

Memorandum

TAB 16

To: CHAIR AND COMMISSIONERS

Date: April 5, 2010

From: 
BIMLA G. RHINEHART
Executive Director

File: Book Item 4.8b
Information

Ref: Public Private Partnership Project - Presidio Parkway Project (Doyle Drive)
Public Hearing

ISSUE:

Section 143 of the Streets and Highways Code requires that the Commission hold a public hearing prior to selecting and approving a public private partnership (P3) project nominated by the Department or a regional transportation agency.

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.

The Presidio Parkway P3 project being 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.

Under the P3 proposal, a private developer would be engaged to design, build, finance, operate and maintain the Presidio Parkway projects over 33 years. For comparison to the design-bid-build option, the project proposal posits a "business case" under which the developer would be paid a \$150 million milestone payment at the end of construction, with availability payments of \$1.13 billion over a 30-year period. Users would not be assessed tolls; availability payments would be made from the State Highway Account.



PROFESSIONAL ENGINEERS

IN CALIFORNIA GOVERNMENT

April 1, 2010

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

Via Facsimile and U.S. Mail
(916) 653-2134

Re: CTC April 7-8, 2010 Agenda Item 17
Public-Private Partnership - Request for Project Approval
Presidio Parkway Project (Doyle Drive)

Dear Ms. Rhinehart:

Professional Engineers in California Government represents more than 13,000 engineers, land surveyors, and related professionals working for the State of California, including those working for the Department of Transportation (Caltrans). PECCG has substantial concerns with Agenda Item 17 on the Commission's April 7-8, 2010 agenda. At Agenda Item 17, the Commission will consider a request to approve the Presidio Parkway Project (Doyle Drive) as a Public Private Partnership (PPP).

As discussed in more detail below, it is clear that the Presidio Parkway Project does not, and cannot, comply with the California law authorizing PPPs, Senate Bill 4 (SBX2 4, Cogdill) on at least three bases. First, Caltrans **did not perform the enumerated environmental, preliminary engineering, and pre-bid services**, and those services were not included in Capital Outlay Support for workload and budget purposes, as **mandated** by SB 4. Second, SB 4 **expressly mandates** tolls and user fees for PPP projects, but such tolls or user fees are **expressly prohibited** on Doyle Drive by the very same legislation. Finally, there is **no authority** to expend STIP, SHOPP or other programmed funds in the manner envisioned by this proposed PPP project. A lease where the State is committed to legally enforceable obligations to make \$35 to \$40 million annual payments for 30 years creates indebtedness which is not authorized by law and exceeds the debt limitations of Article XVI, § 1 of the California Constitution.

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As the Presidio Parkway Project is not eligible to proceed as a PPP under California law, PEEG urges that the CTC **decline to approve the project as a PPP** and not spend any public money in furtherance of this project as a PPP. By the CTC not approving this project as a PPP, the project sponsors could return to a traditional design-bid-build model (which they inexplicably abandoned last June) and the Presidio Parkway Project can proceed as a fully funded project.

In February of 2009, the Legislature passed and Governor Schwarzenegger signed into law Senate Bill 4 which authorizes Caltrans or regional transportation agencies to enter into comprehensive development agreements with public or private entities for transportation. This legislation requires that Caltrans perform certain delineated functions on projects on the state highway system, requires that a PPP project include tolls and does not authorize debt to be incurred in the manner contemplated by this project.

Caltrans is the Responsible Agency for the Performance of Statutorily Defined Project Development Services for PPP Projects on the State Highway System

SB 4 provides at Streets and Highways Code section 143 that:

(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.

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SB 4 clearly provides that for projects on the state highway system, Caltrans 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.

For any PPP project on the state highway system, Caltrans also is responsible for preparing a set of documents setting forth the scope and estimated price of the project. Those documents may include preliminary plans, performance specifications and other documents necessary to adequately describe the needs of Caltrans or the regional transportation agency. Caltrans is to perform these services with state staff or outsourcing. The services are to be included in capital outlay support for workload/budget purposes.

Doyle Drive is a project on the state highway system. Here, the performance specifications, preliminary engineering, project reports and environmental documents were not performed by Caltrans. They were performed through San Francisco County Transportation Authority contracts with Parsons Brinkerhoff (Authority Contract 99/00-7) and with ARUP/Parsons Brinkerhoff (Authority Contract 06/07-29). The environmental documents were completed by Parsons Brinkerhoff and in December 2008, the FHWA issued its Record of Decision.

In October 2007, the Authority amended a contract for general engineering and design services with ARUP/PB to authorize work to complete 35% design for the project. In March 2009, that contract was amended again to authorize ARUP/PB to advance design of the Doyle Drive Replacement Project to 100% design level. The decision to "cease development of the detailed Plans, Specifications and Estimates for Contracts 5 to 8 through a traditional DBB approach was made at the end of June 2009 while assessment of possible PPP procurement was initiated." The Authority instructed ARUP/PB not to continue with the design, rather they were asked to prepare the PPP delivery option analysis.

As these services were not performed by Caltrans and were not included in the Caltrans Capital Outlay Support budget for workload purposes, the mandatory provisions of SB 4 requiring Caltrans to perform these listed services cannot be complied with. As SB 4 cannot be complied with for this project, there is no statutory authorization for a PPP on the Presidio Parkway project.

Halting the design contract to consider a PPP jeopardizes the timely completion of the project, as there is no statutory authority for a PPP on this project. The decision to "recommence" the PS&E for the design of contracts 5 to 8 should be made now as the ARUP/PB analysis said that the design should recommence no later than Mid-2010 to keep the project on schedule.

SB 4 Requires Tolls and User Fees Which are Prohibited on Doyle Drive

The language of SB 4 and the Assembly Floor Analysis make it clear that a PPP project must authorize the lessee to impose tolls or user fees.

SB 4 amended Streets and Highways Code § 143 to include the following:

- (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... (2) Lease agreements shall establish specific toll or user fee rates...

According to the Assembly Floor Analysis of SB 4 (February 15, 2009), the bill:

- 23) Explicitly provides that P3 agreements **must authorize the lessee to impose tolls and user fees for use of a facility constructed by it**, with revenues to be applied to payment of the capital outlay costs, operating costs, and other related costs. Excess revenues must be applied to the lessee's indebtedness, improvements to the facility, or paid into the State Highway Account, or for all three purposes. Excess revenue under a lease with a regional transportation agency may also be used for improving public transportation in and near the P3 facility. (Emphasis added.)

SB 4 also contains the following language regarding the financing of Doyle Drive:

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 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.

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As a condition to the Metropolitan Transportation Commission and the Golden Gate Bridge and Highway Transportation District's contribution of \$80 million each, the November 26, 2008 MOU **precludes tolling** on the 101/Doyle Drive project. The only exception to this prohibition would be a "regional cordon tolling program for the purposes of congestion management that tolls the Doyle Drive entrance to San Francisco in a similar manner and time frame to all other entrances to San Francisco are tolled may be permitted."

The Legislative Analyst's March 2, 2010 document "2010-2011 Budget: Transportation" noted that "Chapter 2 specifically requires that P3 project agreements include financing from toll or user revenue fees." The Legislative Analyst's Office concluded that because tolls or user fees would not be charged on the projects contemplated in its budget proposal, that "this type of agreement does not appear to be allowed under the P3 authorizing legislation." (Page 22, March 2, 2010.)

SB 4 **mandates** tolling authorization for PPP projects, but **precludes tolling** on the Presidio Parkway project. As SB 4 cannot be complied with, this effectively **precludes** the project from consideration as a PPP project.

There is No Statutory Authority to Commit STIP or SHOPP Money in the Manner Envisioned by this PPP and the Proposal Violates the California Constitution's Debt Limitation

This project was fully funded in May 2009. The project would be fully paid for by 2013 as approved in the STIP and the FHWA finance plan. Moving from design-bid-build increases the cost of the project from \$473 million to \$1.378 billion. The proposed DBFOM approach purports to commit funding of both a milestone payment in 2013 and a series of annual "availability payments" over a 30 year period. Nothing in SB 4, or elsewhere in law, authorizes Caltrans to make such payments over 30 years.

As discussed above, SB 4 envisioned toll and user fees to finance a project. There is no provision in SB 4 which allows Caltrans, the Authority, or the CTC to commit the "public sector" to an obligation to make payments to private entities for financing and construction of a project on the state highway system over 30 years.

Article XVI, § 1 of the California Constitution prohibits the creation of a general fund debt or liability in a sum exceeding \$300,000 without approval by the people by majority vote cast at a general election. Although here it is assumed the obligation would be payable out of special funds, the liability of the state would require payment from the general fund should the special fund prove insufficient, making the project and the lease subject to the debt limitation. A lease

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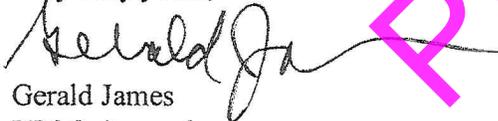
where the State is committed to legally enforceable obligations to make \$35 to \$40 million annual payments for 30 years creates indebtedness which exceeds the limitations of the California Constitution.

Further, the Legislative Analyst's March 2, 2010 report concluded that the even if the law was amended to allow for agreements that did not require tolls, such a project could not go forward as "unidentified portions of the costs the state would pay under the proposed agreements would be for the operations and maintenance of transportation facilities. These costs are not eligible for federal funding."

Based on the lack of compliance with SB 4 and the lack of authority for the Presidio Parkway Project to proceed as a PPP, PEGC urges the CTC to disapprove this project as a PPP project.

PEGC will be present at the April 7-8, 2010 CTC meeting. Should you have any questions, I can be reached at PEGC's Sacramento Office.

Very truly yours,



Gerald James
PEGC Counsel

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HANDOUT

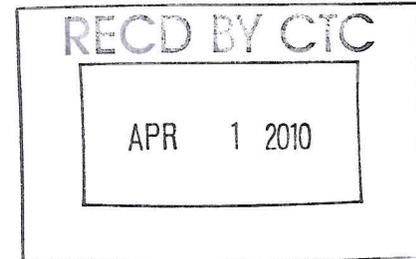
Build the Best. **Be the Best.**



Flatiron West Inc,
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March 31, 2010

Mr. James Earp
Chairman
California Transportation Commission
1120 N Street, MS-52
Sacramento, CA 95814



Subject: Support of Caltrans/San Francisco Transportation Authority Application under the Senate Bill X2 4 Public Private Partnership Program for the Presidio Parkway Project in San Francisco, California

Dear Chairman Earp:

Flatiron Construction, Inc. strongly supports the Caltrans/San Francisco Transportation Authority application to the California Transportation Commission under the state wide Senate Bill X2 4 Public Private Partnership (PPP) program for the Presidio Parkway Project in San Francisco.

We are writing to request your support for this program. With unemployment levels growing past 10%, it is imperative to create jobs in the Bay Area, which has been hard hit by the economic downturn and high unemployment. Unemployment in construction has risen above 20% in California. According to FHWA studies, the Design-Build-Operate-Finance-Maintain (PPP) construction and operating contract could generate over 9,400 job equivalents which will include Engineering and Construction positions. Long term benefits include at least 2,000 job equivalents which will be created in carrying out the operation and maintenance of the Parkway which are part of the project.

Aside from the much needed benefit of putting our California residents to work, the Presidio Parkway Project will reduce congestion and improve mobility along one of California's most congested freeway corridors. Motorists will be granted much easier and safer access to the Golden Gate Bridge and the City of San Francisco. They will have much better and safer access to Presidio Park; an area of great historic and scenic value to the citizens of California.

The use of Design-Build-Operate-Finance-Maintain contracting could reduce the delivery time of these much-needed improvements by over 2 years. This corridor is a vital link in transporting Marin County residents to their employers in San Francisco and the Bay Area. We respectfully request the CTC to approve the Caltrans/San Francisco Transportation Authority pending application, requesting PPP contracting authority for the Presidio Parkway.

Sincerely,

A handwritten signature in black ink, appearing to read "Darren Blume".

Darren Blume,
Area Manager
Flatiron

*Build the Best. **Be the Best.***



Cc: Mr. Larry Zarian
Mr. Darius Assemi
Ms. Lucetta Dunn
Mr. James C. Ghielmetti
Mr. Patrick Mason
The Honorable Alan S. Lowenthal

Mr. Bob Alvarado
Mr. John Chalker
Mr. Dario Frommer
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The Honorable Bonnie Lowenthal

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