

Chapter 6: Contractual Documents and Procedures

This chapter describes the process by which the DOT will commit to provide credit assistance to a selected project sponsor (also termed “borrower” or “obligor”). The chapter also describes the two major contractual documents that will be used for the TIFIA program: the term sheet and the credit agreement.

Each of the contractual documents is used for specific purposes as summarized in Exhibit 6-A. The term sheet establishes the DOT’s legal commitment and triggers the obligation of budget authority for the project. The credit agreement is the definitive agreement between the DOT and the borrower, containing all the terms and conditions pursuant to which the credit assistance is provided.

Exhibit 6-A: Key TIFIA Contractual Documents

Document	Major Prerequisites	Resulting Action
Term Sheet	<p>Credit Assessment: Preliminary rating opinion letter on senior debt*</p> <p>Environmental Clearance: ROD, FONSI, or Categorical Exclusion</p> <p>Planning Consistency: Inclusion in the STIP and long range plan</p>	<p>Defines amount of TIFIA credit assistance committed</p> <p>Obligates contract authority</p> <p>Establishes interest rate for line of credit</p>
Credit Agreement	<p>Credit Assessment: Investment grade credit rating on senior debt</p> <p>Appropriate Security Features: Rate covenants, etc.</p> <p>Updated Financial Plan: All necessary funds committed to the project</p>	<p>Defines final terms of assistance</p> <p>Establishes interest rate for secured or guaranteed loan</p> <p>Authorizes submission of requests for disbursement of funds</p>

*Notes on credit opinions and ratings: 1) The preliminary rating opinion letter should assess the investment grade potential of the project’s senior debt obligations and the default risk of the TIFIA instrument. 2) The credit rating must evidence an investment grade rating on the senior debt obligations (or the TIFIA credit instrument if there are no debt obligations senior to the TIFIA facility) and include a revised assessment of the default risk of the TIFIA instrument.

If a TIFIA project is also financed with other DOT funds, the recipient of TIFIA credit assistance will be required to comply with applicable modal project requirements and approvals as well as the TIFIA program requirements. These may include approval for innovative contracting approaches and "mega project" procedures such as submission of a finance plan, and plan updates. The DOT is implementing a coordinated TIFIA process that recognizes existing modal agency processes to minimize duplication of effort by project sponsors, while ensuring effective oversight and monitoring of the federal investment for projects. The applicant can chose to take advantage of the coordinated processes as long as

the timing of the required documents is scheduled to fulfill both TIFIA and other applicable federal program requirements. The TIFIA credit agreement will specifically address finance plan requirements and monitoring procedures.

Section 6-1

Term Sheet

The term sheet is a contractual agreement between the DOT and the project sponsor that sets forth certain business terms and conditions of TIFIA credit assistance for the project. The DOT's issuance of this document triggers the DOT's obligation (i.e., legal commitment) of budget authority.

Term Sheet Prerequisites

Before issuing a term sheet, the DOT will confirm that all prerequisites for the obligation of funds have been satisfied. As shown in Exhibits 3-A and 6-A, these prerequisites include: (i) submission of the preliminary rating opinion letter as part of the TIFIA application; (ii) the project's receipt of its ROD, FONSI, or Categorical Exclusion; and (iii) the project's inclusion in the approved STIP.

The term sheet obligates budget authority and binds the DOT and the project sponsor to the specified terms; it does not bind the DOT to details of the sponsor's application. Further, the term sheet does not trigger a disbursement of funds to the project sponsor. Disbursements will occur only after the project sponsor has: (i) obtained an investment grade rating on the senior debt obligations and a revised credit opinion on the default risk of the TIFIA instrument; and (ii) signed a credit agreement with the DOT, which includes a negotiated annual draw schedule.

Term Sheet Contents

General rules concerning the terms for secured loans, loan guarantees, and standby lines of credit appear at 23 U.S.C. 183 and 184 and are also summarized in Chapter 2. More specific terms will be determined on a project specific basis.

Since term sheets serve primarily as the obligating instrument for TIFIA credit assistance, they include only basic terms and conditions related to the DOT's provision of credit assistance. Typically, the following will appear in every term sheet:

- parties to the agreement (e.g., lender, borrower, and guaranteed lender, as applicable);
- type(s) of credit instrument (i.e., secured loan, loan guarantee, or standby line of credit);
- description of the project;
- estimated total project costs and total TIFIA-eligible project costs;
- maximum amount of credit assistance;
- method for establishing the interest rate;

- estimated final maturity date;
- source of payment and security, including lien structure and TIFIA credit instrument priority; and
- conditions, if applicable, for execution of a credit agreement.

Term Sheet Conditions: Future-Year Commitments

For projects with extended construction periods and/or special financing needs, the Secretary may consider making future-year contingent commitments of budget authority and associated credit assistance. This might be considered, for example, if a selected project required the obligation of more resources than were available in the current fiscal year. In such a circumstance, the term sheet would include a provision by which the DOT would administratively reserve TIFIA funding for the project and commit to providing federal credit assistance at a future time, upon satisfaction of specified conditions (such as project-specific milestones). Any such term sheet contingent commitments would be subject to the future availability of obligation authority. The DOT would initially obligate budget authority for the project only in the current fiscal year, and would not obligate budget authority in future years until the conditions of the term sheet were met and the availability of sufficient budget authority was confirmed.

The DOT generally does not anticipate making future-year contingent commitments; it would issue a term sheet containing such a condition only in the most exceptional case. The DOT would make a future-year reservation of funds only when the project seeking such commitment had met all TIFIA eligibility requirements and been partially funded out of the current fiscal year's program. In order to ensure additional projects' access to the program in future years, the DOT would never reserve more than 50 percent of the amount of budget authority authorized for a single fiscal year.

Section 6-2

Credit Agreement

The credit agreement is the definitive agreement between the DOT and the project sponsor (and the guaranteed lender, if applicable). It specifies all terms and conditions of the credit assistance and authorizes the funding of the TIFIA credit instrument. Following execution of a credit agreement and disbursement of funds, according to the project's needs (i.e., on a reimbursable basis in accordance with a negotiated annual draw schedule), the project sponsor is required to provide repayments according to the terms of the agreement.

Credit Agreement Prerequisites

In order for the DOT to execute the credit agreement and disburse funds, the project sponsor must satisfy at a minimum any requirements set forth in the term sheet. Also, the project sponsor must present the investment grade rating on the senior debt obligations and a revised opinion on the default risk of the TIFIA credit instrument.

Prior to closing a TIFIA credit agreement, the project sponsor will be required to submit updates to both the plan of finance and project management and monitoring plan.

The DOT reserves the right to review and, as appropriate, approve all related project documents, including, but not limited to design-build contracts, development agreements, and funding agreements with third parties.

Credit Agreement Contents

The contents of the credit agreement will include both standard provisions and transaction-specific provisions. While the project sponsor and the DOT will execute the credit agreement for a secured loan or line of credit, the guaranteed lender, the DOT, and the project sponsor will execute the credit agreement for a loan guarantee. Additionally, the guaranteed lender will execute a separate loan agreement with the project sponsor, and the project sponsor will execute a borrower's certificate, compliance, and loan agreement with the DOT. Depending on the nature of the transaction, additional documents, such as an intercreditor agreement, may also be necessary. The DOT reserves the right to request and review bond documents and other agreements material to the flow of funds.

Generally, project sponsors can expect credit agreements to include, in addition to the items listed under "Term Sheet Contents," the following:

- security features and additional terms;
- detailed description of pledged security (e.g., rate covenants);
- flow of funds;
- repayment terms;
- representations and warranties;
- borrower covenants;
- annual disbursement schedule and conditions for draws on the credit instrument;
- amortization schedule for the credit instrument and final maturity of the credit instrument;
- finance plan requirements; and
- monitoring and reporting requirements.

The credit agreement will also include the form of requisition for disbursements and the note form.

Section 6-3

Closing Activities

When the parties in the transaction have completed negotiations and finalized the TIFIA credit agreement and other related financing documents, the pre-closing and closing occur. This process is very similar to a bond transaction.

At closing, authorized representatives of the borrower, the DOT, and the guaranteed lender (if applicable) execute the legal documents. Copies of the agreements are made and distributed to the appropriate parties. The timing of the TIFIA closing is typically tied to the closing of the senior financing. The closing of the senior and TIFIA debt can be simultaneous, but the TIFIA transaction cannot close until the senior documents have been executed. Transaction documents other than the term sheet and credit agreement will be necessary, including various legal opinions. A closing memorandum is prepared describing the actions that will take place, including funds disbursement, if applicable. This memorandum sets forth in detail the time and place of the closing, conditions precedent, and the required documents.

Following the closing, a binder is prepared which includes all the legal documents, project selection materials, and other closing documents. The TIFIA JPO uses this closing binder as the source of project information for accounting, budgeting and program monitoring systems. Exhibit 6-B contains a sample checklist for a secured loan closing.

Exhibit 6-B: Sample Loan Closing Checklist for a Secured Loan

1. Organizational Documents of the Borrower

If the Borrower is public entity:

- a. Approval resolutions approving project and authorizing official to execute documents
- b. Copies of enabling legislation, bylaws, minutes of meetings regarding the project

If the Borrower is private entity:

- a. Articles of incorporation, partnership agreement or similar documents, as appropriate
- b. Good standing certificate
- c. Bylaws
- d. Incumbency certificate
- e. Resolutions authorizing officials to execute documents

2. Loan Agreement and Promissory Note

3. Inter-creditor Agreement

4. Evidence of site control

5. Evidence of project's inclusion in State Transportation Improvement Program

6. Evidence of consistency with other State or metropolitan transportation plans

7. Evidence of approval by all necessary State or local governmental entities

8. List of all required permits

9. Environmental Record of Decision, Finding of No Significant Impact or Categorical Exclusion

Exhibit 6-B: Sample Loan Closing Checklist for a Secured Loan (Continued)

10. Development agreements and construction contracts
11. Independent Engineer's Report
12. Feasibility Study /Traffic and Revenue Study
13. Formal credit rating(s)
14. TIFIA Credit Agreement
15. Opinion of borrower's counsel (addressing legal authority of Borrower, execution of documents, etc)
16. Opinion of DOT's counsel (addressing DOT's authority to make loan to the borrower)
17. Development Agreement(s) or Contracts for Project (dates for start of Project, phases, and completion)
18. For Senior Project Bonds (Tax-exempt or Taxable Bonds):
 - a. Enabling legislation and other documentation of issuer of senior project bonds
 - b. Borrower's resolution
 - c. Trust indenture
 - d. Loan agreement (if applicable)
 - e. Bond purchase agreement
 - f. Preliminary official statement
 - g. Official statement
 - h. Continuing disclosure agreement
 - i. Bond insurance policy or other credit enhancement

Section 6-4

DOT Oversight and Monitoring Requirements

Following execution of the credit agreements, the DOT will periodically evaluate the credit status of all projects receiving TIFIA assistance. This periodic review has three purposes: (i) to provide the DOT with an oversight tool for ensuring the project sponsor's compliance with the provisions of the credit agreement; (ii) to monitor the overall status of the project; and (iii) to assist the DOT and the Office of Management and Budget (OMB) in identifying any changes to the credit risk posed to the federal government under any given credit agreement.

As part of its oversight and monitoring of TIFIA projects, the DOT will routinely update its information on credit quality, construction schedules, legal issues, revenue forecasts, and financial projections. Accordingly, project sponsors will be required to provide ongoing financial and project information not only during construction, but so long as any credit instrument is outstanding and/or until any debt obligation to the federal government is fully repaid. Documentary evidence that may be requested for each project includes: audited financial statements, updated budget and cash flow projections, audit reports, sources and uses of funds, coverage ratios, project schedules, operating statistics, and management updates. In

addition, this reporting must include an annual update to the project's financial plan in accordance with the requirements specified in the credit agreement. Each project sponsor will be required to give notice to the DOT of material events, including litigation, which could affect the credit quality of the project.

All recipients of TIFIA credit assistance must submit an annual project performance report and audited financial statements to the DOT within no more than 180 days following the recipient's fiscal year-end for each year during which the recipient's obligation to the federal government remains in effect.

The project sponsor is also required to provide, at no cost to the federal government, ongoing credit evaluations of the project and debt obligations, including the TIFIA credit instrument. These surveillance reports must be prepared by a nationally recognized credit rating agency throughout the life of the TIFIA credit instrument. The project sponsor must furnish the DOT with any other credit surveillance reports on the TIFIA-assisted project as soon as they are available.

Oversight and monitoring will also include site visits, periodic status meetings with the project sponsor, and reviews of independent engineer and/or other relevant reports (as applicable). The TIFIA JPO will coordinate oversight and monitoring activities with the appropriate DOT field offices.

Each credit agreement between the DOT and a project sponsor will specify the types of ongoing documentation required by the DOT and the frequency of such information requests. The credit agreement will also authorize the DOT to commence increased monitoring and reporting, as may be necessary, to ensure the continued credit quality of the project and minimize the government's risk.

Section 6-5

DOT Loan Servicing

The DOT has a banking firm under contract to perform loan servicing for TIFIA credit instruments. The services provided under the contract include credit accounting, collections, maintenance of documents, and financial reporting. A TIFIA borrower will be charged an annual fee for loan servicing activities associated with each TIFIA credit instrument. This fee will be set according to the DOT's out-of-pocket costs for loan servicing and may be adjusted annually.

The DOT will provide general payment instructions to the borrower for each credit agreement. Further, at least 30 days prior to a repayment date, the loan servicer will notify the borrower of the date and amount due in accordance with the payment schedule in the credit agreement. The loan servicer will also bill each borrower annually for servicing fees in accordance with the provisions in the credit agreement.