportation

Federal Highway  
Administration

# Memorandum

**Subject:** Pre-submission Evaluation of Information  
under the Freedom of Information Act

**Date:** January 26, 2005

**From:** Chief Counsel

**Reply to**  
**Attn. of:** HCC-40

**To:** Assistant Chief Counsels

A proposal for a public-private partnership submitted under the Federal Highway Administration's (FHWA) Special Experimental Program No. 15 (SEP-15) may include proprietary information that might be exempt from public disclosure under the Freedom of Information Act (FOIA). Even though the private sponsor recognizes the importance of submitting the information to the Federal government, a submitter of information wishes to have a high degree of confidence, before submitting the information to FHWA, that the information will not be disclosed by the Department of Transportation (DOT) if requested under FOIA.<sup>1</sup> The uncertainty of whether the information would be subject to release under FOIA, serves as a disincentive to private sponsors to propose innovative ideas. To address this impediment to the use of PPPs on Federal-aid highway projects, the following procedure shall be made available to PPP project partners prior to the submission of a formal PPP proposal.

1. A representative of FHWA and an attorney from the Office of Chief Counsel (HCC) will examine the records at a place not under the control of any Federal agency (such as a private office).
2. The FHWA representative and HCC attorney will identify those records for which they are confident of DOT's authority to withhold them if requested under FOIA.
3. FHWA will not take any of the records with us when we leave the place of examination.
4. The submitter may then submit to FHWA the records in item 2, above.

The attachment to this memorandum is a direct quotation from the Department of Justice's *Freedom of Information Act Guide* on the threshold question of what records are subject to FOIA. The procedure that we have used follows closely the four-part test set forth there, as follows:

1. The intent of the record's creator to retain or relinquish control over the records. The very use of this procedure is strong evidence of this element.
2. The ability of the agency to use and dispose of the record as it sees fit. Since neither the FHWA representative nor HCC attorney will take any of the records, they will lack the ability to use or

<sup>1</sup> DOT regulations implementing FOIA require that, before any element of DOT may issue a final denial of a FOIA request, the DOT General Counsel's Office must concur. See 49 CFR Part 7. Hence, any commitment by an element of DOT not to disclose information under FOIA must also have the concurrence of the General Counsel's Office.

dispose of them. Examining them at a place not under the control of any Federal agency denies FHWA the "control" required by the Supreme Court.

3. The extent to which agency personnel have read or relied upon the record. Although FHWA will have examined the records enough to come to judgments about DOT's ability to withhold them if requested under FOIA, FHWA will not be among those who work on whatever records the submitter elects to submit, so the records will not be relied upon.

4. The degree to which the record was integrated into the agency's recordkeeping system or files. None of the records that FHWA examines will become part of a DOT recordkeeping system unless and until the submitter submits them.

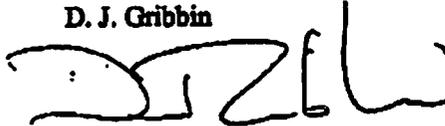
As to any records for which we give assurance and that are submitted to FHWA, DOT will provide the following commitments in writing:

1. The information will be treated as confidential by DOT.
2. DOT will withhold the information if it is sought under FOIA.
3. If taken to court on our decision to withhold the information under FOIA, DOT will forcefully argue to the Department of Justice the validity of that decision and urge it to defend that decision by all appropriate means.

We cannot, of course, commit the Department of Justice to any particular litigation position, nor can we bind a court to a decision in our favor.

If you have any questions about these procedures, please contact attorney Robin Fields, Administrative and Technology Law Division, at 202-366-1355.

D. J. Gribbin



Attachment

### Attachment

#### From the Department of Justice *Freedom of Information Act Guide* (May 2002)

"The Supreme Court has articulated a basic, two-part test for determining what constitutes "agency records" under the FOIA: "Agency records" are records that are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.<sup>1</sup> Inasmuch as the "agency record" analysis usually hinges upon whether an agency has sufficient "control" over a record,<sup>2</sup> courts have identified four relevant factors for an agency to consider when making such a determination: the intent of the record's creator to retain or relinquish control over the record; the ability of the agency to use and dispose of the record as it sees fit; the extent to which agency personnel have read or relied upon the record; and the degree to which the record was integrated into the agency's recordkeeping system or files.<sup>3</sup>

"1. United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (holding that court opinions in agency files are agency records).

"2. See, e.g., Int'l Bhd. of Teamsters v. Nat'l Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (determining that submission of gummed-label mailing list as required by court order not sufficient to give "control" over record to agency); McErlan v. United States Dep't of Justice, No. 97-7831, 1999 WL 791680, at \*11 (S.D.N.Y. Sept. 30, 1999) (finding that agency had no "control" over requested records because it assented to dissemination and use restrictions requested by confidential source who provided them); KDKA v. Thornburgh, No. 90-1536, 1992 U.S. Dist. LEXIS 22438, at \*\*16-17 (D.D.C. Sept. 30, 1992) (concluding that Canadian Safety Board report of aircrash, although possessed by National Transportation Safety Board, is not under agency "control," because of restrictions imposed by Convention on International Civil Aviation); Teich v. FDA, 751 F. Supp. 243, 248-49 (D.D.C. 1990) (holding that documents submitted to FDA in "legitimate conduct of its official duties" are agency records notwithstanding FDA's pre-submission review regulation allowing submitters to withdraw their documents from agency's files (quoting Tax Analysts, 492 U.S. at 145)); Rush v. Dep't of State, 716 F. Supp. 598, 600 (S.D. Fla. 1989) (finding that correspondence between former ambassador and Henry Kissinger (then Assistant to the President) were agency records of Department of State as it exercised control over them); McCullough v. FDIC, 1 Gov't Disclosure Serv. (P-H) ¶ 80,194, at 80,494 (D.D.C. July 28, 1980) (concluding that reports transmitted to agency by state regulatory authorities were agency records because "it is questionable whether [state authorities] retained control" over them); see also FOIA Update, Vol. XIII, No. 3, at 5 (advising that records subject to "protective order" issued by administrative law judge remain within agency control and are subject to FOIA).

"3. See Tax Analysts v. United States Dep't of Justice, 845 F.2d 1060, 1069 (D.C. Cir. 1988) (citing Lindsey v. Bureau of Prisons, 736 F.2d 1462, 1465 (11th Cir. 1984)), aff'd, 492 U.S. 136 (1989); see, e.g., Katz v. NARA, 68 F.3d 1438, 1442 (D.C. Cir. 1995) (holding that autopsy x-rays and photographs of President Kennedy, created and handled as personal property of Kennedy estate, are presidential papers, not records of any agency); Gen. Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (determining that agency "use" of internal report submitted in connection with licensing proceedings renders report

an agency record); Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (holding that transition team records, although physically maintained within "four walls" of agency, were not agency records under FOIA); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11-12 (D.D.C. 1995) (following Wash. Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991), to find that transcript of congressional testimony provided "solely for editing purposes," with cover sheet restricting dissemination, is not an agency record), aff'd on other grounds, 76 F.3d 1232 (D.C. Cir. 1996); Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (declaring that records created outside federal government which "agency in question obtained without legal authority" are not agency records), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987); Ctr. for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) (holding that agency report, prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy, is not an agency record); see also Holy Spirit Ass'n v. CIA, 636 F.2d 838, 841 (D.C. Cir. 1980) (warning that non-"agency record" status "can be lost" if record is "not designated" as such prior to agency's receipt of FOIA request); cf. SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by National Library of Medicine Act); Baizer v. United States Dept of the Air Force, 887 F. Supp. 225, 228-29 (N.D. Cal. 1995) (holding that database of Supreme Court decisions, used for reference purposes or as research tool, is not an agency record); Waters v. Pan. Canal Comm'n, No. 85-2029, slip op. at 5-6 (D.D.C. Nov. 26, 1985) (finding that Internal Revenue Code is not an agency record).



## ***Florida Department of Transportation***

**CHARLIE CRIST**  
GOVERNOR

605 Suwannee Street  
Tallahassee, FL 32399-0450

**STEPHANIE C. KOPELOUSOS**  
SECRETARY

March 24, 2008

Mr. David Gibbs  
FHWA Division Office  
545 John Knox Road, Suite 200  
Tallahassee, FL 32303

**Re: Amended Request for SEP-15 Approval: Request for Waivers/Variations of TIFIA Program Procedures in Connection with a Competitive Procurement for the I-595 Corridor Roadway Improvements Project and Three Projects to be Named.**

Dear Mr. Gibbs:

This letter constitutes the amended application by the Florida Department of Transportation ("FDOT") for Special Experimental Program 15 ("SEP-15") approval of its plan to more effectively utilize the Transportation Infrastructure Finance and Innovation Act of 1998 ("TIFIA") credit assistance program and thereby leverage additional private co-investment opportunities for surface transportation projects of national significance. These amendments have been developed and reviewed by your staff and staff from the TIFIA Program Office. This request relates to our competitive procurement of the following projects:

- The I-595 Corridor Roadway Improvements Project in Broward County, Florida ("I-595"); and
- Three projects FDOT will name in the future.

Exhibit A of this application includes a description of I-595, which is located on the Interstate Highway System. FDOT will provide the TIFIA Joint Project Office ("TIFIA JPO") more detailed project descriptions for each of the three other projects when FDOT notifies the TIFIA JPO of its intent to seek TIFIA credit assistance for that project.

Due to an expedited procurement schedule for I-595, FDOT would greatly appreciate your timely response to this application. There are three shortlisted proposer teams for I-595 and FDOT anticipates issuing the final Request for Proposals ("RFP") for I-595 on April 1, 2008. As a result, for this experiment to be most effective, FDOT would need a SEP-15 approval and executed Early Development Agreement (EDA) in place as soon as possible in order for proposers to negotiate term sheets with the TIFIA JPO before they submit firm, fixed price proposals for I-595.

As circumstances warrant, FDOT reserves the right to supplement this request to seek approval of other experimental features relating to these projects, including features relating to the design and construction of the projects.

## **Background**

FDOT is developing I-595 through a public-private partnership. Specifically, pursuant to a concession agreement, a private entity (the concessionaire) will have the right and obligation to develop, design, construct, finance, operate and maintain the project improvements. FDOT will compensate the concessionaire on I-595 through availability payments.

FDOT will ask the shortlisted proposers for I-595 to submit final detailed proposals that include financial offers. To promote maximum competition and ensure best value for the public, FDOT anticipates that the I-595 RFP will require the proposers to have the essential and material terms of their loan and equity commitments finalized and conditional loan and equity commitments in hand as of the proposal due date. This element of the procurement is crucial because it allows FDOT to compare the value to the State of each financial proposal and confirm that the proposer is likely to achieve financial close.

If any proposer is interested in seeking TIFIA credit support for I-595, the proposer will need to know whether such credit support is available, the amount available, and the terms and conditions of any TIFIA credit support before it delivers its financial proposal to FDOT. Note that two proposers for I-595 have already indicated an interest in pursuing TIFIA credit support. FDOT anticipates that it will require the proposers to have firm financial commitments and arrangements that will enable them to close project financing, including TIFIA credit assistance, within approximately three months after selection.

## **Purpose of Experiment**

Federal policies encourage price competition and FDOT seeks to foster such competition in all of its procurements. Accordingly, FDOT would like for the proposers' anticipated use of TIFIA credit assistance to become part of this competition. However, FDOT recognizes that it would be unduly burdensome for the TIFIA JPO to process separate TIFIA applications for each proposer during the proposal preparation period, when, ultimately, FDOT will award only one proposer the contract.

Therefore, the primary goal of this request is to effectively utilize the TIFIA program and to streamline the TIFIA approval process in connection with procuring a final proposal for each of the projects by having the TIFIA JPO and interested proposers (including the shortlisted I-595 proposers) meet and agree to a term sheet prior to the proposers submitting proposals. These individualized term sheets would function as the USDOT's commitment to the proposer to execute a TIFIA credit agreement with that proposer using the provisions of the term sheet if FDOT selects that proposer for the project. For I-595, and potentially other FDOT projects included within this request, proposers are required to submit firm, fixed price offers to FDOT that would not otherwise be possible without this experimental feature.

This process will enable proposers to prepare substantially final financial plans and include these plans in their proposals with the reasonable assurance that they can achieve financial close if selected. The price offers made to FDOT will only be valid for a limited period of time, so creating the ability to achieve financial close quickly is an important goal for this request. By

reducing the risk to the proposers that TIFIA assistance may not be available or secured in a timely fashion, FDOT believes that proposers will be encouraged to submit more detailed and complete financial proposals that do not price this risk. The end result should be more competitive financial packages that translate into a reduced need for public funding. Furthermore, TIFIA JPO staff, consultants and officials will be relieved of the burden of having to negotiate full credit agreements with multiple potential borrowers. FDOT expects this approach to produce time savings and innovation in project development and financing.

Although each proposer may refer to the cost information obtained from FDOT's Major Project Finance Plan, each is likely to have a different project financial plan, with different combinations of equity and debt, different debt terms depending in part on whether they are utilizing taxable bonds, Private Activity Bonds, bank loans or privately placed debt and different assumptions concerning project revenues over the term of the concession. Another goal of this request is to streamline TIFIA JPO's financial review process by keeping the TIFIA JPO informed of the legal and financial structure of each of the proposers that wish to use TIFIA credit assistance. At the same time, FDOT will work with the TIFIA JPO to ensure that shared information will be handled in a manner that, consistent with applicable law, preserves the confidential and sensitive nature of proposer financial and legal information, particularly during the ongoing procurement process. This process will result in a seamless final approval of the TIFIA credit assistance and execution of the credit agreement upon final selection by FDOT of a concessionaire.

#### **Experimental Features Relating to USDOT Negotiating TIFIA Credit Assistance Term Sheets With Project Proposers**

The implementing regulations for the TIFIA program appear at 49 CFR 80.1-80.21. These regulations appear to have been drafted based on the assumption that TIFIA applications involving private concessionaires would not be submitted to the USDOT until after the public entity has selected a proposer pursuant to its competitive procurement process. The USDOT would typically then evaluate the selected proposer's application for TIFIA credit assistance and decide whether to approve it. The USDOT, the project sponsor and the lenders would also negotiate and agree on the details of the TIFIA financing in a term sheet and a credit agreement.

FDOT expects the selected proposer to complete its financing arrangements within approximately three months after award with few contingencies. To ensure maximum value to the public from the competitive proposals, FDOT would like the proposers to be able to specifically include TIFIA financing, to the extent available and desired, in their final proposals. FDOT therefore requests the opportunity for project proposers to meet with the TIFIA JPO before submitting a project proposal to agree to individual term sheets for TIFIA credit assistance. Each proposer's term sheet would function as the USDOT's commitment to execute a TIFIA credit agreement with that proposer if FDOT selects that proposer for the Project..

To enable proposers to agree to terms sheets with the TIFIA JPO prior to submitting project proposals, FDOT is asking for several waivers of or variations from the usual TIFIA approval process, in particular, the provisions of Sections 49 CFR 80.7, 80.11 and 80.13. As the procurement process progresses, supplemental requests may be necessary.

## **A. Experimental Feature 1 — Waiver of Letter of Interest Requirements**

FDOT requests that you consider this SEP-15 application to be FDOT's letter of interest to use TIFIA credit assistance for each of the projects. FDOT believes that this deviation is appropriate because (i) FDOT has already provided the general project-related information it could submit in a letter of interest for I-595 in this application and (ii) FDOT cannot provide the additional information normally contained in a letter of interest (e.g., information regarding the project sponsor and that sponsor's plan of finance), because FDOT will not have that information until award of the concession agreement.

Note that while FDOT will not submit a letter of interest for I-595 or the other three projects, it will keep the TIFIA JPO informed of key project information as it becomes available. For example, as the procurement process for these projects proceed, FDOT would provide information regarding the prospective proposers, their qualifications and their legal structures. In addition, FDOT would provide information describing the payment mechanism and limited pro forma data based upon the Major Project Financial Plan for the each of the projects.

Experimental Feature 1 would deviate from Chapter 4, Section 4-1 of the TIFIA Program Guide: FDOT does not believe that this feature requires variances or waivers from any other statute, regulation or policy.

## **B. Experimental Feature 2 — Waiver of TIFIA Application Requirements**

FDOT requests that you consider this SEP-15 application to be FDOT's application to use TIFIA credit assistance for each of the projects. FDOT believes that this deviation is appropriate because FDOT is unable to provide further project-related information, including detailed financial information and definitive information about the final project sponsor, until it awards the concession agreement. For example, FDOT will not have a detailed financing plan, preliminary rating opinion or the other financing documents it would include in a TIFIA application until it receives these documents from the prospective proposers as part of their proposals. As a result, it would be inefficient for FDOT to submit a TIFIA application in addition to submitting this SEP-15 application.

Related to this request, FDOT proposes the following waivers/variances and procedures:

- a. The USDOT's Major Project Guidance for financial plans states that TIFIA applicants are to submit a TIFIA "Plan of Finance" with each TIFIA loan application. The Major Project Guidance also states that the USDOT Secretary of Transportation must approve a TIFIA loan prior to FHWA being able to accept the TIFIA "Plan of Finance" for a project. Furthermore, FHWA's acceptance of this plan is required before a project owner can award a design-build agreement.

FDOT has submitted the Initial Financial Plan for I-595 to the TIFIA JPO. The Initial Financial Plan is based on the Major Project Financial Plan for I-595. The Initial Financial Plan includes sufficient data for the TIFIA JPO to conduct an initial risk

assessment and to give the TIFIA JPO a sense of the detailed financing plans the project proposers may submit to the TIFIA JPO for consideration.

For the purposes of this experiment, the TIFIA JPO's review and approval of the FDOT's Initial Financial Plan for each of these projects will serve as FHWA's "acceptance" of a TIFIA "Plan of Finance" for that project and will authorize FDOT (and project proposers) to continue to pursue TIFIA financing for that project. Under the experimental process proposed, the TIFIA JPO would not be required to secure the USDOT Secretary of Transportation's approval of the TIFIA loan in order to approve the Initial Financial Plan. The TIFIA JPO will document its decision by providing FDOT with a written notice of acceptance. This variance will not change the requirement that the USDOT Secretary of Transportation must ultimately approve any final TIFIA loan. This feature will have the benefit of creating a "Plan of Finance" review and approval process that efficiently approves a project for further consideration before the TIFIA JPO directly negotiates a TIFIA credit assistance term sheet with project proposers.

- b. Instead of FDOT submitting an investment grade letter with this SEP-15 application or in an official TIFIA application, the proposer selected by FDOT as a result of the procurement process will submit to TIFIA an investment grade letter for their senior lien debt and provide a model reflecting that the terms the proposer negotiated with TIFIA in the term sheet are met. Because FDOT is not requiring a simultaneous commercial and financial closing, the timing of this submission would be up to the selected proposer.
- c. To further streamline the TIFIA review process, proposers will have equal opportunity to meet with the TIFIA JPO staff in one-on-one meetings during the period starting when FDOT issues the final RFP for a project and before the proposal due date. At these one-on-one meetings, each interested proposer and the TIFIA JPO would negotiate a term sheet (see Experimental Feature 3).
  - i. The TIFIA JPO will agree in the EDA to nondiscriminatory procedures that will ensure that all proposers receive equal treatment regarding the TIFIA JPO's availability to negotiate, TIFIA's sharing of non-confidential information, TIFIA's credit requirements and similar issues to assure a fair and competitive process;
  - ii. To preserve and maximize competition, both FDOT and the individual proposers will have a strong interest in maintaining the confidentiality of their financial negotiations and in not disclosing to the other proposers the terms and conditions of their respective project financial plans. Accordingly, TIFIA will protect all confidential information it receives from FDOT or the proposers and will adhere to all federal laws and regulations regarding non-disclosure of confidential information. Furthermore, TIFIA will cause its advisors to enter into a confidentiality agreement that will prohibit TIFIA's advisors from disclosing a proposer's ideas, positions taken in negotiations and agreements with the TIFIA JPO.

Experimental Feature 2 would require a waiver from the statutes and regulations set forth in 23 USC 182(b)(2)(B), 49 CFR 80.7(a) and (b), 80.11(a) and 80.15(b). Experimental Feature 2 will also require a waiver from the portion of USDOT's Major Project Guidance related to TIFIA projects and from Chapter 3, Section 3-5 (Rating Opinions), Chapter 4, Section 4-2 (Application), Chapter 5 (Selection Process) and any other requirements or processes related to the application submittal or evaluation process in the TIFIA Program Guide.

### **C. Experimental Feature 3 — Provision of Detailed Term Sheets**

The TIFIA JPO will negotiate and agree to a term sheet for TIFIA credit assistance with each of the proposers interested in pursuing such assistance not later than 15 days before the proposal due date stated in the RFP for a project. Under its usual procedures, the TIFIA JPO would await the conclusion of the procurement process to negotiate a term sheet with the proposer awarded the project. In connection with the experiment suggested above, to ensure that the competitive procurement process results in the best value to the public, FDOT believes it is critical that the shortlisted proposers have a term sheet for TIFIA credit assistance finalized while they prepare the financial plans for their proposals for the purpose of submitting a firm, fixed price offer to FDOT. Furthermore, agreement between the selected proposer and the TIFIA JPO on a term sheet before the proposal due date will facilitate financial close within the time frame required to preserve the validity of the successful bid. Accordingly, FDOT requests that the TIFIA JPO meet with proposers interested in pursuing TIFIA credit assistance to negotiate and agree upon individual term sheets not later than the deadline set forth above.

FDOT does not believe that Experimental Feature 3 requires a waiver or variance from any statute, rule or policy. FDOT has included it in this application out of an abundance of caution and to ensure a thorough description of the anticipated TIFIA application process.

#### **Work Plan**

Critical to the success of the experimental features described above and the use of TIFIA financing for these projects is adherence to work plans and schedules that are consistent with the procurement schedules for the projects. See Exhibit A for a tentative procurement schedule for I-595. FDOT proposes that the EDA include the commitment of the TIFIA JPO and FDOT to a work plan and schedule for I-595.

#### **Goals**

FDOT believes that the process for obtaining federal credit assistance under the TIFIA program in connection with the procurement process as described herein will serve the following goals:

- Expedite delivery of the projects, consistent with available public and private funding and maximize use of public-private partnerships and private equity in project delivery;
- Attract proposals from the highest quality, most capable and innovative domestic and international transportation and infrastructure entities and consortia;
- Encourage flexibility, innovation and alternative approaches to financing, design, construction, operation and maintenance;

- Create a process that encourages private sector competition and creates the maximum opportunity to leverage public contributions with private investment;
- Maximize project eligibility for all available forms of financing, allowing a plan of finance to be developed involving a combination of private sector funds, federal, state and other public funds (including both loans and grants), and leveraging scarce public funds to the maximum extent possible;
- Make the benefits of the TIFIA credit program available to all project proposers through an efficient process; and
- Ensure open, fair and wide competition for development of the projects.

### Measures/Evaluation

This experiment in the process for obtaining federal credit assistance under the TIFIA program, with its innovative features, will be evaluated on a range of factors, including:

1. **Time Savings:** FDOT will (1) compare the actual schedule for receiving TIFIA credit approval and execution of the credit agreement with the concessionaire with the estimated schedule based on a traditional approval process, as well as its previous experiences with the Miami Intermodal Center TIFIA Loans, (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:** FDOT will analyze the financing structures and methods developed in connection with the projects 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, FDOT will particularly focus on the levels of financing and project risk shifted to the private sector and the strategies employed to minimize the public sector's risk.

### Reporting

FDOT anticipates filing an initial report and a post-acceptance report for each of the projects as described below:

- **Initial Report:** FDOT will file the initial report within 120 days after the award of the concession agreement for a project and will include a preliminary analysis of the project procurement. This report will:
  - Describe the process used to select the concessionaire;
  - Identify any reaction by the industry to use of the TIFIA approval process as described herein;
  - Document major innovations contained in the proposals received; and
  - Discuss any major problems or issues that have occurred and how they were resolved.
- **Post Acceptance Report:** FDOT will submit a post acceptance report within 180 days following financial close for a project. This report will provide an overall evaluation of

**the role of the TIFIA approval process for that particular project procurement, including its impact on executing the concession agreement and arriving at financial close.**

**Time is of the essence in obtaining the approval of the experiment requested by this letter in order for FDOT to proceed with the procurement of these projects. We would greatly appreciate your earliest consideration of our application.**

**If you have any questions as you review this application, please contact Marsha Johnson at 850-414-4647. Please do not hesitate to request that our agency and staff meet to provide any clarifications or further explanations that you deem advisable.**

Sincerely,

*Gene Branagan*

**Gene Branagan  
Manager, Project Finance**

**GB:smb**

**Attachment**

**Enclosures: Exhibit A**

**cc: Steve Berry, Diane Flowers, Amy Causseaux, Jennifer Weeks**

## **Exhibit A**

### **I-595 Project Description and Tentative Schedule**

#### **I-595 Project Description**

##### **Project Overview**

The I-595 Corridor Roadway Improvements Project (the "Project") consists of the reconstruction of the I-595 mainline and all associated improvements to adjacent cross-roads, frontage roads and ramps from the I-75/Sawgrass Expressway interchange to the I-595/I-95 interchange, for a total project length of approximately 10.5 miles. FDOT will carry out the design, construction, operation and maintenance of the Project, which has an estimated cost of \$1.5 billion, through a concession agreement with a single concessionaire.

##### **Project Objectives**

The primary objectives of the Project are to:

- Optimize mobility in the corridor by maximizing traffic throughput and minimizing congestion in both the express lanes and the general purpose lanes;
- Maintain a high level of quality and safety provisions in the engineering, construction, maintenance and operations services provided by the concessionaire;
- Ensure a premium free-flow service is provided at all times on the express lanes, guaranteeing reliability of travel time; and
- Expedite the Project construction completion while adhering to established NEPA commitments for the Project.

##### **Project Location**

The I-595 corridor is located in central Broward County, Florida. The Project extends from the I-75/Sawgrass Expressway interchange west of SW 136th Avenue to the I-595/I-95 interchange, for a total project length of approximately 10.5 miles. The I-595 corridor passes through or lies immediately adjacent to six governmental jurisdictions: the City of Sunrise, Town of Davie, City of Plantation, City of Ft. Lauderdale, and Town of Dania, as well as unincorporated areas of Broward County.

The majority of the I-595 corridor is comprised of two facilities: I-595 and SR 84. Currently, the I-595 portion of the corridor is a six-lane, limited access facility. SR 84 is typically a four-lane facility, with two lanes in each direction located north and south of I-595. In addition to the interchanges with the two roadway systems at each end of the corridor, there are nine other interchanges along the corridor at the following crossroads: SW 136<sup>th</sup> Avenue, Flamingo Road (SR 823), Hiatus Road, Nob Hill Road, Pine Island Road, University Drive (SR 817), Davie Road, Florida's Turnpike (SR 91) and US 441 (SR 7).

## **Project History**

The Interstate 595 corridor was opened to traffic in 1989, moving high traffic volumes between the western parts of Southeast Florida, and the existing north-south freeways and principal arterials to the east: I-75, Florida's Turnpike, US 441/SR, I-95 and US 1/SR 5. Traffic increased dramatically as a result of Hurricane Andrew in 1992, recovery from the economic recession of the 1980's and changes in local land use plans. The I-595 Freeway Operational Analysis of 1994 evaluated traffic growth and corridor operations, found over-capacity conditions in numerous areas and identified needed short-term improvements. In 2003, the completed I-95/I-595 Master Plan predicted doubling of traffic, congestion, and delay along I-595 by 2020. A long range program of both highway and transit improvements was called for to address future over-capacity traffic conditions along the entire corridor.

## **Design and Construction**

The Project improvements include, but are not limited to, the following design and construction activities:

- Reconstruction, widening, milling and resurfacing of the I-595 and SR 84 roadways (and associated interchange modifications) within the Project limits;
- Construction of three (3) reversible express lanes in the I-595 median, serving express traffic to/from I-75 Sawgrass Expressway from/to I-95 with a direct connection to Florida's Turnpike;
- Additional (auxiliary) lanes that improve facility operations and the safety of vehicles entering and exiting the highway;
- Continuous connection of the SR 84 frontage road between Davie Road and SR 7;
- A new roadway connection (collector – distributor system) between Davie Road and I-95;
- Separated (braided) interchange ramps to eliminate mainline weaving segments;
- Combined ramps and cross-street bypasses to reduce congestion by decreasing the number of entrance and exit points on the highway;
- Noise wall construction;
- Intelligent transportation system deployment; and
- Geometric improvements to the I-595 / Florida's Turnpike interchange and widening / reconstruction of the Florida's Turnpike mainline from Griffin Road to Peters Road to integrate the express lanes direct connection.

The concessionaire selected by FDOT will be responsible for the preparation of all design and construction documents and the construction of the Project improvements.

## **Operations and Maintenance**

During the term of the concession agreement, the concessionaire will operate and maintain (i) the existing I-595 general purpose lanes, SR 84 and associated roadway infrastructure from the date construction commences, and (ii) the Project's capital improvements (with the exception of the express lanes toll system equipment and the Florida's Turnpike mainline) from the date the concessionaire reaches substantial completion. In addition, the concessionaire will be responsible for carrying out the maintenance of all physical elements of the Project facility and ultimately handing back the facility in a manner that is compliant with the handback requirements set forth in the concession agreement.

## **NEPA Approvals**

After review of the Project Development and Environmental (PD&E) Study for the Project, the Federal Highway Administration ("FHWA") approved a Type II Categorical Exclusion for the Project pursuant to the National Environmental Policy Act. This approval, dated June 20, 2006, allowed for the development of the preferred alternative concept (Alternative 2A – reconstruction with three (3) elevated express lanes). In early 2007, FDOT decided to modify the planned improvements by moving the elevated express lanes to ground level in the median of the existing facilities. On November 28, 2007, FHWA provided FDOT with a project reevaluation in which it officially approved the design change and concurred that the change to the previously approved design would not have "social, economic or environmental effects . . . that would significantly impact the quality of the human environment."

## **Express Lanes**

The express lanes will significantly improve the capacity and operations of the I-595 corridor by providing three (3) reversible lanes in the median. The lanes will reverse direction in order to better serve peak traffic demands (eastbound in the a.m. / westbound in the p.m.), removing a portion of the long distance through traffic from the I-595 general purpose lanes. To maximize the operational efficiency, the lanes will be tolled utilizing variable pricing. Access and egress to and from the express lanes will be limited to four (4) exchange points.

Overhead dynamic message signs will guide motorists into or away from the auxiliary lanes leading to the express lanes, depending on the time of day. Opposing traffic will be prohibited from entering the express lanes by access control gates that extend from the inside barrier wall in the area of the auxiliary lanes. Access control barriers and automated security gates will also be used to prohibit motorists from entering or exiting the express lanes in the wrong direction.

Tolls will be collected electronically from a single reversible tolling point. The concessionaire will be responsible for the design, construction, and maintenance of the tolling gantry structure and all related infrastructure, as described in the concession agreement.

Florida's Turnpike Enterprise will provide, install, operate and maintain the electronic tolling equipment for the express lanes, and will manage all SunPass customer services and violation enforcement. FDOT will set the toll rates and retain the toll revenue.

**I-595 Tentative Procurement Schedule**

| <b>Activity</b>   | <b>Due Date and Time</b>        |
|---|---------------------------------|
| First Set of ATC Meetings   | February 5 – 8, 2008            |
| Submit First Draft SEP-15 Application Regarding TIFIA   | February 7, 2008                |
| Utility Coordination Meeting  | February 15, 2008               |
| Issue Second Draft of the RFP Documents   | February 20, 2008               |
| Prepare and Submit Draft EDA  | February 22, 2008               |
| Questions and Comments Due on the Second Draft of the RFP Documents   | March 4, 2008                   |
| Second Set of One-on-One / ATC Meetings   | March 11-14, 2008               |
| Submit Final SEP-15 Application Regarding TIFIA   | March 24, 2008                  |
| Utility Coordination Meeting  | March 28, 2008                  |
| TIFIA Approval of SEP-15 Application (One-on-One meetings between TIFIA and proposers begin immediately after approval) | April 8 – 18, 2008              |
| Issue Final RFP   | April 18, 2008                  |
| Execute the TIFIA EDA   | Tentative Date – April 31, 2008 |
| Last day for Proposers to Submit Questions Under ITP Section 2.3  | June 3, 2008                    |
| Last Day for TIFIA to Provide Proposers with TIFIA Term Sheets  | June 16, 2008                   |
| Benchmark Interest Rates Provided to Proposers  | July 1, 2008                    |
| Proposal Due Date   | July 11, 2008                   |
| Selection/Award   | August 29, 2008                 |
| Execution of Contract   | November, 2008                  |



U.S. Department  
of Transportation  
Federal Highway  
Administration

Office of the Administrator

April 22, 2008

1200 New Jersey Avenue, SE.  
Washington, DC 20590

In Reply Refer To:  
HOA-3

Ms. Stephanie Kopelousos  
Secretary  
Florida Department of Transportation  
604 Suwannee Street  
Tallahassee, FL 32399-0450

Dear Ms. Kopelousos:

*Stephanie*

The Federal Highway Administration (FHWA) has completed its review of the Florida Department of Transportation's (FDOT) Special Experimental Project No. 15 Application (SEP-15 Application) for waivers of the Transportation Infrastructure Finance and Innovation Act (TIFIA) program procedures for the I-595 Corridor Roadway Improvements Project in Broward County, Florida (I-595) and three projects to be named in the future (Projects) that was submitted to the FHWA Florida Division Office (Division Office) on March 24. 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 and Governmental Affairs; Office of Chief Counsel; Office of the Chief Financial Officer; and the Division Office. Based on the comments provided by these offices, the SEP-15 Steering Committee recommended, and I concur, that the I-595 project and three projects to be named be accepted for administration under SEP-15. FHWA's response to each of the proposed experimental features for the TIFIA waivers is discussed below.

The FHWA's acceptance of the SEP-15 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 U.S. 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 provision of detailed term sheets, specific TIFIA requirements to be addressed in FDOT's procurements for the Projects, 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

**AMERICAN  
ECONOMY**

The FDOT is developing the Projects through public-private partnerships. Pursuant to a procurement process and execution of a concession agreement for each Project, a private entity will have the right and obligation to develop, design, construct, finance, operate, and maintain the Project. To encourage price competition in the procurements for the Projects, FDOT would like for the proposers' anticipated use of TIFIA credit assistance to become part of the competition. However, FDOT recognizes that it would be unduly burdensome for the TIFIA JPO to process separate TIFIA credit assistance applications for each proposer during the proposal preparation period, when, ultimately FDOT will award only one proposer a contract for a Project.

The Florida DOT would like each pre-qualified proposer to have full and equal access to the TIFIA JPO through the solicitation process. Specifically, FDOT seeks to allow its SEP-15 Application to serve as the TIFIA Letter of Interest and TIFIA application on behalf of any proposer wishing to include TIFIA credit assistance as part of its proposed financial plan for a Project. Through a request for proposals (RFP), FDOT will notify the proposers of the opportunity to meet one-on-one with the TIFIA JPO to negotiate a conditional term sheet prior to the proposers submitting proposals. Each potential proposer that elects to use TIFIA credit assistance must identify the amount, as well as the terms and conditions of available TIFIA credit assistance prior to making a financial offer to FDOT. The proposed experimental process would allow FDOT to compare the value to the State of each financial proposal, and assure that the winning concessionaire could execute all financing documents within approximately 3 months after award. For the first project, I-595, and potentially for the other three projects to be named, the proposers will be required to submit firm, fixed price offers to FDOT that would not otherwise be possible without use of the experimental features proposed in FDOT's SEP-15 Application.

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 the TIFIA JPO to evaluate and establish credit terms for the plans of finance of all 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 FDOT's proposed procurement process, and could possibly result in precluding access to TIFIA credit assistance. By reducing the risk to the proposers that TIFIA credit assistance may not be available or secured in a timely fashion, FDOT believes that proposers will be encouraged to submit more detailed and complete financial proposals that do not price this risk. The end result should be more competitive financial packages that translate into a reduced need for public funding. Furthermore, the TIFIA JPO will not have to negotiate full credit agreements with multiple potential borrowers. Thus, FDOT expects the SEP-15 experiment proposed herein will produce time savings and innovation in project development and financing.

The 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**

The FDOT would like to first apply the proposed experimental features to the I-595 project. The I-595 project has received environmental clearance from the Division Office and FDOT has short-listed three proposer teams for the I-595 and anticipates issuing the final RFP for I-595 on April 18, 2008. The remaining Projects and experiments would begin only upon acceptable progress of the I-595 project, submission of a written request to advance the next Project, and receipt of FHWA's notice to proceed with the issuance of a RFP.

The FDOT requests the right to supplement its SEP-15 Application to seek approval of other experimental features relating to the Projects including features relating to the design and construction of the Projects.

**Experimental Feature 1:** FDOT requests that the SEP-15 Application be considered the Letter of Interest for the Projects. Under the proposed procurement process, FDOT 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:** FDOT requests a waiver of information required to be submitted in the Letter of Interest because such information is not available at this stage of the FDOT 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 Letter of Interest 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 Letter of Interest 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, Federal Transit Administration, Federal Railroad Administration, or an inter-agency working group) to assist the sponsor with its application for credit assistance.

The FHWA understands that FDOT will not be able to submit a complete Letter of Interest with all of the information required by the TIFIA Program Guide. However, for the I-595 project, the SEP-15 Application includes sufficient information to allow the TIFIA JPO to assess whether the I-595 project meets the basic eligibility criteria for TIFIA credit assistance. Thus, FHWA accepts experimental feature 1a and 1b on the condition that FDOT submits its request to proceed with the next Project no later than 90 days before issuance of an RFP. The request shall

provide information regarding the prospective proposers, their qualifications and their legal structures, information about the payment mechanism and limited pro forma data based upon the Major Project Financial Plan, and the status of the environmental review process for each Project. The FDOT also will seek input from prospective proposers concerning plan of finance information such as project cost and revenue estimates.

**Experimental Feature 2:** FDOT proposes that the SEP-15 Application serve as the application for TIFIA credit assistance for the Projects. In connection with submission of a TIFIA application, FDOT 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, FDOT does not possess information about the final sponsors for the Projects because the TIFIA application will precede final selection of the Projects' sponsors.

*Deviation from FHWA Requirement(s):* The proposed experimental feature deviates from 49 C.F.R. § 80.7 which requires applicants for TIFIA credit assistance to submit an application to the DOT in order for approval by the Secretary. This experimental feature also 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. The FDOT will be required to submit the nonrefundable application fee of \$30,000 for each Project as it is advanced under the terms and conditions of the EDA. The EDA will require that the FDOT's RFP include information and certifications from the proposers that address all applicable TIFIA requirements. As the procurement process proceeds, FDOT 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, Preliminary Rating Opinion, and other Financing Documents.**

*Purpose:* FDOT is not able to provide the TIFIA JPO with required financial information in the SEP-15 Application because its submission precedes FDOT's receipt of the proposers' detailed financial plans and the final concession award. Recognizing that each proposer is likely to have a different project financial plan, FDOT will submit an Initial Financial Plan (IFP) for each Project 60 days before issuance of an RFP for a Project. The IFP shall include sufficient data for the TIFIA JPO to conduct an initial evaluation and to give the TIFIA JPO a sense of the detailed financing plans Project proposers may submit to the TIFIA JPO. The IFP 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 follow the FHWA's Financial Plan Guidance. Further, FDOT will not be able to provide other required application elements, such as a compliance monitoring plan and operation information.

**Deviation from FHWA Requirement(s):** This experimental feature deviates from 49 C.F.R. § 80.7(b) which requires a TIFIA applicant to provide current financial information concerning both the project and the applicant. A project sponsor must submit a detailed financial plan and proposed terms with its application pursuant to 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. § 602(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 FDOT's request for a waiver regarding a project compliance monitoring plan and operations and maintenance description provided FDOT's RFP requires proposers to submit these documents. However, FDOT must ultimately demonstrate that each Project meets eligibility and project selection criteria as set forth in 23 U.S.C. § 602(a) and (b)(2)(A).

The FDOT shall submit a pro forma plan of finance for each Project. FDOT may defer providing a preliminary rating opinion letter, conditioned on FDOT demonstrating 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 FDOT's request to proceed with the next Project 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. In approving the waivers, it is understood that DOT will adhere to the same credit standards applied to any project seeking assistance. The short-listed proposers will have to provide a preliminary rating opinion letter to the TIFIA JPO indicating their senior lien debt has the potential to achieve an investment grade rating at the time that they present their plans of finance and meet one-on-one with the TIFIA office. The proposer selected by FDOT as a result of the procurement process will submit to the TIFIA JPO an investment grade letter for their senior lien debt and provide a model reflecting that the terms the proposer negotiated with the TIFIA JPO in the conditional term sheet are met.

**Experimental Feature 3:** Request for issuance of conditional project selection; for TIFIA to meet one-on-one with the pre-qualified proposers and issue a conditional term sheet.

**Purpose:** FDOT expects the selected proposer for each Project to complete its financing arrangements within 3 months after award. The FDOT requests the TIFIA JPO to meet individually with the pre-qualified proposers to negotiate a term sheet for TIFIA credit assistance. Pre-qualified proposers would be allowed to meet with TIFIA for a period starting not later than 60 days before the due date for proposals set by FDOT. The FDOT requests that the TIFIA JPO negotiate and agree to a term sheet for TIFIA credit assistance with each pre-qualified proposer interested in pursuing such assistance no later than 15 days before the proposal due date stated in the RFP for a Project. Pre-qualified proposers could then base their final proposal on the substantially negotiated credit terms with the TIFIA JPO. The TIFIA JPO

would not participate in FDOT'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 FDOT's selection. To preserve and maximize competition, FDOT 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):* Proposed Experimental Feature 3 deviates from certain term sheet prerequisites specified in Chapter 6, Section 6-1 of the TIFIA Program Guide. This proposed experimental feature 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.

*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. The FHWA accepts proceeding with conditional project selection and conditional term sheets for the I-595 project, subject to approval by the DOT Credit Council. The conditional term sheet would include the terms and conditions offered to each competing entity. This would enable proposers to factor TIFIA credit assistance into their financial plans with the assurance that a credit agreement could be executed shortly (i.e., within 120 days) after the FDOT selection. The conditional term sheet 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 proposals, negotiation of final terms, and execution of the TIFIA credit agreement.

The acceptance of Experimental Feature 3 is predicated on the pre-qualified concessionaires' adherence to all TIFIA program requirements, including any terms and conditions which may be pre-negotiated with FDOT. 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. The FHWA will fully evaluate the proposed factors, listed below, for inclusion in the BDA:

#### **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 as well as its previous experience with the Miami Intermodal Center TIFIA loan; (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 FDOT will analyze the financing structures and methods developed in connection with the Projects 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, FDOT will particularly focus upon the levels of financing and project risk shifted to the private sector and strategies employed to minimize the public sector's risk.

## 3. Reports.

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

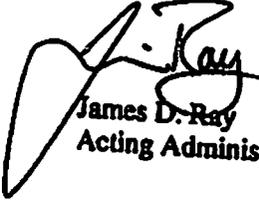
**Initial Report.** The initial report will be filed within 120 days after the award of a concession for a Project and will include a preliminary analysis of the Project procurement. This report will: (1) Describe the process used to select the concessionaire; (2) identify any reaction by the industry 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 financial close for a Project. This report will provide an overall evaluation of the role of the TIFIA approval process for that particular Project procurement, including its impact on executing the concession agreement and arriving at financial close.

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. Marcus J. Lemon, Chief Counsel, and Mr. David Gibbs, Acting Division Administrator for the FHWA Florida Division Office, to serve as the co-facilitators for the SEP-15 for TIFIA Credit Program Waivers. Mr. Lemon and Mr. Gibbs will establish an FHWA interdisciplinary team to work with you to develop the provisions of the EDA.

Sincerely,



James D. Ray  
Acting Administrator