

Chapter 3: Eligibility Requirements

While a wide variety of entities are potentially eligible for TIFIA assistance, the TIFIA statute sets forth several threshold requirements as prerequisites for an award of TIFIA assistance. This chapter describes the types of projects, costs, sponsors, and regulatory and statutory requirements upon which TIFIA assistance is conditioned.

Section 3-1

Eligible Projects and Costs

Highway, transit, passenger rail, and intermodal projects may receive credit assistance through the TIFIA program. Eligible highway facilities include interstates, state highways, bridges, toll roads, and any other type of facility eligible for grant assistance under title 23, the highways title of the U.S. Code (23 U.S.C.). Eligible transit projects include the design and construction of stations, track, and other transit-related infrastructure, purchase of transit vehicles, and any other type of project that is eligible for grant assistance under the transit title, chapter 53 of 49 U.S.C. Additionally, intercity bus vehicles and facilities are eligible to receive TIFIA assistance. Rail projects involving the design and construction of intercity passenger rail facilities or the procurement of intercity passenger rail vehicles are eligible for TIFIA assistance. Publicly owned intermodal facilities on or adjacent to the National Highway System are also eligible for TIFIA assistance, as are projects that provide ground access to airports or seaports. Finally, surface transportation projects principally involving the installation of intelligent transportation systems are eligible for TIFIA assistance.

Federal credit assistance provided under TIFIA is available to cover only eligible project costs. A calculation of total eligible project costs is important in order to determine whether the project meets the eligibility test for minimum project size and whether the credit request does not exceed 33 percent of eligible project costs, as required by statute.

The TIFIA statute, codified at 23 U.S.C. 181, defines eligible project costs as those expenses associated with the following:

- development phase activities, including planning, feasibility analysis, revenue forecasting, environmental review, permitting, preliminary engineering and design work, and other pre-construction activities;
- construction, reconstruction, rehabilitation, replacement, and acquisition of real property (including land related to the project and improvements to land), environmental mitigation, construction contingencies, and acquisition of equipment; and
- capitalized interest necessary to meet market requirements, reasonably required reserve funds, capital issuance expenses, and other carrying costs during construction.

Any deferrals of interest during the construction period may not be included as an eligible project cost. Likewise, if TIFIA credit assistance is provided for a project financing, capitalized interest may not be included as an eligible project cost.

Expenses associated with the application process (such as application fees or fees associated with obtaining the required preliminary rating opinion letter) and other administrative charges, such as credit processing fees and loan servicing fees, will not be considered among the eligible project costs. In all cases, eligible project costs should be calculated and presented on a cash basis (that is, as year-of-expenditure dollars) with the year of planned expenditure clearly identified.

Two clarifications:

- Acquisition of Real Property. While acquisition of real property is eligible for TIFIA reimbursement, such property must be physically and functionally related to the transportation project. If excess land surrounding the project's immediate right-of-way is acquired for development, the cost of this real property may not be included among eligible project costs. The acquisition of real property must be in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (see page 3-5).
- Costs Incurred Prior to Application. It is permissible for a project sponsor to incur costs prior to submitting an application for TIFIA credit assistance. However, these costs may be considered eligible project costs for TIFIA purposes only upon approval from the DOT. Generally, such costs will be confined to development phase or right-of-way acquisition expenses incurred within three years of the date of application. This eligibility determination will be made on a case-by-case basis, depending on the nature and timing of the costs.

Section 3-2

Government Requirements

The TIFIA statute requires all projects receiving TIFIA assistance to comply with 23 U.S.C. (for highway projects), chapter 53 of 49 U.S.C. (for transit projects), and/or section 5333(a) of 49 U.S.C. (for rail projects), as applicable. In addition, all projects receiving TIFIA assistance must comply with generally applicable federal laws and regulations, including title VI of the Civil Rights Act of 1964, the National Environmental Policy Act of 1969, and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

Some of the key federal governmental requirements related to TIFIA credit assistance are listed below. In addition, project sponsors seeking TIFIA assistance are advised to contact the TIFIA JPO as well as the relevant modal agencies (FHWA, FRA, and FTA) for further information on these and other federal laws and regulations that may apply.

Title 23 – Highway Projects

Title 23 of the U.S. Code and related implementing regulations in title 23 of the Code of Federal Regulations (CFR) set forth the rules that govern the design, construction, and operation of federally assisted highway infrastructure. These rules cover a broad range of activities. The following bullet points provide an example of some of the relevant regulations:

- Design. Part 625 of 23 CFR requires that all federally assisted roads, highways, and bridges (i.e., “Federal-aid projects”) adhere to minimum design standards and specifications. Generally speaking, the regulations refer all sponsors of Federal-aid projects to the relevant standards and specifications published by the American Association of State Highway and Transportation Officials.
- Procurement. Part 172 of 23 CFR prescribes policies and procedures related to procurement of engineering and design related services. Part 635 of 23 CFR covers many topics related to purchasing materials and procuring construction services. For example, section 635.107 requires the project sponsor to affirmatively encourage disadvantaged business enterprise participation in the highway construction program. Section 635.410 (“Buy America”) limits the amount of foreign-produced steel and iron that may be used on Federal-aid projects.

- Construction. Part 633 of 23 CFR includes a number of labor and employment rules that apply to all workers involved in constructing a Federal-aid project. For example, the minimum wage rates that the Secretary of Labor determines to be prevailing for the same type of work on similar construction in the same locality must be part of the construction contract. Labor rules also state that no construction work may be performed by convict labor unless the convicts are on parole, supervised release, or probation.

Title 49 – Transit Projects

As with title 23, title 49 of the U.S.C. and related regulations in 49 CFR (“Transportation”) concern a wide range of activities. Chapter 53 of 49 U.S.C. and related regulations address mass transit. For example, drug and alcohol rules specific to FTA-funded projects appear at 49 CFR 653 and 654, respectively. In other cases, the regulations appearing in 49 CFR apply common types of rules specifically to transit-oriented concerns, such as the procurement of buses and rail cars. For example, the “Buy America” regulations, described above, appear also at 49 CFR 661, and provide that federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by the FTA, or the product is subject to a general waiver. The FTA has published a best practices manual on transit procurement regulations. This manual can be found on-line at:

<http://www.fta.dot.gov/fta/library/admin/BPPM/appA1.html>.

Some regulations that implement chapter 53 of 49 U.S.C. do not necessarily appear within 49 CFR. As a prime example, the Department of Labor (DOL) promulgates regulations to implement 49 U.S.C. 5333(b). (Formerly at section 13(c) of chapter 53 of 49 U.S.C., these DOL regulations are now found at 29 CFR 215.) In general, section 5333(b) provides that, as a condition for financial assistance from FTA in financing mass transportation systems, fair and equitable arrangements must be made, as determined by the DOL, to protect certain rights of employees affected by such assistance. These rights include: the preservation of rights, privileges, and benefits under existing collective bargaining agreements; the continuation of collective bargaining rights; the protection of individual employees against a worsening of their employment positions; assurances of employment to employees of acquired mass transportation systems; priority of re-employment; and paid training or retraining. No TIFIA credit agreement for a transit project shall be executed until a labor certification has been issued for that project.

The preceding examples illustrate the types of regulations that implement chapter 53 of 49 U.S.C. and thus apply to all federally assisted transit projects, including those receiving credit assistance under the TIFIA program. For transit projects, all regulatory requirements of chapter 53 are contained in a standard compliance agreement that is attached to and incorporated in the TIFIA credit agreement.

Projects receiving TIFIA assistance also must comply with the provisions of 49 U.S.C. 5333(a). This citation, commonly referred to as “Davis-Bacon,” concerns labor protections ensuring that all labor contracts executed by the project sponsor adhere to prevailing wage rates as determined by the Secretary of Labor.

Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 states that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the recipient receives federal assistance. Companion legislation extends these protections such that no person shall be subjected to discrimination on the basis of sex, age, or disability. As applied to transportation programs, regulations to implement this statute appear at 49 CFR 21.

National Environmental Policy Act of 1969 (NEPA)

In order to comply with NEPA, each proposed TIFIA project must be evaluated to determine its impact on the environment. A project will not be selected for credit assistance until it has received a final agency decision, including (if necessary) a Record of Decision. The three scenarios for addressing NEPA requirements are outlined below.

- Categorical Exclusion. Some projects, such as minor widening, rehabilitation, safety upgrading, or bus replacements, do not individually or cumulatively affect the environment significantly. These projects are termed Categorical Exclusions, and thus are exempt from the requirement to prepare an Environmental Assessment or an Environmental Impact Statement (EIS).
- Environmental Assessment. An Environmental Assessment is usually prepared for a project that does not qualify as a Categorical Exclusion. The Environmental Assessment may reveal that the project's impacts are not significant, in which case a Finding of No Significant Impact (FONSI) is issued for the project.
- Environmental Impact Statement and Record of Decision. Assuming that a project does not qualify for a Categorical Exclusion or FONSI, the project sponsor is required to prepare a draft EIS. For highway projects, this is typically done in cooperation with the state department of transportation. For major investments, the draft EIS must include an analysis of various alternative solutions.

A variety of agencies and the public at large have the opportunity to comment on the draft EIS. These comments are addressed during the preparation of the final EIS. This second iteration ensures that adequate consideration has been given to public comments and the anticipated effects of the project. Depending on the nature of the project, the FHWA, FRA, or FTA issues a Record of Decision (ROD) to signify federal approval of the final EIS.

Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970

Construction of a surface transportation project may displace current residents or businesses. Under the Uniform Relocation Assistance and Real Property Acquisition Policies Act, every displaced resident must be offered a comparable replacement dwelling that is decent, safe, and sanitary. Additionally, relocation advisory services must be furnished and payments made to those residents who must relocate. Such payments cover moving expenses, the cost of replacement housing, and certain incidental expenses. Businesses, farms, and non-profits must also be reimbursed for moving and related expenses.

Section 3-3

Eligible Project Sponsors

With one important exception, public or private entities seeking to finance, design, construct, own, or operate an eligible surface transportation project may apply for TIFIA assistance. Examples of such entities include state departments of transportation; local governments; transit agencies; special authorities; special districts; railroad companies; and private firms or consortia that may include companies specializing in engineering, construction, materials, and/or the operation of transportation facilities.

As specified under TIFIA, however, any intermodal surface freight transfer facility that receives TIFIA assistance must be publicly owned. While a private firm seeking to construct or improve the freight transfer facility may receive TIFIA assistance, the facility must be owned by a public agency at all times.

All project sponsors must demonstrate relevant experience, strong qualifications, a sound project approach, and financial stability, as each of these items ultimately has bearing on the project's creditworthiness.

Project sponsors also must meet various federal standards for participation in a federal credit program. For example, project sponsors may not be delinquent or in default on any federal debts. Such requirements will be specified in the contractual documents between the DOT and each project sponsor.

Section 3-4

Threshold Requirements

A project's eligibility for TIFIA assistance shall depend on its satisfaction of the five threshold requirements listed at 23 U.S.C. 182. This section details these five statutory requirements.

Total Eligible Costs

The project's eligible costs, as defined under 23 U.S.C. 181, must be reasonably anticipated to total at least \$100 million, or, alternatively, equal 50 percent or more of the state's Federal-aid highway apportionments for the most recently completed fiscal year, whichever is less. Based on the fiscal year 2002 apportionments, these minimum project sizes would apply in the following states:

State	Minimum Project Size (\$ millions)
Delaware	68.1
District of Columbia	60.7
Hawaii	79.4
Maine	81.8
New Hampshire	79.3
Rhode Island	92.2
Vermont	70.2

For projects that principally involve the installation of an intelligent transportation system (ITS), eligible project costs must be reasonably anticipated to total at least \$30 million. This \$30 million threshold applies only to projects for which the ITS component is the central feature of the project and not an ancillary component.

The principal amount of the requested credit assistance must not exceed 33 percent of eligible project costs. Project sponsors should calculate and represent all costs, including both eligible project costs and the credit assistance request, on a cash (year-of-expenditure) basis.

Application Submission

Each project sponsor seeking TIFIA assistance must submit an application to the DOT. Appendix D provides a copy of the application for use in fiscal year 2003.

Transportation Planning Process

The TIFIA statute conditions a project's receipt of TIFIA assistance on the project's inclusion in both the state's long-range transportation plan and the approved State Transportation Improvement Program (STIP).

State transportation plans extend as far as 20 years into the future and are often geared to setting general priorities rather than listing individual projects. Therefore, at the time of submitting an application, each project sponsor must certify that the proposed project is consistent with the transportation plan(s) of the affected state(s). For projects in metropolitan areas, the project sponsor must also demonstrate that the project is or can be included in the metropolitan transportation plan.

In contrast to the long-range state transportation plan, the STIP focuses on specific projects to be funded in the near term; STIPs typically look ahead no more than three years. The TIFIA statute requires that a TIFIA-assisted project be included in an approved STIP by the time that the DOT enters into an agreement to make available the federal credit instrument. Therefore, the sponsor must demonstrate that the proposed project is part of the appropriate STIP(s) before the DOT will select the project, issue a term sheet, and obligate funds.

Dedicated Revenue Sources

The TIFIA statute states that project financing shall be repayable, in whole or in part, from "tolls, user fees and other dedicated revenue sources." The TIFIA statute also states that the sources of repayment funds for TIFIA credit instruments may include "tolls, user fees and other dedicated revenue sources." (See 23 U.S.C. 182(a)(4), 183(c)(3), and 184(c)(4).)

The DOT interprets "dedicated revenue sources" to include such levies as tolls, user fees, special assessments, tax increment financing, and any portion of a tax or fee that produces revenues that are pledged for the purpose of retiring debt on the project. The Secretary may accept general obligation pledges or corporate promissory pledges and will determine the acceptability of other pledges or forms of collateral as dedicated revenue sources on a case-by-case basis. Without exception, the Secretary will not accept a pledge of federal funds, regardless of source, as security for the TIFIA credit instrument.

Public Approval of Privately Sponsored Projects

The final threshold requirement requires any private entity applying for TIFIA assistance to demonstrate state support for the project through the project's inclusion in the state's planning documents (the long-range plan and the STIP), as noted above.

Section 3-5

Rating Opinions

In addition to the threshold requirements described in Section 3-4, the TIFIA statute requires each applicant to provide with its application a preliminary rating opinion letter from at least one nationally recognized credit rating agency,¹ indicating that the project's senior obligations have the potential to achieve an investment grade rating. Projects selected for TIFIA assistance then must receive an investment grade rating on their senior debt obligations. This requirement appears at 23 U.S.C. 182(b)(2)(B).

¹ According 23 U.S.C. 181(11), "the term 'rating agency' means a bond rating agency identified by the Securities and Exchange Commission as a Nationally Recognized Statistical Rating Organization." The SEC currently identifies four such firms: Standard and Poor's, Moody's Investor Services, Fitch Ratings, and Dominion Bond Rating Service Limited.

The following discussion summarizes the DOT's use of credit rating agency analyses. Given the large size and unique structure of most TIFIA-supported projects, the DOT encourages project sponsors to obtain credit opinions from more than one rating agency.

The DOT's Use of Credit Ratings

Credit ratings on TIFIA-supported projects are used for three purposes.

1. Statutory Rating Requirement. By statute, a project cannot receive TIFIA assistance unless the senior debt obligations funding the project, i.e., those obligations having a lien senior to that of the TIFIA credit instrument on the pledged security, achieve an investment grade rating. Therefore, even though a project may be selected for TIFIA assistance, this assistance will not be provided, that is, the DOT will not close on the credit agreement, until an investment grade rating from a major credit rating agency is assigned to the project's senior debt obligations, or the TIFIA facility itself, if there are no debt obligations senior to the TIFIA credit instrument.
2. Capital Allocation Requirement. The DOT is the first domestic federal agency to use credit ratings to assess the default risk associated with a federal credit program. Default risk is a key component of the DOT's assessment of expected losses related to the TIFIA program. The Federal Credit Reform Act of 1990 requires federal agencies with credit programs to allocate capital, in the form of budget authority, to cover these expected losses. The DOT uses the TIFIA Capital Allocation Model to estimate credit exposure. The model employs such variables as the repayment structure, the draw-down assumptions, the nature of the dedicated revenues securing the TIFIA instrument, and the credit rating assigned to the TIFIA credit instrument.
3. Annual Capital Reserve Adjustments. As part of its ongoing portfolio monitoring, the DOT is required to annually adjust, or "reestimate," its allowance for credit losses based on updated loss expectations. The DOT will incorporate information from credit surveillance reports, including changes in credit ratings, on TIFIA-supported projects in this annual reassessment process.

For more information on the TIFIA Capital Allocation Model and re-estimate process, please refer to Appendix B.

Preliminary Rating Opinion Letter

The DOT requires TIFIA applicants to provide a preliminary rating opinion letter. The letter must address the creditworthiness of both the senior debt obligations funding the project (i.e., those which have a lien senior to that of the TIFIA credit instrument on the pledged security) and the TIFIA credit instrument, and must conclude that there is a reasonable probability for the senior debt obligations to receive an investment grade rating. This requirement applies to all TIFIA applicants, even those with current credit ratings on other debt instruments. The DOT will not consider applications that do not include a preliminary rating opinion letter. The DOT will use the preliminary rating opinion letter for two purposes.

1. Potential for Senior Obligations to Receive Investment Grade Rating. The letter must indicate that the senior obligations funding the project have the potential to receive an investment grade rating. This preliminary assessment by the rating agencies will be based on the financing structure proposed by the project sponsor. The DOT will not consider projects that do not demonstrate the potential for their senior obligations to receive an investment grade rating.

2. Default Risk on Requested TIFIA Instrument. The DOT will also use the preliminary rating opinion letter to assess the project's overall economic, legal and financial viability and the default risk on the requested TIFIA instrument. Therefore, the letter should provide a preliminary rating assessment of the financial strength of either the overall project or the TIFIA instrument, whichever assessment best reflects the rating agency's preliminary evaluation of the *default risk* on the requested TIFIA instrument without regard to recovery potential.²

Credit Rating of Senior Obligations and TIFIA Instrument Default Risk

In addition to providing the preliminary rating opinion letter, projects selected for TIFIA assistance must receive an investment grade rating on their senior debt obligations and provide confirmation of the assigned rating at least two weeks prior to execution of a TIFIA credit agreement. Also, in conjunction with the rating of the senior debt obligations, project sponsors must obtain a revised rating agency opinion on the default risk of its TIFIA credit instrument.

The rating requirement offers security to the DOT only if the same repayment source is being pledged to both the senior debt obligations and the subordinate TIFIA credit instrument. In such a structure, the investment grade rating for senior debt helps the DOT evaluate its credit risk as a subordinate lender; although the TIFIA instrument itself may be sub-investment grade, the higher rating on the senior debt indicates that the project's overall risk profile is manageable.

The value implied by the senior debt rating, however, would be negated if the par amount of senior debt were substantially smaller than the TIFIA loan. For example, the sponsor of a \$100 million project could propose funding sources of \$5 million in senior debt, \$33 million in TIFIA financing and \$62 million in public grants, thereby technically complying with the 33% cap on TIFIA financing. Due to the imbalance in issue sizes, the senior rating would not reflect the relative creditworthiness of the TIFIA loan. In order to manage the risk of this situation, the DOT requires that TIFIA assistance not exceed the amount of senior debt.

Use of Underlying Ratings

Neither the preliminary rating opinion letter nor the credit rating should reflect the use of bond insurance or other credit enhancement that does not also secure the TIFIA instrument. The assessment of the senior obligations' investment grade potential and the TIFIA instrument's default risk should be based on the underlying ratings of debt obligations and the project's fundamentals.

Applicant Questions about Rating Requirements

TIFIA applicants should contact the TIFIA JPO with any questions about the rating process and the requirement for a preliminary rating opinion letter and an investment grade credit rating. The major credit rating agencies will be able to answer questions concerning fees, timing of assessments, information requirements, and surveillance practices associated with obtaining preliminary opinion letters, credit ratings, periodic rating updates, and credit surveillance reports.

² The less information provided in a preliminary rating opinion letter, the more conservatively the DOT will interpret that letter in initially estimating the government's default risk.

Section 3-6

Timing of Environmental, Planning, and Credit Documents

Requirements for environmental, planning, and credit documents correspond with the application and selection processes, which are described in Chapters 4 and 5, respectively. Exhibit 3-A provides an overview of how these requirements relate to the various stages of the application and selection processes.

Exhibit 3-A: Illustration of Major Documentation Required
During the Application and Selection Processes

