

## CALIFORNIA TRANSPORTATION COMMISSION

### DRAFT POLICY GUIDANCE APPROVAL OF PUBLIC PRIVATE PARTNERSHIP PROJECTS

1. 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 approve the projects before the Department or regional transportation agency begins a public review process leading to the execution of 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.

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 guidance does not address Department and regional transportation agency P3 project procedures that are not within the purview of the Commission. Consistent with statute, the Commission may make exceptions to this policy for a particular project where it finds it appropriate and in the public interest to do so.

2. Preliminary and Full Approval. The Commission will approve P3 projects in two stages, a preliminary approval and a full approval. ***The Department or regional transportation agency may engage in preliminary steps leading to the development of procurement documentation (request for proposals) for a P3 project prior to the Commission's preliminary project approval. However, the Commission expects that the Department or regional transportation agency will not issue the request for proposals prior to the preliminary approval. The Department or regional transportation agency may also select the preferred proposal and develop and negotiate the lease agreement associated with the project prior to the full approval. However, in accordance with Section 143(c)(5), the Department or regional transportation agency may not hold the public hearing or execute the final lease agreement prior to the Commission's full project approval.***

A *preliminary* 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 criteria that the Department or regional agency will use for a final evaluation of proposals based on qualifications and best value
- For Department projects, a certification of the determination of the useful life of the project in establishing the lease agreement terms.
- The project financial plan, including the allocation of financial risk between public and private entities, as described in the project proposal report.

***A full approval will include and apply to any updates or revisions to the above items.*** The Commission will grant both preliminary and full approvals to each P3 project through the adoption of a resolution at a regularly scheduled Commission meeting. Before granting either preliminary or full approval to a project, the Commission will conduct a public hearing as a scheduled meeting agenda item. The Commission will grant the preliminary or full approval with reference to a P3 project proposal report submitted by the Department or regional transportation agency.

3. Criteria for Commission Approval. The Commission will grant ***preliminary or full*** approval to a project if it finds all of the following:

- That the scope of the project as described in the project proposal report is clear and consistent with the requirements of statute.
- That the project is appropriate for development through a public private partnership, consistent with the P3 authorization in statute, and consistent with the public interest.
- That the Commission's approval of the project and its financial plan will not 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(h)(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(h)(4), addresses a known forecast demand, as determined by the Department or regional transportation agency and evidenced in the project proposal report.

***Before granting full project approval, the Commission will review and may update its preliminary findings based on project changes made in the negotiated lease agreement and the full project proposal report.***

4. Preliminary Project Proposal Report. The Commission will consider preliminary approval of a P3 project only when the Department or regional transportation agency has prepared and submitted a preliminary project proposal report to the Commission. ***At a minimum, the preliminary project proposal report should include:***
- 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 project procurement documentation (e.g., request for proposal) that the Department or regional transportation agency may use in the solicitation or selection of the contracting entity or lessee. Where the Department or regional transportation agency will make a final evaluation of proposals based on qualifications and best value, the project proposal report will include the criteria for making that evaluation.
  - ***The proposed lease agreement associated with the project.***
  - ***For a Department project, the Department's determination of the useful life of the project in establishing the lease agreement terms, including the basis used in making that determination.***
  - ***The 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 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 forecast travel demand, as determined by the Department or regional transportation agency, with supporting documentation.***

The Commission will place a project on its agenda for preliminary approval when the Commission office receives the preliminary project proposal report at least **60 days** prior to the meeting.

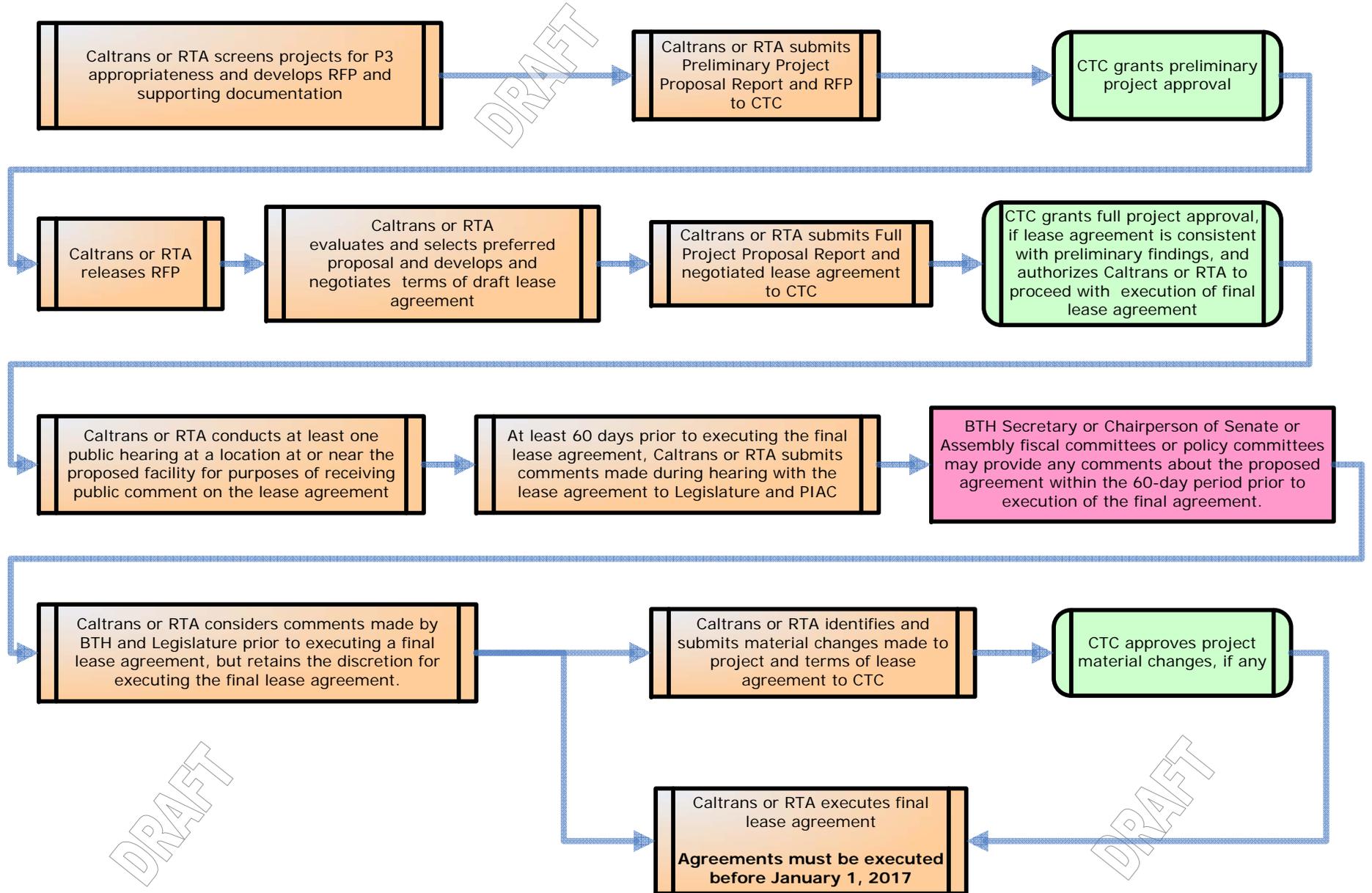
5. **Project Proposal Report for Full Project Approval.** The Commission will consider full approval of a P3 project only when the Department or regional transportation agency has negotiated and developed the terms of a draft lease agreement and has prepared and submitted a full project proposal report to the Commission. ***The Commission will grant full project approval if it finds that the negotiated lease agreement is consistent with the Commission’s preliminary project approval. Where there are inconsistencies or material changes, the Department or regional transportation agency should identify the changes, and the reasons for the changes, in its request for full project approval. When the Commission has granted full approval, the Department or agency may conduct its public hearing to receive comment on the lease agreement and execute the lease final agreement in accordance with Section 143(c)(5).*** The Commission will place a project on its agenda for full approval when the Commission office receives the project proposal report at least **30 days** prior to the meeting.

***The project proposal report requesting P3 full project approval will include the following, updating the information in the preliminary project proposal report, as appropriate, for any changes in the proposed project or lease agreement:***

- 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 the project would be in the public interest to implement the project through a public private partnership.
- The ***negotiated*** lease agreement associated with the project.
- For a Department project, the Department’s determination of the useful life of the project in establishing the lease agreement terms, including the basis used in making that determination.
- The 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 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 forecast travel demand, as determined by the Department or regional transportation agency, with supporting documentation.
6. Project Changes after Commission Approval. The lease agreement executed by the Department or regional transportation agency is to be consistent with the project approved by the Commission. ***Where the Department or regional transportation agency finds it appropriate to make a material change in the project prior to the execution of the lease agreement, the Department or regional transportation agency will submit to the Commission a supplement to the project proposal report, setting forth a description of the change and the reasons for it.*** The Commission will approve the supplement if it finds that the project remains consistent with the findings set forth in section 3 of this guidance. The Commission will place a proposed project supplement on its agenda when the Commission office receives the supplement report at least 30 days prior to the meeting.

Caltrans and/or regional transportation agencies (RTA) 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



ARNOLD SCHWARZENEGGER  
Governor

Department of Alcoholic Beverage Control  
Department of Corporations  
Department of Financial Institutions  
California Highway Patrol  
California Housing Finance Agency  
Department of Housing & Community Development  
Department of Managed Health Care  
Department of Motor Vehicles  
Board of Pilot Commissioners



DALE E. BONNER  
Secretary

Department of Real Estate  
Department of Transportation  
Office of the Patient Advocate  
Office of Real Estate Appraisers  
Office of Traffic Safety  
California Film Commission  
California Office of Tourism  
Infrastructure and Economic Development Bank  
Public Infrastructure Advisory Commission

## BUSINESS, TRANSPORTATION AND HOUSING AGENCY

August 10, 2009

Chairman Alvarado and Commissioners  
California Transportation Commission  
1120 N Street  
Sacramento, California 95814

### Re: Policy Guidance for Selection of Public-Private Partnership Projects

Dear Chairman Alvarado and Esteemed Commissioners:

At the June 10, 2009, meeting of the California Transportation Commission,<sup>1</sup> I sounded a note of extreme urgency regarding the State's continuing fiscal crisis and our worsening infrastructure deficit. As you are fully aware, traditional funding and delivery methods cannot keep pace with California's growing demand. With the current fiscal and economic crises, comprehensive solutions remain elusive and California's economic competitiveness is at risk.

Senate Bill 4, which was passed during the Second Extraordinary Session of 2009-2010, authorizes Caltrans and regional transportation agencies (sometimes referred to below as "transportation agencies") to enter into public-private partnership (P3) agreements to secure alternative and additional private financing and achieve more timely and efficient delivery of critical infrastructure. This legislation is vitally important to our ongoing efforts to improve the State's infrastructure and fiscal condition, to create jobs and to accelerate economic development by expediting investments in transportation.

Much progress has been made in implementing the new law. The Business, Transportation and Housing Agency (BTH) and Caltrans have been coordinating with regional transportation agencies, some of which are or soon will be prepared to submit applications to the CTC to proceed with P3 projects under SB 4. In addition, as required by SB 4, BTH has established the Public Infrastructure Advisory Commission (PIAC) to: (1) identify transportation project opportunities throughout the state; (2) research and document similar transportation projects throughout the world to identify and evaluate lessons learned; (3) assemble and make available to Caltrans or regional transportation agencies a library of information, precedent, research, and analysis concerning P3 transactions; (4) advise Caltrans and regional transportation agencies, upon request, regarding P3 suitability and best practices; and (5) provide, upon request, P3 procurement-related services to Caltrans and regional transportation agencies. The PIAC

<sup>1</sup> Hereafter, "CTC" or "Commission."

convened its first meeting on July 29, 2009, and has its second meeting scheduled for September 1, 2009.

To continue this steady progress, we are asking the CTC to act prudently, but expeditiously, in carrying out its important responsibilities under SB 4. Neither Caltrans nor regional transportation agencies may proceed with a P3 project without first securing the CTC's selection of the project. In addition to its "gatekeeper" function, the CTC will: certify the useful life of projects sponsored by Caltrans, adopt the criteria for the final evaluation of proposals for procurements based on qualifications and best value, authorize the extension of tolls and user fees after the expiration of P3 lease agreements that include tolls or user fees, and report annually to the Legislature on the progress of each project and ultimately on the operation of the resulting facility.

During the past 90 days, our respective staffs, Caltrans and other stakeholders have worked in good faith to develop guidelines that explain how the Commission will perform its statutory duties under SB 4. On Friday, July 31, 2009, BTH received a copy of the CTC staff's proposed guidelines (Draft Guidelines) that will be presented to the Commission at its August 12-13, 2009, meeting. Unfortunately, the Draft Guidelines provide for additional substantive requirements beyond those included in SB 4 and introduce new terms and concepts that would likely add unnecessary time, ambiguity, uncertainty and costs to the P3 program and seriously chill competition.

#### **The Draft Guidelines Are Contrary to the Framework Set Forth in SB 4**

SB 4 is designed to require the CTC's review of specified matters before the relevant transportation agency, or agencies can exercise their discretion to negotiate and execute the best deal for the public. Yet, the Draft Guidelines would have the Commission withhold its selection of a P3 project pending its review (and implicitly, approval) of a final P3 lease agreement. As a result, public and private parties would be asked to expend millions of taxpayer and private dollars leading up to a procurement, and millions more to complete the procurement process – all before knowing whether the CTC will allow the project to proceed as a P3 project.

In California, history shows that public agencies and prospective investors, who have watched the experience of other states, will simply not participate in a process that requires them to commit all the resources necessary to bid on a project, including months of intensive work and lost opportunity costs, if it is possible that, even after a contract is awarded, the CTC still may decide that the project is not a suitable P3 project.

We are aware of and respect the view of those who say the Legislature, in removing the requirement for legislative approval of final P3 agreements, intended to transfer this authority to the CTC. While reasonable minds can differ on whether the CTC *ought* to have such authority, SB 4 as passed by the Legislature and signed by the Governor included no such authority in the language of the law.

The goal reflected in SB 4 is to remove the potentially disruptive and chilling effect of having P3 agreements subject to approval of *any* third party that would not have the requisite expertise or the benefit of its own expert financial, legal or technical advisers, or that may end up approving or disapproving a final agreement based on factors having little or nothing to do with the contents of the agreement. This is why SB 4 amends the prior law to expressly state that the appropriate transportation agency “shall retain the discretion for executing the final lease agreement.”

In reviewing the experience of other states, we are not aware of a single instance in which a project was disapproved based on individual provisions that appeared only in a final agreement. Rather, decisions to disapprove projects have been based on factors having little or nothing to do with the agreement itself. This is why the Governor pushed for a P3 statute that does not include this element of decisional risk, when the better policy, as clearly articulated in SB 4, provides for a process that includes multiple checks that ensure a full review of all pertinent issues, but then allows the transportation agency to retain the discretion to execute the final agreement after a full and transparent vetting.

This is sound policy because, unlike the laws of other states, SB 4: provides for a substantive review and determination of whether proposed projects should proceed as P3 projects, prescribes many of the most critical contract requirements, and ensures transparency and inclusion through public vetting before the CTC, public hearings, and review by the Legislature and the PIAC. Even in California, the absence of third party approval is not without precedent. The legislation guiding what may be the State’s largest P3 project – the High Speed Rail system – requires legislative or voter approval of the *project*, but does not require any third-party approval of final agreements that may be executed to implement the project. Having approved the project, the Legislature and voters have left to the High Speed Rail Authority the discretion to execute necessary agreements. (See Public Utilities Code sections 185043 and 185036; and see Cal. Attorney General Opinion No. 07-1002, February 7, 2009, at p. 7.) The same is true of the large and complex arrangements that transit agencies and other regional transportation agencies have carried out in California over the last three decades, utilizing federal and local resources for many contractual variants, without CTC or legislative review, but remaining wholly accountable to officials elected and appointed to achieve efficiency and to protect the public interest.

It has been suggested that, in reviewing a final lease agreement as proposed in the Draft Guidelines, the CTC would not be inclined to second guess the details of the agreement, but would instead be making an overall judgment that the final agreement satisfies the requirements of SB 4. If this is the goal, it can be achieved much earlier in the process before a lease agreement is finalized since applications for project selection will include virtually all of the information necessary to make this judgment, including a proposed financial plan. Third party approval is not required because the particulars of these provisions will be available for review and comment by the public, the Legislature, the CTC, and the PIAC – all before the agency that negotiated the final agreement can exercise its discretion to sign or not sign the agreement. Accordingly, there is no good reason to withhold a project selection pending receipt of a final lease agreement and much of the other information required by the Draft Guidelines.

### **The Draft Guidelines Add Requirements that Are Ambiguous and Difficult to Implement**

Under the process set forth in SB 4, the CTC is to select the candidate projects if they are primarily designed to: (a) improve mobility; (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; and (d) address a known forecast demand, as determined by the department or regional transportation agency. (Streets & Highways Code section 143, subds. (h)(3) and (h)(4).)

The Draft Guidelines introduce additional requirements that are ambiguous and difficult, if not impossible, to implement. For example, Sections 2, 3 and 5 add the requirement that the CTC approve a project's financial plan, including the allocation of financial risk and various other financial terms. Section 3 adds the requirement that procedures and criteria to be used to select a contracting entity or lessee be "clear, consistent with statute, and fair to all parties concerned." These terms are inherently subjective, have no grounding in SB 4, and raise substantial questions about the CTC's intended role in determining who is a party sufficiently "concerned" so as to have standing to challenge the "clarity," "consistency," or "fairness" of the procedures or criteria, and in adjudicating any bid protests or other disputes based on such newly established standards and requirements. These are issues outside the CTC's area of expertise and, presumably, are not the focus of its interest.

We are also concerned that the Draft Guidelines include multiple additional steps with long time periods for placing items on the Commission's agenda, which could result in substantial and costly delay. These steps include placing items on the agenda at least 30 days prior to preliminary approval, another 60 days prior to full project approval, and 30 days more for approval of the "supplement" if it deems there is a "material" change in the agreement.

However well-intentioned, the Commission should refrain from using its procedural guidelines to create new substantive requirements or additional hoops and hurdles that overly complicate and extend beyond the process established in SB 4. While we do not understand this to be the Commission's desire or intent, doing so, even inadvertently, would be contrary to the Commission's traditional role and require particular expertise that the Commission does not possess.

### **The Guidelines Should More Closely Track SB 4**

On July 27, 2009, BTH delivered to the Commission and its staff draft guidelines (Suggested Guidelines) that suggest a straightforward process for carrying out the CTC's responsibilities under SB 4 while minimizing undue costs, decisional risk and delay. The Suggested Guidelines propose a clear process the components of which may be taken up separately or together: (a) CTC selection of the project based upon the required statutory criteria, its scope and preliminary financial plan (addressing the sources of funding) before the procuring agency had to make the investment in final procurement documents and lease agreement; (b) CTC adoption of the evaluation criteria for best value and review of substantially complete procurement documents and form of P3 agreement (typically 90-95% final) before the multi-million dollar bid

Chairman Alvarado and Commissioners

August 10, 2009

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investments are made by both the private and public sectors; and (c) CTC review of any material changes to those documents after bids are in, when the agreement is in final form. In this way, the public and private partners would be assured by the fact that the post-bid approval would be limited to those factors that would have changed the original CTC decision. This approach is more consistent with SB 4, which is carefully crafted to allow for transparency and inclusion in the process while avoiding the structural features that have undermined the success of prior P3 legislation here and in other states. Further, the Suggested Guidelines propose what will be the most open and transparent process for reviewing P3 transactions, indeed any form of transportation development agreement, in the United States.

As the Commission considers these or any other draft guidelines for this program, I would ask that you bear in mind the urgency of the matter. Any undue delay in the adoption of appropriate guidelines will seriously compromise the implementation of this important program, putting at risk our ability to move forward with projects that could otherwise provide significant economic and other public benefits in the very near future.

Please know that we very much appreciate the Commission's continued leadership and its willingness to take the important steps necessary to help alleviate if not correct the long-term and systemic under-investment in our transportation infrastructure.

Sincerely,



DALE E. BONNER

Secretary

cc: Jim Bourgart, BTH Deputy Secretary for Transportation and Infrastructure  
Randall Iwasaki, Director, Department of Transportation  
Bimla Rhinehart, Executive Director, California Transportation Commission

July 24, 2009

## CALIFORNIA TRANSPORTATION COMMISSION

### DRAFT POLICY GUIDANCE APPROVAL OF PUBLIC PRIVATE PARTNERSHIP PROJECTS

July 2009

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 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 proceeds with the P3 procurement process. For Department projects, the Commission shall also certify the Department's determination of the useful life of the project in establishing the P3 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.

The purpose of this guidance is to set forth the Commission's policy for carrying out its role under SB 4 X2 in P3 projects, in order to assist and advise the Department, regional transportation agencies and private entities that may be contemplating the development of P3 agreements. This guidance does not address Department and regional transportation agency P3 project procedures that are not within the purview of the Commission. Consistent with statute, the Commission may make exceptions to this policy for a project where it finds that particular provisions of this policy are not applicable to the type of P3 agreement under consideration.

Scope of Commission Project Approval. The Commission will approve each P3 project with the following elements. These elements may be taken together or separately, as deemed appropriate. The elements involve the adoption of a resolution after conducting a public hearing on the project as a scheduled meeting agenda item. The Department or agency may engage in preliminary actions leading to the development of a P3 agreement, including the solicitation of expressions of interest and proposals and the prequalification and shortlisting of potential contracting entities, prior to the Commission's project approval. However, the Department or regional transportation agency may not conduct the final evaluation of proposals prior to the Commission's project approval.

Performance Objectives. The Commission will select the project after reviewing the Department's or regional transportation agency's request for P3 selection. The Commission will typically place a request for P3 selection on its agenda if the Commission office receives such a request at least 21 days before the next scheduled meeting. The request for P3 selection will include 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 Department or regional 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;
  - provide quantifiable air quality benefits for the region in which the project is located; and
  - address a known forecast travel demand, as determined by the Department or regional transportation agency, with supporting documentation.

Project Proposal Report. The Commission will review each project with reference to a project proposal report submitted by the Department or regional transportation agency. A project proposal report will include the following:

- The draft project procurement documentation (e.g., request for proposal) that the Department or regional transportation agency intends to use in the solicitation of the contracting entity or lessee. Where the Department or regional transportation agency will make a final evaluation of proposals based on qualifications and best value, the project procurement documentation will include the criteria for making that evaluation.
- The proposed form of P3 lease agreement associated with the project, including proposed terms and conditions.
- For a Department project, the Department's determination of the useful life of the project in establishing the P3 agreement terms, including the basis used in making that determination.
- The project financial plan, which will include:
  - travel demand and toll revenue forecasts (if tolled), 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);
  - if tolled, the alternative source of project revenue should toll revenues 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.

After reviewing the project proposal report, the Commission will approve the project if it finds all of the following:

- That the project proposal report sufficiently describes the scope of the project and project financial plan;

- That the project proposal report sufficiently describes the procedures and criteria to be used to select a contracting entity or lessee;
- That the Commission's approval of the project and its financial plan will not create an undue risk to state transportation revenues committed to other projects; and
- That the project is designed to achieve the above-stated performance objectives.

Project Changes. In the event that, following a Commission approval of a project proposal, there is a change in the project that is material to the Commission's prior findings with regard to performance objectives or to the state's financial commitment to the project, the Department or regional transportation agency will submit to the Commission a supplement to its project proposal, including the final form of the P3 agreement, setting forth a description of such changes and the support thereof for the Commission's review of its prior approval.

Agreement Finalization and Execution. The Department or regional transportation agency will submit to the Commission a copy of the negotiated agreement prior to proceeding with the public hearing required by statute. After completion of the public hearing, the Department or regional transportation agency will submit to the Commission the comments received at such public hearing simultaneously with their submission to the Secretary of the Business, Transportation and Housing Agency, the chairs of the legislative fiscal committees and the Public Infrastructure Advisory Commission. The Department or regional transportation agency shall retain the discretion for executing the final lease agreement. If and when such agreement is executed, the Department or regional transportation agency will submit a certified copy of the P3 agreement to the Commission within 30 days of its execution.

## CALIFORNIA LEGISLATURE

## Senate

STATE CAPITOL  
SACRAMENTO, CALIFORNIA  
95814

August 10, 2009

Mr. Bob Alvarado, Chairman  
California Transportation Commission  
c/o Northern California Carpenters Regional Council  
265 Hegenberger Road, Suite 200  
Oakland, CA 94621-1480

Dear Chairman Alvarado:

As the California Transportation Commission considers its guidelines for implementing SB 4 (Cogdill), Chapter 2, Statutes of 2009, Second Extraordinary Session, we write to provide some context for its passage and to state the Legislature's intent regarding the role of the commission in approving projects developed through a public-private partnership (PPP). We respectfully request that the commission consider this perspective as it deliberates over the proposed guidelines.

Law in effect prior to the passage of SB 4 required the Legislature to approve a PPP project as a condition to execute the lease agreement. Through the SB 4 negotiations, we understood that having the Legislature approve or reject lease agreements was perceived to be a deterrent to PPPs. We agreed to forgo our role in approving lease agreements only by transferring it to an independent transportation entity that is not party to the agreement. The most appropriate body to carry out this responsibility is, in our view, the commission.

We believe it is critical that there be strong oversight of PPP projects by having the commission review and approve the final lease agreement prior to its execution in order to identify possible risks to the public agency as well as to users of the facility, and to ensure that the public interest is upheld.

It is worthwhile to highlight the two PPP projects that California has undertaken to date to emphasize the risks these projects may pose and the value of having a third party review and approve negotiated lease agreements.

The first project -- the State Highway Route 91 Express Lanes -- opened in 1995 and generated substantial controversy prior to being acquired by the Orange County Transportation Authority (OCTA) in 2002. A clause in the lease agreement between Caltrans and the California Private Transportation Company (CPTC), the franchise holder, prohibited Caltrans from developing any public transportation facility within an "Absolute Protection Zone." This restriction, commonly referred to as the "non-compete clause," was deemed necessary to protect the toll road's profitability and CPTC's investment. When Caltrans proposed to make a number of safety improvements to curb the growing number of congestion-related incidents, CPTC filed a lawsuit against Caltrans for violating the non-compete clause of its franchise agreement. Caltrans ultimately settled. As congestion on SR 91 continued to worsen, the Legislature passed AB 1010 (Correa), Chapter 688, to allow OCTA to purchase the franchise rights from CPTC, making California's first operational private toll project a public facility.

The second project -- SR 125, also known as the South Bay Expressway -- has been fraught with challenges and is currently the subject of a \$600 million lawsuit. A lease agreement was first completed in 1991, but development and project approval proved lengthy, and final environmental clearance was not granted until 2001. The project received financing from Macquarie Infrastructure Group in 2003, and the facility opened in the fall of 2007. The facility experienced significant cost overruns and projects additional future costs, which have been heavily disputed. In fact, the Legislature passed SB 463 (Ducheny), Chapter 446, in 2006 to extend the lease agreement and the period of time that tolls may be charged on the facility to help address the cost overruns. In addition, the design-builder, Otay River Constructors, is suing California Transportation Ventures, the lessee, who is in turn suing Caltrans for, among other things, breach of contract.

Now in public hands, the SR 91 Express Lanes are considered a success. The experience with SR 125, however, suggests that the risks of PPPs, including design-build contracts, may likely be borne by the public agency partner and by members of the public who use the facility.

Lease agreements are complex legal documents that set forth the long-term financial commitments of the public agency. Further, these agreements often include conditions regarding the development of other transportation facilities in the vicinity of the PPP project. In other words, the implications of a PPP agreement extend beyond the individual project and affect the agency, its resources, and future development of the regional transportation network.

We understand that some fear having a third party approve a lease agreement may inject a sense of risk that could deter some private entities from undertaking a project. This risk is mitigated, in part, by establishing clear guidelines and performance objectives from the outset to ensure that good projects will be approved.

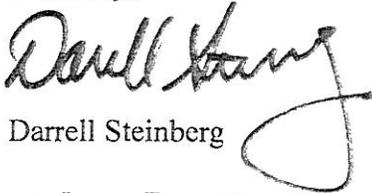
Furthermore, absent adequate oversight by the commission, the Legislature will assert itself. We will conduct oversight hearings, immersing ourselves in the details of lease agreements in a public forum and possibly revisiting the statutory authority for PPPs. In an uncertain political environment, there may be more risk for private entities without the commission's approval role than with it.

Transportation revenues are declining at a time when demand for infrastructure is at its greatest. In this environment, PPPs may be a tool to bolster efforts to develop badly needed transportation infrastructure. Let us be clear: the Legislature is committed to ensuring the success of PPPs. We believe, however, that success will be better assured if the commission upholds the responsibility of reviewing and approving negotiated lease agreements.

These substantive issues aside, our final concern relates to the timeline for adopting the proposed guidelines. We understand, and agree with, the need to approve guidelines in a timely manner. The commission might consider allowing for a complete 30-day review and comment period prior to adoption in order to provide ample opportunity for stakeholders to submit input and for the commission to deliberate carefully and thoroughly. We all share the goal of getting SB 4 right. We therefore urge the commission not to rush adoption of its guidelines at its August 12<sup>th</sup> meeting.

We appreciate your consideration of our views. Please do not hesitate to contact us if you have any questions.

Sincerely,



Darrell Steinberg



Alan Lowenthal

cc: James Earp, Vice Chairman, CTC  
John Chalker, Commissioner, CTC  
Lucetta Dunne, Commissioner, CTC  
Dario Frommer, Commissioner, CTC  
James C. Ghielmetti, Commissioner, CTC  
Carl Guardino, Commissioner, CTC  
Joseph Tavaglione, Commissioner, CTC  
Phil Tagami, Commissioner, CTC  
Larry Zarian, Commissioner, CTC  
Senator Dave Cogdill  
Speaker Karen Bass  
Assembly Member Mike Eng  
Assembly Member Sam Blakeslee  
Dale Bonner, Secretary, Business, Transportation & Housing Agency  
Bimla Rhinehart, Executive Director, CTC  
Randall Iwasaki, Director, Caltrans