Memorandum

To: CHAIR AND COMMISSIONERS **Date:** May 11, 2010

From: BIMLA G. RHINEHART
Executive Director **File:** Agenda Item 41
Action

Ref: **Public Private Partnership Project - Presidio Parkway Project (Doyle Drive) Request for Approval**

ISSUE:

The Department and the San Francisco County Transportation Authority have submitted a project proposal report requesting the Commission's approval to enter into a public private partnership (P3) agreement with a private entity for the development of the Presidio Parkway project. Should the Commission grant this approval?

RECOMMENDATION:

Staff recommends that the Commission not grant the request.

The proposal would take $813 million to $1.0 billion "off the top" from the State Transportation Improvement Program (STIP), without regard to county shares. It would reduce STIP shares for every county in the state to pay for the project. Commission approval would effectively establish and endorse a means of committing state transportation funds to capital projects that bypasses the STIP and other state programming procedures designed to ensure statewide funding accountability and equity. This is the key policy issue before the Commission.

Aside from this policy concern, staff notes that there are conflicting legal opinions regarding the statutory eligibility of the Presidio Parkway project for P3 approval. The legal questions concern whether the statutes require that financing of a P3 project include tolls or user fees and whether a P3 project must be supplemental to the existing transportation system. The Commission should request that the Legislature clarify its intent with regard to the legal concerns.

These and other issues and findings as they may relate to this and future proposals are described more fully in the staff analysis and other attachments to this book item.

BACKGROUND:

Section 143 of the Streets and Highways Code was amended by Senate Bill 4, Second Extraordinary Session (2009), to authorize the Department of Transportation and regional transportation agencies to enter into comprehensive development lease agreements with public or private entities for transportation projects, commonly known as public private partnership (P3) agreements. Section 143 provides that P3 projects and associated lease agreements proposed by the Department or a regional transportation agency shall be submitted to the California Transportation Commission, and that the Commission shall select and approve the projects before the Department or regional agency begins a public review process leading to a final lease agreement. Section 143 further provides that the Commission shall certify the Department's determination of the useful life of a project in establishing lease agreement terms and that the Commission shall adopt the criteria to be used by the project sponsor(s) to make a final evaluation of project bids based on qualifications and best value.

This is the first P3 project proposal submitted to the Commission under the authority granted by Section 143. In October 2009, the Commission adopted its Public Private Partnership Policy Guidance to assist and advise those contemplating the development of P3 agreements. The Commission's action on this proposal will establish a precedent that further delineates the Commission's policy in carrying out its statutory role in selecting and approving P3 projects.

This request for project P3 approval was first brought to the Commission at the April meeting. At that time, the Commission asked Department and Commission staff to work together to resolve outstanding issues and to bring back a revised proposal in May.

PROJECT DESCRIPTION:

The Presidio Parkway P3 project proposed by the Department and the San Francisco County Transportation Authority (project sponsors) is described as the Phase 2 portion of the Doyle Drive Replacement project. Phase 1 of the Doyle Drive Replacement project is now under construction and will shift traffic from the existing seismically deficient structures on to a temporary alignment. Phase 2 (Presidio Parkway P3 project) would reconstruct the existing six-lane facility south of the Golden Gate Bridge in San Francisco to current seismic standards.

According to the FHWA Major Project Financial Plan (May 2009), the overall project had a full funding plan on a design-bid-build basis. The Financial Plan identified the estimated cost for the Phase 2 work as $499 million in 2009 dollars.

Under the P3 proposal, a private developer would be engaged to design, build, finance, operate and maintain the Presidio Parkway projects over 33 years. The developer would be paid a $173.43 million milestone payment at the end of construction, with availability payments estimated by the Department to be between $1.131 and $1.382 billion over a 30-year period. Users would not be assessed tolls. Availability payments would be made primarily from the State Highway Account.

PROJECT REVIEW:

The Commission's Public Private Partnership Policy Guidance sets forth the Commission's policy for carrying out its statutory role under Section 143. Section 2 of the Policy Guidance states that the Commission will approve each project with reference to a P3 project proposal report, and that the approval will include and apply to (1) the description of the scope of the project, including construction work and the performance of maintenance and operations, and (2) the project financial plan. Section 3 of the Policy Guidance states that the Commission will approve a P3 project if, after reviewing the project proposal report, it makes an affirmative finding in each of six specific areas.

Staff engaged a consultant team headed by System Metrics Group to perform an independent evaluation of the reasonableness of the proposal, assumptions, financial data and other information presented in the project proposal report. Staff also reviewed the project scope and financial plan with reference to the project described in the project proposal report and other referenced documents. Staff and the consultant independently analyzed the proposed project in each of the six areas identified in Section 3 of the Policy Guidance. The findings of that staff and consultant analysis are attached.

Attachments

- Staff Analysis Report
- Consultant Project Proposal Assessment Findings Report
- Legal opinions
    - Legislative Counsel
    - Department counsel
    - Commission counsel
- Section 143 of the Streets & Highways Code
- Commission Policy Guidance for Approval of Public Private Partnership Projects, October 2009

California Transportation Commission
Presidio Parkway Public Private Partnership Proposal
Staff Analysis of Project Description, Financial Plan, and Approval Criteria
May 11, 2010

The California Department of Transportation has requested the Commission's approval, pursuant to Section 143 of the Streets and Highways Code, to implement a public private partnership (P3) project for the Presidio Parkway in San Francisco. The original request was accompanied by a project proposal report (PPR) submitted to the Commission by the Department and the San Francisco County Transportation Authority (SFCTA) on February 11, 2010. Prior to the Commission's April 7-8 meeting, Commission staff, with support from the consultant team, reviewed and evaluated this P3 proposal relative to the criteria for Commission project approval set forth in the Commission's Public Private Partnership Guidance, as adopted in October 2009.

This is an update to the staff review presented at the April meeting. Subsequent to the April meeting, the Commission staff and consultant team have worked with Department staff, SFCTA, and their consultant team to provide greater clarification of the Presidio Parkway P3 proposal and to address issues identified in our initial review. The documents reviewed for this update included:

- The Revised Project Proposal Report as transmitted by letter on May 6, 2010, including the following attachments:
    - Attachment 1 – "Analysis of Delivery Options for the Presidio Parkway Project," dated February 2010, by the Arup/PB Joint Venture (the "Business Case")
    - Attachment 2 – Streets and Highways Code 143 Compliance (new)
    - Attachment 3 – Availability Payments (revised)
    - Attachment 4 – Summary of Funding Allocation Model (new)
    - Attachment 5 – Performance Objectives (new)
    - Attachment 6 – Draft term sheet (revised)
    - Attachment 7 – Draft Public-Private Partnership Agreement and Draft Lease Agreement (revised)
    - Attachment 8 – Draft Presidio Parkway P3 Project Evaluation Criteria (new)
    - Attachment 9 – Handback Requirements (new)
    - Attachment 10 – Golden Gate BHTD/MTC/SFCTA Memorandum of Understanding (new)
- Form A – Instructions to Proposers, Proposal Letter (new)
- Financing Competition Process (new)
- Appendix 22 – Baseline Reporting Description – Draft (new)
- Technical Document Description – Draft (new)
- Public Private Partnership Co-Op Agreement dated January 1, 2010 (new)
- The FHWA Initial Financial Plan for the South Access to the Golden Gate Bridge, Doyle Drive, dated May 12, 2009, submitted in partnership by the Federal Highway Administration, San Francisco County Transportation Authority, and the California Department of Transportation. This Plan formed the base for the financial plan in the Project Proposal Report.

<u>Project Description</u>:

The description of the proposed P3 project is unchanged from the original submittal. The Project Proposal Report describes "*the overall Presidio Parkway Project*" as "*the successor name to the Doyle Drive Replacement Project, to reconstruct 1.6 miles of existing route 101 with a new six-lane facility south of the Golden Gate Bridge in San Francisco*." According to the Report, "*the overall project was split into two major construction phases:*

- *Phase I consists of contracts 1 through 4. It will ensure that seismic safety is achieved as soon as possible. At the completion of Phase I all traffic will be on either new structures or detour roads that meet seismic standards. Phase I started construction in November 2009 and is estimated to cost approximately $450 million.*
- *Phase II consists of contracts 5 through 8, with an estimated cost of approximately $473 million. As planned, Phase II would start in 2011 and be completed by 2013*."

The Report then describes the proposed P3 project as consisting of:

- the design, construction and financing of Phase II and
- the future operation and maintenance of the work completed under both Phase I and Phase II, except for certain local streets to be specified in the P3 lease agreement. The operation and maintenance period would extend for 30 years beyond a 3-year construction period.

The overall project is described more completely by reference to the "Refined Presidio Parkway" alternative in the Doyle Drive Final Environmental Impact Statement/Report, for which the Federal Highway Administration rendered its Record of Decision in December 2008.

Staff Comment: The staff finds that this description of project scope is sufficient to support project approval.

<u>Project Financial Plan</u>:

Under the financial plan, the developer is responsible for financing and implementing the design, construction, operation and maintenance of the project. The developer would receive reimbursement from the Department through a $173.43 million milestone payment at the substantial completion of construction, followed by availability payments over the 30-year concession period. According to the PPR, the developer's proposal would "bid a single Maximum Availability Payment in 2014 dollars (MAP) commencing when the facility is in its final configuration and is available to safely carry traffic. The MAP will be subject to adjustment for increases or decreases in interest rates compared to benchmark interest rates, and potentially for increases or decreases in credit spreads compared to benchmark credit spreads, between the proposal due date and a date to be determined (in no event later than the financial close)."

Under a set of base case assumptions, the Department estimates that availability payments would begin at $35.5 million per annum commencing in late 2014 and increase up to $40.53 million in

2043. The PPR estimates a total project cost to the Department of $1.402 billion, including $51 million for oversight and transaction costs, $47 million for retained risk reserves, $173.43 million for the milestone payment at the end of construction, and $1.131 billion in availability payments. According to the PPR, the project costs will be payable from the State Highway Account, except for $292.5 million in funds identified as either already committed or anticipated to be committed for the project. The $292.5 million includes $85.2 million in federal stimulus funds and earmarks, $118.8 million in local funds, $54.2 million in programmed STIP funds, $13.0 million in STIP funds not yet programmed, and $21.0 million in state bond proceeds through the State-Local Partnership Program. The $292.5 million does not include $62.5 million in State Highway Account funds committed for the project from the SHOPP. The project would generate no toll or other user fee revenues.

Under the Department's proposed financial plan, the maximum availability payment in 2014, adjusted at the financial close, will not exceed $43.6 million. At this level, the availability payments would total $1.383 billion and the estimated total project cost to the Department would be $1.654 billion.

Staff Comment: The staff finds that the updated financial plan is sufficient to support project approval, except for the inclusion of $13.0 million in STIP funds for the milestone payment that are not programmed and that were not proposed for programming. In the absence of further clarification of the financial plan, it appears that an additional $13.0 million would be required from local funds.

Criteria for Commission Approval:

Section 3 of the Commission's Public Private Partnership Policy Guidance states that the Commission will approve a P3 project if, after reviewing the Project Proposal Report, it makes an affirmative finding in each of six areas. Following are the staff's findings and comments for each of these six areas.

(1) That the project as described in the project proposal report is consistent with the requirements of statute.

The original analysis issued in April reported the staff finding that the proposed project appears not to meet this test. Section 143(j)(1) specifies, "Agreements entered into pursuant to this section shall authorize the contracting entity or lessee to impose tolls and user fees for use of a facility constructed by it, and shall require that over the term of the lease the toll revenues and user fees be applied to payment of the capital outlay costs for the project, the costs associated with operations, toll and user fee collection, administration of the facility, reimbursement to the department or other governmental entity for the costs of services to develop and maintain the project, police services, and a reasonable return on investment."

The project proposal would not authorize the developer to impose tolls or user fees, and the project would be funded primarily from the State Highway Account, which is derived from fuel tax revenues.

Since the April meeting, the Commission has received three legal opinions regarding this issue. The first is a Legislative Counsel's opinion, dated April 6, that was issued in response to two questions asked by Senator Darrell Steinberg, (1) whether a project funded by a revenue stream of public agency availability payments, rather than toll or user fee revenues, would be eligible under Section 143, and (2) whether the Doyle Drive Replacement Project would be eligible under Section 143. The Legislative Counsel's opinion answers both questions in the negative. In answer to the first question, the opinion concludes that Section 143 contemplates that a project undertaken under its provisions will rely on tolls or user fees rather than on existing sources of state or federal revenues. On the second question, the opinion concludes that the project is ineligible both because the definition of "transportation project" in Section 143(a)(6) requires that facilities be "supplemental to existing facilities" (rather than reconstruction of an existing facility) and because the project MOU precludes tolls and Section 143(s) explicitly precludes an agreement that would affect or supersede the MOU.

The second legal opinion is from the Department's internal counsel, dated April 30, and responds to the Legislative Counsel's opinion. It answers three questions, (1) whether a project under Section 143 must demonstrate that it "supplements" the existing transportation system, (2) if not, whether the Parkway Presidio project is an eligible project under Section 143, and (3) whether the Department is authorized to fund availability payments with monies from the State Highway Account rather than from tolls or user fees. The Department's legal opinion answers the first question in the negative and the other two questions in the affirmative. On the first question, the opinion reasons from grammatical construction that the word "supplemental" in the statutory definition of "transportation project" refers only to "related facilities" and not to highway, public street, or rail projects. On the second question, the opinion concludes that the Presidio Parkway is an eligible project because Section 143 does not mandate tolls or user fees nor prohibit availability payments by the State Highway Account. The Department opinion concludes that a plain reading of the statute does not support the "rigid interpretation" of the Legislative Counsel's opinion, reasoning that this "overlooks that a broad variety of 'transportation projects' may or may not include the construction of a facility and may not include tolls or user fees." Noting that the Presidio Parkway MOU precludes the use of tolls, it reasons that, "If Section 143 required all PPP projects to impose tolls or user fees, it would not have been necessary for the Legislature to make a specific reference to the Presidio Parkway project." On the third question, the opinion notes that state law permits money deposited into the State Highway Account "that is not subject to Article XIX" [i.e., federal funds primarily] may be used for any purpose authorized by statute, upon appropriation by the Legislature. It reasons that since the Section 143(a)(6) definition of "transportation project" includes "finance," the Department is "authorized to pay costs related to the financing of Section 143 PPP projects." It concludes that the Legislative Counsel's opinion "overlooks Section 143(f)(2) which authorizes the Department to 'exercise any power possessed by it with respect to transportation projects to facilitate the transportation projects pursuant to this section.'"

The third legal opinion is in the form of a memorandum from the Commission's own legal counsel and addresses two issues, (1) whether availability payments are a proper financing mechanism under Section 143, and (2) the application of the phrase "supplemental to existing facilities" in the definition of "transportation project" in Section 143(a)(6). The memorandum concludes that (1) availability payments are not authorized by Section 143, and (2) Section 143 projects must be supplemental to existing facilities. For each of the two issues, the memorandum examines the legislative history of Section 143, from its first enactment in AB 680 (1989) through amendments by AB 1010 (2002), AB 1467 (2006), AB 521 (2006), and SB2X 4 (2009). On the first issue, the memorandum concludes that the plain language of Section 143 does not support the use of availability payments, that the financial provision of Section 143(j)(1) contemplates that the revenue from which a lessee will be reimbursed for its costs and derive a return on its investment will be generated by tolls or user fees. It further concludes that the Legislature's intent when Section 143 was first added to the law, and the history of the section's evolution since then, do not support the use of availability payments, noting that the financial provision is essentially unchanged from its original enactment in 1989. It also concludes that the reference to the Presidio Parkway MOU in Section 143(s) does not affect the interpretation of Section 143 and "could be read as excluding Section 143 with regard to the Doyle Drive Project." On the second issue, the memorandum concludes that the phrase "supplemental to existing facilities" applies to all types of projects included in the definition of "transportation project," and not only to "related facilities." It reasons from grammatical construction and legislative history that the current phase, "highway, public street, rail, or related facilities supplemental to existing facilities," is essentially unchanged from the original phrase, "transportation facilities supplemental to existing state-owned facilities," in AB 680.

With such a range of conflicting legal opinions, the Legislature may want to provide further clarification of its intent before these same legal questions are raised with regard to other projects. If Commissioners are otherwise inclined to approve this project, the Commission may want to approve the project in full knowledge that the project may be the subject of further legislative action or litigation. The alternative would be to defer Commission action pending clarification of intent by the Legislature. If Commissioners are not otherwise inclined to approve the project, the legal eligibility issue becomes moot for this project, but remains a potential issue for future projects.

(2) That the Commission's approval of the project and its financial plan does not in and of itself create a new commitment of state transportation revenues or create an undue risk to state transportation revenues committed to other projects.

The proposed project and its financial plan appear not to meet this test. Commission approval of this project and its financial plan would create a new commitment of State Highway Account revenues in the range of $813 million to $1.0 billion over 30 years. (These figures include only the portion of availability payments representing debt service and payable from the SHA, not the portion representing operating and maintenance costs. Because the operating and maintenance costs are estimated in the PPR to be higher than state operating and maintenance costs, this represents a conservative estimate of the net new commitment.) Prior to the enactment of the state transportation tax swap by ABX8 6 and ABX8 9 (signed into law on March 22, 2010), this new commitment would have reduced the amount of funding available for the SHOPP. As the law now stands, the new commitment would reduce the amount of funding available for the STIP and would reduce the amount available to each county under the STIP county share formula. These reductions would first be taken into account in the fund estimate for the 2012 STIP.

Approval of this project by the Commission would effectively establish and endorse a means of committing state transportation funds to capital projects that bypasses the STIP and other state programming procedures designed to ensure statewide funding accountability and equity. This is the key policy issue presented to the Commission by the Presidio Parkway P3 proposal. Unlike debt service on GARVEE bonds, for example, the proposed availability payments would not count against STIP county shares and would instead take funding "off the top" from the STIP. To provide some perspective, the net STIP loss of $30.1 to $38.0 million per year would equate to an annual loss of about 5% to 6.3% for every STIP county share in the state, given the current STIP funding level of about $600 million per year. By comparison, the annual STIP county share for San Francisco is roughly $8.4 million.

Approval of this project would thus provide an incentive to every county to seek approval of availability payments from State Highway Account operating dollars, not for the sake of using P3 as a delivery method so much as for the sake of free funding. Without a limit of some kind, all STIP dollars might eventually be lost to this device.

The Presidio Parkway PPR cites the Department's internal policy to limit annual debt service from the SHA, including GARVEE bonds and P3 availability payments, to 15 percent of the available federal transportation funds. This is the statutory limit for GARVEE debt service alone. With the transfer of transportation bond debt service to the SHA enacted in the recent state transportation fund swap, the level of existing SHA debt service obligation will be about $1.3 billion in 2010-11, about 40 percent of federal transportation revenues. This amount would drop to about $800 million in 2011-12, and grow thereafter peaking at approximately $1.3 billion in 2017-18. With the recent funding swap, SHA annual debt service obligations now exceed annual STIP funding for highway and transit projects, which is about $600 million per year.

When the policy guidance concerning a new commitment of state transportation revenues was drafted, it was contemplated that P3 projects would be funded from toll revenues, together with any public funds already committed through the STIP or other capital funding programs. The intent of the guidance was to state Commission policy that P3 project approval was not to be viewed as an alternative means of committing state transportation funds. In the drafting of the policy, it was contemplated that P3 project sponsors might otherwise request or assume that a P3 approval would commit STIP funds or other state capital funds that are programmed and allocated by the Commission. It was not contemplated that the Department would propose a major commitment of operating budget dollars from the State Highway Account. Although the Commission does not approve or allocate the Department's operating budget, the Commission has a major policy interest in the proposed Presidio Parkway project financial plan because the plan would effectively finance the Presidio Parkway with funding taken from the STIP.

If availability payments from state transportation funds are to be permitted in the future, staff would recommend that legislation be drafted and enacted that would provide a framework for approval that limits the overall extent of such commitments and that provides for equity in geographic distribution. The model might be the state GARVEE bond legislation (Government Code Section 14550 et seq.), which provides an upper limit on annual GARVEE bond debt service and provides that GARVEE bond debt service payments will count against the appropriate STIP county share.

(3) That the project, consistent with Section 143(c)(3), is primarily designed to achieve the following performance objectives, as evidenced in the project proposal report:

- ***Improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor.***
- ***Improve the operation or safety of the affected corridor.***
- ***Provide quantifiable air quality benefits for the region in which the project is located.***

The project proposal report cites specific safety improvements, including increasing lane widths, adding shoulders, constructing median barrier, and enhancing the seismic, structural, and overall traffic safety of Doyle Drive. It cites specific mobility benefits through improved level of service. It also appears to provide quantifiable air quality benefits for the region.

(4) That the project, consistent with Section 143(c)(4), addresses a known forecast demand, as determined by the Department or regional transportation agency and evidenced in the project proposal report.

Section 143(c)(4) seems to anticipate the need for a forecast demand to support the collection of toll revenues or user fees. The project proposal report cites current traffic counts on Doyle Drive and a forecast for 2030. The project proposal report notes that because the P3 proposal does not include tolls or user fees, the sponsors did not commission a traffic and revenue forecast.

(5) Where applicable, that the criteria that the Department or regional transportation agency proposes to use for a final evaluation of proposals based on qualifications and best value are consistent with statute.

The evaluation criteria proposed by the project sponsors appear to meet this test. Section 143 (g)(1)(C) states that the California Transportation Commission shall develop and adopt criteria for making the final evaluation of proposals based on qualifications and best value. The Commission's policy guidance called for the PPR to include the evaluation criteria for the Commission to adopt. The evaluation criteria and methodology provided in PPR Attachment 8 sufficiently detail the technical and financial merits that will be used in the selection of the project developer.

(6) For a Department project, that the Department has made a determination of the useful life of the project in establishing the lease agreement terms that is consistent with the terms of the lease agreement.

The project appears to meet this test. The Department has determined that the useful life of the Presidio Parkway pavement is 40 years and that the structures and tunnels will have a useful life of 75 years. The proposed P3 Agreement is anticipated to be for 33 years (three years to construct and 30 years of operation).

California Transportation Commission (CTC)

PRESIDIO PARKWAY
PUBLIC PRIVATE PARTNERSHIP
PROJECT PROPOSAL ASSESSMENT

FINDINGS

May 11, 2010

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Executive Summary

This report summarizes the main revised findings of System Metrics Group, Inc. (SMG) in association with Jeffrey A. Parker & Associates, Aldaron, Inc. and Nixon Peabody LLP (the "SMG Team") in evaluating the Presidio Parkway Public Private Partnership ("P3") Project Proposal Report ("P3 Project Proposal") and related attachments.

The SMG Team had developed a previous report and submitted it to the California Transportation Commission ("Commission" or "CTC") before its April 7, 2010 meeting. Subsequent to that meeting, the SMG Team was directed to update its findings based on a series of discussions, meetings and additional document exchange with the sponsoring agencies. As a result, the sponsoring agencies submitted a revised project proposal report. The SMG Team's new findings are made regarding the revised project proposal report and supporting documentation that have been made publicly available.

As with the first SMG Team report, the evaluation conducted is based on the scope and criteria for approval as described in the Commission's policy guidance for approval of P3 projects, including the statutory requirements of Section 143 of the California Streets and Highways Code. *However, this report does not provide a legal opinion as to whether the project proposal report meets Section 143 of the statute. Rather, it represents the professional judgment of the consulting team.*

The consulting team focused on two specific categories of the Commission's policy guidance as follows:

1. Completeness of the updated Project Proposal Report ("PPR") submitted by the California Department of Transportation ("Caltrans" or "Department") and the San Francisco County Transportation Authority ("SFCTA", and together the "Sponsors") pursuant to Section 4 of the policy guidance; and
2. Assessment of the proposal vis-à-vis the specific criteria for Commission approval listed in Section 3 of the Commission's policy guidance, including an assessment of the consistency of the proposal with the requirements of statute.

Overall, the SMG Team found that the submittal addresses most of the requirements of the statute and the Commission's policy guidance. The remaining requirements and/or policy guidance elements depend on the interpretation of specific statute sections and/or policy guidance, including:

1. The availability payments during the lease period represent funding commitments over a 33-year period. Discounting these payments to a net present value is useful to compare the economics of a P3 implementation against other forms of delivery. However, these future payments can still be considered to be new commitments upon execution of the Public-Private Agreement because the total year-of-expenditure dollar amount required from state funds is higher than under a conventional delivery method, and no separate or simultaneous action to authorize the additional State fund commitments has been adopted or enacted.
2. Although an "upset limit" ceiling on the availability payments is proposed (pending receipt of proposals for the project), the difference between the base case availability payments and the higher limits could be interpreted as an "undue risk" to the State if a separate or simultaneous commitment of State funds is approved at the base case availability payment levels rather than at the upset limit levels.

I. Summary of Findings

This section addresses completeness and consistency with policy guidance criteria only to the extent that the PPR does not or may not have adequately addressed them.

However, before presenting the findings for each of the two aforementioned categories, the SMG Team believes it is important to note that the policy guidance is not well-aligned with a P3 reconstruction project based on availability payments from future state funds such as the Presidio Parkway project. There are a couple of reasons for this, including:

- The revised project proposal report points out that the Presidio Parkway project is not a “pure” reconstruction project since it adds shoulders and medians and provides benefits consistent with policy guidance and statute. However, other reconstruction projects that aim to gain P3 approval may be subject to the same potential inconsistencies with statute and policy guidance the SMG team pointed out in its first report (i.e., before the revisions were submitted). Any “pure” reconstruction project by its very nature does not generally produce mobility or air quality benefits. The statute and the policy guidance both state that a P3 project shall be “primarily designed” to achieve three performance objectives as follows:

    - Improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor.
    - Improve the operation or safety of the affected corridor.
    - Provide quantifiable air quality benefits for the region in which the project is located.

    Therefore, “pure” reconstruction project will likely not address two of these three objectives. Whether the statute and the commission guidance are intended to require that projects address *all three* performance objectives or *one or more* of them during normal or during special conditions may be subject to interpretation. The Commission, at a future time, may want to revisit its guidance to clarify that matter.

- A project structured with availability payments from future state funds is, in certain respects, similar to a loan to the State with de facto loan payments that include interest cost over a period of time, in this case 30 years (recognizing that availability payments are only payable to the extent performance measures are met). As such, future availability payments inevitably create new commitments of state transportation revenues. Although discounting future payments to present value is a reasonable approach to comparing the economics of different implementation approaches, it does not negate the fact that new commitments of state transportation revenues are being proposed. The Commission’s role with respect to the State’s Grant Anticipation Revenue Vehicle (GARVEE) bond program may offer a useful point of comparison as availability payment policies are considered in the future.

The SMG Team continues to observe that there appears to be a tension between the need for project sponsors to gain CTC approval prior to investing too greatly in advancing a project versus the level of information that is required for approval. Certain guidelines involve threshold questions about a project that could be answered (at least provisionally) at the planning stage. Other guidelines require more complete development of contract and procurement structures and documents, expensive activities that should only be pursued by the Department or regional transportation agency for a project that is almost certain to be approved if statute and guidance are followed. Even the relatively accelerated Presidio Parkway P3 Project only has been able to provide some of the necessary materials.

The CTC may wish to consider a process for providing indicative feedback to earlier stage projects. Once several P3 projects have been implemented, there also will likely be a body of precedents that are acceptable to the CTC and can be more easily adapted and applied with lessons learned to future projects. That said, the process should also not be so onerous as to discourage project-specific customization or application of lessons learned.

A. Project Proposal Completeness Findings

Section 4 of the policy guidance requires the PPR and request for P3 project approval to include or make reference to a number of items. This section is intended only to present the SMG Team's findings as to degree to which each of these items was <u>included</u>; an evaluation of the submission based on the policy guidance follows in Section I (B).

- Financial plan elements

    - Commitments of state and local revenues to the project or to any neighboring or ancillary projects necessary or desirable for full implementation of the project

      Finding – The revised PPR includes a detailed description of how and when the various local, state and federal sources will contribute to the project funding. The State Highway Account funding requirements are identified under a base case and some limited downside sensitivity analyses. The PPR also provides funding plan information related to the Phase I works, upon which the Phase II construction as well as the operations and maintenance of the contemplated P3 are dependent.

    - Public financial responsibility for meeting project costs in case of default by the contracting entity

      Finding – The PPR describes the calculation of Caltrans' termination liability towards the Developer in case of default, and has also been revised (along with the draft Public-Private Agreement) to address to some degree the planning and disbursement considerations related to the payment of such termination compensation, and to a lesser extent the remaining costs to complete the project.

- Estimates, with supporting documentation, the extent to which the project will be designed to achieve each of the following performance objectives:

    - Improve mobility, including travel times or reducing the number of vehicle hours of delay

      Finding – The revised PPR makes reasonably persuasive arguments that there will be mobility benefits from the project: (1) under normal operating conditions due to improved roadway geometry; (2) less congestion as a result of reduced frequency and severity of incidents due to design features such as a median barrier and shoulders; and (3) in comparison to a major closure that might result from a seismic event.

    - Improve the operation or safety of the affected corridor

      Finding – Submittal mentions safety improvements due to the seismic improvements and the new median. It does not quantify these improvements.

    - Provide quantifiable air quality benefits for the region

      Finding - *The PPR makes arguments that there will be positive air quality benefits in each of the three aforementioned mobility improvement cases. We find those arguments to be plausible, even though the magnitude of the benefits from a regional perspective is likely to be marginal and mostly local in nature. It is reasonable to conclude that, as a result, total emissions of at least some criteria pollutants will be less, especially on days when major traffic tie-ups are avoided.*

- Project addresses a known forecast demand

  Finding – The revised submittal addresses this requirement and now states that the traffic forecast in the PPR is consistent with the Metropolitan Transportation Commission's (MTC's) regional model, which is a known model that produces known forecast demand.

- The terms of the draft lease agreement associated with the project

  Finding – Draft Term Sheet and Public-Private Agreement have been provided. Most appendices to the draft Public-Private Agreement – in particular those most relevant to the Commission's review of the PPR in our judgment – have been added to the submittal.

- Criteria to make a final evaluation based on qualifications and best value

  Finding – The proposed evaluation criteria has been updated in the submittal to include a detailed description of the approach to determining best value.

- For a Department project, the Department's determination of useful life of the project

  Finding – The revised submittal now includes a determination of useful life for all critical asset times documented in the handback requirements attachment.

B. Consistency with Policy Guidance Findings

Section 3 of the policy guidance defines specific criteria that the Commission will use to evaluate project proposals submitted for approval. This section provides a summary of the SMG Team findings by criterion. More complete discussions are provided in Sections II – VI which follow.

- Is the project as described in the project proposal consistent with the requirements of statute?

  Finding – With respect to Section 143 (j), the PPR and its attachments generally indicate that the project' scope does not really contemplate tolling, although Section 11.6 of the draft Public-Private Agreement gives the Developer the theoretical right to do so, subject to satisfaction of numerous conditions. An evaluation of the meaning of Section 143(j) is outside the scope of the SMG Team.

- The Commission's approval of the project does not in and of itself create a new commitment of transportation revenues or create an undue risk to state transportation revenues committed to other projects (see Section II):

  Finding – While the Business Case argues that there could be a net present economic benefit to delivering Phase II of the Presidio Parkway Project as a P3, as presented in the PPR, the DBFOM delivery would require State funding in excess of the currently programmed amounts in the STIP/SHOPP and therefore create a new commitment of State transportation revenues. Despite being subject to appropriation, the availability payments might, as a contractual obligation of the State, have first call on State transportation revenues, ahead of outlay support, SHOPP and STIP programming.

  To our knowledge, a separate or simultaneous action to commit State funds has not been approved or enacted. Unless such authorization is at the level of the upset limit, rather than the base case level of availability payments, there are clear risks that additional state funds could be required, with proposers allowed to bid higher prices than the base case and no limitation clearly established at this time that would govern the period following contract execution until financial close, during which time the State *will hold 100% of the risk of changes in financing costs. The PPR does not clearly state whether a proposal in excess of the approved amount, if selected as the best value one by the Sponsors, would need to be re-submitted for the Commission's approval, nor the Commission's role in the event a change in financial cost between contract signing and financial close drives the cost of the project above the approved amount. Further, risks relating to relief events (likely), inflation (likely but relatively minor impact) and default and termination (not likely) could also lead to additional funding commitment requirements at a later stage. Notwithstanding the foregoing, if construction pricing trends in the state apply to this project, then the initial proposals may include capital costs below engineer's estimates.*

- Project is primarily designed to achieve the following performance objectives, as evidenced in the project proposal report (see Section III):

  Finding: The revised PPR meets this criterion.

- Projected addresses a known forecast demand, as determined by the Department or regional agency (see Section IV).

  Finding: The revised PPR meets this criterion.

- The criteria that the Department or regional transportation agency proposes to use for the final evaluation of proposals based on qualifications and best value are consistent with statute (see Section V).

  Finding: While the revised PPR generally meets this criterion, certain aspects may warrant further analysis by the Sponsors as they develop their final RFP and/or by sponsors of future projects. In addition, we note that a bid with an availability payment exceeding the stated upset limit would not be deemed non-responsive.

- The Department has made a determination of the useful life of the project in establishing the lease agreement terms (see Section VI).

  Finding: The revised PPR meets this criterion.

II. Financial Review (Approval Guidelines, Criteria #2)

The PPR presents a financial plan whereby the Developer would be compensated with a $173M[1] milestone payment upon construction completion, followed during the operating period by a stream of annual availability payments. A portion of the availability payments, corresponding to operations, maintenance and renewal expenditures, would be indexed to inflation. The annual availability payments are anticipated to commence in 2014 at $35.5M[2] in year of expenditure dollars ("YOE$"), and to reach $40.3M in 2043 in YOE$ (assuming the 2.2% Consumer Price Index ("CPI") inflation rate set forth in the PPR).

The overall project (comprised of Phases I and II) benefits from $349M in currently programmed State Highway Operations and Protection Program ("SHOPP") funds, of which $175M are allocated to the Phase II works, but only $62M (as stated in PPR Attachment 4) are intended to be used under the proposed Design-Build-Finance-Operate-Maintain ("DBFOM") delivery. Accordingly, the PPR presents a long-term funding plan that requests an additional $1,047M State Highway Account ("SHA") contribution from 2013 through the lease term in 2043, for a total $1,110M SHA contribution to Phase II.

From a financial planning perspective, the portion of future availability payments that will be used to defease capital investment by the Developer under a DBFOM structure should be considered by the state to be a long-term contractual obligation that is similar in certain respects to a debt obligation. As with other forms of borrowing, entering into an availability payment contract provides a new source of cash to pay for near-term expenditures (potentially freeing up previously committed cash for use on other projects) while creating long-term obligations that implicitly include financing costs (consequently reducing funding capacity in future years). The Business Case, under its own stated assumptions, calculates an overall positive impact to these tradeoffs in net present value dollars due to the time-value of money (less expenditure today offsets more expenditure in the future) and other factors including better risk management and efficiency gains when the P3 delivery structure is used as opposed to a traditional Design-Bid-Build ("DBB") procurement.

However, there are significant differences in the timing, programming and amounts of public funding obligations associated with the DBFOM delivery as compared to those associated with a traditional DBB project delivery. As a policy matter, in approving projects (and in particular, availability payment-based P3s), the CTC may wish to not only consider: (i) the forecasted present value cost of different delivery methods (encouraging efficiency); and (ii) the qualitative/performance benefits of each method; but also (iii) the actual cash flow implications to the state over the short-term and long-term. From a precedent standpoint, the approval of availability payment-based P3s without consideration of long-term cash flow implications could lead to circumvention of the previous prioritization of projects, and/or the unplanned erosion of debt capacity via de facto leveraging of the SHA.[3]

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[1] As described on page 27 of the PPR, the milestone payment has been increased from $150M to $173M. The Business Case and several sections of the PPR (main report, Attachment 4, Appendix 4A Attachment 7) have not been modified to account for the increased amount; we consider this to be an oversight and will assume that a $173M milestone payment is the most current plan. We have applied this assumption to our analysis of tables and numbers showing the outdated $150M amount throughout the PPR. Specifically, because cost assumptions are unchanged from the initial PPR submittal, the increase in milestone payment should have been balanced out by a reduction in availability payment (which we estimate would be a reduction of approximately $2M per year). The Sponsors have recognized that the PPR does not reflect this recalibration, and have indicated that the level of availability payments shown in the Business Case – which are the same as the base case amounts shown in the rest of the PPR – are accordingly overstated. So, at the stated availability payment amount levels, there is $2m in additional "headroom" under the upset limit, providing flexibility to deal with pricing volatility issues identified in Section II.B of this report.

[2] While $35.5M is referred to throughout the PPR (and used accordingly in this report), the base case funding allocation table on page 8 of Attachment 4 shows a FY13/14 annual availability payment of $35.39M.

The PPR indicates that the Sponsors have identified an upset limit of $43.53M as the highest 2014 availability payment[4] under which the DBFOM delivery would proceed. Given that this amount is identified in the PPR, it appears that if CTC approves the project, the Sponsors would not need to seek the CTC's re-approval for the project so long as the winning proposal's actual cost does not cause the annual availability payment to be established above $43.53M (for 2014). This maximum level would require $1,361M in year-of-expenditure dollar from the SHA through the lease term in 2043 (versus the $1,110M in SHA funding requirement shown in the base case of the PPR). At this time, $62M of these funds already is programmed through the SHOPP. In addition, the mix of costs covered by the availability payments and the anticipated use of TIFIA assistance would necessitate that about two-thirds of the total SHA funding requirements be sourced from non-federal monies – which will bring additional constraints in future year's programming for the CTC as it relates to federal/state match and other considerations associated with the fungibility of state versus federal dollars in the SHA.

The CTC's second Approval Guideline Criteria established that the Commission's approval of the project should not in and of itself create a new commitment of transportation revenues or create an undue risk to state transportation revenues committed to other projects. It appears that this criterion may not have fully contemplated an availability payment-based P3 for a project already included in the State Transportation Improvement Program ("STIP"). Assuming that Guideline Criteria #2 is meant to contemplate state funding requirements in general (as opposed to state funds programmed by the CTC in the STIP, SHOPP or other funding programs), and unless a separate action – either prior or simultaneous – commits the required state funds, then the delivery of the Presidio Parkway P3 Project as presented in this PPR would require state funding in excess of the currently programmed amounts in the STIP/SHOPP and therefore create a new commitment of state transportation revenues. However, it should be noted Caltrans' milestone and availability payment obligations under the Public-Private Agreement would, under current state laws, be subject to annual legislative appropriation[5].

The review below is intended to provide the CTC with a more complete understanding of the financial implications and risk to the state of developing the Presidio Parkway Project as a P3, including:

- The long-term funding implications to remunerating the Developer as proposed in the draft Public-Private Agreement;
- The reasonableness of the base case assumptions made in the Sponsor's financial plan; and
- An assessment of the risks retained by Caltrans under the P3 structure that could potentially lead to increased costs in the future (including potential supplements or increases to the availability payments, claims and the financing cost premium added to most claims, design and delivery interface with Phase I, and Caltrans' termination liability).

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[3] For this reason, the state of Florida established a statutory limit on all P3obligations including those contracted as part of Design-Build-Finance contracts, toll concessions and availability payment projects (similar to California's approach applied to GARVEE Bonds). No more than 15% of the projected State Transportation Trust Fund for any future year can be committed to future availability payments. As discussed later in this report, the PPR identifies that similar provisions have been proposed by Caltrans. Note that for Florida, this is a cap, not a pool of reserved funds.

[4] Note that due to CPI indexation, a $43.53M annual payment in 2014 would increase to $49.22M by FY42/43, per the downside scenario presented on page 8 of Attachment 4.

[5] As discussed below in this report and in the PPR, we understand that some form of prioritization of availability payments along with GARVEE bonds debt service commitments under the state transportation budget is under consideration and could involve a budget covenant insulating those financial obligations from annual appropriations to the extent possible. This would alter the programming and financial planning approach for future availability payment projects and, more generally, capital improvements in California. An analysis of these considerations is outside the scope of this report.

A. Long-Term Funding Commitments

(1) Total Funding Requirements

The Public-Private Agreement will be in force for approximately 30 years after construction completion and provides for availability payments to be earned to recoup the Developer's capital and operating expenses during the operations period. The long-range, year-by-year DBFOM funding plan included in the PPR details the mix of local, state and federal cash-flowed sources required to fund the Sponsor's risk reserve, transaction costs, milestone and availability payments. The plan shows a total need for $1,110M in SHA funds through 2043 to cover these project costs (notwithstanding the higher potential need if the project costs approach the upset limit). To meet this need, the PPR includes a funding schedule that requires $1,047M of SHA monies, in addition to $62M[6] of the SHOPP funds previously programmed for Phase II.

In addition, the PPR explains that delivering the project under a P3 method would entail a different approach to oversight and maintenance as well as to the scheduling and performance of routine maintenance and major rehabilitation work. Not only would this impact the cost profile during the 33-year concession, but the profile of life-cycle expenses during the three subsequent decades (see Figure 7 of the PPR). Thus, the impact on the state's transportation revenues will extend over at least a 63-year period. (For similar reasons, the Business Case undertook a "value for money" analysis over the same duration)

Analysis of the data provided in the PPR suggests that, given the Business Case assumptions and outputs, delivering the project as a DBFOM would impact the state's budgets over the full 63-year period as follows *in year-of-expenditure dollars*:

- In the short-term, the DBFOM delivery would address the DBB alternative's apparently identified problem of lacking a confirmed funding plan[7], and may at the same time free-up near-term SHOPP capacity for a reallocation to other projects. Specifically, it appears that $113M would be available to be redirected towards other projects in the short-term, rather than the full $175M stated on pages 13 and 21 of the PPR. (We are not sure as to whether such a deprogramming action and the related implications to the multi-source funding schedule would require the consent of all local funding partners.)

- The reduced short-term cash outlay primarily results from deferring project cost payments until after construction through the availability payment structure. This also entails incurring new, third-party Developer financing costs. Under the base case PPR budget, the $113M in near term savings is balanced against a need for $1,047M in SHA funds during the operating period, beginning in FY13/14 and continuing through the lease term (notwithstanding the higher potential need if the project costs were to approach the upset limit identified in the PPR).

- When compared to the DBB scenario, the PPR base case would create an additional $748M[8] of capital outlay commitments to future state transportation budgets over the entire 33 years, and create SHA disbursement or

[6] Per Attachment 4, $62M of the $175M Phase II programmed SHOPP monies are needed to fund construction support costs during the construction phase (the risk reserve and half the transaction costs) through FY12/13. The remaining $113M amount could further increase to $129M should the $16M program risk reserve also be deprogrammed.

[7] The DBFOM capital funding does not present any shortfall during the construction period through 2013 because the P3 structure limits Caltrans payment obligations to a $173M milestone payment and defers the balance of capital funding obligations (and new financing costs) to the 2014-2043 operating period. The DBB funding gap could ultimately be partly or fully reduced by applying cost savings on Phase I and II works – Contract 3 and 4 bids came in $33M and $40.7M (each 41%) below engineers' estimates, respectively (although draws on contingency and supplemental costs are likely).

[8] The Business Case (Section 3.7.4.) states that taxation impacts are neutral across all delivery options. Consequently we have not included those as part of the above analysis. Even if corporate and state income tax cash flows are shown as a benefit of the DBFOM method, such taxes do not accrue to the state transportation funds. However, if the 9% state income

Caltrans operating budget obligations for design and construction support, operations, maintenance and rehabilitation costs through 2073 that are $68M higher than the ones necessary under a DBB delivery. This would reduce capacity in future 5-year STIPs or 4-year SHOPPs for projects not yet programmed, and would essentially "earmark" operating dollars capacity to this project from the top of the SHA distribution waterfall.

- Further, the Business Case assumed substantial adjustments to the construction cost estimates for the DBB and DBFOM delivery methods (see Business Case, Exhibit 34), increasing the relative cost of the DBB. In the event that the cost overruns or required risk contingencies assumed for the DBB were not as detrimental as stated in the Business Case, the additional capital funding requirement for a DBFOM delivery method relative to the DBB would be in excess of the $749M differential identified above.

Table 1 summarizes the funding sources identified as currently available for the project. Table 2 compares the funding requirements for the project under the prior DBB approach and the proposed DBFOM approach. All figures included in these Tables were extracted from the updated PPR dated May 4, 2010.

Table 1. Current Status of Capital Funding Sources (in million dollars)

CAPITAL FUNDING PLAN SPLIT *(From PPR Attachment 4)*	**Phase I Allocation**	**Phase II Allocation**	**Program Risk**	**TOTAL**
State - SHA (incl. SHOPP)	$157.6	$174.8	$16.3	$348.7
State - TCRP (Caltrans/SFCTA)	$14.8			$14.8
MTC Bridge Toll Funds	$80.0			$80.0
GG Br. District Funds		$75.0		$75.0
Sonoma CTA/TA of Marin		$5.0		$5.0
SFCTA - Prop K	$29.1	$38.8		$67.9
SFCTA - SLPP		$21.0		$21.0
SFCTA - STIP RIP	$16.9	$67.2		$84.1
SFCTA - RIP	*$16.9*	*$54.2*		*$71.1*
SFCTA - RIP (future)		*$13.0*		*$13.0*
Federal Stimulus - ARRA (through SHOPP)	$106.3			$106.3
Federal Stimulus - TIGER		$46.0		$46.0
Fed C - Urban Partnership Agreement	$27.3			$27.3
Fed C - Earmark Funds	$36.2	$13.2		$49.4
Federal C - PLHD	*$23.6*	*$13.2*		*$36.8*
Federal C - High Priority	*$12.6*			*$12.6*
Fed R - Earmark (Port Sonoma Ferry Funds)		$20.0		$20.0
Fed R - ER Demo (Devil's Slide)		$6.0		$6.0
Total	**$468.1**	**$467.1**	**$16.3**	**$951.4**

Note to Table 1: The PPR indicates that only the last two federal sources (Fed R – Earmark Port Sonoma Ferry Funds and ER Demo Devil's Slide) remain uncommitted at this stage, for $26M. Assuming those funds are eventually committed to the project, $467M[9] of funds should be available for covering the Sponsors' expenses under the DBFOM delivery (excluding Phase I construction). However, because the ultimate commitment of those funds is not guaranteed, there are some risks, although perhaps not large, that substitute sources of funding – potentially more SHA monies - would be needed.

tax – which may only affect the SHA in a very remote and indirect way - was accounted for out of the 41% effective corporate tax paid by the Developer during operations, we estimate that this would reduce the operating funding requirement differential for the DBFOM delivery by $37M (in YOE$ and calculated using Caltrans' tax liability assumptions).

[9] This would increase to up to $484M if the "Program Risk" reserve is not fully used for Phase I expenses and the balance is applied towards the Sponsors' DBFOM project costs.

Table 2. Summary of Total Phase I & II Funding Requirements *(in YOE$)*
Draws from multiple information sources in the PPR/Business Case

All figures in YOE million dollars

Potential State Budget Requirements	**TOTAL**	**BREAKDOWN BY CATEGORY**		**BREAKDOWN BY SPENDING PERIOD**		
		Construction	**Non-Construction**	**Thru 2013**	**2013-2043**	**2044-2073**
DBFOM delivery	$1,980	$1,065	$915	$343	$1,047	$591
DBB delivery	$1,163	$317	$847	$618	$128	$417
Difference	**$816**	**$748**	**$68**	**($276)**	**$918**	**$174**

DBB DELIVERY	**COST CATEGORY**	**TOTAL**	**BREAKDOWN BY CATEGORY**		**BREAKDOWN BY SPENDING PERIOD**		
			Construction	**Non-Construction**	**Thru 2013**	**2013-2043**	**2044-2073**
Project Delivery Costs							
Phase I Delivery(1)		$468	$385	$83	$468		
Program risk		$16	$13	$3	$16		
Phase II Delivery:							
Design Costs	Design	$55		$55	$55		
Construction Payments Phase II	Construction	$397	$397	$0	$397		
Construction Reserve	Construction	$18	$18		$18		
Operations Costs(2)	Operating/Preservation	$52	$0	$52		$18	$34
Routine Maintenance and R&R Costs(3)	Operating/Preservation	$494	$0	$494		$110	$383
Public Sector Transaction Costs	Const. Support	$54	$0	$54	$54		
Public Sector Retained Risk	Const. Support	$107	$0	$107	$107		
Tax adjustment(4)	Const. Support	$0	$0	$0			
Total Costs through 2073		**$1,660**	**$813**	**$847**	**$1,115**	**$128**	**$417**
minus: Non-SHA/SHOPP funding	Construction	-$496	-$496	$0	-$496	$0	$0
Total State Funding Requirements		**$1,163**	**$317**	**$847**	**$618**	**$128**	**$417**
Phase I - SHOPP (1) already programmed		$264	$217	$47	$264		
Program risk - SHOPP already programmed		$16	$13	$3	$16		
Phase II - SHOPP already programmed (5)		$175	$86	$89	$175		
Additional SHA/SHOPP funding requirement		$291		$291	$163	$128	
Future State funding requirements for operations (SHOPP) for 2044-2073		$417		$417			$417

(1) Assumes all Phase I project costs being the funding split shown in the PPR. Support costs (and funding) portion is assumed in accordance with FHWA initial finance plan.
(2) Excludes costs for outsourced activities such as policing, insurance from any service patrol and utilities assumed to equal under all delivery methods, per Business Case App. F2
(3) Based on Business Case App. H - because of missing cashflows for years 2014-19, we have allocated an extra $3M to match the $494M total shown in the summary
(4) As a baseline, we have discarded the $166.78M tax adjustment per the "neutrality" comment made in the Business Case analysis.
The inclusion of tax adjustments would also not be relevant to a Caltrans funding plan as federal and state income tax do not affect SHA balance.
(5) Breakdown assumed to even out funding of construction category

DBFOM DELIVERY	COST CATEGORY	TOTAL	BREAKDOWN BY CATEGORY		BREAKDOWN BY SPENDING PERIOD		
			Construction	Non-Construction	Thru 2013	2013-2043	2044-2073
Project Delivery Costs							
Phase I Delivery(1)		$468	$385	$83	$468		
Program risk		$16	$13	$3	$16		
Phase II Delivery:							
Availability Payments - capital allocation (2)	Construction	$903	$903			$903	
Availability Payments - non-capital allocation	Operating/Preservation	$228		$228		$228	
Milestone Payment	Construction	$173	$173		$173		
Public Sector O&M+R&R Cost Post Handbacl	Operating/Preservation	$591		$591			$591
Construction Reserve	Construction	$17	$17		$17		
Procurement and Bidding Expenses	Const. Support	$18		$18	$18		
Construction Oversight (3)	Const. Support	$14		$14	$14		
O&M Oversight	Operating/Preservation	$19		$19		$19	
Public Sector Reserve	Const. Support	$29		$29	$29		
Total Costs through 2073		$2,476	**$1,492**	**$984**	$736	$1,150	$591
Funding Plan through 2043							
Phase I - SHOPP already programmed (1)		$264	$217	$47	$264		
Phase I - Various (1)		$204	$168	$36	$204		
Program risk - SHOPP already programmed		$16	$13	$3	$16		
Phase II - Risk Reserve - SHOPP already programmed		$47	$17	$29	$47		
Phase II - Transaction Costs during Construction: Prop K		$16		$16	$16		
Phase II - Transaction Costs during Construction: SHOPP already programmed		$16		$16	$16		
Phase II - O&M Oversight: SHA not yet programmed (future appropriations)		$19		$19		$19	
Phase II - Milestone Payment							
Federal Funding (TIGER, PLHD, ER Demo, Earmark)		$85	$85		$85		
SLPP		$21	$21		$21		
RIP (2008 STIP)		$54	$54		$54		
RIP (future)		$13	$13		$13		
Phase II - First Two Availability Payments in FYE2014 and FYE2015 - GGBHTD		$71	$60	$11		$71	
Phase II - Ongoing Availability Payment							
GGBHTD		$4	$3	$1		$4	
Sonoma CTA /TA of Marin		$5	$4	$1		$5	
SFCTA - Prop K		$23	$18	$5		$23	
SHA - not yet programmed (Future appropriations for Availability Payments)		$1,028	$817	$211		$1,028	
Total Funding Anticipated Disbursement Schedule thru 2043		$1,886	**$1,492**	**$393**	$736	$1,150	
plus: O&M and R&R costs post-handback (2043-73) - future SHOPP requirements		$591		$591			$591
minus: Non-SHA/SHOPP funding		-$496	-$427	-$69	-$393	-$103	
Total State Funding Requirements		**$1,980**	**$1,065**	**$915**	**$343**	**$1,047**	**$591**
Phase I - SHOPP already programmed (1)		$264	$217	$47	$264		
Program risk - SHOPP already programmed		$16	$13	$3	$16		
Phase II - SHOPP already programmed		$62	$17	$45	$62		
SHA not yet programmed - Future appropriations		$1,047	$817	$229		$1,047	
Future State funding requirements for operations (SHOPP) for 2044-2073		$591		$591			$591

(2) Grant Disbursement Covenants

PPR Attachment 4 provides a year-by-year cost schedule for the $47M risk reserve, $51M transaction costs, $173M milestone payment and $1,131M availability payments budgeted by the Sponsors for the Phase II DBFOM delivery. While generally consistent with most state and federal grants covenants, the PPR does not detail the exact mechanisms (whether advance draws, direct payment or reimbursement of costs incurred, etc.) for the Sponsors to access and utilize the various sources of funds for meeting the total $1,402M costs over the lease period. Except for the executed memorandum of understanding between the Golden Gate Bridge Highway and Transportation District (GGBHTD), the Metropolitan Transportation Commission (MTC) and the SFCTA ("MOU") dated November 26, 2008, the PPR does not include information such as draft funding grant agreements or award notification detailing the expected conditions and covenants to each grant's disbursement.

- In particular, the major part of the $75M GGBHTD grant as well as the $4M and $1M respective funding contributions from the Transportation Authority of Marin and Sonoma County Transportation Authority are shown as used after construction final acceptance[10] through 2015 to make the availability payments. Because the MOU requires contributions from those local funding partners to be paid to SFCTA no later than the final year of construction (2013), the administrative procedures for the invoicing and distribution of those funds (which we assume have not yet been established) would need to allow the Sponsors to "draw on and hold" those monies until their full utilization through 2015, and treat the Developer's incurred design and construction expenses as "eligible costs" to support drawing on the funds.

- Similarly the USDOT may, because of the rapid economic recovery goal of the program and the "shovel-readiness" key selection criteria, ultimately condition the $46M TIGER grant on a deadline for actually disbursing the funds that is generally consistent with the construction schedule indicated in the TIGER application submitted in 2009 (which has not been provided). We understand such conditions are under discussion with USDOT at this time. While these funds need to be obligated by September 2011 by federal regulation, the PPR currently assumes the grant monies will not be used until substantial completion of the project when the $173M milestone payment is due – this is currently assumed for December 2012, per the schedule used in the FHWA initial finance plan dated May 2009. Given the "at least […] four month delay" cited in Section 5 of the Business Case with respect to the ongoing Phase I development, Phase II construction works could be delayed by a few months as a result of delayed site access. As a result, the Sponsors might also need to draw and hold the grant monies before substantial completion or find another mechanism to manage this disconnect. USDOT may need to agree to treat the Developer's incurred design and construction expenses as "eligible costs" to support drawing on the funds (which does not seem unreasonable, given that the intent of the program is to encourage timely construction work that indeed would have occurred). The funding cash flow shows that the TIGER grant funds – along with the two federal earmarks, the State and Local Partnership Program (SLPP) and Regional Improvement Program (RIP) 2008 monies - will be received in FY11/12 but not used until the following fiscal year.

We do not view these as insurmountable challenges but note that their successful resolution is necessary in order to ensure that even greater amounts of SHA funding are not required for the project.

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[10] Although the draft Public-Private Agreement states that availability payments will begin upon Substantial Completion, all financial information show availability payments commencing mid-2013 which is the expected Final Acceptance date. We assume in the rest of this report that availability payments begin upon Final Acceptance.

(3) Utilization of Federal Transportation Funds

To the extent federal transportation funds are to be used to make availability payments, there are several key considerations. While from a contractual standpoint availability payments can be defined as unitary, for accounting purposes, they often are disaggregated into imputed elements: a capital portion (including interest/dividends and principal on debt and equity raised to fund capital expenses); an operation / routine maintenance portion; and a capital renewal and rehabilitation portion. This type of breakdown also helps ensure that the use of grant monies to fund availability payments does not breach any associated statutory requirement or contractual grant covenant. Such analysis was not expressly provided in the PPR[11].

Section 80.13(c) of the TIFIA Regulations (49 CFR Part 80) provides that federal funds may not be pledged as security for the repayment of TIFIA loans. In addition, federal monies cannot be used to fund operations and routine maintenance expenses other than capital renewal and rehabilitation works. Finally, given of the novelty of availability payments and the specifics of each project, the Federal Highway Administration does not systematically construe the portion of the availability payment used to offset the Developer's financing costs as authorized capital spending.

The PPR information indicates that $1,047M of SHA funds would be required to make the $1,131M total availability payments and cover $19M of owner's operations and maintenance oversight costs over the lease period, but does not specify the portion of these SHA funds that would need to be sourced from monies other than Federal Highway Trust Fund dollars, due to the restrictions such as those mentioned above.[12] Based on the information available in the PPR, the SMG Team estimates that <u>up to ~$650M (about two-thirds of the total SHA requirement) may have to be funded from SHA funds specifically originating from state sources</u>:

- Approximately $130M of routine operations and maintenance (assuming the $228M O&M portion of the availability payments contains roughly $100M of capital maintenance and renewal costs);
- $450M in TIFIA debt service; and
- Potentially $70M in various fees and non-TIFIA financing costs.

Note that these amounts are based on the Sponsors' estimated costs and expected financial plan; the actual amounts and distribution between federally eligible and non-eligible costs will eventually be determined by the Developer's actual costs and financial plan;[13] thus the risk for a mismatch will need to be monitored and managed by the Sponsors through the proposal evaluation process and financial close of the project.

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[11] While Attachment 3 breaks the availability payment down into an "assumed 85% fixed portion" and an "assumed 15% O&M portion indexed to inflation" (which we assume encompasses operation/routine maintenance but also capital renewal and replacement costs), the PPR does not refer to such breakdown to address any covenant related to federal funds that may be used in making availability payments.

[12] As a general matter, federal grant money retains its character until spent on the purpose for which the grant was received – and the simple deposit and commingling of Federal Highway Trust Fund dollars into the SHA would not relieve the Caltrans from the usage restrictions noted above.

[13] For instance, an increase of the availability payment to the $43.53M upset limit could be due to numerous cost increase factors, some eligible for federal dollars and some not – possibly necessitating the same two-third proportion of SHA funds sourced from non-federal dollars, or close to $750M.

B. Reasonableness of DBFOM Base Case Financial Assumptions and Sensitivity Analysis

The PPR itself identifies several of the risks and financing assumptions used in the DBFOM base case that would adversely affect the cost of the project in the immediate and/or longer term, even if the construction and operating costs are held constant. While the PPR does not include a detailed sensitivity analysis of these risks, the Sponsors have provided an alternate scenario that shows an annual availability payment of $41.4M in 2014$ (compared to the base case $35.5M in 2014$ for the first full year), that include what the SMG Team considers to be a less aggressive set of TIFIA loan related assumptions:

- The TIFIA loan interest rate is now set to 4.60%, based on the April 28, 2010, 30-year State Local and Government Series ("SLGS") rate upon which the TIFIA loan would be based;
- The TIFIA loan amount is limited to 50% of the total project debt (instead of 72%), per the TIFIA statutory limitation that prohibits exceeding this level unless the loan is rated investment grade; and
- The TIFIA loan subsidy cost is a conservative 10% of the loan amount and is payable upfront by the Developer to USDOT, rather than assumed to be absorbed entirely by TIFIA's limited federal budget authority.

Due to escalation, the annual availability payment under this scenario would rise from $41.4M in FY2014 to $46.5M in FY2043, increasing the all-in SHA requirement from $1,110M to $1,297M over the lease term.[14] This $197M change in YOE cost is equivalent to an additional $50M in net present cost at an 8.5% discount rate or $75M at a 5.5% discount rate. Using this scenario as a baseline rather than the one outlined in the PPR/Business Case would alter the quantitative value for money analysis' results, and it would also require additional future funding from the state to make the availability payments. As further explained below, other uncertain bid and financing cost parameters also appropriately could be stress-tested under more conservative assumptions in addition to the above adjustments.

On the other hand, the winning bids received on Phase I Contracts 3 and 4 both have been approximately 40% below estimate (prior to consideration of claims, contingency and supplemental agreements). Assuming these bids reflect discrepancies between engineers' estimates and current construction market conditions, and that such market conditions hold, then it may be expected that the underlying construction costs of Phase II could be lower than anticipated and the overall risk that state funding requirements will exceed the levels shown in the Business Case would be proportionally diminished.[15] The SMG Team estimates, based on its own modeling calculations, that under a scenario in which the contractor's bid is priced 25% below current estimates, the FY2014 starting availability payment would be decreased by $11M to $13M per year, equivalent to $95M to $110M on a net present value basis at an 8.5% discount rate, or $140M to $165M at a 5.5% discount rate. However, as the economy recovers and construction and materials prices rise, it may not be reasonable to expect that construction pricing will remain so far below estimate. Likewise, a higher than expected construction price would result in a higher required availability payment.

[14] Assuming 15% of the annual availability payment increases with CPI and under the 2.2% per annum CPI increase assumed in the Business Case.

[15] Given this wide variance from estimate to actual cost, the validity of inputs to and results from the DBB vs. DBFOM comparison is difficult to assess. For example, the DBB case assumed costs substantially above estimate and the DBFOM assumed costs near estimate. Both would seem high given the current pricing environment.

If the construction price estimates remain at the levels shown in the PPR, the CTC should anticipate that proposals might come closer to, or above (in the event of very adverse interest rates fluctuations, delays, failure to provide a clear appropriation framework, and/or other financing costs developments), above the $43.53M upset limit for the 2014 annual availability payment proposed in the PPR.[16] Therefore the SMG Team recommends that the upset limit and corresponding SHA funding requirements of $1,361M (instead of the $1,110M needed under the PPR's baseline assumptions) should form the basis on which the CTC considers approving the P3 delivery.[17]

Following is a more detailed discussion of two major financing assumptions used in the PPR base case that could adversely affect the cost of the project in the immediate and/or longer term if proven to be aggressive: the creditworthiness of California availability payments, and the terms and availability of a federal TIFIA loan. Lastly, there is a brief review of the financing competition process now contemplated by the Sponsors as being conducted after bid evaluation and contract signing, but before financial close, during which period the state will receive the entire benefit / hold the entire risk of changes in the cost of financing. It is currently unclear that the upset limit will be enforced during this potentially extended period, which the CTC may wish to address should it approve the project.

(1) Creditworthiness of California Availability Payments

The PPR base case may be aggressive in assuming that the project (and specifically its senior debt and TIFIA loan tranches) can achieve a similar or better credit rating than the two U.S. DBFOM concessions often referred to in the Business Case, Florida's I-595 and Port of Miami Tunnel (POMT) availability payment P3s, both of which closed in 2009. In particular, while the levels of debt-to-equity leverage and equity returns experienced on those two Florida projects are consistent with the Presidio Parkway P3 base case, the PPR assumes that Presidio Parkway senior debt would be priced exactly as in POMT, and that the project's TIFIA loan would achieve an investment-grade rating. However, in neither Florida project was the TIFIA loan investment grade (resulting in limitations on the TIFIA loan amount in accordance with the TIFIA statute). Further, it is unlikely in the current budget and political environment that a commitment by the state of California to make availability payments (and, if necessary, relief event compensation and/or termination payments) subject to appropriation would be viewed as favorably from a credit rating perspective as a similar commitment by the state of Florida.

At this time, California appropriation risk bears a different, lower credit than Florida appropriation risk at the time of POMT and I-595's closings:

- California general obligations are rated A/BAA/Baa1, compared to Florida AAA/AA+/Aa1 ratings at the time of the closings. This rating differential is the most appropriate reference to compare

[16] PPR states that the availability payment will be bid in 2014$. This differs from the standard practice to seek long-term, indexed price proposals in current base date dollars. Should availability payment proposals ultimately be sought in 2010$, then to respect the $43.53M upset limit expressed by the PPR in 2014$, the proposed availability payment, if bid in 2010$, must not exceed approximately $43.0M. This is because the Public Private Agreement provides for 15% of the availability payment to escalate with CPI. So, the amount bid in 2010$ will increase (assuming a 2.2% annual CPI growth per the PPR) by approximately $0.5M-$0.6M when expressed in 2014$.

[17] As explained in the first footnote related to the beginning of Section II, we consider this $2.1M annual cushion on the availability payment (the difference between the $43.53M upset limit and the $41.4M sensitivity scenario) to be sufficient because the Sponsors have not decreased the availability payment level under the base case and this alternative scenario, despite increasing the milestone payment increase from $150M to $173M. So the upset limit appears to include both $23M in milestone payment and $2.1M in annual availability payment as cushions, together comprising a reasonable level.

underlying FDOT/Caltrans availability and milestone payment credit risks taken by the Developer and its investors/lenders. By contrast, GARVEE bond ratings are not appropriate comparators as GARVEE bonds are usually issued on shorter maturities and benefit from a dedicated pledge of future Federal-aid highway funds, thus essentially taking on Federal government and gas tax risk (for this reason, there is little credit rating variation between GARVEE bonds issued by different states).

- In addition, Florida had a credit history of issuing appropriation risk debt for its state Infrastructure Bank debt; this debt was typically rated only one notch below other Florida debt. Beyond providing a clear benchmark, the creditworthiness of this appropriation risk debt gave comfort to P3 lenders because a failure to appropriate availability payments would also negatively impact the State Infrastructure Bank debt. California has neither a similar benchmark for appropriation risk nor similarly linked indebtedness which would provide P3 lenders an additional basis for security.

- Florida's statute prioritizes P3 payments over other agency payment obligations for new projects and caps those P3 payments liabilities at 15% of annual budgets. While contemplated, California does not have such a statutory covenant at this time.

Although the health of the financial markets has been improving over the past fifteen months, the differences in underlying credit strength between California and Florida might lead to borrowing costs from lenders being higher than stated in the base case presented in the PPR/Business Case.

On the other hand, as discussed previously, we understand (i) that an internal Caltrans policy limits annual GARVEE Bonds and availability payment commitments to 15% of annual federal transportation dollars; and (ii) a prioritization of those GARVEE Bonds and availability payment obligations in the SHA is under consideration, as well as other possible enhancements such as "continuous appropriation" or a budget covenant allowing Caltrans to make payments without appropriation to the extent possible. In addition, similar to Florida DOT commitments provided in the I-595 and POMT projects, the draft Public-Private Agreement commits Caltrans to include the milestone and availability payments in its STIP Fund Estimate for adoption by the CTC and its total, bundled legislative budget request, reducing the risk of non-appropriation.

However, although Caltrans is the sole agency party to the prospective Public-Private Agreement and would apparently backstop all its funding partners' contributions, the liquidity of public funding is a key consideration to lenders and investors – even more so in an economic environment where local funding partners are experiencing marked-down short-to-medium term sales tax and toll revenue outlooks. The PPR does not fully detail the liquidity of federal, state and local funding partners' monies and commitments. The Business Case vaguely refers to credit support or letters or credit arrangements as potential credit enhancers – but it is unclear that these would or could be implemented for most of the grants. At the time they reached financial close, the Florida precedents had letters of credit signed and necessary bond proceeds already issued and escrowed by Florida's local funding partners as backstops to their respective contributions.

(2) TIFIA Loan Availability and Terms

While not provided nor referenced in the PPR, we understand that Caltrans has submitted a Letter of Interest ("LOI") for TIFIA by the mandatory March 1, 2010, deadline established in the recent federal register Notice of Funding Availability ("NOFA"). However, <u>the granting of TIFIA credit assistance is not generally guaranteed, nor are the conditions that are assumed in the PPR and Business Case under which assistance would be given</u>. If the TIFIA loan or a similar federal credit facility is not available or is only available in reduced amounts, a greater financing share of more expensive senior debt (costing approximately 6-7% and potentially bearing refinancing risk) would be needed.

Several risks related to base case TIFIA assumptions are noted in the PPR but are not quantified. In general, assumed parameters (and derived financial benefits) of the TIFIA loan appear to be optimistic in the base case and more reasonable under the alternate scenario:

- The TIFIA statute provides that only 33% of eligible project costs may be financed using TIFIA assistance. The $309M TIFIA loan amount shown in the PPR assumes that the costs of Phase I Contracts 1 through 4 will be deemed eligible project costs for the Presidio Parkway P3. Should this not be accepted by the TIFIA Joint Program Office, only a ~$170-200M loan amount might be allowed, depending on the eligible costs to be spent on Phase II works per the TIFIA loan federal rules. Although precedents exist for the inclusion of such costs, the securing of such a large TIFIA loan based on approximately $376M of Phase I costs that have already been incurred, is not guaranteed this stage.[18]

- Even if the Phase I costs were deemed eligible, having a TIFIA loan size larger than the senior debt facility ($118M) statutorily requires the TIFIA loan to receive an investment-grade rating. As discussed above, this might be challenging given that the Florida precedents did not receive an investment grade rating and, for reasons mentioned above, the SMG Team believes California's credit rating associated with this project will be viewed as lower than Florida's.

- Section 3.7.4 of the Business Case assumes that the entire cost of the loan subsidy will be paid from federal budget authority. However, the NOFA made clear that there likely are more worthy projects than subsidy funds available to pay for the TIFIA credit assistance's loan loss reserve, and recent media[19] reports suggest that 39 LOIs for nearly $13 billion of TIFIA assistance were submitted in response to it. The subsidy required to honor all interested projects would likely be roughly 10 times the total 2010 budget authority. On the newest TIFIA projects, including the Port of Miami Tunnel, the borrower has been required to pay a portion of their own subsidy. To address this capacity problem, the NOFA contemplated the establishment of a pilot program in which projects would pay 100% of their subsidy cost. Furthermore, although recent guidance for the new TIGER II discretionary grant program has suggested an additional $150M of funding will be made available for TIFIA subsidy payments, there is still substantial uncertainty and TIGER II may well attract additional applications beyond those responding to the NOFA.[20]

  While the Presidio Parkway P3 may well be a strong, "shovel ready" candidate for a TIFIA loan, a conservative base case analysis should assume the project would have to pay upfront for some or all of the loan subsidy, typically 7-10% of the loan amount (~$22 to $31M for a $309M loan). This

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[18] As a background, Section 80.5(b) of the TIFIA Regulations provides that costs incurred prior to a project sponsor's submission of an application for credit assistance may be considered eligible project costs only with the approval of the Secretary. As such, to the extent that the overall funding plan covers Phase I and II costs and a significant portion of Phase I costs were incurred and paid for prior to the date of application submission, it is questionable whether those costs would be treated as eligible project costs for purposes of sizing the TIFIA loan. On the other hand, that Phase I and II are considered the same project from a NEPA perspective should support an argument for favorable determination.

[19] Public Works Financing, March 2010.

[20] Under the original TIGER discretionary program, several projects requesting grants instead received TIFIA subsidy funding, while at least one other Bay Area project explicitly requested TIFIA funding but did not receive it.

would add to the $10M of upfront project costs assumed for the bidding and initial development of the project in the PPR (which themselves also may be on the low side for this type of project).

- The assumed base case 4.15% TIFIA interest rate dated from September 2009, needed to be revised upwards. The SLGS rate, the basis for the TIFIA lending rate, had stabilized in the 4.40%-4.80% range over the past 6 months, and was at 4.60% as of April 28, 2010. Because financial close is expected for spring/summer 2011, at a time when 30-year treasury rates (upon which are based the TIFIA SLGS lending rate) are expected to rise from today's historically low rates as the US economy recovers, rising interest rates could cause a challenge to the project's affordability. Implied Q2-2011 and Q3-2011 forward-rates currently are 0.25-0.50% higher than "spot rates" current levels, and represent the market's expectations (based on universally accepted principles of capital markets finance and economics) of what the 30-year treasury rate should be by Q2 and Q3-2011, the expected time of financial close. Using the 0.25-0.50% increase range for forward rates, the implied forward TIFIA rate would be 4.85 to 5.10%. The 5.50% TIFIA rate used in Scenario B is, therefore, conservative but not an excessively unlikely stress-test assumption. We also understand anecdotally that the TIFIA JPO has encouraged at least some projects that anticipate reaching financial close in 2011 to assume a 5.5% interest rate for budget planning purposes.

The PPR shows that assuming a 5.50% TIFIA interest rate, a TIFIA loan no greater than the amount of the senior debt, a TIFIA loan subsidy paid upfront by the project, the 2014 annual availability payment would increase from the base case's $35.5M to $43.6M, all else being equal. This level is close to the upset limit chosen by the Sponsors, beyond which they would not proceed with the P3 delivery.

(3) Financing Competition and Adjustments to Proposal Prices

According to the PPR, the financing process contemplated by the Sponsors calls for proposers to submit technical and financial proposals (including an availability payment amount) in the summer of 2010, based on developed but not fully committed plans of finance. This will be quickly followed by evaluation, award and contract execution (often referred to as "commercial close"). However the final availability payment amount will not be locked-in until the Developer's financial close which is expected for the summer of 2011, after a financing competition process whereby the Developer, under Caltrans' oversight, will tender the financing between various potential lenders.

Throughout the process conducted prior to financial close, it appears that Caltrans will bear all risks (or upside if any) related to the fluctuation of benchmark interest rates[21] and to changes in debt financing terms and structure (credit spreads, swap margins, debt-to-equity leverage, upfront fees, cover ratios, etc.), without any impact to the Developer's return on investment which would be held constant. The Developer would only be at risk of termination and forfeiture of security to Caltrans in the event it cannot achieve financial close[22]. While the PPR states that the funding competition concept is subject to ongoing

[21] It is typical for bid prices to be subject to adjustment to account for interest rate fluctuations (up or down) between bid submission and financial close (although this period is usually much shorter, with financial close being achieved concurrently with the P3 contract execution in most cases), since such rates cannot be controlled or hedged by proposers until they close the financing. Although financial market volatility is no longer at the record levels experienced during the peak of the financial crisis, it should be anticipated that adjustments for interest rates could potentially swing the availability payment amount upward or downward by up to a few million dollars per year.

[22] In this case the Developer's Financial Close Security - provided upon contract execution - would be drawn. The amount of this security has not been finalized yet. Note that the Developer would be "excused" from such failure to achieve financial close should events outside of its control prevent federal financings (TIFIA loan or private activity

refinement, at this time, the materials provided by the Sponsors indicate that the Developer would not be at risk for achieving financial close within the financing terms or availability payment pricing parameters presented in its bid. In other words, the Developer will not be bound to its price (except to honor its stated IRR, regardless of the ultimate level of leverage), although its financial proposal will have been the main basis (70 points out of a total of 100) for it being awarded the project.

The proposers will be required to submit letters of support as well as evidence of lender due diligence and credit committee review from a proposer-chosen group of lenders, which should mitigate some of this risk. These "core lenders" will ultimately be given a right to match final lending terms up to a prescribed amount of the debt. However, we do not feel this adequately addresses concerns that the lenders will be highly motivated / incentivized to submit aggressive financing packages so that their proposals will be accepted and the Developer will be selected – given that neither the core lenders, nor the Developer, will be bound to the submitted financing terms. Similarly, there is no clarity as to how a potential issuance of Private Activity Bonds might be contemplated, if at all.

While we understand the financing competition process is still under development, it appears that in the current incarnation, the Developer has no "skin in the game" (by virtue of 100% of the risk being borne by Caltrans) after award. This is appropriate for benchmark interest rate levels, which are transparent and clearly outside the Developer's influence. However, for assumptions that are not observable, as well as loan terms and structure, the lack of Developer exposure could pose risks. Some risk-sharing adjustment would better align incentives to ensure that the Developer's expertise and relationships are used to reach financial close under parameters beneficial to both Caltrans and the Developer. In addition, it would assure that proposers that use aggressive assumptions in formulating their prices bear downside risk, dis-incentivizing gaming of price proposals (as further discussed in Section V of this report). That said, such risk-sharing may need to be capped, particularly if Caltrans anticipates a very substantial delay between award, commercial close and financial close.

As shown by the $5.9M difference in annual availability payment between the PPR's base case and the updated TIFIA assumptions scenario, adjustments to the financial structure can significantly change the overall project's costs and thus the impact on SHA funding requirements. As we have not seen the full Instruction to Proposers, nor Appendix 13 and 24 of the draft Public-Private Agreement, it is unclear whether Caltrans' exposure to benchmark interest rates fluctuation and variation in debt financing terms would be subject to some separately defined limitations. However, in order to manage the SHA's exposure to the DBFOM's budget requirements, the financing competition mechanism should not obligate Caltrans to proceed with the project if the annual availability payment would breach the $43.53M upset limit upon financial close. However, even if the Public Private Agreement ultimately provides Caltrans with the flexibility to walk away, we note that budgeting additional SHA monies may at that point in time be a better choice than going back to a DBB procurement that could then only deliver the project one year later and with sunk costs from the then failed P3 procurement. This is why setting reasonable baseline expectations and ensuring that the Developer is incentivized to achieve financial close with the lowest availability payment possible, would further help mitigate risks *to state transportation revenues committed to other projects*.

In approving the project, the CTC may also wish to clarify what action the Sponsor's would be expected to take with respect to CTC should the project costs ultimately breach (or be anticipated to breach) the upset limit at the time of financial close.

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bonds) to be implemented under any reasonable assumption included in its initial bid. Thus, at this time, it appears that California would hold the risk of the availability of these federal instruments.

C. Risks Retained by Caltrans under the Contemplated P3 Delivery Structure

Under a number of circumstances during the procurement and subsequent term of the P3 agreement, there may be risks *to state transportation revenues committed to other projects*. In many cases these are parallel risks that would exist should the project be advanced using a DBB approach. Examples of clear risks that have potential to increase the annual availability payment from the amount assumed in the PPR base case are discussed below (although it should be reiterated that if bids come in below current estimates, as has been the case for the Phase I DBB contracts, the starting availability payment level may be lower, all else being equal).

In the discussion which follows, risks arising during the procurement period or from the availability payment mechanism itself are reviewed first. There are also substantial potential claims / relief event risks during the construction and operations period which are discussed in the third and fourth sub-sections. An analysis of reasonable contingencies for likely relief events is appropriate – as well as consideration of major force majeure events. We note that the PPR values public sector risks retained under the DBFOM at $47M. As the final element, financial considerations in case of termination of the P3 are also addressed in the last sub-section.

(1) Procurement Period Risks for the State's Budget

- Unlike in a self-funding toll-road, the availability payment amount is bid – and the higher the bid, the greater the budgetary impact. To state the obvious, should the PPR's estimate for financial costs (likely) or construction pricing (less likely it would seem) prove to be more expensive than the base case assumptions presented, then the required availability payment amounts could be larger than anticipated. As discussed above, an affordability ceiling has been established to limit this exposure.

- However, this risk does not vanish upon opening of the price envelopes. Even if the preferred proposer's bid comes in below the said ceiling and leads to a contract signature specifying an annual availability payment amount deemed to be affordable, the "true price" will float through financial close because of interest rates volatility and the fact that the debt financing terms may vary under the financing competition process described earlier. The risk will remain significant during this process – as explained above and shown in the PPR' scenario analysis, changes in the financing structure may substantially alter the availability payment pricing. <u>In order to actually cap the SHA's exposure to the DBFOM's budget requirements, the $43.53M upset limit must not only apply upon bid evaluation and contract signature, but it must also serve as a limit on Caltrans' obligation to adjust the annual availability payment upon financial close.</u>

(2) Payment Mechanism-related Financial Risks during the Lease Period

- Per the draft Public-Private Agreement, if the Developer, in its proposal and actual implementation, finishes construction ahead of Caltrans' engineering estimate, it could trigger for Caltrans an earlier financial obligation for the milestone and availability payment streams and the obligation to reward the Developer with more availability payments overall – this is a built-in schedule acceleration incentive typical of some availability payment structures. Should substantial completion be achieved a few months ahead of schedule, an earlier milestone payment funding would appear to be manageable for the Sponsors given the timing of the associated grants sources' availability. However, supplemental early availability payment obligations would arise for approximately $3M-4M more for each month the project is completed ahead of schedule. This risk may well be mitigated to a substantial degree through an "Early Completion Date" limit to be specified in the draft Public-

Private Agreement, essentially capping the number of availability payment bonus months the Developer would be entitled to, but the exact limit date has not been finalized yet so the SMG Team cannot quantify the level of risk entailed.[23] We understand the Sponsors have not identified a reserve or funding source for those contingent payments, but instead have indicated that they intend to set the Early Completion Date so that no such bonuses could be payable to the Developer. Note that late completion would have the opposite – and commensurately beneficial – effect from a budget standpoint, at least partially offsetting the intrinsic harm of delayed completion. (A benefit of availability payment contract structures is that delays – so long as not public owner-caused – result in budget savings rather than additional construction cost for the public owner.)

- Because the draft Public-Private Agreement allocates the cost escalation risk of long-term operations, maintenance and rehabilitation expenses of the project by indexing approximately 15%[24] of the availability payments to the Consumer Price Index ("CPI"), even if commercial and financial close are achieved with the opening year availability payment amount estimated in the PPR ($35.5M), the payments eventually owed by Caltrans over the lease term could increase over time beyond baseline expectations set forth in Attachment 3 which indicate a total $1,131M to be disbursed through availability payments over the lease term and which also form the basis for the $1,110M SHA total funding requirement. If actual inflation turns out – over the 33 year term of the concession - to rise above the Business Case's expectation of a 2.2% per annum, additional monies will be required to fund Caltrans' availability payment obligations. The 30-year, 2.2% annual CPI rate assumption used in the PPR is on the low end of economic forecasts[25]. With a high 3.0% inflation rate, Caltrans would end up paying an extra $36M over the lease term. While no financial reserve or source has been identified by the Sponsors to cover this risk, the present value of this difference is between $6M and $11M (depending on the discount rate used), which is minor in comparison with the project's overall cost. It should also be noted that if Caltrans retained O&M responsibility (i.e., under a DBB), it too would face exposure to CPI in the form higher O&M costs if inflation exceeds expectations.

  In addition, an increase in the portion of the availability payment indexed to CPI to something above the stated 15% estimate in the PPR would also increase Caltrans' availability payment obligations and exposure to inflation risk over the lease term. For example, assuming an increase in the percentage of the availability indexed to inflation to 20%, Caltrans would pay nearly $70M extra over the lease term which is approximately $17M-$26M in present value dollars (depending on the discount rate used).

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[23] While the $173M milestone payment is currently scheduled for December 2012, the first availability payment would occur in July 2013. An early completion would require Caltrans to program additional SHA monies for FY12/13, depending on how many months of "early completion" the Developer could benefit from under the payment mechanism. This risk to the state was introduced in both of the Florida precedents to encourage Developer's schedule adherence and acceleration, essentially serving as a bonus/damages system. Given a fixed 33-year concession term, a baseline 3-year construction would entitle the Developer to 30 annual availability payments. However, a 2.75-year construction would mean 30.25 annual availability payments, and on the other hand a late construction completion after 4 years would reduce the availability payment stream to only 29 annual payments under the current drafting of the Public Private Agreement.

[24] This amount is roughly equivalent to the portion of the availability payment that is attributable to operations, maintenance and rehabilitation expenditures, which are exposed to inflation.

[25] The California Department of Finance's Economic Research Unit forecasts national CPI-U at 2.1% for 2011, increasing to 2.5% by 2013. The Congressional Budget Office in its 2010-20 budget and economic outlook notes that surveys of forecasters and implied inflation rates (derived from comparing yields on inflation-protected Treasury securities and yields on traditional securities) indicate expectations of an average CPI-U inflation rate of 2% to 2.5% for 2010 to 2014 and approximately 3% for the following five years. According to the Bureau of Labor Statistics and California Department of Finance, the 20-year historical annual average CPI-U for the U.S. was 2.7%.

We do not have a basis for believing this risk is significant, however, and have relied on the Sponsors' analysis that 15% is reasonable.

- In addition to long-term CPI risk exposure, the insurance premium benchmarking regime as currently contemplated in the draft Public-Private Agreement could lead to supplements to Caltrans' annual availability payments, although this risk's impact appears to be even lower than that associated with CPI exposure.

(3) The Cost of Project Risks Allocated to Caltrans

As stated in the PPR, project risks are more extensively transferred to the private sector under a DBFOM delivery versus in a traditional DBB with subsequent public performance of operations, maintenance and rehabilitation. However, under the contemplated draft Public-Private Agreement, it must be recognized that Caltrans would still retain some or all responsibility for key construction risks (such as right-of-way, utility relocation, pre-existing hazardous materials, etc.). It is not uncommon for such risks to remain primarily with the public owner in P3 arrangements as the public owner is often in a better position to manage them.

Further, it should be assumed that Caltrans will need to carry contingency funds for these risks, and Caltrans has assumed a $47M risk reserve[26]. This amount has been assessed using a risk register that seemed to only account for design and construction-related risks, with risks arising during the operations and maintenance period borne predominantly by the Developer (with the exception of CPI-linked cost escalation described above and the latent defects and termination scenarios discussed below).

However, while the inherent nature of P3 contracts, combining overall project delivery and financing responsibilities, transfers many risks to the Developer, those relief events for which Caltrans will likely be expected to provide schedule and/or cost relief (such as owner's changes, owner-caused delays, force majeure, change in law, pre-existing hazardous materials or archeological findings, utility owner delays, delays in obtaining permits or right-of-way acquisition, and more generally, events outside of the Developer's control) are typically cited as more expensive under a P3 than what such claims would have cost the owner under traditional delivery methods. This is due to the additional financing costs incurred by the Developer during the critical path delay: the draft Public-Private Agreement (and generally, all P3 contracts) includes compensation provisions directing the owner to pay for additional interest during construction, some share of lost revenue, and extra work costs and delay costs traditionally recoverable by the contractor under a DBB or DB delivery. Under the terms set forth in the draft Public-Private Agreement, the "financial clock ticking" would cost Caltrans up to approximately 85% of the availability payment prorated on the delay period (according the draft Public-Private Agreement) plus the interest incurred on the delayed $173M milestone payment, or approximately $3-4M for a 1-month delay.[27]

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[26] This is the reserve size under a DBFOM structure. In the Business Case, Caltrans has assumed a $91M reserve under a DBF structure, and a $125M risk reserve under a DBB structure. Note that this subsection does not intend to debate how substantial the risk transfer to a private entity under a DBFOM will be as compared to a DBB. Rather it is simply to note that Caltrans will assuredly retain some risks under a DBFOM and that those risks could be meaningful and do warrant contingency.

[27] This financial cost may be one reason why public owners are less likely (and willing) to direct owner changes or cause delays under a P3 than a traditional delivery method, a fact which is not always clearly accounted for in the studies drawing schedule and cost overruns statistics for P3 and traditional delivery methods. (Another reason for the relatively high incidence of overrun in public sector delivery of projects, as identified by Robert Bain, PhD in Project Finance International, January 2010, is that many global studies tend to calculate overruns from estimates that were made prior to detailed design.)

These risks do not appear to have been factored into the sizing of the DBFOM $47M risk reserve, and might require additional funding – possibly SHA monies – to complete the project.

(4) Design and Interface Risks with Phase I Delivery

These relief event considerations appear to be more critical to the Presidio Parkway P3 Project than on a generic P3 project, given the interrelation and interdependency of the Developer's Phase II responsibilities with the Phase I activities already underway using traditional DBB contracting. The PPR does not identify or address most of these risks in detail if at all (except insofar as the Business Case argues that they are endemic to any large Caltrans project using the DBB method).

- Per the draft Public-Private Agreement, Caltrans' substantial completion of Phase I works is a condition precedent to the commencement of Phase II construction works. Contracts 3 and 4 are currently in their construction and procurement phases, respectively, and are expected to be complete in the summer of 2011 per the Business Case. As the intention for the sequencing of activities is for financial close to occur shortly before actual completion of Phase I works, followed (within 30 days) by the commencement of Phase II construction, delays in completing Phase I may not cause (or cause limited) additional financing fees to be incurred during Phase II construction. However, given the current progress of Phase I construction and the likely "*at least […] four month delay*" cited in Section 5 of the Business Case, we anticipate that the bidding teams will probably require: (i) potential Phase I delays to be treated as a relief event, as these delays could consume Phase II "construction schedule float" for certain construction commencement activities, affect the critical path and potentially result in a delayed Phase II construction completion; and/or (ii) an extension of the lease period to allow for lost availability payments to be recouped.

  In addition, the lump-sum fixed construction price agreed on between the Developer and its construction subcontractor will need to be flexible with respect to a construction commencement date to accommodate potential schedule slippage in Phase I completion – possibly leading the additional delay-related cost escalation risk for a longer validity period to be priced into the bidders' proposals, and/or a requirement that Caltrans absorb/escalate construction and materials prices. It is also unclear whether a Developer would be willing to fund design costs ahead of financial close with its own expensive equity; industry feedback or negotiations might lead Caltrans to be at risk for any Phase II detailed design costs incurred before financial close.

- The landscaping work involved in Contract 8 requires third-party stakeholder coordination with the Presidio Trust, the National Park Service and other governmental agencies – potential completion delays caused in this respect, assuming availability payments start upon final acceptance (rather than substantial completion which is achieved ahead of the landscaping works), could also trigger the portion of compensation described above attributed to the delayed start of the availability payments, in the same $3-4M monthly amounts while the value of those landscaping works is only about $8M.[28]

- In addition to schedule interdependency, Phase II segments may have greater exposure to overrun / delay / latent defect risks (and related claims from the Developer) compared to P3s in which the Developer has substantial flexibility to design, construct and manage a project to meet performance specifications. The Presidio Parkway P3 is notable because of its advanced state of design,

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[28] From a budget standpoint, it may merit consideration as to whether or not Contract 8 should be included in the Public-Private Agreement as it is a significant driver of O&M cost and could lead to "gold-plating". The SMG team queries whether Caltrans may be able to better negotiate (and renegotiate over the next 33 years) with these stakeholders if it is directly responsible for the landscaping costs.

prescriptive specifications for Phase II in the context of U.S. and California law, as well as allocation of lifecycle cost responsibility for segments not built by the Developer. Therefore, the potential for innovation may be reduced. An analysis, given these design and interface risks, of the probability of relief event claims and their budgetary impact has not been provided by the Sponsors – it is not clear whether or not such risks are included in the $47M reserve identified in the PPR.

Similarly, the operations and maintenance performance specifications and deductions regime for the P3 could be subject to claims for relief or compensation to the extent the performance is impaired by a specified design and/or problems arising from latent defects. The provisions of the draft Public-Private Agreement illustrate this: per Section 4.14, Caltrans is financially responsible for any Phase I structural latent defect arising until [3 to 5] years after the commencement of Phase II construction works, provided (i) the Phase I contractor is not affiliated with the Developer and (ii) those structural latent defects are not the result of substandard maintenance and repair.

While there are many examples of P3s involving reconstruction of existing highway infrastructure, in hindsight, it would appear that the Presidio Parkway project might have achieved more complete risk transfer and offered greater innovation potential had the Developer been given responsibility for both Phases I and II (perhaps excluding Contract 8, as discussed above). As it stands now, the Phase II P3 may face some of the very risks attributed generically to DBB projects in the PPR.

- Last, we understand that Caltrans' funding sources for both Phases I and II do not have covenants requiring them to be used on one particular phase or another, and the allocation of certain federal / state / local grants to the Phase II funding plan as currently shown in the PPR is driven by the grants' disbursement schedules and statutory restrictions on fund usage. This ability to commingle all sources of funds between Phases I and II could create funding shortages for Phase II, should Phase I works incur cost overruns on the level projected in the Business Case for the DBB scenario – potentially leading to an additional state budget requirement. In fact, the funding allocation between Phase I and Phase II has been revisited in the update of the PPR. However this risk appears to be reduced due to the low bids received for Contracts 3 and 4; indeed, the overall project may now be close to having a full DBB capital funding plan if cost savings from these contracts are not significantly eroded by claims or supplemental agreements.

(5) Compensation on Termination Liability and Cost-to-Complete Perspective

The draft Public-Private Agreement assigns long-term financing responsibilities to the Developer, compensating it with a combination of a $173M completion milestone payment and the estimated 30-year stream of availability payments during the operations period. Under this form of indirect leverage, Caltrans does not fully pay for the value of the construction works during the course of construction advancement (as it would with progress payments under a DBB delivery). However, in the event the Public-Private Agreement is terminated, this "compensation shortfall" could come due immediately creating a payment obligation of up to several hundred million dollars owed by Caltrans.[29] Considered another way, the public sector will not be able to receive something of value (the completed or partially completed works) without compensating for it. The compensation amount due would be calculated differently (formulas are detailed in the draft Public-Private Agreement) and vary substantially depending on the termination circumstances – i.e., Developer default, extended relief events, Caltrans default or

[29] Similarly in a conventional project delivery financed via public debt, a failure of the project does not erase the public debt obligation, nor lead to an automatic refund of progress payments already earned.

convenience. The likelihood of such circumstances and Caltrans' maximum probable loss exposure under them is assured to vary greatly and are discussed further below.

With respect to the funding of this contingent liability, the PPR identifies the SHA as the source for making such payments, which would be subject to legislative budget appropriation. In addition, the draft Public-Private Agreement provides the option for Caltrans to essentially make the termination payments in installments by owing an estimated 85% of the scheduled availability payments (the fixed portion of the payments) until the termination compensation, plus interest for delayed payments (at a rate not yet determined), is paid in full. The concept does not seem unreasonable, but appears to be novel and would need to be accepted by the bidding and lending communities. Alternatively, Caltrans – subject to certain CTC and potentially legislative actions - may be able to use the capacity freed-up from the cessation of the future availability payment obligations to issue debt to fund a termination payment. Another option would be for the Sponsors to procure a replacement Developer, compensate the new Developer with the same payment stream, and have him fund the termination payment. If termination occurs before construction completion, the milestone payment would not be due, but Caltrans would need to rectify any construction defects, re-procure the project and pay for a new contractor to complete the works.

The draft Public-Private Agreement could be terminated under three scenarios – for Developer default, under "force majeure" circumstances or for Caltrans default or convenience.

- Under a Developer default scenario, the termination payment calculation is such that the Developer's lenders would be able to mitigate their own losses more completely by stepping-in and rectifying the default rather than by allowing the default to progress to termination. Thus their incentive is to mitigate the default. Based on research of hundreds of availability payment P3s in Canada and the UK, we have found almost no incidence of termination for developer default in a properly structured P3 wherein lenders are fully at-risk; however, there have been a number of cases of default with lenders stepping in (similar to a surety assuring completion of a conventional project). The draft Public-Private Agreement also suggests performance and payment bonds will be required from the Developer and will provide additional security to Caltrans to remedy any defective work (potentially providing more protection to Caltrans than under conventional procurement); however, the amount of any such security has not yet been determined.[30] This security would be in excess of substantial performance security (likely letters of credit and parent company guarantees) provided by the design-build subcontractor to the Developer and its lenders. So, in the event of a theoretical termination for default during construction, Caltrans would be in a position to complete construction if it could reprogram the future availability payment sourced from the SHA towards short-term obligations. This could amount up to several hundred million dollars. It should be noted that if the construction contract was vastly underestimated by the Developer, Caltrans could be responsible for even greater payments in order to complete construction (with no compensation owed to the failed Developer).

- The other termination scenarios ("force majeure" or Caltrans default or convenience) would create a greater payment liability for Caltrans. The formulas for payment amounts provide for compensation of demobilization costs, debt repayment, and book equity with potentially additional compensation for return on equity in case of a Caltrans default or convenience termination. However, Caltrans can avoid or delay each of those termination circumstances by refusing the Developer's notice to terminate (and continuing to make availability payments), not defaulting under its own contractual obligations or electing not to terminate for convenience. In the case of termination for force majeure, Caltrans may be able to seek compensation from the Federal Emergency Management Agency (a source of relief likely unavailable to the Developer). In general, force majeure is a risk that Caltrans

[30] Such surety bonds were included in the Florida precedents because of statutory "mini Miller Act" constraints. At the opposite end of the spectrum, British Columbia typically does not require any such security on P3 projects.

bears on all of its assets. However, the need to make a lump sum termination payment is distinct to the P3 approach and merits specific analysis and advance mitigation planning. Note that the Developer could also (by its own choosing as this is not required in the draft Public-Private Agreement) subscribe an insurance package that would cover some force majeure events – provided such coverage is available at reasonable rates.

III. Performance Objectives (Approval Guidelines Criteria #3)

Both the Commission's policy guidance and the statute state that the proposed P3 project is primarily designed to achieve the following three objectives:

- Improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor;
- Improve the operations or safety of the affected corridor; and
- Provide quantifiable air quality benefits for the region in which the project is located.

The Presidio Parkway project is a reconstruction or replacement project that aims to replace an aging and structurally deficient facility, ensure its seismic safety, and provide for a wider facility with medians and shoulders to improve operations and safety.

A. Mobility

It is the SMG Team's conclusion that the revised submittal demonstrates mobility benefits. The revised submittal states that the project will provide "mobility benefits under normal conditions, during incidents on the facility (e.g. breakdowns and crashes) and by preventing a major closure due to a seismic event."

During normal conditions, the revised submittal lists specific level of service benefits at multiple locations, including:

- Ramp from US 101 Southbound to SR 1 Southbound (Golden Gate Bridge to Veteran's Boulevard) due to capacity increase from one lane to two;
- Ramp from SR 1 Northbound to US 101 Southbound (Veteran's Boulevard to Doyle Drive) due to improved ramp design; and
- Southbound Weaving Patterns between SR 1 Northbound and Marina Boulevard due ramp exit redesign (from left to the right) and associated reduced weaving.

The revised submittal also states that the frequency of incidents will be reduced due to the inclusion of a median barrier. Incident related delays will be reduced due to the addition of the shoulders.

Finally, the revised submittal reiterates the mobility benefits associated with a major closure of the current facility and/or structures due to a major earthquake. Avoiding the traffic impacts of such a disaster would reduce region-wide mobility benefits.

B. Safety and Operation

It is the SMG Team's conclusion that the submittal clearly demonstrates both safety and operations improvements. The submittal states that: *"The overall Presidio Parkway Project will offer improved operations and safety with the following enhancements:*

- *A median barrier will be constructed to separate traffic traveling in opposite directions. This will reduce the potential for head-on collisions. In addition, the barrier will eliminate the need for the lane switching operations on Doyle Drive, thus reducing worker exposure to traffic.*

- *Inside and outside shoulders that are currently non-existent will be constructed, thus providing a clear recovery zone, as well as improving sight distance.*

- *Lane width will be increased from the current 10-foot width to 11-foot width for interior lanes and 12-foot width for outside lanes. The increased width will reduce the potential for side-swipe type collisions.*

- *Traffic management equipments will be installed, allowing the Department to monitor real time traffic conditions. The Department can provide real time traffic advisory information to motorists about congestion or collisions, improving both operations and safety."*

C. Air Quality

It is the SMG Team's conclusion that the revised submittal reasonably makes the case that the project does provide air quality benefits. The revised Performance Objectives attachment to the PPR discusses the Project's conformance with the CTC P3 guideline requiring that a project "provide quantifiable air quality benefits for the region in which the project is located."

The context for the air quality assessment is the discussion of Mobility Improvements that precedes it in the revised PPR. The PPR makes reasonably persuasive arguments that there will be mobility benefits from the project: (1) under normal operating conditions due to improved roadway geometry; (2) less congestion as a result of reduced frequency and severity of incidents due to design features such as a median barrier and shoulders; and (3) in comparison to a major closure that might result from a seismic event.

With respect to air quality, the PPR makes arguments that there will be positive air quality benefits in each of those three cases. We find those arguments to be plausible, even though the magnitude of the benefits from a regional perspective is likely to be marginal and mostly local in nature. It is reasonable to conclude that, as a result, total emissions of at least some criteria pollutants will be less, especially on days when major traffic tie-ups are avoided.

In fairness, it is very difficult to quantify air quality benefits at the project level in the context of the regional air quality conformity analysis. Benefits could be estimated using micro-simulation techniques or "off-model" emission calculations. However, since this project is primarily designed to improve safety of the structure, and since the conclusion that there will be mobility benefits yielding positive air quality benefits appears to be supported by the revised PPR, we believe that the project can be reasonably judged to have met the air quality performance criterion.

IV. Substantiation of Infrastructure Need (Approval Guidelines Criteria #4)

Section 143 (d) states that "*the projects authorized pursuant to this section shall address a known forecast demand, as determined by the department or regional transportation agency.*"

The Commission policy guidance includes the following criterion for evaluating project proposals for approval: "*That the project, consistent with Section 143(c)(4), addresses a known forecast demand, , as determined by the department or regional transportation agency in the project proposal report*"

The SMG Team reviewed the revised submittal and concludes that the project addresses a known forecast demand that is consistent with the Metropolitan Transportation Commission's (MTC's) regional travel demand model.

- The project proposal report states that "*The Sponsors have estimated that the average daily trips (ADT) on Doyle Drive are approximately 120,000 vehicles currently and that the ADT on the Presidio Parkway will be approximately 163,000 vehicles in 2030.*"

- The project proposal states that "The traffic analysis and forecast represented in the report are based on a regional transportation demand model that is consistent with MTC's regional model". Since MTC is the regional transportation agency and the forecast was based on a model consistent with MTC's, it is reasonable to conclude that the revised submittal addresses a known forecast demand.

V. Proposals Evaluation Process (Approval Guidelines Criteria #5)

The PPR states that the Sponsors intend to evaluate proposals based on qualifications and best value. While the draft instructions to proposers ("ITP") or similar document for the anticipated Request for Proposals ("RFP") were not included with the PPR, the Sponsors provided a transmittal letter (Form A) and an excerpt from the ITP that describe the best value selection process. Attachment 2 of the PPR describes the qualifications process. Our findings with respect to these evaluation processes follow below. In addition, a more detailed discussion of the best value evaluation process is provided, given the CTC's explicit role in developing and adapting the criteria.

(1) Qualifications

The Presidio Parkway P3 procurement involves a two-step process involving first qualifying and short-listing potential proposers, followed by the request for and submission of proposals. A Request for Qualifications ("RFQ") was issued on February 2, 2010, and on April 8 the Sponsors shortlisted all three of the teams (Golden Gate Access Group, Golden Link Partners and Royal Presidio SF Partners) which had submitted Statements of Qualifications ("SOQs"). They will now participate in the RFP process. Section 143(h) establishes qualifications requirements, and Attachment 2 of the PPR demonstrates that the RFQ complied with them. (The RFQ was not provided in the PPR and has not been reviewed by the SMG Team). Further, the ITP Form A generally requires each detailed proposal to be submitted with a representation that all SOQ affirmations remain true and accurate at the time of bid submission and/or asks for disclosure of any modifications.

For the purposes of the CTC approval process, we find that there is reasonable comfort that the requirements of Section 143(h) will be met. However, for completeness, it may be appropriate for the Sponsors to clarify in the ITP that, in the event there is a substitution, removal or addition of any equity or non-equity member of the proposer team, there will be a process followed to verify that such proposer continues to meet the Section 143(h) requirements at the time of the actual proposal submission and evaluation.

(2) Best Value

The PPR includes an excerpt from the to-be-completed ITP that establishes the best value selection criteria and describes an overall evaluation approach comprising: (a) pass/fail evaluation, followed by (b) qualitative review, and (c) a scored evaluation. The proposer with the highest score is deemed to offer the best value to Caltrans, provided that proposers must meet minimum pass/fail requirements in order to even be considered responsive.[31]

The SMG Team finds that the best value selection criteria set forth with the PPR are generally acceptable and recommend that they should not preclude approval by the CTC at this time. However as further discussed below, we note:

- The formula used to score price, while common among public agencies, may merit further analysis and/or calibration on this or future projects.

- It should be clarified as to whether or not the milestone payment will be included in the calculation of price Net Present Value (NPV) used to determine the prices scores. In addition, it should be clarified as to what assumed financial close date (which should be used for all proposals' evaluation) the NPV will be calculated. These seemingly minor decisions would have a significant impact on the scores for price (in excess of 10 points in one example shown in Chart 1 below) because of the price scoring formula being used.

- CTC may wish to seek clarification as to the treatment and evaluation of proposals seeking maximum availability payments[32] that exceed the $43.53M upset limit (2014$) established with the PPR submittal. For example, will such proposals be deemed responsive? Will the same weighting of price and technical score weightings apply if some or all proposals exceed such level?

- The draft Public-Private Agreement and financing competition process memorandum included in the PPR provide for the Sponsors to bear 100% of the increases in the cost of financing from the time of bid submission to financial close, provided a financing competition is held. As this process is refined we would anticipate that the Sponsors may wish to consider additional refinements that align the interests of the parties and discourage gaming of financial assumptions at the time of price submission. To an extent, this also may be managed/scored qualitatively via the Financial Feasibility criteria.

[31] The Sponsors have not established that a proposal price in excess of the upset limit would be non-responsive under the pass/fail evaluation.

[32] The maximum availability payment refers to the annual availability payment amount that is bid by the Developer. The actual availability payment that will be made may be reduced from time to time because of performance deductions imposed in case the Developer's operations and management of the project do not meet pre-agreed operational and contractual specifications. No such deductions are assumed in the PPR, so our financial and budgetary review is based on the availability payment being the equal to the maximum bid amount.

Summary of Basis for Best Value Scoring

For responsive proposers, the maximum possible score is 100 points, which can be earned as follows:

Table 3. Summary of Scoring Approach

Maximum Points	Major Criteria
5	Management and Administration (including management and QA/QC plans for various functions)
10	Preliminary Master Design
15	Operation and Maintenance (including plans and approach)
30	*Subtotal Technical Points*
10	Feasibility of Financial Proposal (including credibility of finance plan and strength of commitments)
60	Maximum Availability Payment, i.e. price (score determined using a formula as discussed below)
70	*Subtotal Financial Points*
100	*Maximum Points*

We understand that there is limited scoring for design because many aspects of the design will be dictated by Caltrans and/or the Phase I elements of the project. Operations and maintenance comprises the second largest opportunity to earn points outside of price. As will be shown below, scoring 10 points higher on Technical scores would be sufficient to overcome the points lost by having a price that is roughly $18M to $40M higher in present value dollars (depending on assumptions, as shown in Chart 1).

Evaluation of Price

Price will be scored using a NPV of the projected cost of the availability payments to the Sponsors over the 33 year period, discounted back to the anticipated date of financial close[33], using an 8.5% discount rate. In addition, all bidders are to incorporate a 2.2% annual CPI growth for 15% of the annual availability payment (the remaining 85% portion being fixed). Because the amount of the milestone payment will be fixed for all bidders, the differentiator of prices will be the maximum (annual) availability payment proposed as well as the expected timing of the first payment[34].

[33] We assume all bidders will be directed to use the same date, sometime in the spring or summer 2011.

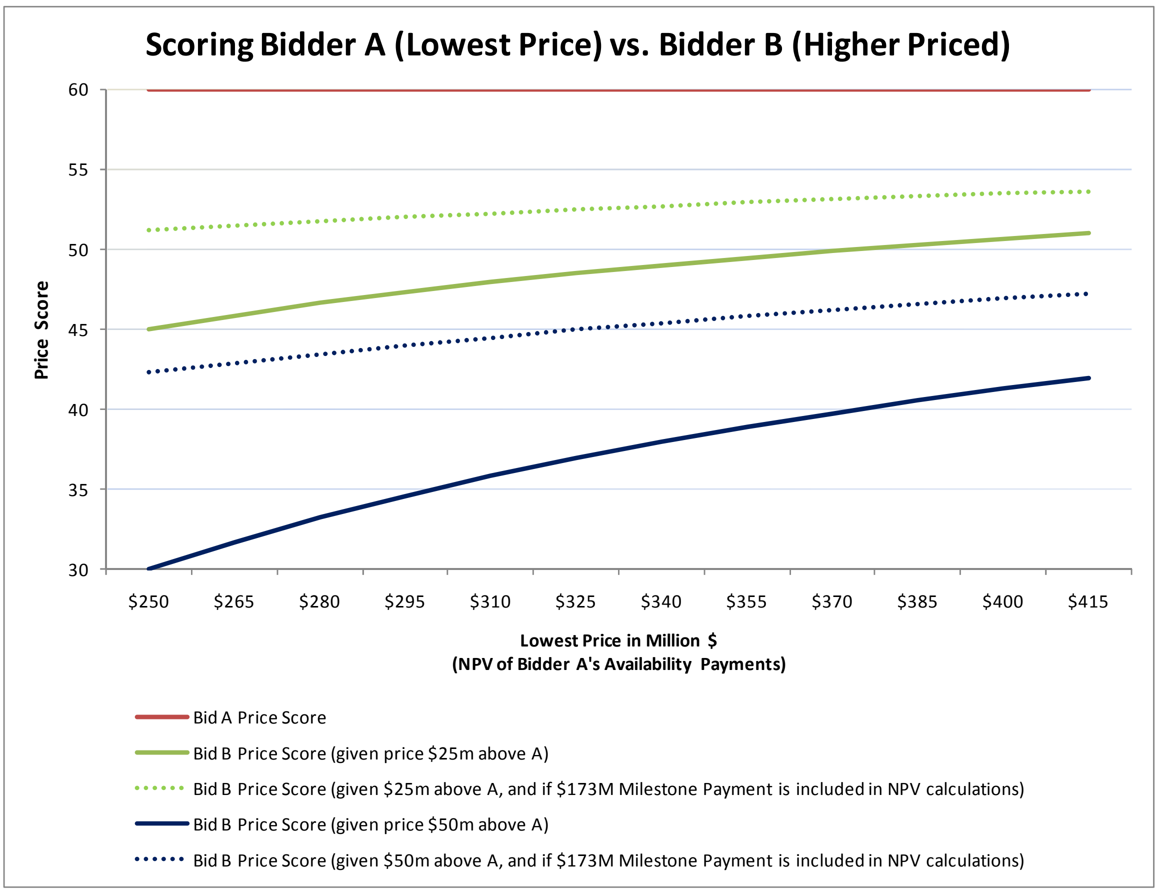
[34] Because of the NPV calculation approach, the treatment and evaluation of proposals assuming different construction schedules may merit clarification. Will proposers assuming a longer construction period than shown in the business case respectively receive pro rata fewer than the 30 availability payments assumed in the business case? This appears to be the case, and could result in slightly less favorable scoring of price for such a proposal. As stated in Section II.C.(2) of this report, we also assume that the Early Completion Date used in the Public-Private

To support the determination of Best Value, the NPV of the projected cost will be translated into points. 60 of 100 points will be awarded to the lowest priced bid ("Bidder A"), with each higher priced bid losing 1.5 points for every percentage point by which it exceeds the lowest price, i.e.

- $Price\ Score\ of\ Bid\ A = 60\ Points$
- $Price\ Score\ of\ Bid\ B = 60\ Points - \left[1.5\ Point \times \left(\frac{NPV\ Bid\ B - NPV\ Bid\ A}{NPV\ Bid\ A \times 1\%}\right)\right]$

In practice, using a percentage-based or "relative" scoring approach will mean that no bidder is likely to receive zero or close to zero price points. Instead, the exact number of price points lost (by the second and third place price) for exceeding the lowest price by $1M is going to be dependent on the amount of Bid A, the lowest price. The higher the lowest price, the less significant the $1M difference will be on a relative percentage basis – even though it remains constant in terms of actual dollar value. Thus, the lines shown on Chart 1 are sloped rather than straight.

Chart 1



Accordingly, it appears that a ~$25M NPV difference between bidder A and bidder B prices would lead to approximately 10-14 point difference in price scores (equates to ~$2M per annum difference in

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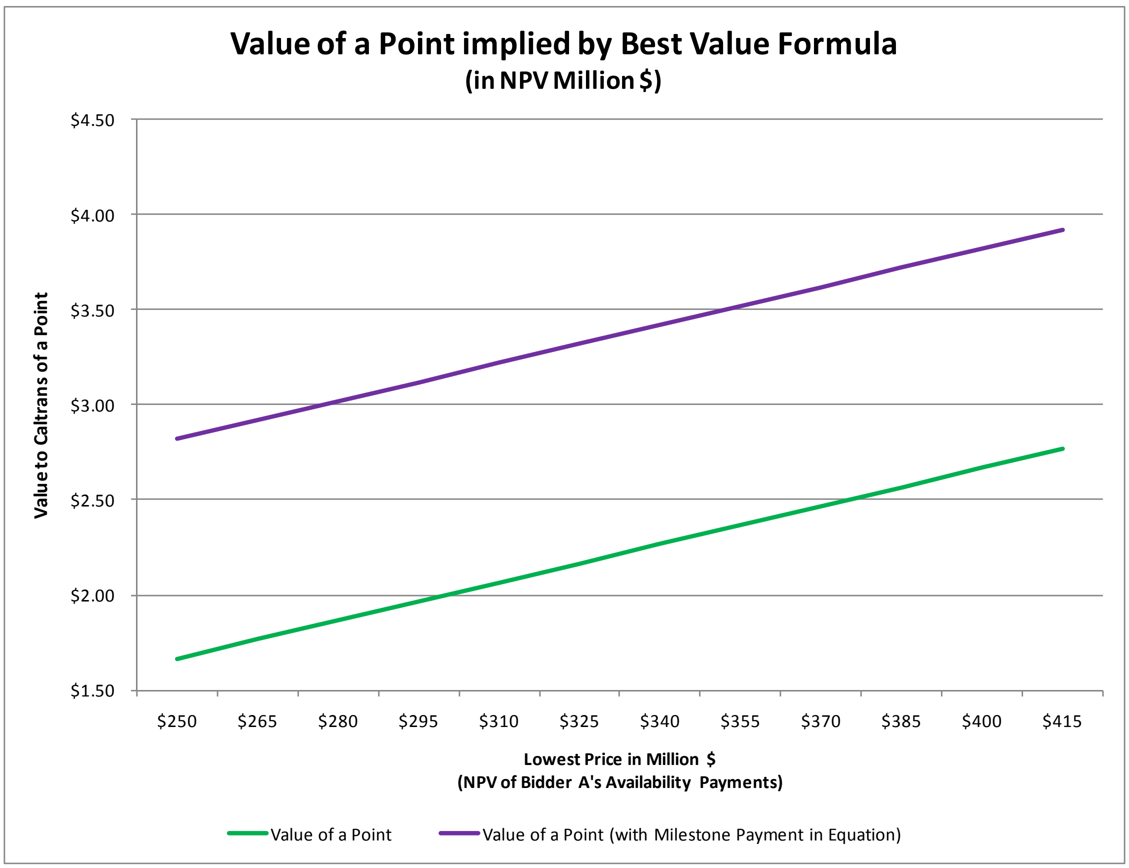
Agreement will be set so that no early completion bonus will be payable by Caltrans. (It appears unlikely that schedules will be more than several months different given the advanced state of design, however proposers working on Phase I may have potential advantages in mobilization.)

availability payments, given an 8.5% discount rate). The 14 point difference would arise when prices are low; the 10 point difference would arise when prices are high. These amounts approximately double for a $50M NPV price spread. As a result, an additional point (be it earned for price, feasibility or technical) is essentially valued between $1.8M and $2.6M in NPV price by the Sponsors' formula.

Note that if the identical, $173M milestone payment (not just the availability payments) ***is*** included in the NPV calculations of each bidder's price, score of Bidder B will rise. The change would occur because the relative difference in prices would become compressed in percentage terms *even though the actual difference in prices remained constant.* This has the effect of making dollar differences in price less important. If the milestone payment is included in the NPV calculation a single difference in technical points would be equivalent to approximately $3M to $4M in NPV dollars under reasonable scenarios[35].

It may be difficult for the CTC to fully understand the importance of price relative to other factors in the best value determination until it is clarified whether or not the milestone payment will be included in the NPV calculations (the Sponsors did not respond to this question in its final PPR submission).

Chart 2



[35] As mentioned before the PPR is unclear as to whether the NPV of each price will be calculated only considering future availability payments, or if the NPV will include the identical milestone payment for each bidder. The PPR states that the score will be established by calculating the "NPV of the Maximum Availability Payments and the MAP". It is unclear whether "and the MAP" refers to the milestone payment or if it is a misstatement which should have been deleted. If the milestone payment is included, then all NPVs – including the lowest one - will be increased, therefore reducing the value of a $1M availability payment price spread.

There are some reasons to not use percentage-based formulas to score price. Economic considerations would suggest that the Bidder B price score lines on Charts 1 and 2 should be horizontal or slope in the opposite direction; if all bids are increased by an equivalent amount, the economic opportunity cost to the Sponsors is increasing and e.g. the $25M NPV price spread is becoming more (not less) significant to the Sponsors' budget. Instead, the PPR's formula makes the competition closer: the higher the prices go, the less significant a $25M difference would become. In simple terms, as our budget is stretched we typically count our pennies more carefully; but under this formula, as the budget is stretched, pennies matter less.

<u>However, it should be noted that many public agencies use similar, percentage based formulas to score price. Percentage formulas are simple to describe, and use to encourage price competition and should pick the "right" winner in most circumstances,</u> assuming they have calibrated to reflect the Sponsors' actual economic preferences.

Feasibility of Financial Proposal and Financing Competition

In addition to price and technical, 10 points are allocated for the Feasibility of the Financial Proposal. The criteria are generally consistent with other availability payment procurements precedents. However, the Maximum Availability Payment score is given more relative weight than in other P3 projects we have seen. This could be analyzed further because the Sponsors do not intend to receive fully committed plans of finance (as described in Section II.B.(3)). While equity investment is expected to be locked-in[36], debt financing will not be committed until financial close activities are initiated shortly before the actual completion of Phase I. This is structured as such because it is highly unlikely that lenders' financing commitments could be held through spring or summer 2011 if they were obtained and included in bid submissions in the fall of this year. Under current market conditions, validity periods for lenders' financing terms rarely exceed three months. To address this concern, the Sponsors will not require proposals with fully committed financing offers, but instead require the winning proposer to organize a financing competition that, in conjunction with indexation for benchmark interest rate fluctuations, will result in an adjustment to the annual availability payment upon financial close.

Since the financing competition essentially will require all lenders to re-analyze and re-price the project six to nine months after contract execution (at a point when certain risks would be better understood or mitigated), the SMG Team finds that there may be diminished incentive for a lending institution to commit resources on an exclusive basis (given pricing information exchanges) to undertake a profound level of due diligence on the project to support one team that may not necessarily win the project - even if it would give them a right to match during the later financing competition.

In addition, the compressed procurement schedule may not give sufficient time for lenders to undertake a thorough financial due diligence[37].

[36] The financial close security (in an amount not yet determined) would crystallize each equity investors' commitment, essentially like earnest money. While proposed equity rates of returns would not be subject to change, the investment amount may be adjusted should the debt amount and debt-to-equity leverage have to be resized upon financial close.

[37] With this understanding, bidders may not spend heavy pursuit costs and resources to deliver a close to fully committed financial plan, and rather focus on price reduction initiatives or technical excellence with the provision of sufficient letters of lenders' support demonstrating willingness to fund the project. These specific procurement and Phase I construction schedule constraints may provide limited dispersion in the proposals' advancement of financial structuring and lenders' due diligence.

As the financing competition process is refined, we would anticipate that the Sponsors may wish to consider additional approaches that further dis-incentivize proposers from making aggressive financing assumptions in order to submit the lowest price, with Caltrans bearing the entire risk of all increases. Depending on the ultimate structure of the competition, it seems that a bidder (and core lenders) using aggressive assumptions for financing costs and terms might face few if any monetary consequences and no winner's curse; while a bidder with more conservative assumptions will be penalized for having a commensurately higher price at the time of evaluation, despite presenting a lower risk of cost escalation in the future. To an extent, this also may be scored qualitatively using the Financial Feasibility score. However, moderate exposure to cost-of-financing risks not associated with pure market benchmark movement might also encourage more constructive participation in the design of funding competitions and in negotiations of terms with potential lenders. That said, we recognize that the Sponsors' must bear responsibility for delays arising for Phase I schedule slippage.

VI. Useful Life Review (Approval Guidelines Criteria #6)

Section 143 (d) states that *"For department projects, the commission shall certify the department's determination of the useful life of the project in establishing the lease agreement terms."* and that *"At time of the reversion, the facility shall be delivered to the department or regional transportation agency, as applicable, in a condition that meets the performance and maintenance standards established by the department or regional transportation agency"*

The Commission guidance in response to the statute states that, as part of the approval criteria, *"For a Department project, that the Department has made a determination of the useful life of the project in establishing the lease agreement terms that is consistent with the terms of the lease agreement"*.

The SMG Team reviewed all materials provided and concludes that the revised submittal addresses this criterion based on the following:

- In the PPR, Caltrans has determined that the pavement has a useful life of 40 years and that the structures and tunnels have useful lives of 75 years based on the "design and construction specifications in the overall Presidio Parkway Project design documentation." These two asset categories represent the largest cost elements of the project.

- The SMG Team reviewed the Caltrans Design Manual. The table below extracted from the 2006 Caltrans Design Manual confirms that a 40-years design life for pavement is consistent with the manual. The 75 years for structures and tunnels is consistent with the useful life defined for bridge structures in the Department's bridge manuals, specifically in California's amendments to American Association of State Highway Transportation Officials' (AASHTO's) bridge specifications[38]. It is reasonable to expect tunnels to have a long useful life like bridges.

[38] http://www.dot.ca.gov/hq/esc/techpubs/manual/bridgemanuals/ca-to-aashto-lrfd-bds/page/sec_2.pdf

Table 612.2

Pavement Design Life for New Construction and Reconstruction

Facility	Pavement Design Life (Years)	
	AADT[3] <150,000[1] and AADTT[4] <15,000[1]	AADT ≥ 150,000[1] or AADTT ≥ 15,000[1]
Mainline Traveled Way	20 or 40 [2]	40
Ramp Traveled Way	20 or 40 [2]	40
Shoulders:		
≤1.5 m wide	Match adjacent traveled way	40
>1.5 m wide: First 0.6 m	Match adjacent traveled way	40
Remaining width [5]	20	20
Intersections	20 or 40 [2]	40
Roadside Facilities	20	20

Notes:
(1) Projected mainline AADT and AADTT 20 years after construction
(2) Use design life with lowest life-cycle cost (See Topic 619)
(3) Annual Average Daily Traffic (AADT)
(4) Annual Average Daily Truck Traffic (AADTT)
(5) If the shoulder is expected to be converted to a traffic lane with the pavement design life, it should be engineered to match the same pavement design life as the adjacent traveled way.

- The revised submittal includes a new attachment with the Handback Requirements. This attachment includes specific requirements for all major asset types, including pavement, bridges, guardrail, attenuators, signs, drainage systems, lighting, signage, tunnels, retaining walls, and ITS equipment. For most of these cases, a useful life at the end of the lease is defined, and specific actions expected from the concessionaire are defined.

LEGISLATIVE COUNSEL BUREAU

April 6, 2010

Honorable Darrell Steinberg
Room 205, State Capitol

COMPREHENSIVE DEVELOPMENT LEASE AGREEMENTS - #1008978

Dear Senator Steinberg:

You have asked two questions concerning Section 143 of the Streets and Highways Code (hereafter Section 143), which authorizes, until January 1, 2017, the Department of Transportation or regional transportation agencies to enter into comprehensive development lease agreements with certain entities under which those entities, rather than the department or regional agency, assume responsibility for the period of the lease term for various aspects of a transportation project, including design, construction, operation, and maintenance.

The first question you have asked is whether a transportation project funded by a revenue stream of public agency availability payments, rather than toll or user fee revenues, would be eligible to be undertaken under these provisions.

Section 143 provides as follows:

> "143. (a) (1) 'Best' value means a value determined by objective criteria, including, but not limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the department or the regional transportation agency.
>
> "(2) 'Contracting entity or lessee' means a public or private entity, or consortia thereof, that has entered into a comprehensive development lease agreement with the department or a regional transportation agency for a transportation project pursuant to this section.
>
> "(3) 'Design-build' means a procurement process in which both the design and construction of a project are procured from a single entity.
>
> "(4) 'Regional transportation agency' means any of the following:
>
> "(A) A transportation planning agency as defined in Section 29532 or 29532.1 of the Government Code.
>
> "(B) A county transportation commission as defined in Section 130050, 130050.1, or 130050.2 of the Public Utilities Code.

"(C) Any other local or regional transportation entity that is designated by statute as a regional transportation agency.

"(D) A joint exercise of powers authority as defined in Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, with the consent of a transportation planning agency or a county transportation commission for the jurisdiction in which the transportation project will be developed.

"(5) 'Public Infrastructure Advisory Commission' means a unit or auxiliary organization established by the Business, Transportation and Housing Agency that advises the department and regional transportation agencies in developing transportation projects through performance-based infrastructure partnerships.

"(6) 'Transportation project' means one or more of the following: planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance of highway, public street, rail, or related facilities supplemental to existing facilities currently owned and operated by the department or regional transportation agencies that is consistent with the requirements of subdivision (c).

"(b) (1) The Public Infrastructure Advisory Commission shall do all of the following:

"(A) Identify transportation project opportunities throughout the state.

"(B) Research and document similar transportation projects throughout the state, nationally, and internationally, and further identify and evaluate lessons learned from these projects.

"(C) Assemble and make available to the department or regional transportation agencies a library of information, precedent, research, and analysis concerning infrastructure partnerships and related types of public-private transactions for public infrastructure.

"(D) Advise the department and regional transportation agencies, upon request, regarding infrastructure partnership suitability and best practices.

"(E) Provide, upon request, procurement-related services to the department and regional transportation agencies for infrastructure partnership.

"(2) The Public Infrastructure Advisory Commission may charge a fee to the department and regional transportation agencies for the services described in subparagraphs (D) and (E) of paragraph (1), the details of which shall be articulated in an agreement entered into between the Public Infrastructure Advisory Commission and the department or the regional transportation agency.

"(c) (1) Notwithstanding any other provision of law, only the department, in cooperation with regional transportation agencies, and regional transportation agencies, may solicit proposals, accept unsolicited proposals, negotiate, and enter into comprehensive development lease agreements with public or private entities, or consortia thereof, for transportation projects.

"(2) Projects proposed pursuant to this section and associated lease agreements shall be submitted to the California Transportation Commission. The commission, at a regularly scheduled public hearing, shall select the candidate projects from projects nominated by the department or a regional transportation agency after reviewing the nominations for consistency with paragraphs (3) and (4). Approved projects may proceed with the process described in paragraph (5).

"(3) The projects authorized pursuant to this section shall be primarily designed to achieve the following performance objectives:

"(A) Improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor.

"(B) Improve the operation or safety of the affected corridor.

"(C) Provide quantifiable air quality benefits for the region in which the project is located.

"(4) In addition to meeting the requirements of paragraph (3), the projects authorized pursuant to this section shall address a known forecast demand, as determined by the department or regional transportation agency.

"(5) At least 60 days prior to executing a final lease agreement authorized pursuant to this section, the department or regional transportation agency shall submit the agreement to the Legislature and the Public Infrastructure Advisory Commission for review. Prior to submitting a lease agreement to the Legislature and the Public Infrastructure Advisory Commission, the department or regional transportation agency shall conduct at least one public hearing at a location at or near the proposed facility for purposes of receiving public comment on the lease agreement. Public comments made during this hearing shall be submitted to the Legislature and the Public Infrastructure Advisory Commission with the lease agreement. The Secretary of Business, Transportation and Housing or the Chairperson of the Senate or Assembly fiscal committees or policy committees with jurisdiction over transportation matters may, by written notification to the department or regional transportation agency, provide any comments about the proposed agreement within the 60-day period prior to the execution of the final agreement. The department or regional transportation agency shall consider those comments prior to executing a final agreement and shall retain the discretion for executing the final lease agreement.

"(d) For the purpose of facilitating those projects, the agreements between the parties may include provisions for the lease of rights-of-way in, and airspace over or under, highways, public streets, rail, or related facilities for the granting of necessary easements, and for the issuance of permits or other authorizations to enable the construction of transportation projects. Facilities subject to an agreement under this section shall, at all times, be owned by the department or the regional transportation agency, as appropriate. For department projects, the commission shall certify the department's determination of the useful life of the project in establishing the lease agreement terms. In consideration therefor, the agreement shall provide for complete reversion of the leased facility, together with the right to collect tolls and user fees, to the department or regional transportation agency, at the expiration of the lease at no charge to the department or regional transportation agency. At time of the reversion, the facility shall be delivered to the department or regional transportation agency, as applicable, in a condition that meets the performance and maintenance standards established by the department or regional transportation agency and that is free of any encumbrance, lien, or other claims.

"(e) Agreements between the department or regional transportation agency and the contracting entity or lessee shall authorize the contracting entity or lessee to use a design-build method of procurement for transportation projects, subject to the requirements for utilizing such a method contained in Chapter 6.5 (commencing with Section 6800) of Part 1 of Division 2 of the Public Contract Code, other than Sections 6802, 6803, and 6813 of that code, if those provisions are enacted by the Legislature during the 2009–10 Regular Session, or a 2009–10 extraordinary session.[1]

"(f) (1) (A) Notwithstanding any other provision of this chapter, for projects on the state highway system, the department is the responsible agency for the performance of project development services, including performance specifications, preliminary engineering, prebid services, the preparation of project reports and environmental documents, and construction inspection services. The department is also the responsible agency for the preparation of documents that may include, but need not be limited to, the size, type, and desired design character of the project, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans, and any other information deemed necessary to describe adequately the needs of the department or regional transportation agency.

"(B) The department may use department employees or consultants to perform the services described in subparagraph (A), consistent with Article XXII of the California Constitution. Department resources, including

[1] The referenced provisions were enacted by the Legislature as Section 3 of Chapter 2 of the Statutes of 2009, Second Extraordinary Session, which act became effective on May 21, 2009. Section 143 of the Streets and Highways Code, as set out here, was amended by Section 5 of the same act.

personnel requirements, necessary for the performance of those services shall be included in the department's capital outlay support program for workload purposes in the annual Budget Act.

"(2) The department or a regional transportation agency may exercise any power possessed by it with respect to transportation projects to facilitate the transportation projects pursuant to this section. The department, regional transportation agency, and other state or local agencies may provide services to the contracting entity or lessee for which the public entity is reimbursed, including, but not limited to, planning, environmental planning, environmental certification, environmental review, preliminary design, design, right-of-way acquisition, construction, maintenance, and policing of these transportation projects. The department or regional transportation agency, as applicable, shall regularly inspect the facility and require the contracting entity or lessee to maintain and operate the facility according to adopted standards. Except as may otherwise be set forth in the lease agreement, the contracting entity or lessee shall be responsible for all costs due to development, maintenance, repair, rehabilitation, and reconstruction, and operating costs.

"(g) (1) In selecting private entities with which to enter into these agreements, notwithstanding any other provision of law, the department and regional transportation agencies may utilize, but are not limited to utilizing, one or more of the following procurement approaches:

"(A) Solicitations of proposals for defined projects and calls for project proposals within defined parameters.

"(B) Prequalification and short-listing of proposers prior to final evaluation of proposals.

"(C) Final evaluation of proposals based on qualifications and best value. The California Transportation Commission shall develop and adopt criteria for making that evaluation prior to evaluation of a proposal.

"(D) Negotiations with proposers prior to award.

"(E) Acceptance of unsolicited proposals, with issuance of requests for competing proposals. Neither the department nor a regional transportation agency may award a contract to an unsolicited bidder without receiving at least one other responsible bid.

"(2) When evaluating a proposal submitted by the contracting entity or lessee, the department or the regional transportation agency may award a contract on the basis of the lowest bid or best value.

"(h) The contracting entity or lessee shall have the following qualifications:

"(1) Evidence that the members of the contracting entity or lessee have completed, or have demonstrated the experience, competency, capability, and capacity to complete, a project of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, and a financial statement that ensures that the contracting entity or lessee has the capacity to complete the project.

"(2) The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration.

"(3) Evidence that establishes that members of the contracting entity or lessee have the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

"(4) Evidence that the contracting entity or lessee has workers' compensation experience, history, and a worker safety program of members of the contracting entity or lessee that is acceptable to the department or regional transportation agency.

"(5) A full disclosure regarding all of the following with respect to each member of the contracting entity or lessee during the past five years:

"(A) Any serious or willful violation of Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or the federal Occupational Safety and Health Act of 1970 (Public Law 91-596).

"(B) Any instance where members of the contracting entity or lessee were debarred, disqualified, or removed from a federal, state, or local government public works project.

"(C) Any instance where members of the contracting entity or lessee, or its owners, officers, or managing employees submitted a bid on a public works project and were found to be nonresponsive or were found by an awarding body not to be a responsible bidder.

"(D) Any instance where members of the contracting entity or lessee, or its owners, officers, or managing employees defaulted on a construction contract.

"(E) Any violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), including, but not limited to, alleged violations of federal or state law regarding the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or Federal Insurance Contribution Act (FICA) withholding requirements.

"(F) Any bankruptcy or receivership of any member of the contracting entity or lessee, including, but not limited to, information concerning any work completed by a surety.

"(G) Any settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the contracting entity or lessee during the five years preceding submission of a bid under this article, in which the claim, settlement, or judgment exceeds fifty thousand dollars ($50,000).

Information shall also be provided concerning any work completed by a surety during this five-year period.

"(H) If the contracting entity or lessee is a partnership, joint venture, or an association that is not a legal entity, a copy of the agreement creating the partnership or association that specifies that all general partners, joint venturers, or association members agree to be fully liable for the performance under the agreement.

"(i) No agreement entered into pursuant to this section shall infringe on the authority of the department or a regional transportation agency to develop, maintain, repair, rehabilitate, operate, or lease any transportation project. Lease agreements may provide for reasonable compensation to the contracting entity or lessee for the adverse effects on toll revenue or user fee revenue due to the development, operation, or lease of supplemental transportation projects with the exception of any of the following:

"(1) Projects identified in regional transportation plans prepared pursuant to Section 65080 of the Government Code.

"(2) Safety projects.

"(3) Improvement projects that will result in incidental capacity increases.

"(4) Additional high-occupancy vehicle lanes or the conversion of existing lanes to high-occupancy vehicle lanes.

"(5) Projects located outside the boundaries of a public-private partnership project, to be defined by the lease agreement.

However, compensation to a contracting entity or lessee shall only be made after a demonstrable reduction in use of the facility resulting in reduced toll or user fee revenues, and may not exceed the difference between the reduction in those revenues and the amount necessary to cover the costs of debt service, including principal and interest on any debt incurred for the development, operation, maintenance, or rehabilitation of the facility.

"(j) (1) Agreements entered into pursuant to this section shall authorize the contracting entity or lessee to impose tolls and user fees for use of a facility constructed by it, and shall require that over the term of the lease the toll revenues and user fees be applied to payment of the capital outlay costs for the project, the costs associated with operations, toll and user fee collection, administration of the facility, reimbursement to the department or other governmental entity for the costs of services to develop and maintain the project, police services, and a reasonable return on investment. The agreement shall require that, notwithstanding Sections 164, 188, and 188.1, any excess toll or user fee revenue either be applied to any indebtedness incurred by the contracting entity or lessee with respect to the project, improvements to the project, or be paid into the State Highway Account, or for all three purposes, except that any excess toll revenue under a lease agreement with a regional transportation agency may be paid to the regional transportation agency for use in improving public transportation in and near the project boundaries.

"(2) Lease agreements shall establish specific toll or user fee rates. Any proposed increase in those rates not otherwise established or identified in the lease agreement during the term of the agreement shall first be approved by the department or regional transportation agency, as appropriate, after at least one public hearing conducted at a location near the proposed or existing facility.

"(3) The collection of tolls and user fees for the use of these facilities may be extended by the commission or regional transportation agency at the expiration of the lease agreement. However, those tolls or user fees shall not be used for any purpose other than for the improvement, continued operation, or maintenance of the facility.

"(k) Agreements entered into pursuant to this section shall include indemnity, defense, and hold harmless provisions agreed to by the department or regional transportation agency and the contracting entity or lessee, including provisions for indemnifying the State of California or the regional transportation agency against any claims or losses resulting or accruing from the performance of the contracting entity or lessee.

"(l) The plans and specifications for each transportation project on the state highway system developed, maintained, repaired, rehabilitated, reconstructed, or operated pursuant to this section shall comply with the department's standards for state transportation projects. The lease agreement shall include performance standards, including, but not limited to, levels of service. The agreement shall require facilities on the state highway system to meet all requirements for noise mitigation, landscaping, pollution control, and safety that otherwise would apply if the department were designing, building, and operating the facility. If a facility is on the state highway system, the facility leased pursuant to this section shall, during the term of the lease, be deemed to be a part of the state highway system for purposes of identification, maintenance, enforcement of traffic laws, and for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

"(m) Failure to comply with the lease agreement in any significant manner shall constitute a default under the agreement and the department or the regional transportation agency, as appropriate, shall have the option to initiate processes to revert the facility to the public agency.

"(n) The assignment authorized by subdivision (c) of Section 130240 of the Public Utilities Code is consistent with this section.

"(o) A lease to a private entity pursuant to this section is deemed to be public property for a public purpose and exempt from leasehold, real property, and ad valorem taxation, except for the use, if any, of that property for ancillary commercial purposes.

"(p) Nothing in this section is intended to infringe on the authority to develop high-occupancy toll lanes pursuant to Section 149.4, 149.5, or 149.6.

"(q) Nothing in this section shall be construed to allow the conversion of any existing nontoll or nonuser-fee lanes into tolled or user fee lanes with the exception of a high-occupancy vehicle lane that may be operated as a high-occupancy toll lane for vehicles not otherwise meeting the requirements for use of that lane.

"(r) The lease agreement shall require the contracting entity or lessee to provide any information or data requested by the California Transportation Commission or the Legislative Analyst. The commission, in cooperation with the Legislative Analyst, shall annually prepare a report on the progress of each project and ultimately on the operation of the resulting facility. The report shall include, but not be limited to, a review of the performance standards, a financial analysis, and any concerns or recommendations for changes in the program authorized by this section.

"(s) Notwithstanding any other provision of this section, no lease agreement may be entered into pursuant to the section that affects, alters, or supersedes the Memorandum of Understanding (MOU), dated November 26, 2008, entered into by the Golden Gate Bridge Highway and Transportation District, the Metropolitan Transportation Commission, and the San Francisco County Transportation Authority, relating to the financing of the U.S. Highway 101/Doyle Drive reconstruction project located in the City and County of San Francisco.

"(t) No lease agreements may be entered into under this section on or after January 1, 2017."

Therefore, among other things, Section 143 authorizes the Department of Transportation (hereafter the department) or specified regional transportation agencies to enter into comprehensive development lease agreements with public or private entities, or consortia thereof, for transportation projects, which are alternatively referred to as transportation facilities (para. (4), subd. (a), para. (1), subd. (c), and subd. (d), Sec. 143). The authority to enter into these agreements expires on January 1, 2017 (subd. (t), Sec. 143). The type of transportation project that may be undertaken under Section 143 is limited (para. (6), subd. (a) and paras. (3) and (4), subd. (c), Sec. 143). Approval by the California Transportation Commission of transportation projects nominated by the department or regional transportation agency is required (para. (2), subd. (c), Sec. 143). The comprehensive development lease agreement is required to authorize the contracting entity or lessee to impose tolls or user fees for use of the transportation facility, which are to be specified in the agreement, and the agreement must require the toll and user fee revenues to be applied to payment of the capital outlay costs for the project and the costs associated with operations, revenue collection, administration, associated development and maintenance costs, police services, and a reasonable return on investment (paras. (1) and (2), subd. (j), Sec. 143).

Excess toll or user fee revenues not required for those purposes must be applied to specified other purposes (Ibid.). The comprehensive development lease agreement must also authorize the contracting entity or lessee to use the design-build method of procurement, under which both the design and construction of a project are procured from a single entity, rather than the standard design-bid-build method that is typically required for construction projects under the State Contract Act (Ch.1 (commencing with Sec. 10100), Pt. 2, Div. 2, P.C.C.) pursuant to which a project is designed and then put out to bid for construction (para. (3), subd. (a) and subd. (e), Sec. 143; see also Sec. 6800, P.C.C. and *Consulting Engineers and Land Surveyors of California v. California Dept. of Transp.* (2008) 167 Cal.App.4th 1457, 1462)). The transportation facility constructed under a comprehensive lease agreement is also to be maintained and operated by the contracting entity or lessee during the term of the lease, rather than by the department or regional transportation agency (para. (2), subd. (f), Sec. 143). Section 143 also authorizes reasonable compensation to the contracting entity or lessee for the adverse effects on toll or user fee revenues due to certain competing projects that may be constructed by public agencies (subd. (i), Sec. 143). At the expiration of the lease term, the transportation facility is to revert to the department or regional transportation agency at no charge and without any encumbrances (subd. (d), Sec. 143).

Thus, Section 143 contemplates that a project undertaken under its provisions will rely for funding on tolls or user fees, rather than on existing sources of state or federal transportation revenues.

We next examine the concept of availability payments in connection with the statutory framework in Section 143. The term "availability payments" is not defined or used in Section 143 or elsewhere in state law. However, the Federal Highway Administration uses the term and has defined it as follows:

> "An availability payment is a periodic payment made to a concessionaire by a public authority for providing an available facility. Payments are reduced if the facility is not available for a period of time, or not being maintained in satisfactory condition. Using an availability payment structure eliminates the need for the concessionaire to assume any traffic risk and protects the interests of the public by giving the concessionaire a financial incentive to maintain the facility in satisfactory condition and operating at a specified level of performance."[2]

In that regard, the Department of Transportation has submitted a budget change proposal (BCP) for consideration during the 2010-11 fiscal year budget process. Under the BCP, the department is seeking a continuous appropriation of $3.45 billion in federal highway funds projected to be received by the state over the next 30 years. On an annual basis, this proposal would make available an estimated $115 million for availability payments,

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[2] Available at http://www.fhwa.dot.gov/reports/pppwave/08.htm (3/31/10).

which the department proposes to use for projects under Section 143. As we understand the concept, the contracting entity or lessee receiving the payment or pledge of availability payments could use that revenue stream to access private capital, which would be used at the front end to construct the project and then be repaid over time as the availability payments are received (BCP No. 13, Continuous Appropriation Authority for Public-Private Partnership Availability Payments, September 14, 2009).

The question presented is whether Section 143 authorizes existing public agency revenues, such as the federal highway funds identified in the department's BCP, to be paid or pledged to a contracting entity or lessee in the form of availability payments as described above, as a substitute for toll or user fee revenue.

In construing a statute, the court's principle task is to ascertain the intent of the Legislature, and it does so by first turning to the words themselves, giving them their ordinary meaning (*People v. O'Neal* (2004) 122 Cal.App.4th 817, 822). Consistent with established principles of statutory construction, an intent that finds no expression in the words of a statute cannot be found to exist. The courts may not speculate that the Legislature meant something other than what it said, nor may they rewrite a statute to make it express an intent not expressed therein (*Woodmansee v. Lowery* (1959) 167 Cal.App.2d 645, 652).

At the outset, while toll and user fee revenues on the one hand, and availability payments on the other hand, may be alternative forms to finance what are commonly known as public-private partnerships for development and delivery of transportation projects, Section 143 does not purport to authorize all forms of public-private partnerships. Indeed, the term "public-private partnership" does not appear in Section 143.[3] Rather, Section 143 authorizes comprehensive development lease agreements and sets forth specific requirements for entering into those agreements.

Central to the implementation of projects under Section 143 is the reliance on toll or user fee financing, rather than competition of those projects for existing public revenue sources such as state and federal fuel tax revenues. While it could be argued that Section 143 merely authorizes agreements under which the lessee may impose tolls or user fees and does not require them, a reading of Section 143 in its entirety makes clear that the source of revenues for funding of the project and for the return on the lessee's investment is intended to be revenue from tolls or user fees (see subds. (i) and (j), Sec. 143). In contrast, reliance on an existing public revenue source for the proposed availability payments has the effect of reducing the availability of those funds for other transportation purposes. In other words, rather than providing access to a new source of financing supported by tolls or user fees, the

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[3] The statute does require a new entity, the Public Infrastructure Advisory Commission, among other things, to assemble and make available to the department or regional transportation agencies a library of information, precedent research, and analysis concerning infrastructure partnerships and related types of public-private transactions for public infrastructure (subpara. (C), para. (1), subd. (b), Sec. 143).

use of availability payments would rely on the existing transportation revenues available to public agencies.

The nature of the risk assumed by the partner of the public agency, the lessee, is also fundamentally different under the two forms of financing. A project relying on toll or user fee revenues imposes the risk on the lessee that traffic using the facility may not reach projected levels. In contrast, in a project relying on availability payments, the lessee need not assume that risk but need only comply with contractual obligations for upkeep of the facility. There is evidence in subdivision (i) of Section 143 that the Legislature intended the financial risk for a project undertaken under Section 143 to be borne by the lessee, because that provision contemplates compensation to the lessee for a reduction of toll or user fee revenues resulting from the availability of a competing public agency transportation project under certain conditions.

There is additional evidence that the Legislature intended the scope of Section 143 to be narrow. Agreements may be entered into under Section 143 only until January 1, 2017. And, Section 143 provides that only projects that are supplemental to existing facilities already owned by the department or regional transportation agency may be considered under paragraph (6) of subdivision (a) of Section 143. Moreover, as discussed above, projects pursuant to Section 143 would be undertaken in a fundamentally different manner than projects funded from traditional public sources of transportation funding, with a different procurement method and the lessee responsible for tasks such as operation and maintenance of a transportation facility, among other things. We find nothing to indicate that the Legislature intended to deviate from the existing framework for operation and maintenance except in a narrow manner and, thus, we do not think a court would read Section 143 more broadly to include elements that are not mentioned. Courts should not presume the Legislature, in the enactment of statutes, intends to overthrow the long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 779). Thus, the concept of availability payments is fundamentally different from toll or user fee revenues, and therefore we think a court would determine that they are not authorized under the statutory framework in Section 143.

Accordingly, it is our opinion that a transportation project funded by a revenue stream of public agency availability payments, rather than toll or user fee revenues, would not be eligible to be undertaken under the provisions authorizing comprehensive development lease agreements in Section 143 of the Streets and Highways Code.

You have also asked whether the State Highway Route 101 Doyle Drive Replacement Project would be eligible to be undertaken as a transportation project under Section 143.

The Doyle Drive Replacement Project, also known as the Presidio Parkway Project, involves the replacement of 1.2 miles of the existing substandard elevated freeway approach to the Golden Gate Bridge that was originally constructed in the 1930s. The project is expected to cost $1.045 billion, with multiple agencies and funding sources involved. Among other agreements, the project is the subject of a memorandum of understanding dated November 26, 2008, between the Golden Gate Bridge, Highway and Transportation District, the Metropolitan Transportation Commission, and the San Francisco County Transportation Authority (hereafter MOU). Under the MOU, the parties have agreed that there will be no tolling of any kind on the Golden Gate Bridge or on Doyle Drive to fund the project, except to the extent a regional congestion management toll might be imposed on all entrances to San Francisco and except for an allocation of existing Golden Gate Bridge tolls to the project (MOU, Sections 1, 2, and 3).[4]

Section 143 defines "transportation project" for purposes of determining eligibility under that section as follows:

> "143. (a) . . .
>
> * * *
>
> "(6) 'Transportation project' means one or more of the following: planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance of highway, public street, rail, or related facilities supplemental to existing facilities currently owned and operated by the department or regional transportation agencies that is consistent with the requirements of subdivision (c).
>
> * * *"

We think this provision, specifically the language "supplemental to existing facilities currently owned and operated by the department or regional transportation agencies," establishes a threshold eligibility criterion before a project may be considered as a candidate to be undertaken pursuant to Section 143. Under that criterion, a project needs to demonstrate that it supplements the existing transportation system, such as by adding an additional lane or providing an alternative route to an existing route. In the case of the Doyle Drive Replacement Project, the basic thrust of the project, evidenced by its name, is to replace the existing southern approach to the Golden Gate Bridge one-for-one with a new facility, rather than providing an additional facility that supplements the existing Doyle Drive. There may be elements of the project that the California Transportation Commission could determine are supplemental in nature, such as providing an opportunity for access to city streets along the routing that is currently not available from the elevated freeway. However, we think those elements of the project that are replacement in nature, rather than supplemental, would fail to meet threshold eligibility under that definition.

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[4] A regional congestion management toll, also referred to as a cordon toll in the MOU, has not been implemented in San Francisco.

In addition, as we have discussed, Section 143 also contemplates the imposition of tolls or user fees on a project constructed under its provisions. Thus, to be eligible, Doyle Drive, an existing toll-free highway, would need to be converted into a toll or user fee facility. However, with limited exceptions not applicable here, conversion of existing nontoll or nonuser-fee lanes into tolled or user fee lanes is prohibited for projects undertaken pursuant to Section 143 (subd. (q), Sec. 143). Moreover, in the above-referenced MOU, certain of the parties involved in this project have agreed that there will be no tolls charged on the replacement Doyle Drive facility. Finally, subdivision (s) of Section 143 precludes the entering into of a lease agreement under Section 143 that affects, alters, or supersedes the MOU.

Accordingly, it is our opinion that the Doyle Drive Replacement Project would not be eligible to be undertaken as a project under Section 143 of the Streets and Highways Code.

Very truly yours,

Diane F. Boyer-Vine
Legislative Counsel

By
L. Erik Lange
Deputy Legislative Counsel

LEL:jlr

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Flex your power!
Be energy efficient!

April 30, 2010

Bimla Rhinehart, Executive Director
California Transportation Commission
1120 N Street, Room 2221
Sacramento, CA 95814

Re: **Caltrans Legal Opinion Re: Use of Monies in State Highway Account to Fund Availability Payments for the Presidio Parkway Public-Private Partnership**

Dear Ms. Rhinehart:

As you know, on April 6, 2010, the Legislative Counsel issued an opinion (LC Opinion) concluding that (1) a transportation project funded by a revenue stream of public agency availability payments, rather than toll or user fee revenues, would not be eligible under Streets and Highways Code section 143 (Section 143) and (2) the Presidio Parkway project is not an eligible transportation project as that term is defined under Section 143 because it does not "supplement" the existing transportation system. The California Department of Transportation (Department) has been asked to comment on the LC Opinion. The Department's comments, in the form of a legal memorandum, are attached for your review and consideration.

To summarize, the Department does not concur with the LC Opinion because it adopts an overly-narrow interpretation of Section 143 that is inconsistent with statutes governing the permissible uses of transportation funds and recent amendments to Section 143 that increase the Department's flexibility to structure and finance transportation projects. For the reasons discussed in the attached memorandum, the Department concludes that the Presidio Parkway project is an eligible transportation project pursuant to Section 143 that can be financed with availability payments funded with monies from the State Highway Account (SHA).

First, a plain reading of Section 143 demonstrates that the definition of "transportation project" in section 143(a)(6) does *not* establish a threshold eligibility criterion under which a project must "supplement" the existing transportation system. Second, Presidio Parkway is an eligible "transportation project" under Section 143(a)(6) because it falls squarely within that statutory definition in that it involves the design, finance, construction, reconstruction, lease, operation and maintenance of a highway as well as related facilities supplemental to existing facilities currently owned and operated by the Department. Third, State policy governing the permissible uses of monies within the SHA authorizes the expenditure of funds for all work within the powers and duties of the Department and does not in any way restrict lawful expenditures based on work delivered under Section 143. Therefore, the Department is authorized to use monies from the SHA to fund availability payments for the Presidio Parkway and other transportation projects delivered under Section 143.

To facilitate such projects, Section 143(f)(2) authorizes the Department to exercise *any* powers it possesses, which includes the power under Streets and Highways Code sections 163, 182, 183 and other provisions that permit the use of SHA funds for all of the purposes included within the definition of transportation projects set forth in Section 143(a)(6).

We are mindful that reasonable minds can differ in construing the language of legislative acts. Accordingly, the Department's legal memorandum carefully analyzes the applicable rules of statutory construction in reaching our conclusions. As required by law, the Department's analysis harmonizes Section 143 with other statutory provisions related to the authorities conferred on the Department.

Please give me a call if you have any questions at (916) 654-4227.

Sincerely,

Kome Ajise

KOME AJISE
Public Private Partnership
Program Manager

Memorandum

Flex your power!
Be energy efficient!

To: KOME AJISE
Program Manager
PPP Program

Date: April 30, 2010

From: DANIEL A. NEAR
Assistant Chief Counsel/Lead PPP Attorney
Legal Division

Subject: Use of Monies in State Highway Account to Fund Availability Payments for the Presidio Parkway Public-Private Partnership

INTRODUCTION

The Department of Transportation ("Department") has been asked to comment on the April 6, 2010, opinion of the Legislative Counsel ("LC Opinion") that concludes: (1) a transportation project funded by a revenue stream of public agency availability payments, rather than toll or user fee revenues, would not be eligible under Streets and Highways Code section 143 ("Section 143") and (2) the Presidio Parkway project is not an eligible transportation project as that term is defined under Section 143 because it does not "supplement" the existing transportation system.[1] In effect, the LC Opinion suggests the Department can only undertake projects that add capacity supplemental to an existing transportation facility and are financed exclusively with tolls or user fees.

The Department does not concur with the Opinion because it adopts an overly-narrow interpretation of Section 143 that is inconsistent with statutes governing the permissible uses of transportation funds and recent amendments to Section 143 that increase the Department's flexibility to structure and finance transportation projects.[2] For the reasons discussed below, the Department concludes that the Presidio Parkway project is an eligible transportation project pursuant to Section 143 that can be financed with availability payments funded with monies from the State Highway Account ("SHA").

[1] This memorandum does not address other issues raised by in the Professional Engineers in California Government ("PECG") in its April 1, 2010, letter to Bimla Rhinehart, Executive Director of the California Transportation Commission. The Department's response to the issues raised by PECG is set forth in its April 5, 2010 letter to Ms. Rhinehart.

[2] While this Memorandum discusses the Department's authority, we note that Section 143 authorizes the Department and regional transportation agencies to enter into PPP agreements under terms and conditions set forth in the statute. For simplicity, the proposed milestone and availability payments are collectively referred to as "availability payments."

QUESTIONS PRESENTED

I. Does the definition of "transportation project" in section 143(a)(6) establish a threshold eligibility criterion under which a project must demonstrate that it "supplements" the existing transportation system?

II. If not, is the proposed Presidio Parkway project (Presidio Parkway or Project) an eligible "transportation project" under Section 143?

III. For the Presidio Parkway and other transportation projects, is the Department authorized to fund availability payments with monies from the SHA rather than from tolls or user fees?

CONCLUSIONS

I. No. The definition of "transportation project" in section 143(a)(6) does *not* establish a threshold eligibility criterion under which a project must demonstrate that it "supplements" the existing transportation system. Section 143 projects include new and existing facilities without regard to being supplemental to an existing facility.

II. Yes. Presidio Parkway is an eligible "transportation project" under Section 143(a)(6) because it involves the design, finance, construction, reconstruction, lease, operation and maintenance of a highway and related facilities supplemental to existing facilities currently owned and operated by the Department.

III. Yes. State policy governing the permissible uses of monies within the SHA authorizes the expenditure of funds for all work within the powers and duties of the Department and does not in any way restrict otherwise lawful expenditures based on whether work is delivered under the Public Contract Code or Section 143. Therefore, the Department is authorized to use monies from the SHA to fund availability payments for the Presidio Parkway and other transportation projects delivered under Section 143. To facilitate such projects, Section 143(f)(2) authorizes the Department to exercise *any* powers it possesses, which includes the power under Streets and Highways Code sections 163, 182, 183 and other provisions that permit the use of SHA funds for all of the purposes included within the definition of transportation projects set forth in Section 143(a)(6).

FACTUAL BACKGROUND

As part of the 2009-2010 Budget Proposal, the Governor proposed to amend Section 143 to, among other things, provide "expanded authority for Caltrans to do performance-based projects." (Governor's Budget 2009-10: "Summary of Major Changes by Program Areas", p. 24.) The proposal implements an important component of the State's 20-year Strategic Growth Plan that, among other things, proposes that "all legitimate means of project delivery, including" performance-based infrastructure "in order to maximize public benefit and service." (California Strategic Growth Plan, p. 9.)

On February 20, 2009, Governor Schwarzenegger approved SBX2 4, Statutes of 2009 (Cogdill), which established the legislative authority until January 1, 2017, to allow the Department and regional transportation agencies to enter into an unlimited number of Public-Private Partnership ("PPP") Agreements and deleted the restrictions on the number and type of projects that may be undertaken. The Department is now proposing to enter into a PPP Agreement with a contracting entity (referred to herein as a "Developer") that would design, build, finance, operate and maintain the Presidio Parkway.[3] The proposed agreement contemplates that the Developer would be compensated with availability payments funded with revenues from the SHA and other public funds. As generally defined, an "availability payment" is:

> "[A] periodic payment made to a concessionaire by a public authority for providing an available facility. Payments are reduced if the facility is not available for a period of time, or not being maintained in satisfactory condition. Using an availability payment structure eliminates the need for the concessionaire to assume any traffic risk and protects the interests of the public by giving the concessionaire a financial incentive to maintain the facility in satisfactory condition and operating at a specified level of performance.[4]

In response to a request from Senator Darrell Steinberg, the Legislative Counsel issued an opinion concluding that a transportation project funded by a revenue stream of public agency availability payments, rather than toll or user fee revenues, would not be eligible under Section 143, and the Presidio Parkway is not an eligible Transportation Project as that term is defined under Section 143 because it does not "supplement" the existing transportation system with additional capacity funded and financed with tolls or user fees.

LEGAL ANALYSIS

The following analysis first explains why the Presidio Parkway is a "transportation project" within the meaning of Section 143 and then explains why the Department is authorized to pay for the Project with milestone and availability payments funded with monies from the SHA.

I. Presidio Parkway Need Not be "Supplemental" to a State Highway

The proposed Presidio Parkway project involves the replacement of a 1.2 mile existing portion of Doyle Drive on the State Highway system. The LC Opinion concludes the Presidio Parkway project is not an eligible transportation project because the language "supplemental to existing facilities currently owned and operated by the department or regional transportation agencies," establishes a threshold eligibility criterion under which a project needs to demonstrate that it "supplements" the existing transportation system, for example, by adding an additional lane or

[3] Section 143(a)(2) defines "Contracting entity or lessee" as "a public or private entity, or consortia thereof, that has entered into a comprehensive development lease agreement with the department or a regional transportation agency for a transportation project pursuant to this section."

[4] USDOT, Federal Highway Administration (FHWA) Public-Private Partnerships, VIII. Glossary of Terms http://www.fhwa.dot.gov/reports/pppwave/08.htm.

providing an alternative route to an existing route, and those elements of the project that are replacement in nature, rather than supplemental, would not constitute an eligible transportation project under Section 143.

Section 143(c)(1) gives the Department the authority to enter into PPP Agreements for transportation projects. A "transportation project" is broadly defined as "one or more of the following: planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance of highway, public street, rail, or related facilities supplemental to existing facilities currently owned and operated by the department or regional transportation agencies that is consistent with the requirements of subdivision (c)". (Section 143(a)(6).)

The term "supplemental" does not modify the terms highway, public street, or rail, but only "related facilities" that are supplemental to an existing facility owned and operated by the Department or a regional transportation agency. Therefore, a transportation project can involve any mix of planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance of: (i) a highway, (ii) a public street, (iii) rail, or (iv) a related facility supplemental to an existing facility owned and operated by the Department or a regional transportation agency.

In *PECG v. Department of Transportation* (1993) 13 Cal. App. 4th 585, the Appellate Court interpreted similar language in Section 143 as originally enacted in 1989, which provides/provided in pertinent part:

> "For the purpose of facilitating those projects, the agreements may include provisions for the lease of rights-of-way in, and airspace over or under, state highways, for the granting of necessary easements, and for the issuance of permits or other authorizations to enable the private entity to construct transportation facilities supplemental to existing state-owned transportation facilities."

In that case, PECG complained that the Department's grant of airspace rights to the developers exceeded its authority under Section 143(b) because the statute only permitted airspace leases along *existing* state highways and not along the new toll roads. The Court rejected PECG's argument that the phrase "to enable the private entity to construct transportation facilities supplemental to existing state-owned transportation facilities" supported PECG's contention, citing the rule of construction that qualifying or modifying phrases refer to immediately preceding words or phrases rather than to more remote ones, unless the context or evident meaning requires a different interpretation. (*Id.* at 596, citing *Olivia v. Swoap* (1976) 59 Cal.App.3d 130, 138.) The phrase in question was found to modify only the third item ("permits or other authorizations") in a series of three because it came immediately after the third item, which itself was separated by commas from the first two items ("the lease of rights-of-way" and "airspace over or under, state highways, for the granting of necessary easements").

Applying this analysis here demonstrates that the word "supplemental" refers only to the immediately preceding phrase "related facilities" and not to the more remote references to highway, public street, or rail. The Presidio Parkway project is a transportation project as defined in section 143(a)(6) because it provides for the design, construction, finance, lease, operation, and maintenance of a highway, public streets, and related facilities supplemental to existing facilities currently owned by the Department.

II. Presidio Parkway Is a Legally Eligible Transportation Project Since Section 143 Does Not Mandate Tolls or User Fees, Nor Prohibit Availability Payments Funded by the SHA

The LC Opinion relies heavily on Section 143(j)(1) which provides that "agreements entered into pursuant to this section shall authorize the contracting entity to impose tolls and user fees for use of a facility constructed by it." Citing this and other provisions of Section 143, the LC Opinion concludes that "Section 143 contemplates that a project undertaken under its provisions will rely for funding on tolls or user fees, rather than on existing sources of state or federal transportation revenues." (Legislative Counsel Bureau, "Comprehensive Development Lease Agreement - #1008978", April 6, 2010, p. 10.)

Section 143 does not *require* that each transportation project delivered through a PPP Agreement involve construction of a new toll facility or that every Developer impose tolls or user fees. As demonstrated below, Section 143 requires that PPP Agreements *authorize* Developers that build a facility to impose tolls or user fees for use of the facility, but does not *require* all Developers to impose tolls or user fees, nor restrict the use of conditions that must be satisfied before tolls or user fees can be imposed. When tolls or user fees are involved in a PPP project, Section 143 establishes guidelines for setting toll rates and the use of any toll or user fee revenues, but does not require that all PPP projects be paid for exclusively from tolls or user fees, nor in any way prohibit the use of public revenues to compensate Developers.

As noted above, the LC Opinion and PECG rely on Section 143(j)(1) to support a conclusion that every Developer that signs a PPP agreement pursuant to Section 143 must impose tolls or user fees. Applying this logic further suggests that *every* project undertaken pursuant to Section 143 must involve construction of a facility for which tolls or user fees can be imposed and that *in every case* there must be revenue generated by tolls and user fees that is applied to the payment of: (i) the capital outlay costs for the project, (ii) the costs associated with operations, (iii) toll and user fee collection, (iv) administration of the facility, (v) reimbursement to the department or other governmental entity for the costs of services to develop and maintain the project, (vi) police services, and (vii) a reasonable return on investment. (Section 143(j)(1).)
A plain reading of the statute does not support the rigid interpretation reached in the LC Opinion that every Developer entering into a Section 143 PPP agreement must impose tolls or user fees. This rigid interpretation overlooks that a broad variety of "transportation projects" may or may not include the construction of a facility and may not include tolls or user fees. (See discussion herein at p. 4.) Clearly, where the PPP project involves only design, for example, and not construction, it would make no sense to require a Developer to impose tolls or user fees "for use

of a facility constructed by it" or to require that revenue from tolls or user fees be applied to capital outlay costs when none exist. Similarly, Section 143(e) provides, "Agreements between the department or regional transportation agency and the contracting entity or lessee *shall authorize the contracting entity or lessee to use a design-build method of procurement for transportation projects. ...*".[5] It is illogical to interpret the "authorization" of the use of a design-build procurement to require that every PPP project include design and construction or, if the PPP project did involve design and construction, to require the Department to use a design-build method of procurement. The phrase "shall authorize" means that certain things "may" be undertaken and the use of this phrase in Section 143 demonstrates that every Developer that enters into a Section 143 PPP agreement is *not* required to impose tolls or user fees.

The legislative history and documents prepared contemporaneous with the amendments to Section 143 also make it very clear that tolls or user fees would be authorized, but not required. For example, the Legislative Analyst's Office summarized the Governor's proposes amendments to Section 143 as follows:

> "The Governor proposes to allow Caltrans and other state agencies to enter into public-private partnerships for certain projects. Partnerships could be agreements whereby a private partner assists the public sponsor to define a feasible project and negotiates reasonable terms to implement the project. Alternatively, partnerships could involve a private entity assuming the responsibility for delivering, improving, operating, or maintaining eligible facilities in exchange for payment. For transportation projects, such payments ***could*** be made from revenue generated by tolls or other road user fees. (emphasis added)(Legislative Analyst's Office, "2009-10 Budget Analysis Series", February 3, 2009, p. 19.)

The SBX2 4 Senate Bill Analysis dated February 14, 2009, states that "[t]his bill allows regional agencies and Caltrans to enter into an unlimited number of PPPs for transportation projects, deleting the limitation on both the number and *type* of projects eligible to be developed through a PPP" (emphasis added).

The Legislative Counsel's Digest also indicates that tolls and user fees would be authorized, but not required under the amendments to Section 143: Existing law authorizes the Department of Transportation and regional transportation agencies, as defined, until January 1, 2012, to enter into comprehensive development lease agreements with public and private entities, or consortia of those entities, for certain transportation projects that ***may*** charge certain users of those projects tolls and user fees, subject to various terms and requirements. (emphasis added)(Legislative Counsel's Digest, section 4.)

[5] Emphasis added. Section 143(e) further provides that the use of design-build procurement is "subject to the requirements for utilizing such a method contained in Chapter 6.5 (commencing with Section 6800) of Part 1 of Division 2 of the Public Contract Code, other than Sections 6802, 6803, and 6813 of that code, if those provisions are enacted by the Legislature during the 2009–10 Regular Session, or a 2009–10 extraordinary session."

Considering section 143(j)(1) and other parts of Section 143 in the context of the statutory framework as a whole leads to the conclusion that tolls and user fees are authorized, but not required in every instance. Had the Legislature intended to mandate tolls or user fees in every case, Section 143 could easily have been written, not simply to "authorize", but to expressly "require" the imposition of tolls or user fees in connection with every PPP project procured under Section 143. This is precisely what the Legislature did to ensure that Developers would be required to submit any information or data that may be requested by the California Transportation Commission ("CTC") or the Legislative Analyst. [Compare section 143(j)(1) -- lease agreements "shall authorize" the contracting entity to impose tolls or users fees for constructed facilities, with section 143(r) -- the lease agreement "shall require" the contracting entity or lessee to provide any information or data requested]. On its face, the statute clearly reflects the Legislature's intent to "require" in one instance and simply "authorize" in another. Neither the courts, nor administrative agencies are free to convert a legislative authorization to a mandate. Since the language of Section 143 is clear, the statute should simply be enforced according to its terms. (Code of Civil Procedure section 1858; *Santa Ana Unified School Dist. v. Orange County Development Agency* (2001) 90 Cal.App.4th 404, 408.)

Section 143 now affords the Department flexibility to transfer, retain or share the cost of development, reconstruction, operations and maintenance on a project-by-project basis. Such costs must be the Developer's responsibility "*except as may otherwise be set forth in the lease agreement.*" (Sec. 143(f)(2).) As section 143(f)(2) clearly affords the Department broad flexibility to define projects and negotiate lease agreements that transfer, retain or share these costs on a project-by-project basis, it is clear that every transportation project need not involve toll or user fee revenues to cover project costs.

When authorizing a Developer to impose tolls or user fees on a PPP project, such authorization can be subject to lawful conditions. In the case of the Presidio Parkway project, Section 143(s) provides that no PPP Agreement may be entered into that affects, alters, or supersedes the November 26, 2008, Memorandum of Understanding ("MOU") between certain local public agencies relating to the financing of the Presidio Parkway project. At the time that the Legislature enacted Section 143, the terms of the MOU did not allow the imposition of either tolls or user fees as a means of financing the Presidio Parkway project. If Section 143 required all PPP projects to impose tolls or user fees, it would not have been necessary for the Legislature to make a specific reference to the Presidio Parkway project. It is not reasonable to conclude that the Legislature intended to specifically identify the Presidio Parkway as a project that could not be considered as a Section 143 PPP project, especially since no other specific projects were identified. The only logical interpretation for the Legislature's reference to the Presidio Parkway project was that the Legislature acknowledged that Presidio Parkway was a likely candidate for a PPP project and, if it was considered, it would have to be financed by a means other than tolls or user fees. An interpretation that Section 143(j)(1) only authorized projects that imposed tolls or user fees would render Section 143(s) superfluous which is contrary to the rules of statutory construction. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.)

The Presidio Parkway PPP Agreement complies with Section 143(s) by not altering, affecting, or superseding the terms of the MOU. A specific condition of the proposed Presidio Parkway PPP Agreement provides that a Developer exercising its right to impose tolls or user fees must not affect, alter, or supersede the MOU and must obtain the approval to impose tolls or user fees from the agencies signatory to the MOU.

With regard to the Presidio Parkway PPP agreement, the Department does not foreclose the Developer from submitting a proposal which exercises the option to impose tolls or user fees. Any short-listed Developer will have the right to submit a proposal that contemplates imposing tolls or user fees. However, by electing to impose tolls or user fees, the Developer will forego the right to receive availability payments. Therefore, as a condition for imposing toll or user fees, a PPP Agreement can specify certain conditions which must be satisfied, including approval by relevant the local and federal agencies. (*ACLU v. Board of Education* (1963) 59 Cal.2d 203, 222; *Gilbert v. State* (1990) 218 Cal.App.3d 234, 244).

III. Availability Payments May be Funded From the State Highway Account

The LC Opinion questions whether Section 143 authorizes existing public agency revenues to be paid or pledged to a Developer in the form of availability payments (LC Opinion, p. 11.) The correct answer is found in pertinent provisions of Section 143 and in the controlling state policy governing the use of transportation funds. The LC Opinion correctly states that "Courts should not presume the Legislature, in the enactment of statutes, intends to overthrow the long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication. (Citation omitted.)" Furthermore, in *Voss v. Superior Court* (1996) 46 Cal. App. 4th 900, the Court held that "[I]t must be presumed the Legislature in enacting a law is 'aware of existing, related laws and intended to maintain a consistent body of statutes'". With regard to the enactment of Section 143, the long-standing policy governing the permissible uses of transportation funds is set forth in Streets and Highways Code section 163 ("Section 163") and related provisions.

First, Section 163 provides, "The Legislature, through the enactment of this section, intends to establish a policy for the use of all transportation funds that are available to the state, including the State Highway Account, the Public Transportation Account, and federal funds." Under the policy set forth in Section 163, transportation funds may be used for: administration of the Department, maintenance, operation and rehabilitation of the state highway system, local assistance, safety, environmental enhancement and mitigation, and capital improvement. (Section 163.)

In addition, Streets and Highways Code section 182 ("Section 182") provides that all monies in the SHA are available "for expenditure on work within the powers and duties of the department" without any restriction based on the specific statute authorizing such work. Streets and Highways Code section 183.1(a) provides, "*Notwithstanding* subdivision (a) of Section 182 or *any other provision of law*, money deposited into the account that is not subject to Article XIX of the California Constitution ... *may be used for <u>any</u> transportation purpose authorized by statute*, upon appropriation by the Legislature. (Emphasis added.) Section 143(a)(6) provides that a "transportation project" includes "finance". Therefore, the Department is authorized to pay costs related to the financing of Section 143 PPP projects.

Had the Legislature intended to allow the use of monies from the SHA for projects delivered pursuant to the State Contract Act of the Public Contract Code, but not those delivered under Section 143, it clearly could and would have adopted such a prohibition in statute as it did with regard to certain projects that impact Amtrak. (See Streets and Highways Code section 183.5, "No funds from the State Highway Account shall be budgeted, allocated, or expended for any project which calls for any change in passenger train stations or loading platforms used by the National Railroad Passenger Corporation unless the change has been submitted to the National Railroad Passenger Corporation for review and comment which may include a recommendation for a modification in the change"). The Legislature has enacted no similar restriction regarding projects to be delivered under Section 143 and no such restriction can be applied by implication.

By previously programming and allocating funds for the Doyle Drive replacement project, the Department and the CTC have already determined that the Doyle Drive replacement project is a permissible use of transportation funds. Nothing is expressly stated or implied in Section 143, Section 163, Section 182, or any other provisions of the Streets and Highways Code to suggest that the Presidio Parkway project no longer constitutes a permissible use of funds simply because the work is being procured pursuant to the Streets and Highways Code using availability payments instead of pursuant to the State Contract Act of the Public Contract Code as would be the case if the project were procured through traditional "design-bid-build" contracting methods.

By broadening the number and type of transportation projects that may be undertaken under Section 143, the Legislature empowered the Department to take advantage of the latest contracting methods and financing techniques in keeping with the longstanding principles of developing the full potential of resources. The Legislature expressly stated its intent to increase the Department's flexibility to structure and undertake public-private partnerships by, among other things:

- Adding Section 143(a)(5) and (b)(1) to create the "Public Infrastructure Advisory Commission" (PIAC) to advise Caltrans and regional transportation agencies in "developing transportation projects through ***performance-based infrastructure partnerships***" (emphasis added) based on the latest international best practices (Nothing in the statute suggests the PIAC's authority is constrained to considering only projects that impose toll or user fees.);

- Amending Section 143(f)(2) to give broad flexibility to allocate risks and responsibilities in PPP agreements by providing that the contracting entity or lessee shall be responsible for all costs due to development, maintenance, repair, rehabilitation, and reconstruction, and operating costs, *"[e]xcept as may otherwise be set forth in the lease agreement."* (emphasis added). This is clear intent to provide flexibility to fashion lease agreements in terms that provide the best value for the public; and

- Amending Section 143(a)(1) to define "best value" ("a value determined by objective criteria, including, but not limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the department or the regional transportation agency"), and amending Section 143(c) clearly reserves to the Department or regional transportation agency the ultimate discretion to execute the final agreement.

The LC Opinion overlooks Section 143(f)(2) which authorizes the Department to "exercise any power possessed by it with respect to transportation projects to facilitate the transportation projects pursuant to this section." This includes, among other things, the power to: (i) "do any act necessary, convenient or proper for the construction, improvement, maintenance or use of all highways which are under its jurisdiction" (Streets and Highways Code section 92); (ii) determine the degree and type of maintenance for each highway, or portion thereof (including the Presidio Parkway project) (Streets and Highways Code section 27); (iii) work with local and regional transportation entities in developing "the full potential of all resources and opportunities which are now, and may become, available ... ." (Gov. Code section 14030(c)); and (iv) "use transportation funds as permitted in Section 163.

An availability payment structure does just that by, among other things, providing for the long-term maintenance and preservation of facilities and making the expenditure of resources contingent upon the Developer's compliance with performance specifications set forth in the PPP Agreement. With regards to the Presidio Parkway project, the Department's financial analysis projects a net present value savings of approximately $147 million or 23% over the 30-year term of the PPP Agreement. (Project Proposal Report for the Presidio Parkway Project Public Private Partnership, p. 18.)

Therefore, using an availability payment mechanism is entirely consistent with the Department's long-standing charge to develop the full potential of available resources (Gov. Code sec. 14030(c)), determine the degree and type of maintenance for the facility (Streets and Highways Code section 27), and achieve rehabilitation and maintenance goals at the lowest possible long-term total cost (Streets and Highways Code section 164.6). Whether the proposed availability payment structure for the Presidio Parkway project better develops available resources or achieves rehabilitation and maintenance or other goals at the lowest possible long-term cost presents questions of fact, not questions of law. Nothing is expressly stated or necessarily implied in Section 143 or other provisions to limit these principles, powers or duties to projects procured through traditional methods pursuant to the State Contract Act of the Public Contracts Code.

Section 143 authorizes a broad array of partnerships and gives the Department flexibility to retain, transfer or share the funding responsibility for costs, services and functions as may be set forth in the PPP Agreement. Coupled with the Department's broad authority to make and enter contracts as are required for the performance of its duties and its discretion over the expenditure of certain transportation funds, the Department is authorized to use SHA monies to fund availability payments.

The LC Opinion expresses concern that such use creates funding competition with projects delivered through traditional methods pursuant to the State Contract Act of the Public Contract Code. In this instance, any such competition exists notwithstanding the delivery method chosen since SHA funds already committed to the project will be used if the CTC does not approve delivery under Section 143. While delivery under Section 143 will require additional resources to finance the full life cycle costs of the Presidio Parkway project, this is entirely consistent with the policy reflected in Streets and Highways Code section 164.6, for example, which directs the Department to balance resources to achieve maintenance and rehabilitation goals at the lowest possible long-term total costs and allows the Department to increase expenditures for maintenance when it can identify projected future costs that will be avoided. Whether or not this proves to be the case with regard to the Presidio Parkway project or other specific projects involves question of fact and policy, but not questions of law.

State of California

Department of Justice
1300 I STREET, SUITI
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SACRAMENTO, CA 94244-2550

Memorandum

To: Chairman James Earp and Commissioners
California Transportation Commission

Date: May 4, 2010

Telephone: (916) 324-7862
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From: George Spanos
Deputy Attorney General
Office of the Attorney General – Sacramento

Subject: Streets and Highways Code Section 143 and Availability Payments

INTRODUCTION

This memorandum is a consolidation of my previous two memoranda on the subject of whether availability payments are a proper financing mechanism under Streets and Highways Code section 143. In addition, this memorandum addresses the application of the phrase "supplemental to existing facilities" contained in the definition of "transportation project" set forth in section 143, subdivision (a)(6).[1] This memorandum responds to a request for informal advice in the context of a letter the Commission received on April 1, 2010, from the Professional Engineers in State Government ("PECG"). The letter challenges a project proposed pursuant to section 143 on several grounds.[2]

EXECUTIVE SUMMARY

Availability Payments Are Not Authorized by Section 143

Availability payments are not an authorized financing mechanism for projects implemented pursuant to section 143. From the time section 143 was first enacted until the present, the section has provided that agreements entered into pursuant to the section "shall authorize" the contracting entity to impose tolls (and, more recently, user fees). In addition, the section has provided since it was first enacted that revenues from tolls (and, more recently, user fees) are to be applied to payment of capital outlay costs and other costs associated with operation of the facility.

Section 143 has therefore always provided authorization for the imposition of tolls. Tolls are a type of user fee. Without such authorization tolls or user fees could not be imposed. Since tolls (and user fees) come from private funds (as opposed to availability payments), section 143 provides for a financing mechanism that relies on sources of funding other than public funds.

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[1] All section references are to the Streets and Highways Code. All subdivision references are to subdivisions of section 143 unless otherwise indicated.
[2] As is always the case, I provide this advice to you in my capacity as legal counsel to the Commission. This advice does not constitute a formal opinion of the Attorney General and does not necessarily reflect the Attorney General's views

By contrast, availability payments are paid from public funds, and the allocation of risk is entirely different than it is when tolls or user fees are the source of payment of capital outlay and other operational costs.

This conclusion, which is based on a plain reading of the language, is in accord with the legislative history of AB 680, including the findings and declarations contained in that bill, with analyses of AB 680, with statements made to the transportation committees when they heard AB 680, and with statements made by Caltrans in its enrolled bill report to the Governor in 1989 as well as by Caltrans' director soon after the bill was approved by the Governor. This conclusion was reiterated in analyses of later amendments to section 143 that explained the purpose of section 143.

In short, the purpose of section 143 was "to allow for privately funded . . . projects" in order "*to augment or supplement* available public sources of revenue." (AB 680, sec. 1 (legislative findings and declarations), subd. (b) and (c); emphasis added.)

Section 143 Projects Must Be Supplemental to Existing Facilities

The original version of section 143, at subdivision (b), referred to the construction of "transportation facilities *supplemental to existing state-owned transportation facilities*." It is clear from this language that all projects contemplated by section 143, without exception, were to be supplemental to existing state-owned transportation facilities. This intent is demonstrated by the plain language of the section; it is also supported by analyses of AB 680, by statements made to the transportation committees, and even by statements made by Caltrans in its enrolled bill report.

In 2006, as a result of AB 1467, the law was amended to allow regional transportation agencies as well as Caltrans to enter into agreements pursuant to section 143. Thus, references to state-owned highways were changed to references to "highway," which includes local highways, public streets, rail, and "related facilities."

The current section 143, in subdivision (a)(6), defines "transportation project" to include various activities pertaining to "highway, public street, rail, or related facilities *supplemental to existing facilities* currently owned and operated by the department or regional transportation agencies." (Emphasis added.) In effect, the original reference to "*transportation* facilities" was replaced by "*highway, public street, rail, or related* facilities." Just as the phrase "supplemental to existing . . . facilities" applied to all "*transportation* facilities" implemented through section 143, the same essential phrase applies to all the types of "transportation projects" enumerated in current law.

The result of the 2006 amendment was essentially to substitute, for "*transportation* facility," the words "*highway, public street, rail, or related* facilities." Thus, "supplemental to existing facilities" reasonably applies to all of the words that precede the phrase, and not only to "related facilities." To interpret the effect of the "supplemental" phrase as pertaining only to "related facilities" ignores the plain meaning of the language, the history of that part of the section, and the absence of any intent to reduce the scope of the application of the phrase. The analyses of AB 1467 make no reference to an intent to so limit the application of the phrase. Neither do the analyses of SB 4 (2X).

DETAILED ANALYSIS

AVAILABILITY PAYMENTS ARE NOT AUTHORIZED BY SECTION 143

The first question addressed in this memorandum is the following: Does section 143, which pertains to development lease agreements in connection with transportation projects, permit a lease agreement in which the revenue to the lessee consists of availability payments? By "availability payments" I refer to payments which come from public funds and which do not depend on the amount of use of the facility constructed as a result of the project.

In effect, the question is whether availability payments are a form of toll revenue or user fees. Based on the language of section 143, and on the significant differences between "tolls" and "user fees," which are mentioned in section 143, and "availability payments," which are not, and on the history of the evolution of section 143, the answer to the question appears to be "no."

This conclusion is supported by the language of section 143, by the findings and declarations contained in the bill that first added section 143 to the code, by statements made during the consideration of that bill by the Legislature, by statements made by Caltrans itself, both to the Governor and internally, by the subsequent history of section 143 and the interpretations made of section 143 when the section was amended, and by the inherent and substantial differences between tolls and user fees, on the one hand, and availability payments, on the other.

The Plain Language of Section 143 Does Not Support the Use of Availability Payments

In interpreting a statute, courts consider its plain meaning. "If the statutory language is unambiguous, we presume the Legislature meant what it said, and the plain meaning of the statute controls." *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal. 4th 32, 45. A court "may not rewrite the statute to conform to an assumed intention which does not appear from its language." *In re Hoddinott* (1996) 12 Cal. 4th 992, 1002, quoting from earlier cases.

Section 143 allows the Department of Transportation ("Caltrans") and regional transportation agencies to enter "into comprehensive development lease agreements with public or private entities, or consortia thereof, for transportation projects." (Subd. (c)(1).) Subdivision (j)(1) provides as follows:

> Agreements entered into pursuant to this section *shall authorize* the contracting entity or lessee to impose *tolls and user fees* for use of a facility constructed by it, and *shall require* that over the term of the lease the toll revenues and user fees be applied to payment of the capital outlay costs for the project, the costs associated with operations, toll and user fee collection, administration of the facility, reimbursement to the department or other governmental entity for the costs of services to develop and maintain the project, police services, and a reasonable return on investment. The agreement *shall require* that, notwithstanding Sections 164, 188, and 188.1, any excess toll or user fee revenue either be applied to any indebtedness incurred by the contracting entity or lessee with respect to the project, improvements to the project, or be paid into the State Highway Account, or for all three purposes, except that any excess toll revenue under a lease agreement with a regional transportation agency may be paid to the regional transportation agency for use in improving public transportation in and near the project boundaries.

(Emphasis added.) Thus, section 143 contemplates that the revenue from which the lessee will pay for capital outlay costs for the project, costs of operation, and other costs, and from which the lessee will derive a return on investment, will be generated by tolls or user fees.

On the other hand, section 143 makes no express reference to "availability payments." Nor is there any reference to "availability payments" in the two analyses of the bill that enacted the current version of the section, or in any of the analyses of the bill that effected the previous amendment of section 143.[3]

The question, then, is whether section 143, and its references to tolls and user fees, somehow embraces the notion of availability payments and authorizes them as a source of revenue under the development lease agreements described in that section. As is demonstrated below, there are substantial differences between tolls and user fees, on the one hand, and availability payments, on the other.

"User fee," as the words imply, refers to a fee paid in connection with the use of something. A fee is generally distinguished from a "tax." Taxes are used to raise general revenue, whereas a fee refers to a charge collected to defray the cost of providing the service that is used. "[U]ser fees are those which are charged only to the person actually using the service;

[3] Senate Bill 4, Second Extraordinary Session: see Stats 2009 ch. 2, and Assembly Bill 1467, Stats. 2006 ch. 32.

the amount of the charge is generally related to the actual goods or services provided." *Isaac v. City of L.A.* (1998) 66 Cal. App. 4th 586, 597. (Thus, "user fees" could include not only tolls but fares paid on public conveyances, such as rail transit, that are not generally referred to as "tolls.")

The Random House College Dictionary, 1982 edition, defines "toll" in pertinent part as follows:

> 1. a payment or fee exacted, as by the state, for some right or privilege, as for passage along a road or over a bridge. 2. (formerly in England) the right to take such payment. 3. A payment for a long-distance telephone call. 4. A tax, duty, or tribute, as for services, use of facilities, etc. . . . 6. A compensation for services, as for grinding corn or for transportation or transmission.

Although a toll charge could be considered a type of user fee, strictly speaking it could also be used to generate revenues in excess of the cost of making the facility available. What tolls and user fees have in common is that they are paid by someone using the service that is provided. Before the money is used to pay the toll or fee, it belongs to a private person. In other words, it is not paid out of public funds in competition with other possible public uses for such funds.

An availability payment is a payment in consideration of a facility of some type being made available for use. The Federal Highway Administration provides the following definition:

> An availability payment is a periodic payment made to a concessionaire by a public authority for providing an available facility. Payments are reduced if the facility is not available for a period of time, or not being maintained in satisfactory condition. Using an availability payment structure eliminates the need for the concessionaire to assume any traffic risk and protects the interests of the public by giving the concessionaire a financial incentive to maintain the facility in satisfactory condition and operating at a specified level of performance.[[4]]

Thus, unlike revenue from tolls or user fees, the amount of an availability payment generally does not depend on how much the facility is used. "Rather than relying on achieving certain levels of traffic and revenue, the concessionaire receives a predictable, fixed set of payments over the life of the agreement."[5] "[A]n availability payment is a payment for performance made irrespective of demand."[6]

[4] http://www.fhwa.dot.gov/reports/pppwave/08.htm
[5] American Association of State Highway and Transportation Officials ("AASHTO"), http://www.transportation-finance.org/funding_financing/financing/other_finance_mechanisms/availability_payments.aspx
[6] *Introduction to Public-Private Partnerships with Availability Payments*, Silviu Dochia and Michael Parker, www.transportation-finance.org/pdf/funding_financing/financing/jpa_introduction_to_availability_payments_0709.pdf

It is true that an agreement calling for availability payments may provide that the payments will be reduced if performance standards are not met. However, those standards have to do with how well the project is maintained. The amount of use of the completed project generally has no bearing on the amount of the availability payments. By contrast, toll and user fee revenues depend directly on the amount of usage of the facility, and only indirectly on how well the facility is maintained.

Thus, a very important distinction between tolls and user fees and availability payments has to do with how risk is allocated. As noted in the Federal Highway Administration's definition set forth above, with availability payments a concessionaire does not assume any traffic risk. "From the private sector's perspective, availability payment transactions are attractive because they provide a more predictable payment stream, with nearly all traffic and toll-revenue risk and upside potential held by the public sector. The concessionaire and its lenders rely *on the agency's credit* rather than an often unpredictable toll revenue."[7] With availability payments, "the public sector takes [the] revenue risk"[8]

In addition, availability payments come from a different source than do tolls and user fees. Availability payments come from public funds. A commitment to make availability payments thus has a direct potential impact on funds that could otherwise be committed for other public purposes.

For the reasons set forth above, tolls and user fees, on the one hand, and availability payments, on the other, are distinctly different forms of revenue. They differ in terms of how they are calculated. They differ in terms of the source of funds. And, perhaps most importantly, they differ in terms of the allocation of risks. The Legislature is presumed to understand those differences. In light of these differences, and of the absence of any mention of availability payments in section 143, it must be concluded, from the language of the current section, that the Legislature did not intend that availability payments constitute a funding mechanism for projects falling within section 143.[9]

The Legislature's Intent When Section 143 Was First Added to the Law, and the History of the Section's Evolution Since Then, Do Not Support the Use of Availability Payments

Section 143 was added to the law as a result of AB 680, enacted in 1989 (Stats 1989 ch 107 sec 2, effective July 10, 1989). It has been amended a total of six times.

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[7] *Florida's Highway Partnership Plan Can Serve as a Roadmap*, Patrick D Harder, www.nossaman.com/showArticle.aspx?show=5536; emphasis added.
[8] What the Public Sector Needs from PPPs, Fred Kessler, Nossaman Guthner Know & Elliott LLP, p. 8, http://usclusk.urbaninsight.com/files/WhatthePublicSectorNeedsfrom%20PPPs.pdf
[9] This conclusion is consistent with the Legislative Analyst's Office's March 2, 2010, report on the 2010-2011 Budget for transportation. See http://www.lao.ca.gov/analysis/2010/transportation/trans_anl10.pdf, at pages TR-21 to TR-22.

The original version of section 143 contained several subdivisions. Subdivision (d) set forth the way in which a project could be financed:

> Agreements entered into pursuant to this section shall authorize the private entity to impose tolls for use of a facility constructed by it, and shall require that over the term of the lease the toll revenues be applied to payment of the private entity's capital outlay costs for the project, the costs associated with operations, toll collection, and administration of the facility, reimbursement to the state for the costs of maintenance and police services, and a reasonable return on investment to the private entity. The agreement shall require that any excess toll revenue be applied to any indebtedness incurred by the private entity with respect to the project or be paid into the State Highway Account. Subsequent to expiration of the lease of a facility to a private entity, the department may continue to charge tolls for use of the facility.

The key phrases from the above-quoted original language of section 143, subdivision (d), are:

> (1) "shall authorize the private entity to impose tolls for use of a facility constructed by it," and
>
> (2) "shall require that over the term of the lease the toll revenues be applied to payment of the private entity's capital outlay costs [etc.]."

The corresponding language in the current version of section 143, at subdivision (j)(1), contains essentially the same authorization and requirement:

> (1) "shall authorize the *contracting entity or lessee* to impose tolls and user fees for use of a facility constructed by it," and
>
> (2) "shall require that over the term of the lease the toll revenues *and user fees* be applied to payment of the capital outlay costs [etc.]."

Only the italicized words differ from the original AB 680 version, and those differences have to do with an expansion of the types of entities that can construct transportation projects pursuant to section 143 and the addition of "user fees." Given the essential identity between the original formulation and the current one, the intended meaning of the original formulation applies to the current formulation.

For the sake of clarity, the key phrases noted above will be referred to in this memorandum as the "financing provision." It is well-worth considering what this "financing provision" was intended by the Legislature to mean, when it was included as part of the original section 143, and how it has evolved as a result of later amendments to section 143.

It is clear from AB 680 itself that the financing provision of the original version of section 143 expressly contemplated tolls and the use of toll revenues for payment of various costs, including those associated with the private investment. In addition to adding section 143 to the code, AB 680 included uncodified legislative findings and declarations contained in Section 1 of the bill. Those findings and declarations included several noteworthy statements, all of which relate directly or indirectly to the "financing provision" of section 143.

> *Public sources of revenues* to provide an efficient transportation system have not kept pace with California's growing transportation needs, and alternative funding sources should be developed *to augment or supplement* available *public sources of revenue*. [AB 680, sec. 1, subd. (b); emphasis added.]
>
> One important alternative is *privately funded* Build-Operate-Transfer (BOT) projects whereby private entities obtain exclusive *development agreements* to build, with *private funds*, all or a portion of public transportation projects for the citizens of California. [AB 680, sec. 1, subd. (c); emphasis added.]

The above two quoted passages from the findings and declarations make it clear that the Legislature viewed the new section 143 as providing an *alternativ*e to the use of public funds in financing transportation projects. *The alternative was to use private funds*. The next quoted passage explains how the development agreement was to operate and how the private investment was to be repaid:

> During the term of the *development agreement* the private entity will have the right *to lease* the facility from the state and *charge tolls* sufficient to retire the private investment in the project (including a reasonable profit), operate and police the facility, maintain the facility, retire any outstanding bonds issued in support of the facility, and to make lease payments to the state. [AB 680, sec. 1, subd. (d); emphasis added.]

Thus, according to the findings and declarations contained in AB 680, the objective of the bill and the original version of section 143 was to allow for financing of some transportation projects with private moneys rather than public funds, and to repay private investment with revenues derived from tolls. Use of availability payments is not consistent with that objective. To put it in simpler terms, AB 680 was viewed as authorizing toll roads.

Statements made to the Legislature while AB 680 was being considered, statements contained in analyses of the language contained in AB 680, and even the enrolled bill report prepared by Caltrans provide further direct evidence of the Legislature's intended meaning relative to the financing provision. During consideration of AB 680 by each of the Legislature's two Transportation Committees, the bill's author, William Baker, made the following statements:

> "Financing for the design, construction, maintenance, and operations of the facility would come from *tolls, rents, and royalties* derived from the private use of the right-of-way and related airspace." [Emphasis added.]
>
> "Given the documented shortfall in available transportation resources, it is clear that we are limited in how much we can do in terms of capital investments and improvements. AB 680 gives us the flexibility *to supplement governmental funds* and bring additional projects into reality." [Emphasis added.]

In a memorandum to the Republican members of the Assembly Transportation Committee, dated April 3, 1989, Assemblyman Baker explained:

> CalTrans, with the governor's approval, recently requested that this bill be amended to establish a more refined demonstration project to encourage development of *public toll facilities* to supplement state facilities. [Emphasis added.]

An analysis of the bill prepared for the Senate Appropriations Committee described the bill as one which

> permits Caltrans to enter into agreements with private entities for up to 6 public transportation demonstration projects, in which the department would lease right-of-way or airspace over state highways and the entity would construct a transportation *toll facility* which is supplemental to a state-owned facility. [Emphasis added.]

In addition, the enrolled bill report, *prepared by Caltrans*, stated that the bill "[a]llows the Department to lease rights of ways and airspace over and under State highways to private entities wishing to construct and operate State transportation *toll facilities*." (Emphasis added.) The report noted that the opposition to the bill included "[a] significant number of legislators and segments of populace [who] continue to contend that toll roads should not be allowed in California," thus demonstrating that both supporters and opponents of the bill saw it as a measure allowing for privately constructed and operated toll roads. Finally, the enrolled bill report noted that the bill would make "*private capital* available to fund the construction and operation of transportation facilities." (Emphasis added.)

Thus cognizable legislative history surrounding the consideration of the original version of section 143 provides direct, unequivocal support for the conclusion that availability payments or use of public revenues was never considered as a financing mechanism under section 143, and that the projects constructed pursuant to that section were expected to be toll facilities in which tolls, a form of "user fee," were to be the source of repayment of capital outlay costs.

It is interesting to note that, after AB 680 was enacted, *Caltrans* viewed the bill as authorizing privately constructed and operated toll facilities. In a memorandum dated July 6, 1989, to the Chief Deputy Director and other Caltrans personnel, Caltrans' Director stated: "These projects are to be supplemental to existing state-owned facilities. The private investors are allowed up to 35-years to operate *toll facilities to permit the recovery of the capital investment* before the facility reverts to state ownership." (Emphasis added.)

The view that section 143 and its financing provision provided for toll roads and for repayment of capital costs from toll revenues continued to be the Legislature's view. This fact is made clear in the context of later amendments to section 143.

In 2002 the Legislature enacted AB 1010 (Stats 2002 ch 688 § 3). The primary focus of AB 1010 was to resolve the dispute that had arisen with regard to State Route 91. Part of the bill, however, amended section 143. The amendments consisted of a reduction from four to two of the number of public demonstration projects, the prohibition of the entry into agreements after January 1, 2003, and a provision that tolls would terminate upon the expiration of the agreement.

Several of the legislative committee and floor analyses of AB 1010 demonstrate the Legislature's view that the original bill, AB 680, was intended to allow for privately-developed toll roads. For example, relying in part on the findings and declarations in Section 1 of AB 680, the Senate Transportation Committee analysis of AB 1010 stated that AB 680 "authorized the Department of Transportation to enter into contractual agreements with private entities for the construction and operation of *toll roads*." (Emphasis added.) The Senate Appropriations Committee analysis of AB 1010 noted that current law (i.e., as established by AB 680) authorized Caltrans "to enter into agreements with private entities to operate 4 *toll roads* in the State." (Emphasis added.) When AB 1010 was brought back to the Assembly for concurrence in Senate amendments, the floor analysis described the earlier bill as follows: "Authorizes Caltrans to enter into agreements with private entities for the construction of four transportation demonstration projects *featuring the use of tolls*." (Emphasis added.)

Nothing in AB 1010 or in the committee and floor analyses of the bill suggests that the essence of section 143 – to allow for privately-developed toll roads – was being changed. The only change made to the "financing provision" of section 143 was the addition of language that provided that the authority to collect tolls would expire upon termination of the franchise agreement.

The next substantive change to section 143 came in 2006, with the enactment of AB 1467, as modified by AB 521 (Stats 2006 ch 32 § 1 and Stats 2006 ch 542 § 1, respectively). The 2006 amendments expanded the text of section 143, added definitions, included regional transportation agencies, allowed Caltrans and regional transportation agencies to contract with public as well as private entities for projects, and provided that leases would be approved unless the Legislature issued its disapproval within 60 days. The "financing provision" of section 143 was modified to accommodate the inclusion of regional transportation agencies. With regard to funding mechanisms, the only significant thing the 2006 amendments did was to add "user fees" so that both tolls and user fees were included. As already noted, there is no significant difference between tolls and user fees in terms of their source or how they are measured. Moreover, the fact that, as amended in 2006, the developer of a transportation project could be a public entity as well as a private one does not affect the source of funding that is legally available to cover the costs of the project.

The last amendment was accomplished by the enactment of SB 4 (2X). That amendment deleted the provision for Legislative approval of leases, added some more definitions, established a "Public Infrastructure Advisory Commission" and described its function, described the role of the California Transportation Commission in the approval process, provided for Caltrans to perform certain enumerated services, and described in greater detail the method of selecting proposals. However, SB 4 did not identify any new type of funding. The financing provision (which is now numbered as subdivision (j)(1)) was essentially left intact. Tolls and user fees remained, but there was still no reference to "availability payments."

What the foregoing history of the development of section 143 demonstrates is that the language – i.e., the "financing provision" – that was the basis for the Legislature's understanding, that AB 680 allowed for toll roads financed by toll revenues, and the use of toll revenues to repay capital costs, has not changed in any essential way. Thus, the Legislature's intent with regard to the "financing provision" -- as expressed in the findings and declarations section of AB 680, as expressed by statement made during consideration of AB 680, as evidenced by statements made by Caltrans at the time, and as illustrated further by the analyses of amending legislation such as AB 1010 -- should be presumed to have remained the same. The only change in terms of revenue source that has occurred with regard to the "financing provision" is the addition of "user fees." However, as already noted, "user fees," like tolls, come from the private users of the facility and not from public revenues, and therefore do not include "availability payments."

The essence of section 143, as originally enacted, was to allow for construction of toll roads by private companies. That essential point was set forth in the "financing provision." The financing provision allowed for private investment and for the repayment of private investment from toll revenues (and later from user fees). There has been no essential change to the financing provision. It follows that the current version of section 143 should be interpreted in a manner consistent with the objectives that the Legislature intended to achieve in adding section 143 to the code in 1989. Private investment is to be repaid from tolls and user fees, not from availability payments.

The Reference in Section 143, Subdivision (s), Does Not Affect the Interpretation of Section 143

In November 2008, the San Francisco County Transportation Authority, the Golden Gate Bridge District, and the Metropolitan Transportation Commission entered into a Memorandum of Understanding concerning Doyle Drive. The latter two parties agreed to contribute funds to the Doyle Drive project, but only on condition that the MOU prohibit the use of tolls for purposes of paying for reconstruction, except for a regional cordon tolling program for congestion management. The MOU also provided that, if an act of the Legislature authorized and actually led to the imposition of a toll on Doyle Drive for reconstruction purposes, the amounts contributed by the Golden Gate Bridge District and the Metropolitan Transportation Commission would have to be reimbursed, with interest.

As amended by SB 4 (2X), a subdivision (s) was added to section 143 stating, in pertinent part, that "Notwithstanding any other provision of this section, no lease agreement may be entered into pursuant to the section that affects, alters, or supersedes the Memorandum of Understanding [i.e., the MOU discussed above]." A question is raised by this reference in terms of whether it is evidence of the Legislature's intent regarding funding mechanisms, since the reference is to a particular project subject to an MOU that essentially prohibits tolls.

The reasonable interpretation of this direct reference to the MOU among the San Francisco County Transportation Authority, the Golden Gate Bridge District, and the Metropolitan Transportation Commission is that section 143 cannot be used to impose a toll on Doyle Drive in a manner that interferes with the rights of the parties to the MOU or otherwise "affects" the agreement. The MOU represents an agreement of which the prohibition on tolling Doyle Drive is obviously an important condition from the perspective of the Golden Gate Bridge District and the MTC. By prohibiting lease agreements that "affect" the MOU, the Legislature attempted to make it clear that it did not want to interfere with the agreement the parties to the MOU had worked out.

This interpretation is supported by the floor analysis of SB 4 (2X) prepared by the Assembly Appropriations Committee staff. That analysis describes that portion of the bill as follows:

> Excludes lease agreements that would affect, alter, or supersede the Memorandum of Understanding (MOU), [d]ated November 26, 2008, relating to the financing of the U.S. Highway 101/Doyle Drive reconstruction project in the City and County of San Francisco.

Thus, subdivision (s) could be read as excluding the use of section 143 with regard to the Doyle Drive project.

SECTION 143 PROJECTS MUST BE SUPPLEMENTAL TO EXISTING FACILITIES

The second question pertains to interpretation of the phrase, in Streets and Highways Code section 143, subdivision (a)(6), "supplemental to existing facilities." Specifically, the question pertains to whether that phrase applies to all types of projects included within the definition of "transportation project" set forth in that provision, or only to "related facilities."

If the phrase applies to all of the types of projects enumerated in subdivision (a)(6), then any project implemented pursuant to section 143 would have to supplement an existing facility owned and operated by the state or by a regional transportation agency. If the phrase applies only to "related facilities," then those types of projects that are specifically enumerated – highways, public streets, and rail – would not need to be supplemental; only "related facilities" would need to be supplemental.

A casual reading of subdivision (a)(6) could support either interpretation from a purely syntactical perspective. For example, the absence of a comma after "related facilities" seems to provide some support for an argument that the qualification which follows – i.e., the "supplemental phrase – applies only to related facilities.

However, such an interpretation is based on a misreading of the language, and not only ignores the history of section 143 and the way the section was amended in 2006; it also ignores *the context and meaning of the language*. (See *Professional Engineers v. Department of Transportation* (1993) 13 Cal. App. 4th 585, 596.) The error is to treat the word "facilities" as modified only by the word "related," whereas in fact it is modified by all the adjectives that precede it: "highway," "public street," and "rail," as well as by "related."

In the original version of the law, as enacted by AB 680 in 1989, the following language was used:

> For the purpose of facilitating those projects, the agreements may include provisions for the lease of rights-of-way in, and airspace over or under, state highways, for the granting of necessary easements, and for the issuance of permits or other authorizations to enable the private entity *to construct transportation facilities supplemental to existing state-owned transportation facilities.*

(Original section 143, subdivision (b); emphasis added.) Thus, in the original version, *all* transportation facilities implemented pursuant to section 143 – *without exception* – were to be supplemental to existing state-owned transportation facilities.

The grammatical structure of the last part of the above-quoted language is important to note. In the phrase "transportation *facilities* supplemental to existing state-owned transportation facilities," the key noun is the italicized word "facilities." "Facilities" is modified by two adjectives or adjectival phrases: “transportation” and “supplemental to existing . . . facilities.”

The current definition of transportation projects in subdivision (a)(6) follows the same grammatical structure. In the phrase “highway, public street, rail, or related *facilities* supplemental to existing facilities currently owned and operated by the department or regional transportation agencies,” the key noun is the italicized “facilities.” The word “facilities” is now modified by two sets of adjectives or adjectival phrases: by “highway, public street, rail, or related” and by the phrase “supplemental to existing facilities . . .” Thus all of the types of facilities described in the definition – highway facilities, public street facilities, rail facilities, and related facilities – are subject to the “supplemental” phrase.

The argument that suggests that the “supplemental” language modifies only “related facilities” because of the absence of a comma after the words “related facilities” overlooks the fact that not only “related” but also “highway,” “public street,” and “rail” are used as adjectives, not as nouns, and all of them modify “facilities.” “Rail” clearly is used as an adjective; if a noun were intended, the word would be accompanied by a noun such as “facilities” or “systems” or “infrastructure.” “Highway” and “public street” would be written as plural nouns, as is the word “facilities,” and not as adjectives. Thus, the argument would have some merit if the language read as follows: “highway**s**, public street**s**, rail system**s**, and related facilities supplemental to existing facilities.” But that is not how the phrase is worded.

In other words, the following substitution of language occurred as a result of the 2006 amendment:

1. The adjective “transportation” was replaced by the adjectives “highway, public street, rail, and related.”

2. The main noun “facilities” remained the same.

3. The adjectival phrase “supplemental to existing state-owned transportation facilities” was replaced by the phrase “supplemental to existing facilities currently owned and operated by the department or regional transportation agencies” to reflect other changes made by the amendment.

This effect can be demonstrated more graphically by substituting, in the current law, the definition of “transportation projects” contained in subdivision (a)(6) for the phrase “transportation projects” as used in subdivision (d), and comparing the result with the previous version of the law:

1	**Previous version:**	**Current version:**
2	For the purpose of facilitating those projects,	For the purpose of facilitating those projects,
3	the agreements may include provisions for the lease of rights-of-way in, and airspace over or under, state highways, for the granting of necessary easements, and for the issuance of permits or other authorizations	the agreements between the parties may include provisions for the lease of rights-of-way in, and airspace over or under, highways, public streets, rail, or related facilities for the granting of necessary easements, and for the issuance of permits or other authorizations
4	to enable the private entity	
5	to construct	to enable the planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance [i.e., by the lessee[10]] of
6	transportation	highway, public street, rail, or related
7	facilities	facilities
8	supplemental to existing state-owned transportation facilities.	supplemental to existing facilities currently owned and operated by the department or regional transportation agencies . . .

In other words, the replacement of "transportation facilities" with "transportation projects" does not change the fact that all projects contemplated in section 143 are subject to the limitation set forth in the phrase "supplemental to existing facilities."

As further support for this conclusion, there is no evidence of any intent by the Legislature, in enacting AB 1467, to narrow or to reduce the limitation of the "supplemental" phrase to something less than all transportation facilities or projects, and to apply it only to the vague and undefined universe of "related" facilities. Neither of the two analyses of AB 1467

[10] A "subject type clause" in row 4 is rendered unnecessary through the use of the passive voice in the portion of the current language set forth in row 5.

prepared after the bill became a vehicle for amending section 143 makes any reference at all to the application of the "supplemental" language nor any reference to "related facilities." For that matter, neither of the two analyses of SB 4 (2X) make any such reference, either. Thus, there is no evidence to support the view that the 2006 amendment was intended to reduce or minimize the scope of the "supplemental" phrase as compared to its previous scope.

The scope of the "supplemental" phrase, and its application to all projects implemented through section 143, is reflected in analyses of AB 680, in statements made to the Legislature during its consideration of the bill, in the enrolled bill report prepared by Caltrans, and in the Department of Finance's memorandum to the Governor. According to the Senate Appropriations Committee analysis, the bill would allow Caltrans to enter into an agreement which would allow a private entity to "construct a transportation toll facility which is supplemental to a state-owned facility."

In its enrolled bill report to the Governor, Caltrans described AB 680's most likely application as one that "would involve double-decking existing freeways with the second deck operated as a toll road." As bill author Assemblyman Baker put it in his statement to the Assembly Transportation Committee, "[t]he basic thrust of the bill is to permit private industry to propose, finance, design, construct, and operate SUPPLEMENTAL transportation systems . . ." (Original emphasis.)

Based on the foregoing analysis, the following conclusion is reached. The original language of section 143 was unequivocal in making all transportation facilities developed pursuant to it supplemental to existing transportation facilities. The language changes effected by AB 1467 reflected changes that spelled out with greater specificity the projects that were eligible, and the expansion of the public agencies that could enter into agreements for transportation. There is no support, in the language of the current law, in the history of section 143, or in any of the bill analyses to reach a different conclusion from the following: A necessary feature of any transportation project that is to be implemented pursuant to section 143, subdivision (a)(6), is that it is to be "supplemental to existing facilities currently owned and operated by the department or regional transportation agencies."

CONCLUSION

Both the language of the current version of section 143 and the history of that section's original enactment and evolution support the view that availability payments, which of necessity would be drawn from public funds, cannot be used to repay private investment. Only tolls or user fees are available for that purpose for projects proposed under section 143.

The history of the evolution of section 143 demonstrates that projects implemented pursuant to section 143 are to be supplemental to existing facilities.

STREETS AND HIGHWAYS CODE
SECTION 143

143. (a) (1) "Best value" means a value determined by objective criteria, including, but not limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the department or the regional transportation agency.

(2) "Contracting entity or lessee" means a public or private entity, or consortia thereof, that has entered into a comprehensive development lease agreement with the department or a regional transportation agency for a transportation project pursuant to this section.

(3) "Design-build" means a procurement process in which both the design and construction of a project are procured from a single entity.

(4) "Regional transportation agency" means any of the following:

(A) A transportation planning agency as defined in Section 29532 or 29532.1 of the Government Code.

(B) A county transportation commission as defined in Section 130050, 130050.1, or 130050.2 of the Public Utilities Code.

(C) Any other local or regional transportation entity that is designated by statute as a regional transportation agency.

(D) A joint exercise of powers authority as defined in Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, with the consent of a transportation planning agency or a county transportation commission for the jurisdiction in which the transportation project will be developed.

(5) "Public Infrastructure Advisory Commission" means a unit or auxiliary organization established by the Business, Transportation and Housing Agency that advises the department and regional transportation agencies in developing transportation projects through performance-based infrastructure partnerships.

(6) "Transportation project" means one or more of the following: planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance of highway, public street, rail, or related facilities supplemental to existing facilities currently owned and operated by the department or regional transportation agencies that is consistent with the requirements of subdivision (c).

(b) (1) The Public Infrastructure Advisory Commission shall do all of the following:

(A) Identify transportation project opportunities throughout the state.

(B) Research and document similar transportation projects throughout the state, nationally, and internationally, and further identify and evaluate lessons learned from these projects.

(C) Assemble and make available to the department or regional transportation agencies a library of information, precedent, research, and analysis concerning infrastructure partnerships and related types of public-private transactions for public infrastructure.

(D) Advise the department and regional transportation agencies, upon request, regarding infrastructure partnership suitability and best practices.

(E) Provide, upon request, procurement-related services to the department and regional transportation agencies for infrastructure partnership.

(2) The Public Infrastructure Advisory Commission may charge a fee to the department and regional transportation agencies for the services described in subparagraphs (D) and (E) of paragraph (1), the details of which shall be articulated in an agreement entered into between the Public Infrastructure Advisory Commission and the department or the regional transportation agency.

(c) (1) Notwithstanding any other provision of law, only the department, in cooperation with regional transportation agencies, and regional transportation agencies, may solicit proposals, accept unsolicited proposals, negotiate, and enter into comprehensive development lease agreements with public or private entities, or consortia thereof, for transportation projects.

(2) Projects proposed pursuant to this section and associated lease agreements shall be submitted to the California Transportation Commission. The commission, at a regularly scheduled public hearing, shall select the candidate projects from projects nominated by the department or a regional transportation agency after reviewing the nominations for consistency with paragraphs (3) and (4). Approved projects may proceed with the process described in paragraph (5).

(3) The projects authorized pursuant to this section shall be primarily designed to achieve the following performance objectives:

(A) Improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor.

(B) Improve the operation or safety of the affected corridor.

(C) Provide quantifiable air quality benefits for the region in which the project is located.

(4) In addition to meeting the requirements of paragraph (3), the projects authorized pursuant to this section shall address a known forecast demand, as determined by the department or regional transportation agency.

(5) At least 60 days prior to executing a final lease agreement authorized pursuant to this section, the department or regional transportation agency shall submit the agreement to the Legislature and the Public Infrastructure Advisory Commission for review. Prior to submitting a lease agreement to the Legislature and the Public Infrastructure Advisory Commission, the department or regional transportation agency shall conduct at least one public hearing at a location at or near the proposed facility for purposes of receiving public comment on the lease agreement. Public comments made during this hearing shall be submitted to the Legislature and the Public Infrastructure Advisory Commission with the lease agreement. The Secretary of Business, Transportation and Housing or the Chairperson of the Senate or Assembly fiscal committees or policy committees with jurisdiction over transportation matters may, by written notification to the department or regional transportation agency, provide any comments about the proposed agreement within the 60-day period prior to the execution of the final agreement. The department or regional transportation agency shall consider those comments prior to executing a final agreement and shall retain the discretion for executing the final lease agreement.

(d) For the purpose of facilitating those projects, the agreements between the parties may include provisions for the lease of rights-of-way in, and airspace over or under, highways, public streets, rail, or related facilities for the granting of necessary easements, and for the issuance of permits or other authorizations to enable the construction of transportation projects. Facilities subject to an agreement under this section shall, at all times, be owned by the department or the regional transportation agency, as appropriate. For department projects, the commission shall certify the department's determination of the useful life of the project in establishing the lease agreement terms. In consideration therefor, the agreement shall provide for complete reversion of the leased facility, together with the right to collect tolls and user fees, to the department or regional transportation agency, at the expiration of the lease at no charge to the department or regional transportation agency. At time of the reversion, the facility shall be delivered to the department or regional transportation agency, as applicable, in a condition that meets the performance and maintenance standards established by the department or regional transportation agency and that is free of any encumbrance, lien, or other claims.

(e) Agreements between the department or regional transportation agency and the contracting entity or lessee shall authorize the contracting entity or lessee to use a design-build method of procurement for transportation projects, subject to the requirements for utilizing such a method contained in Chapter 6.5 (commencing with Section 6800) of Part 1 of Division 2 of the Public Contract Code, other than Sections 6802, 6803, and 6813 of that code, if those provisions are enacted by the Legislature during the 2009-10 Regular Session, or a 2009-10 extraordinary session.

(f) (1) (A) Notwithstanding any other provision of this chapter, for projects on the state highway system, the department is the responsible agency for the performance of project development services, including performance specifications, preliminary engineering, prebid services, the preparation of project reports and environmental documents, and construction inspection services. The department is also the responsible agency for the preparation of documents that may include, but need not be limited to, the size, type, and desired design character of the project, performance specifications covering the quality of materials, equipment, and workmanship, preliminary plans, and any other information deemed necessary to describe adequately the needs of the department or regional transportation agency.

(B) The department may use department employees or consultants to perform the services described in subparagraph (A), consistent with Article XXII of the California Constitution. Department resources, including personnel requirements, necessary for the performance of those services shall be included in the department's capital outlay support program for workload purposes in the annual Budget Act.

(2) The department or a regional transportation agency may exercise any power possessed by it with respect to transportation projects to facilitate the transportation projects pursuant to this section. The department, regional transportation agency, and other state or local agencies may provide services to the contracting entity or lessee for which the public entity is reimbursed, including, but not limited to, planning, environmental planning, environmental certification, environmental review, preliminary design, design, right-of-way acquisition, construction, maintenance, and policing of these transportation projects. The department or regional transportation agency, as applicable, shall regularly inspect the facility and require the contracting entity or lessee to maintain and operate the facility according to adopted standards.

Except as may otherwise be set forth in the lease agreement, the contracting entity or lessee shall be responsible for all costs due to development, maintenance, repair, rehabilitation, and reconstruction, and operating costs.

(g) (1) In selecting private entities with which to enter into these agreements, notwithstanding any other provision of law, the department and regional transportation agencies may utilize, but are not limited to utilizing, one or more of the following procurement approaches:

(A) Solicitations of proposals for defined projects and calls for project proposals within defined parameters.

(B) Prequalification and short-listing of proposers prior to final evaluation of proposals.

(C) Final evaluation of proposals based on qualifications and best value. The California Transportation Commission shall develop and adopt criteria for making that evaluation prior to evaluation of a proposal.

(D) Negotiations with proposers prior to award.

(E) Acceptance of unsolicited proposals, with issuance of requests for competing proposals. Neither the department nor a regional transportation agency may award a contract to an unsolicited bidder without receiving at least one other responsible bid.

(2) When evaluating a proposal submitted by the contracting entity or lessee, the department or the regional transportation agency may award a contract on the basis of the lowest bid or best value.

(h) The contracting entity or lessee shall have the following qualifications:

(1) Evidence that the members of the contracting entity or lessee have completed, or have demonstrated the experience, competency, capability, and capacity to complete, a project of similar size, scope, or complexity, and that proposed key personnel have sufficient experience and training to competently manage and complete the design and construction of the project, and a financial statement that ensures that the contracting entity or lessee has the capacity to complete the project.

(2) The licenses, registration, and credentials required to design and construct the project, including, but not limited to, information on the revocation or suspension of any license, credential, or registration.

(3) Evidence that establishes that members of the contracting entity or lessee have the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(4) Evidence that the contracting entity or lessee has workers' compensation experience, history, and a worker safety program of members of the contracting entity or lessee that is acceptable to the department or regional transportation agency.

(5) A full disclosure regarding all of the following with respect to each member of the contracting entity or lessee during the past five years:

(A) Any serious or willful violation of Part 1 (commencing with Section 6300) of Division 5 of the Labor Code or the federal Occupational Safety and Health Act of 1970 (Public Law 91-596).

(B) Any instance where members of the contracting entity or lessee were debarred, disqualified, or removed from a federal, state, or local government public works project.

(C) Any instance where members of the contracting entity or lessee, or its owners, officers, or managing employees submitted a bid on a public works project and were found to be nonresponsive or were found by an awarding body not to be a responsible bidder.

(D) Any instance where members of the contracting entity or lessee, or its owners, officers, or managing employees defaulted on a construction contract.

(E) Any violations of the Contractors' State License Law (Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code), including, but not limited to, alleged violations of federal or state law regarding the payment of wages, benefits, apprenticeship requirements, or personal income tax withholding, or Federal Insurance Contribution Act (FICA) withholding requirements.

(F) Any bankruptcy or receivership of any member of the contracting entity or lessee, including, but not limited to, information concerning any work completed by a surety.

(G) Any settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the contracting entity or lessee during the five years preceding submission of a bid under this article, in which the claim, settlement, or judgment exceeds fifty thousand dollars ($50,000). Information shall also be provided concerning any work completed by a surety during this five-year period.

(H) If the contracting entity or lessee is a partnership, joint venture, or an association that is not a legal entity, a copy of the agreement creating the partnership or association that specifies that all general partners, joint venturers, or association members agree to be fully liable for the performance under the agreement.

(i) No agreement entered into pursuant to this section shall infringe on the authority of the department or a regional transportation agency to develop, maintain, repair, rehabilitate, operate, or lease any transportation project. Lease agreements may provide for reasonable compensation to the contracting entity or lessee for the adverse effects on toll revenue or user fee revenue due to the development, operation, or lease of supplemental transportation projects with the exception of any of the following:

(1) Projects identified in regional transportation plans prepared pursuant to Section 65080 of the Government Code.

(2) Safety projects.

(3) Improvement projects that will result in incidental capacity increases.

(4) Additional high-occupancy vehicle lanes or the conversion of existing lanes to high-occupancy vehicle lanes.

(5) Projects located outside the boundaries of a public-private partnership project, to be defined by the lease agreement.

However, compensation to a contracting entity or lessee shall only be made after a demonstrable reduction in use of the facility resulting in reduced toll or user fee revenues, and may not exceed the difference between the reduction in those revenues and the amount necessary to cover the costs of debt service, including principal and interest on any debt incurred for the development, operation, maintenance, or rehabilitation of the facility.

(j) (1) Agreements entered into pursuant to this section shall authorize the contracting entity or lessee to impose tolls and user fees for use of a facility constructed by it, and shall require that over the term of the lease the toll revenues and user fees be applied to payment of the capital outlay costs for the project, the costs associated with operations, toll and user fee collection, administration of the facility, reimbursement to the department or other governmental entity for the costs of services to develop and maintain the project, police services, and a reasonable return on investment. The agreement shall require that, notwithstanding Sections 164, 188, and 188.1, any excess toll or user fee revenue either be applied to any indebtedness incurred by the contracting entity or lessee with respect to the project, improvements to the project, or be paid into the State Highway Account, or for all three purposes, except that any excess toll revenue under a lease agreement with a regional transportation agency may be paid to the regional transportation agency for use in improving public transportation in and near the project boundaries.

(2) Lease agreements shall establish specific toll or user fee rates. Any proposed increase in those rates not otherwise established or identified in the lease agreement during the term of the agreement shall first be approved by the department or regional transportation agency, as appropriate, after at least one public hearing conducted at a location near the proposed or existing facility.

(3) The collection of tolls and user fees for the use of these facilities may be extended by the commission or regional transportation agency at the expiration of the lease agreement. However, those tolls or user fees shall not be used for any purpose other than for the improvement, continued operation, or maintenance of the facility.

(k) Agreements entered into pursuant to this section shall include indemnity, defense, and hold harmless provisions agreed to by the department or regional transportation agency and the contracting entity or lessee, including provisions for indemnifying the State of California or the regional transportation agency against any claims or losses resulting or accruing from the performance of the contracting entity or lessee.

(l) The plans and specifications for each transportation project on the state highway system developed, maintained, repaired, rehabilitated, reconstructed, or operated pursuant to this section shall comply with the department's standards for state transportation projects. The lease agreement shall include performance standards, including, but not limited to, levels of service. The agreement shall require facilities on the state highway system to meet all requirements for noise mitigation, landscaping, pollution control, and safety that otherwise would apply if the department were designing, building, and operating the facility. If a facility is on the state highway system, the facility leased pursuant to this section shall, during the term of the lease, be deemed to be a part of the state highway system for purposes of identification, maintenance, enforcement of traffic laws, and for the purposes of Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

(m) Failure to comply with the lease agreement in any significant manner shall constitute a default under the agreement and the department or the regional transportation agency, as appropriate, shall have the option to initiate processes to revert the facility to the public agency.

(n) The assignment authorized by subdivision (c) of Section 130240 of the Public Utilities Code is consistent with this section.

(o) A lease to a private entity pursuant to this section is deemed to be public property for a public purpose and exempt from leasehold, real property, and ad valorem taxation, except for the use, if any, of that property for ancillary commercial purposes.

(p) Nothing in this section is intended to infringe on the authority to develop high-occupancy toll lanes pursuant to Section 149.4, 149.5, or 149.6.

(q) Nothing in this section shall be construed to allow the conversion of any existing nontoll or nonuser-fee lanes into tolled or user fee lanes with the exception of a high-occupancy vehicle lane that may be operated as a high-occupancy toll lane for vehicles not otherwise meeting the requirements for use of that lane.

(r) The lease agreement shall require the contracting entity or lessee to provide any information or data requested by the California Transportation Commission or the Legislative Analyst. The commission, in cooperation with the Legislative Analyst, shall annually prepare a report on the progress of each project and ultimately on the operation of the resulting facility. The report shall include, but not be limited to, a review of the performance standards, a financial analysis, and any concerns or recommendations for changes in the program authorized by this section.

(s) Notwithstanding any other provision of this section, no lease agreement may be entered into pursuant to the section that affects, alters, or supersedes the Memorandum of Understanding (MOU), dated November 26, 2008, entered into by the Golden Gate Bridge Highway and Transportation District, the Metropolitan Transportation Commission, and the San Francisco County Transportation Authority, relating to the financing of the U.S. Highway 101/Doyle Drive reconstruction project located in the City and County of San Francisco.

(t) No lease agreements may be entered into under this section on or after January 1, 2017.

CALIFORNIA TRANSPORTATION COMMISSION

POLICY GUIDANCE
PUBLIC PRIVATE PARTNERSHIP PROJECTS
Resolution G-09-13

1. Authority and Purpose. Section 143 of the California Streets and Highways Code, as amended by Chapter 2 of the Statutes of 2009 (Senate Bill 4, Second Extraordinary Session), authorizes the California Department of Transportation and regional transportation agencies to enter into comprehensive development lease agreements with public or private entities for transportation projects, commonly known as public private partnership (P3) agreements. Section 143 further provides that P3 projects and associated lease agreements proposed by the Department or a regional transportation agency shall be submitted to the California Transportation Commission, and that the Commission shall select and approve the projects before the Department or regional transportation agency begins a public review process for the final lease agreement. For Department projects, the Commission shall also certify the Department's determination of the useful life of the project in establishing the lease agreement terms. Where the Department or a regional transportation agency uses a final evaluation of proposals based on qualifications and best value to select a contracting private entity, Section 143 mandates that the Commission adopt the criteria for making that evaluation. However, the Commission does not approve or execute the final lease agreement nor does it have a role in selecting the private entities for P3 agreements.

   The purpose of this guidance is to set forth the Commission's policy for carrying out its role in implementing P3 projects in order to assist and advise the Department, regional transportation entities, and private entities that may be contemplating the development of P3 agreements. This Commission policy guidance is not a regulation and should not be construed as imposing any requirement or imposing any deadline on any agency beyond those found in Section 143. References to timeframes in this guidance are statements of Commission intent for responding to submittals from other agencies. They are not deadlines or restrictions for either the Commission itself or for other agencies. References to the contents of submittals from other agencies are statements of what the Commission expects that it will need in order to carry out its own responsibility for project approval under statute. They are not procedural requirements. Section 143 does not modify nor does this guidance address the Commission's authority to program and allocate state funds. This guidance does not address Department and regional transportation agency P3 project procedures that are not within the purview of the Commission.

2. Scope of Project Approval. The Commission will select and approve each P3 transportation project, as defined in Section 143(a)(6), through the adoption of a resolution at a regularly scheduled Commission meeting. Before approving a project, the Commission will conduct a

public hearing on the project as a scheduled meeting agenda item. The Commission will approve each project with reference to a P3 project proposal report, as described in section 4 below, prepared and submitted by the Department or regional transportation agency. The Commission's P3 project approval will include and apply to:

- The description of the scope of the transportation project and its boundaries, including construction work and the performance of maintenance and operations.
- The project financial plan, including the allocation of financial risk between public and private entities.
- For Department projects, a certification of the determination of the useful life of the project in establishing the lease agreement terms.
- Where the Department or regional transportation agency proposes to use a final evaluation of proposals based on qualifications and best value to select a contracting entity or lessee, the criteria that the Department or regional transportation agency will use for that evaluation.

3. Criteria for Commission Approval. The Commission will approve a P3 project if, after reviewing the project proposal report as described in section 4 below, it finds all of the following:
   - That the project as described in the project proposal report is consistent with the requirements of statute.
   - That the Commission's approval of the project and its financial plan does not in and of itself create a new commitment of state transportation revenues or create an undue risk to state transportation revenues committed to other projects. This does not preclude the commitment of state funds as a separate, even simultaneous, action. For example, the Commission could approve an amendment of the state transportation improvement program (STIP) to commit new funds to a P3 project, subject to the constraints of STIP funding.
   - That the project, consistent with Section 143(c)(3), is primarily designed to achieve the following performance objectives, as evidenced in the project proposal report:
     - Improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor.
     - Improve the operation or safety of the affected corridor.
     - Provide quantifiable air quality benefits for the region in which the project is located.
   - That the project, consistent with Section 143(c)(4), addresses a known forecast demand, as determined by the Department or regional transportation agency and evidenced in the project proposal report.
   - Where applicable, that the criteria that the Department or regional transportation agency proposes to use for a final evaluation of proposals based on qualifications and best value are consistent with statute.
   - For a Department project, that the Department has made a determination of the useful life of the project in establishing the lease agreement terms that is consistent with the terms of the lease agreement.

4. Project Proposal Report. The Commission will consider approval of a P3 project only when the Department or regional transportation agency has prepared and submitted a project proposal report to the Commission. The Department or regional transportation agency may engage in preliminary steps leading to the development of the draft lease agreement, including the general solicitation of proposals and the prequalification of potential contracting entities, prior to submitting a project proposal report. However, the Department or regional transportation agency should not issue the final request for proposals to implement a specific transportation project, and the Department or regional transportation agency shall not conduct the final evaluation of proposals, prior to the Commission's approval of the P3 project. The Commission will place a request for approval of a P3 project on its agenda when the Commission office receives the project proposal report at least 45 days prior to the meeting.

   The project proposal report and request for P3 project approval will include or make reference to the following:

   - The description of the scope of the transportation project and its boundaries, including construction work and the performance of maintenance and operations.
   - The basis of the Department or regional transportation agency for finding that it would be in the public interest to implement the project through a public private partnership agreement.
   - The Department or regional transportation agency's proposed project financial plan, including the allocation of risk between public and private entities. The financial plan will include:
     - forecasts of revenue from tolls and user fees, as determined by the Department or regional transportation agency;
     - commitments of state or local revenues to the project (including capital, operating, maintenance, and debt service) or to any neighboring or ancillary projects necessary or desirable for full implementation of the project;
     - the alternative source of project revenue should revenues from tolls and user fees fail to meet projections or otherwise be insufficient to meet project costs; and
     - public financial responsibility for meeting project costs (including costs for operations, maintenance, and debt service) in case of default by the contracting entity or lessee.
   - The Department or regional transportation agency's estimate, with supporting documentation, of the extent to which the project will be designed to achieve each of the following performance objectives:
     - improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor;
     - improve the operation or safety of the affected corridor; and
     - provide quantifiable air quality benefits for the region in which the project is located.
   - The Department or regional transportation agency's forecast of travel demand, with supporting documentation.
   - The terms of the draft lease agreement associated with the project.

- Where the Department or regional transportation agency proposes to make a final evaluation of proposals based on qualifications and best value, consistent with Section 143(g)(1)(C), the criteria the Department or regional transportation agency proposes to use in making that evaluation.
- For a Department project, the Department's determination of the useful life of the project in establishing the lease agreement terms, consistent with Section 143(d), including the basis the Department used for making that determination.

5. Project Changes after Approval. The Commission does not approve or execute the final lease agreement. However, the Commission's expectation is that, pursuant to Section 143, the final lease agreement executed by the Department or regional transportation agency will implement the project approved by the Commission, consistent with project scope as described in section 2 of this guidance. After the Commission has approved a project, it will have no further role in reviewing or approving changes to the project or the lease agreement except at the request of the Department or regional transportation agency. If the Department or regional transportation agency finds it necessary or appropriate to make changes that alter the project scope, as described in section 2 of this guidance, the Commission expects that the agency will request approval of the change by submitting a supplement to the project proposal report setting forth a description of the change and the reasons for it. The Commission will approve the change if it finds that the revised project meets the criteria set forth in section 3 of this guidance. The Commission will place a proposed project supplement on its agenda in sufficient time to allow action to be taken on the requested change within 45 days after the Commission office receives the supplement to the project proposal report.