

Chapter 6: Transaction Documents and Ongoing Monitoring Requirements

This chapter describes the process by which the DOT will commit to provide credit assistance to a selected borrower (also termed “obligor”). The chapter also describes the two major contractual documents 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.¹⁷⁸ The credit agreement is the definitive agreement between the DOT and the borrower, containing all of the terms and conditions pursuant to which the TIFIA credit assistance is provided.¹⁷⁹

Exhibit 6-A: TIFIA Prerequisites

Document	Major Prerequisites
Term Sheet	<ul style="list-style-type: none"> • Credit Assessment: Preliminary rating opinion letter on senior debt and TIFIA credit instrument • Environmental Clearance: ROD, FONSI, or Categorical Exclusion Planning Consistency • Compliance with Federal rules and applicable planning requirements
Credit Agreement	<ul style="list-style-type: none"> • Credit Assessment: Investment grade credit rating on senior debt and rating on TIFIA credit instrument by two rating agencies (only one rating required if total project debt is less than \$75 million) • Appropriate Security Features: Rate covenants, dedicated revenue source, etc. • All necessary grant funds committed to the project • All non-TIFIA equity and debt agreements executed

If a TIFIA project is also financed with other DOT funds, the recipient of TIFIA credit assistance is 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 financial plan and plan updates. The TIFIA process minimizes duplication of effort by borrowers, while ensuring effective oversight and monitoring of the Federal investment for projects. The applicant can choose to take advantage of the coordinated processes as long as the timing of the submission of required documents fulfills both TIFIA and other applicable Federal program requirements. The TIFIA credit agreement will specifically address financial plan requirements and monitoring procedures.

Section 6-1

Term Sheet

The term sheet is a contractual agreement between the DOT and the borrower that sets forth certain business terms and conditions of TIFIA credit assistance for the project. The DOT’s

¹⁷⁸ 23 U.S.C. §608(b)(1).

¹⁷⁹ 23 U.S.C. §§603(a)(1), (e)(2) and 604(a)(1).

issuance of this document triggers the DOT's obligation (*i.e.*, legal commitment) of budget authority.¹⁸⁰

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;¹⁸¹ (ii) the project's receipt of its ROD, FONSI, or Categorical Exclusion;¹⁸² and (iii) the project's inclusion in the state's planning documents (the long-range plan and the STIP).¹⁸³

The term sheet obligates budget authority and binds the DOT and the borrower to the specified terms; it does not bind the DOT to details of the borrower's application. Further, the term sheet does *not* trigger a disbursement of funds to the borrower. Disbursements are made pursuant to the credit agreement, which is the definitive financing agreement between the borrower and the DOT.

Term Sheet Contents

General rules concerning the terms for secured loans, loan guarantees, and standby lines of credit appear at 23 U.S.C. §§603 and 604, and are also summarized in Chapter 2. More specific terms will be determined on a project-specific basis. The DOT commitment in the term sheet is subject to subsequent negotiation of the credit agreement.

Since term sheets serve primarily as obligating instruments 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 line of credit);
- Description of the project;
- Estimated total project costs and total TIFIA-eligible project costs;
- Maximum amount of TIFIA 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;

¹⁸⁰ 23 U.S.C. §608(b)(1).

¹⁸¹ 23 U.S.C. §602(b)(3).

¹⁸² 23 U.S.C. §602(c)(2).

¹⁸³ 23 U.S.C. §602(a)(3) and 49 C.F.R. §80.13(a)(1).

- Requirement to reimburse the DOT for credit processing fees;
- Conditions, if applicable, for execution of a credit agreement; and
- Covenants such as limitations on additional bonds, minimum coverage ratios, and any required reserve funds.

Section 6-2

Credit Agreement

The credit agreement is the definitive agreement between the DOT and the borrower (and the guaranteed lender, if applicable). It specifies all terms and conditions of the credit assistance and authorizes the disbursement of TIFIA credit assistance to the project.

Credit Agreement Prerequisites

In order for the DOT to execute the credit agreement and disburse funds, the borrower must satisfy at a minimum any requirements set forth in the term sheet. Also, the borrower must have two investment grade ratings on the senior debt obligations and two ratings on the TIFIA credit instrument, as described in Chapter 3. If the TIFIA debt is intended to be the senior debt, it must receive two investment grade ratings.

Prior to closing a TIFIA credit agreement, the borrower will be required to submit updates to both the financial plan 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, concession agreements, development agreements, financing 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. The borrower and the DOT will execute the credit agreement for a secured loan or line of credit; the guaranteed lender, the DOT, and the borrower will execute the loan guarantee agreement or instrument for a loan guarantee. Additionally, for a loan guarantee, the guaranteed lender will execute a separate loan agreement with the borrower, and the borrower 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 will require the borrower to provide copies of the bond documents and other agreements material to the flow of funds or to DOT's security for its review of the project's creditworthiness.¹⁸⁴ The DOT may also review any disclosure with respect to the TIFIA transaction that the borrower includes in offering documents.

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

¹⁸⁴ 23 U.S.C. §602(a)(2).

- Security features and additional terms;
- Detailed description of pledged security (*e.g.*, rate covenants);
- Flow of funds;
- Repayment terms, including amortization schedule and final maturity;
- Representations and warranties;
- Borrower covenants;
- Annual disbursement schedule and conditions for draws;
- Financial plan requirements; and
- Monitoring and reporting requirements.

The credit agreement will also include the form of requisition for disbursements and the form of note. Each borrower under a TIFIA secured loan agreement executes a note evidencing the obligation to repay the loan.

Section 6-3

Closing Activities

When the parties to 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 closing.

At closing, authorized representatives of the borrower, the DOT, and the guaranteed lender (if applicable) execute the legal documents. Documents requiring execution by persons not attending the closing are signed in advance. 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 will not close until the senior documents have been finalized and execution is within a week of the TIFIA closing. Standard transaction closing documents are required, 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 documentation.

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 a 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 a 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. TIFIA Loan Agreement and Promissory Note
3. Intercreditor 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
10. Development agreements (including design/build or concession agreements) and any other construction contracts
11. Independent Engineer's Report
12. Feasibility Study/Traffic and Revenue Study
13. Working Financial Model (not in .pdf or values format) and Financial Plan
14. Credit rating(s)
15. Opinion of borrower's counsel (addressing legal authority of Borrower, execution of documents, etc.); the DOT also requires 10b-5 opinions from attorneys participating in the transaction
16. Opinion of the DOT's counsel (addressing the DOT's authority to make loan to the borrower)
17. 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

Oversight and Monitoring Requirements

The DOT requires certain ongoing, periodic reporting with respect to project receiving TIFIA credit assistance. This periodic review has three purposes: (i) to provide the DOT with an oversight tool for ensuring the borrower'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 individual credit agreements. The TIFIA credit instrument will specify the scheduled annual and project milestone reporting requirements, as well as any other ad hoc or periodic reporting requirements.

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, financial projections, and project performance. Accordingly, borrowers will be required to covenant in the TIFIA credit agreement to provide ongoing financial and project information not only during construction, but so long as any TIFIA 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 (no more than 180 days following the borrower's fiscal year-end). In addition, the TIFIA credit agreement obligates the borrower to provide the DOT with an annual update to the project's financial plan in accordance with specified requirements. Financial plans must show full funding for the project and are subject to review and approval by the relevant DOT office(s). Each borrower will be required to give notice to the DOT of material events, including litigation, which could affect project development or the credit quality of the project.

The borrower is also required to provide annually, at no cost to the Federal Government, ongoing credit evaluations of the project and all debt obligations, including the TIFIA credit instrument.¹⁸⁵ These surveillance reports must be prepared by an NRSRO throughout the life of the TIFIA credit instrument.¹⁸⁶ By "current credit evaluation," the DOT means: (i) in the case of a project with a published rating, either a current rating or the borrower's certification stating that the rating and outlook are unchanged from the previous year, and (ii) in the case of a project without a published rating, a current rating of the project obligations and the Federal credit instrument. The DOT will also require periodic updates to the rating rationale to the extent that it is not included as part of the annual rating letter. The borrower must furnish the DOT with any other credit surveillance reports on the TIFIA-assisted project as soon as they are available.

The DOT's oversight and monitoring may also include site visits, periodic status meetings with the borrower, and reviews of independent engineer and/or other relevant reports. The TIFIA JPO will coordinate oversight and monitoring activities with the appropriate DOT field offices.

¹⁸⁵ 49 C.F.R. §80.11(d).

¹⁸⁶ 49 C.F.R. §80.11(d).

Each credit agreement between the DOT and a borrower 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 Federal Government's risk.

Section 6-5

Loan Servicing

The DOT may retain outside assistance to perform loan servicing for TIFIA credit instruments, including credit accounting, collections, maintenance of documents, and financial reporting.¹⁸⁷ To offset in part the DOT's costs, a TIFIA borrower is charged an annual fee for loan servicing activities associated with each TIFIA credit instrument, which is adjusted periodically based on inflation.¹⁸⁸

The DOT will provide general payment instructions to the borrower for each credit agreement. Prior to each repayment date, the DOT's 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, for the DOT's account, in accordance with the provisions in the credit agreement.

¹⁸⁷ 23 U.S.C. §605(c)(1).

¹⁸⁸ 23 U.S.C. §605(b)(2).

