Module 3

Advance Funding Agreements between the Texas Department of Transportation (TxDOT) and a Local Government (LG) for Transportation Projects

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Section 1

Overview

Introduction

In order for TxDOT to spend funds or other resources on a transportation project with a Local Government (LG), a written contract must first be executed between the parties.

At TxDOT, an Advance Funding Agreement (AFA) is the form of contract most frequently used for development of projects with LGs.

The purpose of this chapter is to help LGs:

- Identify, negotiate, execute, administer and manage AFAs for transportation improvement projects with TxDOT
- Calculate and track funding; and
- Understand and undertake proper contract management procedures for these agreements.

To develop an AFA for a specific project, the LG staff works with TxDOT district staff. The Contract Services Section (CSS) of the General Services Division is the central TxDOT office that prescribes the legal form and content for these agreements and supports the district staff in contract matters.

What is an Advance Funding Agreement?

An Advance Funding Agreement (AFA) is an agreement under which TxDOT (the State) and a LG allocate participation in a transportation improvement project. In other words, they allow the State and a LG to "jointly" provide for the implementation of a specific project, whether it deals with construction or not. Lastly, one must not confuse an AFA with a procurement contract, because it is not.

The AFA defines the scope of work, labor and material resources, and cash funding responsibilities to be contributed by each party that are necessary to accomplish a transportation project. The AFA answers the questions, "Who will do each task?" and "Who will pay for each task?"

In addition to contract provisions specifying the work and resource contributions, an AFA will have other legally required provisions. For example, if the AFA involves federal funds, a provision requiring the parties to follow federal Office of Management and Budget (OMB) Circular A-133 audit requirements will be included in the AFA. (NOTE: there are other Federal requirements besides just the audit requirements.)

Parties to an AFA

In most cases the parties to an AFA include TxDOT and a LG(s) such as:

- A city
- A county
- A river authority
- An independent school district
- A municipal utility district, or
- Other LG agencies.

Contrasting an AFA with a Procurement Contract

A procurement contract is a way to pay for goods or services. When TxDOT contracts with another party, usually a private firm, for a well-defined good or service such as engineering plans, environmental studies, or asphalt for a highway, a procurement contracts is used.

In an AFA, TxDOT and a LG negotiate an agreement that determines which party is responsible for conducting work, providing funding or contributing items in-kind. Examples of work contemplated in these agreements are:

- Acquiring Right-of-way
- Drafting engineering plans
- Providing for utility relocation
- Performing environmental studies
- Supplying Construction services, and
- Providing Maintenance of a transportation project.

The parties then follow the terms of the agreement and carry out each of the tasks assigned to them by the AFA. In many instances a LG might contract on its own for construction services in order to fulfill its obligation under the AFA, or in some cases, it may perform the work itself.

For example, in an AFA, the State may negotiate with a LG for development of the plans, specifications, and estimates (PS&E) for a specific project. Under the AFA, depending on the negotiations:

- The State may perform the PS&E with its own employees (this is called “state force account work”); or
- The State may enter into a contract with an engineering firm that would do the PS&E work; or

- The LG may use its own forces to do the work, if approved by the department (LG force account); or
- The LG may enter into a contract with an engineering firm for the PS&E work. In this case, the State or the LG may be the party responsible for paying for the work, regardless of which party is responsible for performance of the work.

When the State or a LG under an AFA, seeks to have work done, that party must follow their applicable laws and rules applicable to that type of work , as well as federal or state requirements that may apply. For example, under the AFA, if the State is going to provide the PS&E for a project by contract, the State must follow Texas Government Code Chapter 2254, which specifies the procurement process the State must follow for engineering services procurements. If this engineering contract were federally funded (23 CFR Part 172), then the State would also have to allow the federal auditors to audit the payments and performance related to the engineering services. (NOTE: There are other Federal requirements besides the audit requirements.)

Section 2

Categories of Advance Funding Agreements

General Categories of AFAs with Local Governments

AFAs with LGs may be divided into three broad categories:

1. AFAs for Voluntary Transportation Projects
   (all local funds with no federal or state funds involved in the work)
2. US Department of Transportation (USDOT), Federal Highway Administration federally funded AFAs between the State and LGs (local or State funds along with federal funds)
3. State funded AFAs with LGs
   4. (local or State funds (or both), but no federal funds)

AFAs for Voluntary Transportation Projects

An AFA for a Voluntary Project has cash or other resources voluntarily contributed to an on-system project. These are voluntary contributions. LGs may sign these Agreements providing that they pay for 100% of the project costs or 100% of a “discrete element” of a project and there is no required local match.

For accounting purposes within TxDOT, it is usually said that the “work under these voluntary agreements is 100% paid for by others” . In practice, “the work paid for by others” may be a small part of a larger TxDOT project (that is mostly paid for by TxDOT).

AFAs for Voluntary Projects in the past have been used for:

- Feasibility studies
- Land acquisition
- Environmental work
- PS&E
- Drainage projects
- Highway construction, and
- Maintenance projects.

The AFA for Voluntary Projects does not contain federal provisions because the contributed resources are not a part of a federal program agreement.

The value of these contracts varies in size from very small (a short length of curb and gutter for $15,000) to quite large (a $500,000 contribution for construction on a major state highway.) There is no minimum or maximum dollar amount for these agreements.

Federally funded U.S. Department of Transportation FHWA Programs

Federal legislation creates funding programs that allow States (typically their Transportation Departments) to pass federal funds through the State to a LG for coordinated development of transportation projects.

TxDOT acts as our State's conduit for the funds and is the *oversight* agency responsible for assuring that these federal funds are spent in an allowable manner.

In most cases, the federal programs require a *local match to the* federal funds in a defined ratio. For example, a project might be funded with 80% federal funds and 20% local resources. The *local match* may be paid with state resources, LG resources, or, in some cases, private sector resources. In most cases the local match is a *cash match*, but it can also be an *in-kind match* of resources, such as land, labor, or materials. The federal government may also provide funding for specific *earmark* projects. The specifics of the agreement depend on the program and negotiated agreements among the parties.

Examples of the most common programs are:

- Metropolitan Mobility/Rehabilitation Projects
- Enhancement Projects
- Off-State System Bridge Rehabilitation/Replacement Projects
- Urban Mobility Projects
- Congestion Mitigation and Air Quality Projects (CMAQ)
- Intelligent Transportation System Projects
- Border Corridor Projects
- High Priority Corridor Projects
- Demonstration Projects.

TxDOT has adopted rules under the Texas Administrative Code that are applicable to many of the federally funded programs. These rules are found at 43 TAC §15.50 et seq.

Some other programs have extensive rules specifically applicable to them. For example, enhancement program rules are found at 43 TAC §11.200 et seq. It is the responsibility of the contract manager of individual contract programs to be familiar with the applicable rules for their specific program contracts. A contract manager working with federally funded FHWA AFAs with LGs should read and be familiar with 43 TAC§§15.50 – 15.56 and with the specific rules affecting their programs. Some TxDOT divisions administering various programs have published important guides for referencing. For example, refer to: the Bridge Division's Bridge Project Development Manual for more information on bridge AFAs; the TxDOT Design Division's Statewide Transportation Enhancement Program Guide for information on enhancement projects; and, the *Right of Way Manual* found in the Texas Department of Transportation Online Manual System.

State-funded AFAs with Local Governments

There are a few state-funded programs that are handled with other versions of AFAs- with LGs. These include the Farm-to-Market (FM) Road Program, the Urban Street Program, and the use of district discretionary funds.

Under Transportation Code §256.008, State Funding of Farm-to-Market Roads, TxDOT's Farm-to-Market Fund may finance no less than $23 million a year for the construction, improvement, and maintenance of FM roads. TxDOT distributes these funds among the counties in an equitable and judicious manner. To be considered, a road must have the following five (5) general characteristics according to the statute:

1. It may not be a potential addition to the federal aid primary highway system;
2. It must serve rural areas primarily and must connect farms, ranches, rural homes, sources of natural resources such as oil, mines, timber, and water loading points, schools, churches, and points of public congregation, including community developments and villages;
3. It must be capable of contributing to the creation of economic values in the areas it serves;
4. It must preferably serve as a public school bus route or rural free delivery postal route; and,
5. It must be capable of early integration into the improved state road system, and at least one end of the road should connect with an improved road or a road that is soon to be improved that is in the state road system.

If TxDOT selects the FM road it would fall under Transportation Code §201.104, Designation of Farm-to-Market Roads. If the road is not selected to be a FM road, the local entity can choose to improve the county road itself.

Transportation Code §201.104 also addresses FM road agreements. The county usually pays for right-of-way, utilities, and any related environmental remediation expenses and fencing. Under this statute, the Texas Transportation Commission may designate any county road as a FM road for the purposes of construction, reconstruction, and maintenance. The commissioner's court of the county in which the county road is located must enter in its minutes an order waiving any rights the county may have for state participation in any indebtedness incurred by the county in the construction of the road. The State and the County may set forth the duties of the State in the construction, reconstruction, and maintenance of the county road in consideration for the county's relinquishing all claims for state participation in indebtedness.

District discretionary funds may be used by a district engineer for improvements to the State Highway System. In some cases, a district may agree to make an on-system improvement with a combination of discretionary funds or other state funds (that are not matching program funds) and LG funds. In this case, an AFA for Voluntary Project is used as the form of agreement between the State and the LG.

Section 3

The MAFA/LPAFA System and the Long Form Agreements

Background

In 2000, the TxDOT Contract Services Section (CSS) introduced a new, streamlined format for AFAs with LGs. The format consists of two components:

1. A Master Advance Funding Agreement (MAFA), and
2. A Local Project Advance Funding Agreement (LPAFA).

An understanding of the MAFA is important to comprehending the relationship between TxDOT and the LG in designing, constructing, and maintaining the transportation system. The MAFA/LPAFA system is an efficient contracting system that simplifies the majority of local project agreements and substantially reduces their physical size and processing time. It is also the basis for the provisions contained in the traditional "long form" agreements described below.

The MAFA and LPAFAs are currently used by LGs throughout Texas. To check if your agency or local governmental unit has signed an agreement, navigate to http://www.dot.state.tx.us/OGC/cso/list.htm.

MAFA

The MAFA sets out the *general terms and conditions of the relationship* and cites the federal and state laws that govern the agreements with LGs. The LG adopts a MAFA and agrees that its general terms and conditions will be followed on all the local projects undertaken between TxDOT and the LG, unless a specific exception is made in a project agreement (LPAFA). Signing a MAFA dispenses with the need for the two parties to negotiate and review standard contract terms and conditions each time they wish to enter into an agreement. The MAFA *does not* specify either the cost or the scope of work for individual projects. The MAFA also *does not* have a set termination date and is in effect until it is terminated by TxDOT or the LG.

LPAFA

Once a MAFA has been adopted, a LPAFA is then used to define the scope of work and funding for a *specific project*. The LPAFA contract period usually ends upon completion of the project unless the LPAFA is terminated early. The LPAFA specifies the division of responsibilities for performing work, such as:

- Right-of-way acquisition
- Preparation of PS&E, or

- Construction of a roadway.

The LPAFA also specifies which party will provide what resources, such as the land or the cash necessary for a project. The party responsible for performing work may or may not be the party responsible for paying for the work. The LPAFA *does not* include general terms and conditions of the agreement, since TxDOT and the LG have previously agreed to these provisions in the MAFA. If there are exceptions to the MAFA that pertain to a specific project, then the LPAFA provides for these exceptions.

Using the MAFA/LPAFA System

The first step is to provide a MAFA to a LG for adoption by resolution or ordinance. In some cases, after being adopted, the LG may wish to modify the MAFA. This is done by written amendment, and any such amendment must be reviewed and approved by the Contract Services Section (CSS).

Once a MAFA is adopted, the second step is to develop LPAFAs for specific projects. District offices have access to general-purpose LPAFA forms, as well as special program LPAFAs, including Enhancement Program LPAFAs and Off-system Bridge Rehabilitation/Replacement Program LPAFAs.

Long Forms

Because the MAFA/LPAFA system is not in place with all LGs, TxDOT processes two different kinds of *long form* agreements for those situations:

1. Long form agreements modeled after the MAFA/LPAFA contain provisions that are substantially identical to the MAFA/LPAFA provisions. Specific long form agreements have been developed for Enhancement Agreements and Off-System Bridge Replacement/Rehabilitation Agreements. In addition, a *generic* long form agreement has been developed for other federal programs, such as Hazard Elimination/Safety (HES) and Metropolitan Mobility (MM). This generic long form agreement is modified in the same manner as the LPAFA for use with different programs. The program title ordinarily is used in the title of the AFA, and the specific scope of work and unique budget requirements are the principle variables in the generic long form agreement.
2. Non-standard long form agreements are still accepted by TxDOT, but are least preferred. In reviewing these agreements, TxDOT assures that the standards inherent in the MAFA/LPAFA system are contained in non-standard agreements. Processing time is more extensive, however, because individual legal review is required for all non-standard agreements.

Section 4

Important Procedures and Other Useful Information

Commission Approval

A highway improvement project must be authorized in a Commission Minute Order presented and heard at a meeting of the Texas Transportation Commission. This is usually an individual minute order. If a project is included in the Unified Transportation Program (UTP), the Minute Order approving the UTP is the only Minute Order needed. Use the UTP Minute Order for the authorization of discretionary projects since the UTP awards the funds and allows the districts the discretion to choose projects.

Funding Commitment

Before TxDOT can expend money or resources on a project with a LG, a written agreement must be executed.

In all cases for projects using Federal funds, an approved Federal Project Authorization and Agreement (FPAA) is required before the LG can begin work.

Local Government Authority

It is the responsibility of the LG to know the legal requirements governing its ability to contract with the State. In general, LGs authorize the expenditure of funds through action of their governing body or board which authorizes the LG to enter into a contract with the State. For example:

- For cities, this is usually accomplished by an ordinance of the city council.
- For a county, the commissioner’s court adopts a resolution.
- For school districts and other LGs, they have similar bodies that must approve expenditures of funds.

Outstanding Balance

In negotiating AFAs, the involved TxDOT district office must first check with the Finance Division to determine if the LG has an outstanding balance owing to the State in accordance with 43 TAC §5.10. In most cases, outstanding balances need to be paid before further funding agreements can be executed.

Special Approvals

In some cases, special approvals are needed to allow a LG to carry out the work. For example:

- *Local Letting*. In some cases the LG may locally let and award a construction contract. 43 TAC §15.52 (8) outlines the conditions that are required if a LG is to let/award a construction contract. If these conditions are met, approval of the Executive Director or designee is required prior to the letting of the contract.
- *Local Force Account Work*. In some cases, the LG may use county or municipal employees to perform minor improvements of the highway system. 43 TAC §15.52 (8) outlines the conditions that must be met if a LG is to perform minor highway improvement. Once these conditions are met, approval of the Executive Director or designee is required prior to performing the improvements.
- *Fixed Price Agreement.* This is an alternate financing agreement in which the LG agrees to pay a *best estimate amount* that is not subject to change; this type of agreement must be approved by the Executive Director or designee. This rule is found at 43 TAC §15.52(3).
- *Incremental Payment Agreement*. This alternate financing agreement allows the LG to pay its share of estimated project costs using a repayment schedule included in an advance funding agreement; these incremental payments must be authorized by the Executive Director or designee and the LG may not have any delinquent obligations to TxDOT. See 43 TAC §15.52(6).
- *Approval of Projects in Economically Disadvantaged Counties*. Title 43 TAC §15.55 provides for special consideration for projects located in economically disadvantaged counties. In evaluating a proposal for a highway improvement project with a LG that consists of all or a portion of an economically disadvantaged county, the commission shall, for those projects in which the commission is authorized by law to provide state cost participation, reduce the minimum local matching funds requirement after evaluating a LG's effort and ability to meet the requirement. Transportation Enhancement projects do not qualify for this program.

An economically disadvantaged county is one that has:

- Below average per capita taxable property value;
- Below average per capita income; and,
- Unemployment.

Transmitting AFAs for Execution

After executing an agreement, the LG sends the partially executed agreement to the appropriate district office for coordination and execution by the State.

Tracking the Status of AFAs

When AFAs are sent to Contract Services Section (CSS) for processing, they are entered into the CSS log for tracking. TxDOT district offices can track the status of these agreements in the review and approval process by referring to the CSS contract log.

Collection of Funds

The district or division that is managing an AFA is responsible for collecting the agreed-upon funding from the LG in accordance with the terms of the AFA.

At the time the LG transmits the project funds to TxDOT, the district/division deposits the funds via Rapid Deposit into Trust Fund 927 (FIMS Segment 27), unless the funds are maintenance project funds.

Funds are collected for many different kinds of work including:

- Right-of-way acquisition;
- Environmental work;
- Engineering work;
- Construction, and,
- Maintenance.

If the funds are for construction, special procedures must be undertaken just prior to letting of the contract and also between letting and awarding of the contract.

If the funds are for maintenance work, special handling is required to assure that the funds are transferred into the district maintenance budget.

Interest

TxDOT does not pay interest on funds provided by a LG.

Post-Bid

After the bids are opened and the apparent low bidder identified, the district will be advised of the cost of the bid items. The DE will be asked to verify that the bid prices are acceptable to the LG. If the DE indicates that the bid amounts are not acceptable to the LG, the contract will not be awarded.

Monitoring the Financial Records for AFAs

TxDOT project managers work with their LG counterparts to ensure the accuracy of the department's financial records in regard to AFAs.

Indirect Costs

Government Code, Section 2106.001 defines indirect costs as “the cost of administering a state or federally funded program and includes a cost of providing a statewide support service. The term does not include the actual costs of the program” . 'Support service' includes accounting, auditing, budgeting, centralized purchasing, and legal services.

The language used in TxDOT's AFAs attempts to closely mimic the Government Code by using the terms “direct” and “indirect” costs to differentiate between costs incurred by providing a statewide support service (indirect) and the actual costs of the program (direct). For federal and state matching fund programs, the current TxDOT policy is not to bill third parties for certain indirect costs on highway improvement projects.

LGs should also be aware that there are two rates to be used by each district. There is a statewide rate used for billing indirect costs on damage claims and billing local entities for indirect costs on Voluntary Projects. There is also an individual rate for each district that is combined with the Austin office rate for performing cost estimates on construction projects. These individual rates are also used by the Finance Division to distribute indirect costs to the projects and in billing the Federal Highway Administration on federally funded projects. For additional information, please contact the Accounting Management Section of Finance Division.

Withdrawal from the Project

If a LG withdraws from a project after a LPAFA has been executed, it is responsible for payment of direct and indirect project costs incurred by TxDOT for the items of work in which it is participating.

Project Changes and Amendments

If there is a significant change in the scope of work, funding, or time, the district will prepare an AFA amendment that sets forth the change and the reason for the change. Frequently this is related to a construction contract change order. The same designee authorized to sign the original AFA signs the amendment and coordinates distribution. If additional funding is required, the LG remits the additional amount in accordance with the terms of the original agreement.

An amendment to the AFA will frequently trigger a change order in the related construction. . Any change in the scope of the project must be consistent with TxDOT’s change order policy. If the proposed change is outside of the change order policy, the district must coordinate with the Design Division to get a new Commission Minute Order to authorize the new project. If the change is consistent with TxDOT’s change order policy, no new Minute Order is needed and TxDOT’s Construction Division (CST) will coordinate with the district to issue the appropriate change order.

Project Close-out

The primary responsibility to finally close-out an AFA project lies with the district. If an underrun is found, the unexpended funds are returned to the LG. If an overrun is found, the LG will submit the additional funds in accordance with the requirements of the individual AFA. The district should prepare a statement of costs detailing the necessary information that would allow the Finance Division (FIN) to refund money or notify FIN that additional funds must be being collected. The district has pertinent data available to determine the actual shared costs that FIN does not have.

If the underrun is not paid, TxDOT must follow the procedures set forth in 43 TAC §5.10, relating to the collection of funds due the State.

Document Retention

When a contract is closed out, the file of record should be securely stored and protected until the legal document retention requirements have been met. The AFA must be kept during the contract period and for four years from the date of final payment under the contract, until completion of all audits, or until any pending litigation has been completely and fully resolved, whichever occurs last. However, if the AFA includes right-of-way or surviving (permanent) maintenance provisions, the file must be retained indefinitely.

Brief History of AFAs

AFA's have evolved over nearly seventy years. In the 1930s, when TxDOT built a new state highway through a city or county, the LG would review the plans and often request modifications. These situations were what lead to the advent of the first AFA-like creature.

For example, in the early days, TxDOT did not include "curb and gutter" as part of the plans (roads in the countryside had ditches for drainage). A city would want "curb and gutter" on the state highway where it passed through town. To accomplish this, the State and the LG would negotiate a contract in which the LG would contribute money to the State and in return the State would redesign the road and construct the "curb and gutter." These earliest agreements were called "escrow" agreements and the law permitting these agreements with cities was enacted in 1939 (Article 6673b, now titled Texas Transportation Code §221.002). A law later extended this ability to counties.

Railroads and utility companies were two other major industry groups which, because of the nature of their business, had reason to enter into similar agreements with TxDOT. Railroads crossed the State right-of-way and depending on the volume of traffic, these private companies needed to build, or have the State build, facilities such as overpasses, underpasses, or special at-grade crossings. Utility companies needed access to rights-of-way for their water and sewer lines or communication lines. Both of these groups have extensive legislation relating to their rights and duties, but their complex business needs frequently required them to enter into agreements with the State to determine which party would be responsible for providing plans and constructing a project.

Since the 1970s, the USDOT has established many programs that require the State to enter into an agreement with a LG in order to spend federal transportation funds. This legal structure requires the State and the LG to reach an agreement, or the funds cannot legally be spent. These agreements usually require either the State or the LG to contribute some amount of "matching funds" to the transportation project. The off-system bridge replacement/rehabilitation program and the enhancement program are examples of these programs.

Some State programs also result in AFAs with LGs. For example:

- Some TxDOT districts use discretionary funds in conjunction with local funds for on-system projects
- The Farm-to-Market Road Program, and
- Right-of-Way.

All of these projects are addressed using AFAs of one kind or another. The essence of these agreements is that one or more parties enter into an agreement with TxDOT to improve some aspect of the transportation system. Who does the work to create this improvement and who pays what share of the agreement's cost are negotiated as part of the agreement or are set by State law or rule.