

Memorandum

To: CHAIR AND COMMISSIONERS

Date: August 28, 2009

From:  BIMLA G. RHINEHART

File: Agenda Item 46
ACTION

 Executive Director

Ref: **Draft Policy Guidance for Implementation of Senate Bill No. 4 – Design-Build Demonstration Program and Public Private Partnerships**

ISSUE

Should the Commission adopt the attached revised draft policy guidance for the implementation of the design-build demonstration program and the public private partnerships agreements authorized through the approval of Senate Bill No. 4?

RECOMMENDATION

Staff recommends that the Commission discuss the attached draft policy guidance carefully, taking into account the roles and responsibilities of the Commission with regards to programming and allocation of State transportation funding, in addition to those responsibilities identified in SB 4. The Commission might also want to consider extending the public review and comment period if any changes it considers might constitute a significant deviation from the guidelines discussed and distributed for comment at and following the August 12 Commission meeting.

BACKGROUND

Senate Bill No. 4 (SB 4), by Senator Cogdill, was signed by Governor Schwarzenegger on February 20, 2009, and has since become effective as amended sections of the Public Contract Code and the Streets and Highways Code. SB 4 allows the California Department of Transportation (Department) and local transportation entities, if authorized by the California Transportation Commission, to use the design-build procurement method for the delivery of a limited number (total 15) of projects as a demonstration program until January 1, 2014. SB 4 also allows the Department or regional transportation agencies, until January 1, 2017, to enter into an unlimited number of comprehensive development lease agreements with public and private entities, or consortia of those entities, for certain transportation projects that are primarily designed to achieve improved mobility, improved operations or safety, and quantifiable air quality benefits.

1. **Design Build Demonstration Program.** Since presenting the July 31 version of these guidelines at the Commission's August 12, 2009 meeting, staff received the attached comments from our transportation stakeholders. Staff incorporated

comments that were thought to be appropriate into the attached revised version, dated August 24, 2009.

2. **Public Private Partnerships.** Since presenting the August 12, 2009, P3 guidelines at the Commission's August meeting, staff received the attached comments from our transportation stakeholders. Staff has incorporated comments as appropriate in the P3 policy guidance which will be provided as a handout before the meeting.

One critical question, among many related to the function of the Commission, which should be answered: who is the responsible entity to commit (program and allocate) State funding to a project, and when along the timeline of developing an agreement is that decision made?

Since the Commission was first created in legislation over 30 years ago, one of its primary functions has been to program and allocate state transportation funds to particular projects. It does this, for example, through the adoption of the multiyear STIP and SHOPP programs and through the approval of allocations for individual STIP and SHOPP projects. From time to time, the Legislature has given the Commission the same kind of responsibilities for other state transportation programs, including several Proposition 1B bond programs. Under California law generally, the Legislature makes transportation funds available on a program basis. The CTC assigns the funds to particular projects, consistent with criteria and restrictions in state law and in cooperation with the Department and regional transportation planning agencies. Caltrans and regional agencies then implement the projects with the approved funding. While public private partnerships offer a new approach for project implementation, staff believes the Legislature's expectation of the Commission is essentially unchanged. The Commission would hold responsibility for the approval of particular projects and for the commitment of any state funds required. As with more traditional implementation methods, Caltrans and regional agencies would hold responsibility for awarding and managing project contracts. A major interest of the Commission in the review of P3 projects would be the commitment or risk of state funds involved and any effect that might have on the availability of transportation funding for other projects.

The financial commitment is major issue for P3 projects due to the instability and inadequacy of state transportation funding. This would not be an issue if P3 projects were to rely entirely on toll revenues or public funds from other non-state sources. However, we anticipate that certain P3 proposals may rely on "availability payments," payments made over time by a public agency to the private operating entity to supplement or replace the collection of tolls. While this may be an

appropriate means of project implementation, it does require the availability of the public funds.

Under current law, availability payments made over time would be an operating expense of the Department, subject to annual appropriation by the Legislature and not subject to programming and allocation by the Commission. A Department commitment to additional future operating expense would further reduce the availability of already inadequate capital funding for State highway maintenance and rehabilitation. Availability payments that are in effect the reimbursement of a contracting entity for its project capital expenditures would also have the effect of distorting the distribution of state capital program funding. Because availability payments would not be programmed by the Commission and would not be subject to STIP county distribution formulas, they could also lead directly to the loss of funding for other counties, especially in the absence of stable and adequate state transportation funding.

The Legislature could amend current law to make P3 availability payments subject to county shares, much as the debt service on GARVEE bonds now is. While this might improve long-term equity, it would also introduce a higher level of complexity and instability in the STIP process, especially for payments that might extend over a lengthy or indefinite period. The major equity issue would remain as long as overall state funding levels are inadequate and unstable.

Attachments:

1. Draft Policy Guidance for Project Authorization under the Design-Build Demonstration Program, dated August 24, 2009
2. Draft Policy Guidance for approval of Public Private Partnerships – **to be provided before the meeting.**
3. Relevant Sections of Senate Bill No. 4 (Cogdill, 2009)
4. Stakeholder feedback on policy guidance for Design-Build and Public Private Partnerships

August 24, 2009

CALIFORNIA TRANSPORTATION COMMISSION

DRAFT POLICY GUIDANCE PROJECT AUTHORIZATIONS UNDER THE DESIGN-BUILD DEMONSTRATION PROGRAM

The Design-Build Demonstration Program was established in Chapter 6.5 (commencing with Section 6800) of Part 1 of Division 2 of the Public Contract Code, as added by Chapter 2 of the Statutes of 2009 (Senate Bill 4, Second Extraordinary Session). The purpose of the program is described in Section 6800: "The design-build method of procurement authorized under this chapter should be evaluated for the purposes of exploring whether the potential exists for reduced project costs, expedited project completion, or design features that are not achievable through the traditional design-bid-build method. A demonstration program will allow for a careful examination of the benefits and challenges of design-build contracting on a limited number of projects. This chapter shall not be deemed to provide a preference for the design-build method over other procurement methodologies."

The Design-Build Demonstration Program authorizes use of the design-build method of procurement by local transportation entities for up to five projects and by the Department of Transportation for up to ten projects, subject to project authorization by the California Transportation Commission. The design-build projects authorized by the Commission for the demonstration program shall vary in size, type, and geographical location. The Commission shall also determine whether a transportation entity may award a design-build contract based on lowest responsible bid or best value, balancing the number awarded according to each method to enable the Commission to determine the costs and benefits of using each method.

Eligibility for the demonstration program is limited to projects that the Commission has programmed for funding from the state transportation improvement program (STIP), from the state highway operation and protection program (SHOPP), from the Traffic Congestion Relief Program (TCRP), or from one of the programs designated under Proposition 1B of 2006.

The purpose of this guidance is to set forth the Commission's policy and expectations for the selection of projects for the Design-Build Demonstration Program. This guidance does not address other responsibilities under the program that the Commission will address separately:

- The Commission shall establish a peer review committee to conduct an evaluation of the 15 projects selected for design-build procurement.
- The Commission shall develop guidelines for a standard organizational conflict of interest policy for entities entering into design-build contracts authorized under the demonstration program.
- The Commission shall develop a standard form of payment and performance bond.

- The Commission shall submit an annual report to the Legislature that includes the information provided by the Department and local transportation entities in the annual design-build project progress reports submitted pursuant to Public Contract Code Section 6811.

This guidance does not address the statutory responsibilities of the Department and local transportation entity under the Design-Build Demonstration Program that are not within the purview of the Commission.

Project Authorization. The Commission will select and authorize each project for the Design-Build Demonstration Program through the adoption of a resolution at a regularly scheduled Commission meeting. The Commission will authorize each project with reference to a project authorization request submitted by the Department or a local transportation entity.

The Commission's design-build authorization will include:

- The project scope described in the design-build project authorization request.
- Whether the Department or local transportation entity may award the contract based on lowest responsible bid or best value.
- An expiration date by which the Department or local transportation entity must execute a design-build contract.

Criteria for Commission Approval. The Commission will authorize a project under the Design-Build Demonstration Program if it finds that the project:

- meets the statutory programming requirement for eligibility;
- is fully funded and a design-build contract will be awarded before January 1, 2014.
- contributes to the statutory mandate for a balance of the number of transportation entities that may use the low bid and best value selection methods;
- contributes to the statutory mandate that selected projects shall vary in size; and
- contributes to the statutory mandate that selected projects shall vary in geographical location.

Commission Expectations. The selection of projects will depend in large part on the project requests the Commission receives from the Department and local transportation entities and when the Commission receives them. The Commission expects that it will select the first projects on a first-come first-served basis, and that the mandates for balance will become ever-larger factors as the number of projects authorized approaches the maximums authorized in statute. The Commission's expectations for project balance include the following:

- Transportation Entity. This is firmly mandated. There will be a maximum of 5 projects for local transportation entities and 10 projects for the Department. The Commission may approve a project for a local transportation entity that is on the state highway system if the Department approves the local entity's implementation of the project.

- Selection method. The Commission expects that it will approve 7-8 projects for selection by low bid and 7-8 projects for selection by best value.
- Geographical location. The Commission expects that it will approve 8-10 projects in the South and 5-7 projects in the North, with South and North defined as for the STIP.
- Project size. The Commission expects that will approve ~~3-5~~2-3 projects with a total design-build contract cost estimate under \$20 million and ~~3-5~~2-3 projects with a total design-build contract cost estimate over \$200 million.

The Commission's expectations for geographic location and project size are subject to change, particularly if adhering to these expectations would preclude the Commission from authorizing up to 15 projects that can be constructed by the expiration date of the demonstration program.

Project Authorization Requests. The Commission will consider approval of a project for the Design-Build Demonstration Program only after the Department or a local transportation entity has submitted a project design-build authorization request to the Commission. The Department or local transportation entity may submit a project design-build authorization request at any time, either in conjunction with a project allocation request or separately from it. The Commission will usually place a design-build authorization request on its agenda at a meeting at least ~~60~~45 days after the Commission office receives the design-build authorization request.

The design-build project authorization request will describe the scope of the project, the total estimate of project cost, the estimated schedule for project completion, the full funding plan for the project, including both state and local funding, and whether the Department or local transportation entity proposes to select the contractor using a low bid or best value selection method.

Ray Tritt/HQ/Caltrans/CAGov
08/17/2009 12:40 PM

To Andre Boutros/HQ/Caltrans/CAGov@DOT
cc Terry Abbott/HQ/Caltrans/CAGov@DOT, Richard
Land/HQ/Caltrans/CAGov@DOT, Joseph
Dongo/HQ/Caltrans/CAGov@DOT
bcc

Subject Comments on CTC DB Guidelines

History: This message has been forwarded.

Andre,

I have reviewed the proposed Design-Build Guidelines and have several comments. The guidelines as proposed are well thought out and provide a great deal of flexibility in selecting projects for the program. My comments are meant to provide a little more flexibility while still meeting the intent of the Demonstration Program.

- CTC Guidelines state that only 7 or 8 projects will be authorized for each of the award methods (low bid and best value). Since the award method will be highly project specific, I would recommend providing more flexibility by restating the number of projects as "at least 6 projects will be selected for each award method." Let the applicants make a case for the proper award method. The intent is to be able to report to the Legislature the benefits of each award method.
- CTC Guidelines state that 3 to 5 projects under \$20 million and 3 to 5 projects over \$200 million will be selected. Additional flexibility could be obtained by revising this to read "at least 2 projects under \$20 million and at least 2 projects over \$200 million will be selected."
- CTC Guidelines state that the Commission will place a design-build authorization request on its agenda at least 60 days after receipt of the design-build authorization request. This seems to be excessive. It seems that 45 days would provide adequate time to review a properly prepared nomination package and develop a recommendation for the Commission.
- It would be helpful to define what is meant by "total design-build cost estimate." Is this the anticipated cost of the awarded design-build contract? Does this include the Department's support cost during the contract?

If you would like to discuss these comments, please give me a call.

Thank you for the opportunity to comment. I look forward to working with you in monitoring and implementing this program.

Ray Tritt
Office of Special Projects
Division of Design



Michael Blomquist
<mblomquist@rctc.org>
08/18/2009 02:55 PM

To Andre Boutros <andre_boutros@dot.ca.gov>
cc Anne Mayer <AMayer@rctc.org>
bcc
Subject RCTC Comments on the SB 4 PPP and Design-Build CTC
Application Guidelines

History:

This message has been forwarded.

Andre,

RCTC is pleased to have the opportunity to submit comments to the CTC's draft application guidelines for the PPP (dated 8.12.09) and design-build (dated 7.31.09) sections of SB 4. Attached are RCTC's comments to both sets of guidelines.

Best Regards,

Michael

Michael Blomquist, P.E.
Toll Program Director
Riverside County Transportation Commission
951.787.7141



mblomquist@rctc.org RCTC Comments to CTC Guidelines for SBX2 4 Design-Build 8.18.09.docx



RCTC Comments to CTC Guidelines for SBX2 4 Public Private Partnerships 8.19.09.docx

Comments on Design-Build Application Guidelines

Comment #1: Requested Design-Builder Selection Method

The guidelines currently reflect that the CTC can allocate the mix of projects to either the best-value or low-bid method of selection. Certain projects lend themselves better to one method or the other based on contract size, complexity, potential innovations, project goals, etc. Therefore, the CTC should strongly consider the requested selection method by the project sponsor when allocating the mix of projects.

Additionally, many local transportation entities currently have the authority to use a low-bid selection method by creating a procurement and contract that carefully combines professional services and low-bid contracting under existing state statutes. Given this existing authority, local transportation entities might be more inclined to request the best-value selection method. Should a local transportation entity request but not obtain authority for a best-value selection method there could be little reason to remain in the Design-Build Demonstration Program.

Further, the statute calls for a balance of best-value vs. low-bid selection methods so that the CTC can determine the costs/benefits of using each method. It does not dictate the number of each nor that they are equally balanced. Design-build use is generally more effective through best value. We would suggest it be more appropriate to not get tied to numbers in the guidelines to provide CTC flexibility in decision-making.

Requested Changes

Priority consideration for the best-value selection method by local transportation entities should be reflected in the current guidelines. Keep flexible the balance between best-value and low-bid project selections.

Comment #2: Full-Funding Requirement

The guidelines establish five criteria for Commission approval including that the project be fully-funded and a design-build contract be awarded by January 1, 2014. Certain projects will be funded (at least partially) by the sale of toll revenue bonds. These types of projects are structured to prioritize financial feasibility to provide for the sale of toll revenue bonds based on the projected future tolls generated by the project. The sale of these toll revenue bonds is made possible partially by the establishment of a fixed price and schedule achieved through an executed design-build contract. Therefore, certain projects will comprehensively plan for but not seek their funding from the bond market until after a design-build procurement. Therefore, acceptance into the Design-Build Demonstration Program would precede the toll revenue bond sale which would complete the project's funding.

Requested Change

Allow for projects that are to be partially or fully financed with future bond sales to be considered fully funded for the purposes of Commission approval.

Comment #3 -- Contract Award Deadline

The CTC's authorization places a deadline by which the design-build contract must be executed. This is likely intended to ensure that a project authorization is not wasted on a project that does not go forward, but it creates a risk that a delay in procurement could result in the loss of authorization and hence an unnecessary expenditure of time and money on the part of the proposers and the transportation entity. It may also make proposers less inclined to participate in the process if it appears the project may not be permitted to go forward based on an expiration of the authority.

Requested Change

Add language stating expiration dates shall be subject to extension upon reasonable request of Caltrans/Local Transportation Entity and that it will also be extended for items outside the control of Caltrans/Local Transportation Entity.

Comment #4: Balancing of Project Size Requirement

The statute does not provide direction on the "size" of the projects other than they must vary and does not mandate that they be broken up into different monetary thresholds. We think having the same number of small projects as large does not optimize use of the Design-Build Demonstration Program and that the allocation should be deleted or modified. If retained in the guidelines, we also believe that the monetary thresholds are too low and would suggest "under \$50 mm" and "over \$500 mm".

Requested Change

Delete the project size requirements in the guidelines or, alternatively, raise the thresholds to "under \$50 mm" and "over \$500 mm".

Comment #5: Timeline for Consideration and Approval

The 60-day timeline for consideration should be reduced to maintain an efficient procurement schedule. Additionally, greater CTC commitment and assurance on meeting the timeline would be helpful for sponsoring agency's procurement planning and help mitigate potential delays to a procurement.

Requested Change

Reduce the timeline from 60-days to 30-days and reflect a greater CTC commitment on timely approval in the guidelines.

DRAFT POLICY GUIDANCE

**APPROVAL OF PUBLIC PRIVATE PARTNERSHIPS
PROJECTS**

**To be provided as a Handout at the
September 9, 2009
Commission Meeting**

Public Private Partnerships

Comments on Commission Policy



Macquarie Infrastructure Partners Inc.

125 West 55th Street
New York NY 10019
UNITED STATES

Telephone +1 212 231 1686
Fax +1 212 231 1828
Internet www.macquarie.com

August 28 2009

Bimla Rhinehart
Executive Director
California Transportation Commission
1120 N Street, MS 52
Sacramento, CA 95814

Dear Ms. Rhinehart

Re: CTC Draft PPP Policy Guidelines – 12 August 2009



Macquarie respectfully submits the following comments on the CTC draft policy guidelines for your consideration. Macquarie remains supportive of the process currently being undertaken by the California Transportation Commission and the current administration. Public-Private Partnerships (PPP) have demonstrated to be a useful development tool for states looking to leverage private capital and, where appropriate, to enhance and supplement public funding sources to finance and deliver more much needed infrastructure.

Macquarie understands there are different opinions and interpretations of the PPP authorizing statute, SBX2 4, regarding the role of the California Transportation Commission. Macquarie does not have an opinion on the interpretation of SBX2 4 but seeks to provide some feedback on the draft policy guidance from a private sector perspective.

The overriding issue for private sector participants in any PPP procurement is certainty, particularly certainty of process and certainty of timetable. Where additional uncertainty is present in a PPP procurement, this will be reflected in private sector bids (for example, higher pricing where committed financing is required for extended periods) and may result in private sector bidders choosing to participate in fewer projects or even choosing not to participate in a particular market.

Specifically in relation to the draft policy guidance:

1. Proposed process contains bidder uncertainty

The proposed process does not provide adequate certainty for projects to reach financial close. There remains a multi-approval process i.e., a "preliminary" and a "final". Additionally, the CTC could require a third approval if additional material changes are suggested/made after the "final" approval. This remains one of the most problematic areas for bidders; especially considering there is limited guidance or understanding as to how the CTC will approach approvals at each stage.

While the draft guidelines identify the necessary documentation and information for a project to receive "preliminary" approval, there remains no guidance on how that information will be used or considered in approving a

None of the entities noted in this document is an authorised deposit-taking institution for the purposes of the Banking Act 1959 (Commonwealth of Australia). The obligations of these entities do not represent deposits or other liabilities of Macquarie Bank Limited ABN 46 008 583 542 (MBL). MBL does not guarantee or otherwise provide assurance in respect of the obligations of these entities.

project. Further, there is limited understanding on how that information will be used in a "final" approval. Will the CTC merely confirm that the project meets the original goals as preliminarily approved? Or will CTC consider a new set of evaluation criteria?

Macquarie recommends that the CTC establish clear and transparent grading criteria for each project during the preliminary approval phase. Approval should include acceptable "bands" or minimum thresholds of performance, with final approval simply confirming that the project falls within the performance bands or above the applicable thresholds. Financial considerations should be based on "affordability ceilings" which set a basis for the minimum financial parameters on which the project would receive final CTC approval. These performance bands, thresholds and affordability ceilings should be clearly communicated to bidders at the preliminary approval stage and should be capable of being objectively assessed to the greatest extent possible. Incorporating these into the process will deliver more certainty to bidders and transparency to the public – everyone will understand how projects are being evaluated and the benefits they will deliver.

2. Length of procurement process is costly and difficult for bidders

Requiring applications at least 60 days before a CTC meeting for "preliminary" approval and at least 30 days for "final" approval adds time and cost to the procurement process. While it can be argued that longer lead times are needed before "preliminary" approval, it is recommended that this time frame be shortened to a maximum of 45 days, although 30 days would be ideal.

Further, as the "final" approval should simply be confirmatory of the conditions and considerations established in the "preliminary" approval, less lead time should be needed. Ideally this can be shortened to two weeks or a maximum of 20 days before "final" approval. To be even more efficient, if the criteria for acceptance are clearly stated at the preliminary approval stage, final approval could be delegated to the procurement agency or another suitable party (such as the procurement auditor), so that final approval could be assessed in real time.

Additionally, as a general comment, the consultation and comment periods should be moved earlier in the process and completed concurrently to the greatest extent possible. For example, the public consultation process and any comments from the BTH Secretary or Chairperson of the Senate or Assembly should be incorporated as part of obtaining preliminary CTC approval.

We trust that the foregoing remarks are helpful to your consideration of this matter and look forward to an opportunity to be of further assistance. Please do not hesitate to contact me at (212) 231 1686 if you have any questions.

Yours faithfully
Macquarie Infrastructure Partners Inc



Christopher Leslie
Chief Executive Officer



Kiewit

August 24, 2009

California Transportation Commission
1120 N Street
Sacramento, CA 95814

Attention: Bob Alvarado
Chairman

Re: Draft Policy Guidance
Approval of Public Private Partnership Projects

Dear Chairman Alvarado:

We applaud the leadership of the California Transportation Commission (CTC) in fostering California's ability to enter into public-private partnership (P3) agreements through the passage of Senate Bill X2 4 (SB 4). We write to provide feedback on the guidelines drafted by the CTC that frame the implementation of this important legislation. These policies will have a far reaching and significant impact to the success of SB 4.

Kiewit Corporation is one of the largest and most respected general contractors in North America. Kiewit has been building civil infrastructure projects in California since the 1940's. We look forward to continuing to work and partner with Caltrans and other Regional Transportation Agencies for many years to come, regardless of how projects may be delivered.

We have extensive experience participating in P3 projects in California and Canadian provinces, including:

- SR-91 Express Lanes, Orange County, CA, \$200M – design-build construction of HOV lanes within the existing SR-91 alignment.
- Sea to Sky Highway, Horseshoe Bay to Whistler, BC, C\$600 million – design-build improvements to the existing Sea to Sky Highway in preparation of the 2010 Winter Olympics.
- A-25 Bridge and Highway, Laval/Montreal, QC, C\$550 million – design-build construction of a cable stay bridge linking the two cities of Montreal and Laval and the completion of Auto Route - 25.

Our involvement in these and other P3 projects has given us a sound understanding of the commonalities of successful P3 programs. On review of the draft guidelines, we have the following comments:

- Withholding CTC approval of a project until review of a final lease agreement presents an unreasonable level of cost and risk.
- Multiple approvals could obscure the procurement process and result in substantial and costly delay.

Mr. Bob Alvarado

August 24, 2009

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- Public comment late in the procurement creates uncertainties and risk regarding project definition, acceptance and final outcome.

Our experience indicates these points will discourage highly qualified potential proposers from participating in a process that asks them to expend significant sums – almost certainly in the millions of dollars – in preparing and completing a procurement when there is potential that the basis of the project may evaporate or unreasonably change late in the process. Ultimately, these issues may result in reduced competition and lost value to the state.

Withholding Project Approval

The draft guidelines propose that CTC withhold its selection of a P3 project pending its review of the final lease agreement. This counters our understanding of the intent of SB 4 and creates “political risk” associated with the great uncertainty as to whether a project will proceed as a P3.

To remedy this, we suggest the CTC develop a set of guidelines through the Public Infrastructure Advisory Commission (PIAC) that determines whether a candidate project can benefit from a P3 delivery. Once a project meets those qualifications and the CTC approves it as a candidate project, Caltrans should be left to execute the project. This is a common approach taken by other states. Early approval is granted by the state legislature or transportation commission with the authority to negotiate and execute final agreements retained by the transportation agency. Other programs where a third party retained approval late into the process have struggled. One decision to disapprove a final lease agreement under the proposed policy may result in potential investors becoming very weary and lead them to seeking opportunities elsewhere.

Elimination of Multiple Approvals

The draft policy guidance provides three project approvals.

1. The CTC selects and approves a project with then commences procurement through Caltrans early in the process.
2. Prior to Caltrans' issuance of the Final Request for Proposal and Lease Agreement to shortlisted proposers CTC approves the project and certifies the useful life.
3. Final approval following a final comment period that engages public and legislative sources along with the CTC.

To remedy this, we suggest the CTC develop guidelines to provide a streamlined and transparent decision making process. Caltrans is best positioned to provide expertise (or the PIAC as requested) on financial plans, risk allocation and other various issues. We are concerned about the apparent redundancy of incorporating the CTC into these areas on top of a Caltrans review. Likewise, the proposed additional procedural steps and associated lead times before placing items on the CTC's agenda elevate the risk of costly delay for the public and private sectors. A streamlined process will minimize this risk factor.

Public Comment Period Late in the Procurement Process

It is important all parties have an opportunity to comment on a project, regardless of the delivery method. Public comment periods are best held in the early stages of project procurement. In fact,

Mr. Bob Alvarado
August 24, 2009
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stronger private sector interest would likely result after a positive public response was completed. The draft policy guidance calls for comment from the public as well as the CTC, PIAC, BTH Secretary and Chairs of the Senate and Assembly fiscal committees. This comment period is currently provided very late in the process. Per the proposed guidance, teams would have been shortlisted through a Request for Qualification, submitted price and technical proposals in response to a Request for Proposals, and negotiated a lease agreement with Caltrans prior to this final round of comment.

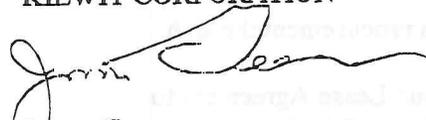
To remedy this, we suggest the CTC adopt guidelines that allow Caltrans to move a project forward, through award and then contract execution following clear expectations established by the CTC. Draft agreements should be submitted for public comment concurrent with the early phases of the procurement, at the Request for Qualifications stage.

In closing, we would like to point out that states and provinces vary in their administration of P3 programs. Yet, there remains one common theme surrounding any successful program, and that theme is the professionalism transportation agencies exhibit in managing procurements and negotiating agreements. P3 procurements are major undertakings in which both agencies and concessionaire teams are highly focused on providing value to the taxpayers. To achieve the best outcome, responsibilities are assigned to highly qualified, senior level people. Technical, legal, and financial consultants are engaged to advise on various issues and gain from the benefit of their experience on other, similar projects across the country. Caltrans is a professional organization that should retain the discretion to execute the final agreement as set forth in SB 4.

We appreciate the CTC's efforts to advance the implementation of SB 4 and look forward to participating in this important program. Please contact me at (402) 943-1405 with any questions.

Sincerely,

KIEWIT CORPORATION



James Geer
Public Private Partnerships

cc: Mike Phelps, Kiewit
John Jansen, Kiewit
Phil DuPuis, Kiewit



COMMENTS TO PROPOSED CALIFORNIA TRANSPORTATION COMMISSION GUIDELINES FOR APPROVAL OF P3 PROJECTS

August 21, 2009

California Transportation Commission (the "Commission")
c/o Mr. Robert Alvarado, Commission Chair
1120 N Street
Room 2221 (MS-52)
Sacramento, CA 95814

Dear Commissioners:

ACS Infrastructure Development, Inc. ("ACSID") is pleased to submit these comments to your Commission's Draft Policy Guidance for Approval of Public Private Partnership Projects issued by the Commission at its August 12, 2009 meeting (the "Proposed Guidelines").

INTRODUCTION

ACSID is a U.S. subsidiary in the development/investment-arm of ACS Group. ACS Group has been a leader (ranked number #1 transportation developer since 1994 by the prestigious US Magazine Public Works Financing) in the development of infrastructure projects worldwide, particularly public private partnership ("P3") projects, and is currently involved in 69 P3 projects throughout the world. Within North America, ACS Group has been active in P3 projects and was awarded four (4) projects bid in North America: the I-595 Corridor Roadways Improvement Project in Florida, the I-69/Trans Texas Corridor Project in Texas, the Mid-Currituck Bridge Project Pre-Development in North Carolina and the Autoroute A-30 in Montreal, Canada. ACSID has also had a consistent presence in California for the past four years and has been closely watching the development of P3 policy and potential projects.

ACSID participates in these P3 projects together with its affiliate Dragados USA, Inc. ("Dragados USA"), the U.S. subsidiary of Dragados, S.A., the construction-arm of ACS Group (ranked 6th Worldwide Global Contractor according to ENR and 2nd Worldwide Contractor according to Forbes). Dragados USA has developed an important presence in North America and has offices in New York, Florida, North Carolina, Texas, California, British Columbia, Ontario and Quebec. It has recently opened an office in Sacramento that will focus on P3 opportunities, as well as, other construction projects in the western United States.

ACSID is excited about the enactment of Senate Bill X2 4, and encouraged by the many efforts that the Commission and the Business, Transportation and Housing Agency ("BTH Agency") have made to try and develop implementation guidelines that will ensure successful P3 projects for the State of California.

GENERAL COMMENTS TO P3 PROCESS

Certainty in the Process is Necessary

To reiterate some of the comments made during our public testimony at the August 12th Commission Meeting, ACSID believes that it is in the best interest of both the private and public sector to institute a process that provides transparency and certainty as to the “rules of the game.”

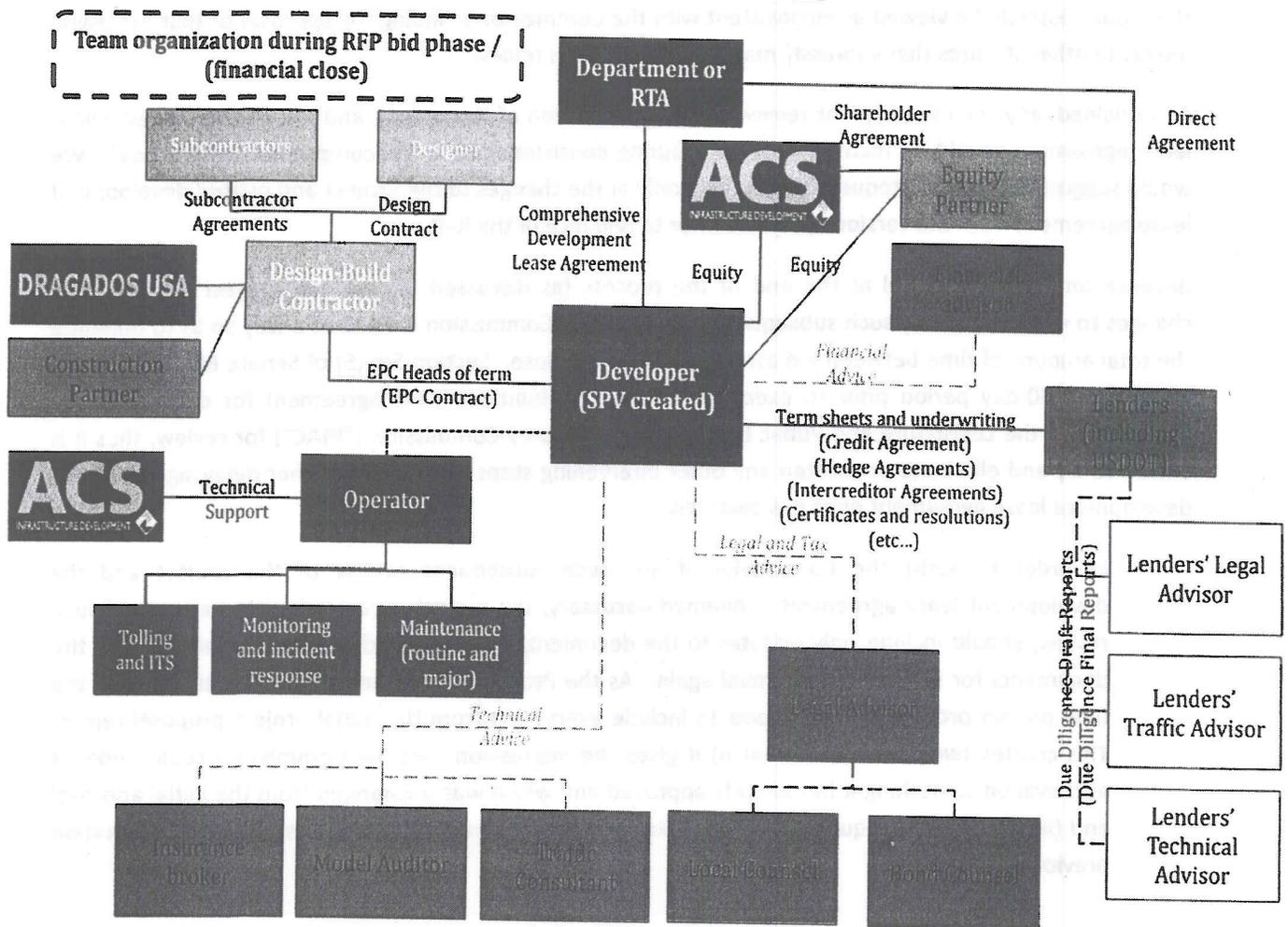
As was explained by various parties at the August 12th Commission Meeting, the effort and resources that go into putting together a proposal/bid in response to an RFP are substantial. For a better understanding of these efforts that take place on the private-sector side during the RFP process (and during financial close), please see [Figure 1](#) below showing the roles of the various parties involved. The fundamental concern for the private sectors, as well as the public procuring agencies (i.e., Caltrans and the regional transportation agencies) is that an open-ended review and late approval process by an agency that has not been involved in the ongoing negotiations of the comprehensive development lease agreement could undo months (and even years) of work and expense by all parties.

Because P3 projects are more expensive to bid compared to other types of projects, the private sector will be skeptical of any process that leaves open the risk that an approval will be declined after such a substantial investment of money and time (anywhere between 9-18 months and \$3 -\$10 million from the time the RFQ is released until financial close is achieved). If such an uncertain process exists, the State will not properly realize all the benefits that the P3 process has to offer, as either potential bidders will decide to use their resources to bid on projects in other states/countries with more certain processes or will price that uncertainty into the proposals, resulting in fewer bidders with more expensive overall costs to the public partner(s). As much as possible, any review that takes place at the end of the process (especially after RFP bids have been submitted) should be based on clearly defined criteria and delineate a limited and detailed scope.

Time is of the Essence

Given the unique economic market conditions that currently exist—particularly the credit and liquidity crunch—it is increasingly important to ensure that the development lease agreement negotiated is signed and financial close occurs as soon after bid submission as possible. In the past, banks were able to provide committed financing for substantial periods of time (typically up to 6 months). Today, however, the market turmoil and uncertain economic conditions have made banks unable to provide commitments for longer than 60-90 days in the best case scenario. If the period between bid submission and financial close is too long, the parties will lose the protection of committed financing and thus negatively impact one of the major benefits of P3 projects. Again, a late review in the development process and/or a review that is prolonged as to time, can chill the interest in a project with the financial community that is assessing the overall funding package involved in a P3 project.

Figure 1: RFP Bid Phase (Financial Close)



SPECIFIC COMMENTS TO PROPOSED GUIDELINES

After reviewing the Proposed Guidelines, ACSID believes that this draft does take steps to address some of the broader concerns that the private sector has had up to this point, but should be clarified further in order to assure that a transparent and timely process is implemented.

In order to assure the private sector that a project is fundamentally approved as a P3 project, we suggest moving the CTC approval as early in the process as possible. A comprehensive approval of the P3 project prior to issuance of the RFP would ensure that all parties understand the limits and restrictions of the proposed project. As part of this comprehensive approval, the Commission would set forth its finding for approval, and following such comprehensive approval, the Commission's role would be limited to reviewing subsequent changes identified by the procuring agency to ensure consistency with the approval. In the section of the Proposed Guidelines concerning "changes after Commission approval," we would suggest giving more guidance to the procuring agencies on what is considered a "material" change. Rather than

“material,” we would suggest language making clear that this refers to substantial changes in the project that could possibly be viewed as inconsistent with the Commission’s finding for approval or that otherwise implicate other statutes that expressly mandate Commission review.

As explained, any such subsequent review by the Commission of the project and the related development lease agreement would be focused only on ensuring consistency with the comprehensive approval. We would suggest that this subsequent review look only at the changes to the project and related development lease agreement from the version approved prior to issuance of the RFP.

Because timing is so critical at the end of the process (as discussed above), we suggest the following changes to ensure that any such subsequent review by the Commission is done in a way so as to minimize the total amount of time between bid award and financial close. Section 5(c)(5) of Senate Bill 2X 4 already mandates a 60-day period prior to execution of the development lease agreement for delivery of the agreement to the Legislature and Public Infrastructure Advisory Commission (“PIAC”) for review, thus it is critical to try and eliminate or shorten any other intervening steps that would further delay signing of the development lease agreement once it is awarded.

- In order to assist the Commission if any such subsequent review of the project and the development lease agreement is deemed necessary, the project report submitted as part of such review, should include only updates to the documents reviewed and not the complete set of the documents for review and approval again. As the Proposed Guidelines are currently written, the final project proposal report seems to include everything from the initial project proposal report. This creates two concerns in that (i) it gives the impression that the Commission could undo its approval on something it has already approved and which was unchanged from the initial approval and (ii) would likely require an unnecessary and time consuming re-analysis of all documentation previously submitted.
- If possible, we suggest that such subsequent Commission review take place prior to bid submission. We believe that even having such subsequent review prior to bid submission adequately protects the public, as it is highly unlikely that there will be any major modifications that substantially alter the development lease agreement or the project after bid award. If a major change was agreed to the development lease agreement after the project was awarded to a particular bidder, the winning bidder and the procuring agency would run the risk of a suit challenging the entire procurement process and cancelling the procurement. For this reason, any modifications that take place after bid award are usually administrative in nature or done to address specific factual circumstances/changes that have taken place since the bid submission/award. A Commission review for consistency with its approval timed to take place prior to bid submission would accomplish 3 important objectives:
 - One: it would ensure that all bidders were bidding on a document that was confirmed approved. As almost all of the substantial modifications to the development lease agreement will take place during the RFP Process, a review ensuring that these changes are consistent with the approval of the Commission would create a process that is fair for all

bidders. In the situation where the modifications to the development lease agreement are found to be inconsistent with the CTC's approval, the procuring agency and the potential bidders will be able to modify the development lease agreements to address such inconsistencies prior to bid submission. That would allow the bidders to all adjust their bids based on the same document, and the procuring agency to receive a number of bids to evaluate.

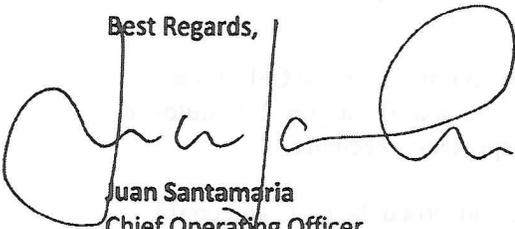
- o Two: it would also help protect the public sector, by ensuring that any finding of inconsistency could be dealt with prior to the bid submission, and adequately priced by all bidders in their bid submissions. On the other hand, if this finding of inconsistency occurred after bid submission, the procuring entity would only be negotiating with one party (the awarded bidder), making the negotiations less competitive.
- o Three: it would save valuable time. If the subsequent review for consistency took place prior to bid submission, then once the project is awarded, the development lease agreement could be quickly delivered to the Legislature and PIAC for their review.

CONCLUSION

ACSID is looking forward to the opportunity to participate in P3 projects throughout California, and excited for the implementation of such legislation that will help provide vital infrastructure assets to the State.

Should you have any questions on the above or need further clarification, please feel free to contact me or Nuria Haltiwanger, our General Counsel at nhaltiwanger@acsinfra.com or (305) 424-5400.

Best Regards,

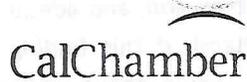
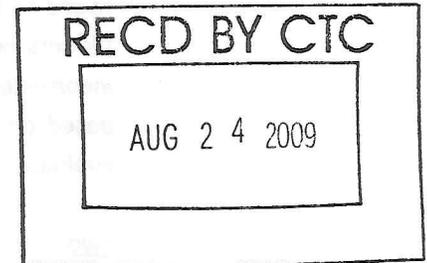


Juan Santamaria
Chief Operating Officer
jsantamaria@acsinfra.com
(305) 424-5400

Cc: All Commissioners
Commission Staff
Mr. Dale E. Bonner, Secretary of the BTH Agency
Mr. Jim Bourgart, Deputy Secretary for Transportation and Infrastructure of the BTH Agency



**ASSOCIATED GENERAL
CONTRACTORS (AGC)**



August 21, 2009

Bob Alvarado, Chairman
California Transportation Commission
1120 N Street
Sacramento, CA 95814

From: American Council of Engineering Companies *California*
Associated General Contractors
California Chamber of Commerce
Western Electrical Contractors Association, Inc.

RE: Policy Guidance for Selection of Public-Private Partnership Projects

Dear Chairman Alvarado:

On behalf of the above listed organizations we are writing you to provide comments on the California Transportation Commission's (CTC) guidelines for implementing SB 4x2 (Cogdill) Chapter 2, Statutes of 2009 which authorized Public-Private Partnerships projects (P3) for transportation agencies.

We believe the current draft guidelines from the CTC exceed the authority afforded the CTC and could potentially discourage participation in the P3 authority from private sector investors.

Specifically the proposed draft guidelines include an additional review of the final lease agreement between the sponsoring transportation agency and private sector investor. We believe this final lease review included in the draft guidelines is not consistent with the authority granted the CTC by SB 4x2. The final agreement in SB 4x2 was reached following a deliberative and negotiated agreement which included in the legislation paragraph 5 subdivision (c) of Section 143 which stated that:

"...The department or regional transportation agency shall consider those comments prior to executing a final lease agreement and shall retain the discretion for executing the final lease agreement"

We find this language unambiguously assigns authority for final lease approval to the department or regional transportation agencies which will utilize the P3 authority under SB 4 x2 and further makes no such provision for any other entities to approve the final lease.

Furthermore, the Legislature's own counsel agrees with this assessment its opinion #0917322 dated June 22 stating:

"...while the commission has a central role in selecting projects at the beginning of the process...we think the commission has no role at all in the second phase of the process, as outlined in paragraph (5) of subdivision (c) of section 143. Further, while the sponsoring agency is required to submit the "associated lease agreement" to the commission along with its project nomination, it is clear that this need only be a draft lease agreement, rather than the final lease agreement, because the statute contemplates potential changes to the agreement as a result of the vetting process in the second review phase established by paragraph (5) of subdivision (c) of Section 143, during which no provision is made in the statute for a further review or approval role by the commission...."

The legislation by Senator Cogdill carefully balances the interests and roles of many parties – regional agencies, Caltrans, the CTC, PIAC, and the Legislature. The proposed guidelines upset that balance.

With the continued decline of transportation revenue sources throughout the State, ensuring P3 funding as an optional fiscal tool on appropriate transportation projects remains critical. We ask that as the CTC prepares draft guidelines for the P3 authority, it clearly follow the statutorily defined role(s) for all parties in the selection and approval of P3 projects as specified under SB 4x2.

We appreciate the opportunity to comment on the draft proposed guidelines and continue to support the CTC's leadership in providing for California's transportation infrastructure.

Sincerely,

Paul Meyer
American Council of Engineering Companies California

David Ackerman
Associated General Contractors

Robert Callahan
California Chamber of Commerce

Richard Markuson
Western Electrical Contractors Association



Skanska Infrastructure Development
99 Canal Center Plaza, Suite 125
Alexandria, VA 22314, USA
Phone: 703-340-1200
Fax: 703-340-1201
Web: www.skanska.com/rid

A Business Unit within the Skanska Group

August 23, 2009

Chairman Bob Alvarado
California Transportation Commission
1120 N Street, Room 2221 (MS-52)
Sacramento, CA 95814

Re: Comment letter on Draft Guidance for CTC Approval of P3 Projects

Dear Chairman Alvarado:

Thank you for the opportunity to comment on the revised draft guidance for the California Transportation Commission's (CTC) approval of public-private partnership projects.

Skanska, a Fortune 500 company, is a leading international project development and infrastructure company. Skanska develops major residential and commercial projects in the United States, Europe, and Latin America. The United States is the company's largest market where Skanska focuses on building and civil engineering projects and is a leading participant in public-private partnerships. The business operates in the United States through its subsidiary construction units Skanska USA Building and Skanska USA Civil and its investment arm Skanska Infrastructure Development.

As we understand it, the CTC is interpreting the authorizing legislation (SB 4) as giving the CTC the authority to review and approve a project *after* the lease agreement is negotiated. The guidance contains the following statements to that effect: "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 agency may not hold a public hearing or execute the final lease agreement prior to the Commission's full project approval." "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."



We respectfully take exception to that view for the following reasons:

1. CTC's interpretation is inconsistent with the legislative intent of SB 4

Under SB 4, the CTC only has authority to approve projects *before* the lease is negotiated. The authorizing legislation provides that the department or regional agency retains discretion for the lease agreement. There are no indicia of legislative intent to support the view that CTC has such authority. There is no express conferral of this authority on CTC; whereas in previous circumstances where such authority was conferred on a political body, as in AB 1467, it was done so expressly. Furthermore, SB 4 did not provide any resources for CTC to carry out this function indicating that it was not intended in the first place.

Legislative Counsel has opined on the subject and has concluded definitively that the legislature did not intend for CTC to assume this function.

2. CTC's interpretation will drive up costs

The biggest concern is that the costs on private industry -- and the public agencies as well -- start mounting as soon as the RFP is released. The expenses are enormous. If approval is not tendered until down the line, then contractors will price that risk into the project and it will make the whole enterprise cost-prohibitive. If the project is scuttled after the lease is negotiated, then both the private contractors and the public agencies will waste substantial sums of money.

3. CTC's interpretation will discourage projects

If approval is not secured until after the lease is negotiated, then contractors won't want to take that risk and will refrain from participating altogether. Other states and contractors have uniformly said that third party approval after negotiations is infeasible. It works only if approval is done before negotiations, not after the deal is final.

4. It is not necessary for CTC to assume this function

Under the authority granted to it from SB 4, the CTC already has a valuable and important oversight/approval role. CTC has the authority to review the full project plan before the lease is negotiated. This is similar to the role of the legislature and the Public Infrastructure Advisory Commission. Three layers of review at the RFP stage are sufficient, especially given the fact that the entire process is completely transparent.

SKANSKA

All concerned parties have recognized that there is an urgent need for infrastructure development in California and that public-private partnerships are a desirable method for project delivery in appropriate circumstances. If the CTC's expansive interpretation of its authority were to prevail, it would undercut these objectives and render public-private partnerships undesirable in California.

Thank you for considering our views.

Sincerely,



Karl Reichelt
Executive Vice President
Skanska Infrastructure Development

CTC P3 Approval Process

Comments on August 12th draft of the California Transportation Commission's policy guidance regarding the approval of public private partnership projects

INTRODUCTION

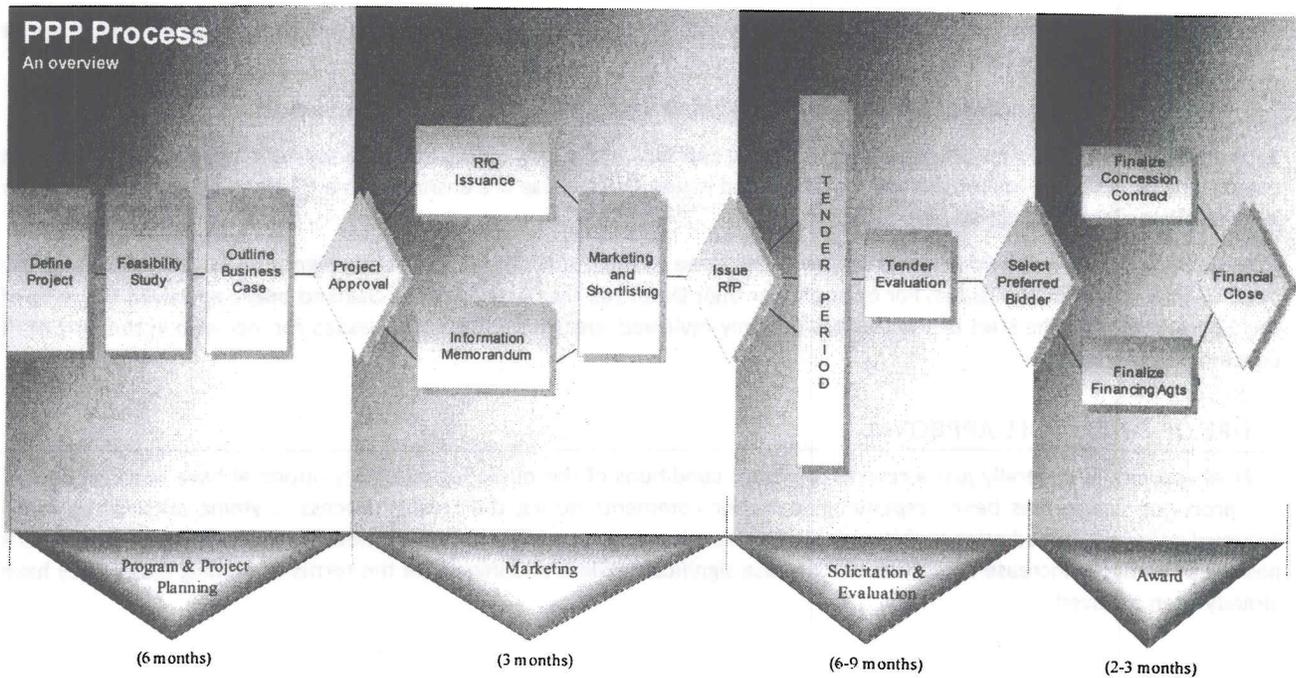
This is a written follow up to verbal testimony given at the meeting on August 12th, as requested by Commission Chair Alvarado. The comments below reflect the latest draft of the policy guidance which was released at the meeting.

These comments are made on behalf of Heritage Oak Capital Partners LLC, though they also reflect the prior experience of team members as P3 advisors to public sector entities in California, Colorado, Texas, Florida and Georgia as well as in other countries.

Heritage Oak Capital Partners is a boutique advisory firm which focuses on infrastructure finance, especially for Public Private Partnerships ("P3s"). Heritage Oak has also formed the Build America Infrastructure Fund to take advantage of the emergent investment opportunity in the infrastructure/P3 sector. The Fund is an independent, labor-centric equity fund which has sought out project developer partners committed to fair and responsible labor practices and to environmental stewardship.

TWO STAGE APPROVAL PROCESS

A two stage approval/verification process for P3 projects makes a lot of sense and is commonly used in other jurisdictions. However, a typical approval pattern is for an outline approval (or just "project approval") after the initial P3 feasibility study and prior even to an RfQ being issued, followed by a final review to ensure compliance with or approve changes from the terms of the outline approval. The example below is a modified version of a UK/ Canadian process where the approval is at the start before the RfQ and the compliance check (part of the value for money report) is either in the tender period or part of the tender evaluation.



It should be noted that many of these jurisdictions have standard terms or standard agreements which set a lot of the approval parameters, though even then the procuring authority is free to depart from them with only a few specific terms requiring approval to change or waive them. That process is usually carried out during the tender period when bidder comments are incorporated into the draft version of the concession agreement (usually in several iterations as due diligence and design becomes more detailed). The intent being to freeze all changes in the agreement 4-6 weeks prior to the tender submission date to allow funders and investors to finalize their due diligence and get their approvals so that finance is as close to being committed as possible (and to that end to ensure that the only post bid changes to the agreement are to incorporate the winning bidder's price/payment and detailed technical elements to reflect their design).

Also note these comments focus on solicited RfQ/RfP processes for P3 projects such as those envisaged for Doyle or by LACMTA. In the case of project development agreements and unsolicited bids the timelines are different and their bids cannot provide committed financing or a fixed price as they are based on conceptual projects which typically do not have CEQA approval.

SCOPE OF OUTLINE/ PRELIMINARY APPROVAL

Typically such an approval covers all the issues outlined in SB4, namely whether the project is judged able to:

- *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;*
- *Address a known forecast demand, as determined by the department or regional transportation agency.*

It would also set out the required parameters for the agency intending to procure the project as a P3 including:

- Maximum concession length and handback criteria (in other words the useful life the private sector bidders will be required to design to);
- The public sector financial commitment to the project which maybe just the be the cost of some advance works in the case of a user fee project or a full availability payment in the case of a non-user fee P3;
- Any requirements regarding the evaluation criteria to be used to judge either Qualifications at the RfQ stage or value (for money) at the RfP stage;
- Any essential concession agreement terms without which the project will not be approved.

Such an approval again, does not typically involve the approval of the entire RfQ, RfP or concession agreement as this is not usually practical – it just focuses on the key terms and issues. Often these are enshrined in a P3 enabling law such as SB4 or in general procurement legislation.

In some recent US brownfield projects this has been done as these documents tend to be significantly shorter without the need to cover construction issues. For example, for their Outer Harbor P3, the Port of Oakland board approved the issue of the 12 page RfQ and the start of the process but only reviewed specific risk allocation issues for inclusion in the RfP/ draft concession agreement.

SCOPE OF FINAL/ FULL APPROVAL

A Final approval is generally just a review to ensure conditions of the outline/preliminary approval have been met and if the procuring agency has been responding to bidder comments during the tender process anything outside the initial approval is usually cleared prior to this review. It is strongly recommended that nothing new is introduced at this stage, as it has the potential to increase all parties costs, cause significant delays and invalidate the terms of binding bids if they have already been received.

The current concept of approving all material changes to a Concession Agreement is unlikely to be practical given the scale of such agreements. Often agreements have hundreds of pages of annexes, which are design or bidder specific which can change materially up until close without affecting the risk to the public sector. Also the concept of materiality itself would give Heritage Oak concern as a potential investor, it varies with context and is too detailed for such a short review.

We believe that an agency would be reluctant to negotiate on terms if it had to justify each and every change it made, out of context, to third parties without the benefit of counsel. It would also not be in the Agency's interest to publicly reveal its negotiating position for any subsequent P3 transactions, as this would not normally be part of the written record and subject to disclosure.

Thus it is recommended that the final review be focused on a specific list of issues which are flagged at the initial approval.

TIMING OF APPROVALS

PROJECT CANCELLATION

As discussed at the meeting at length, there is significant concern that, even the latest draft of the guidance has the approvals (both initial and final) too late in the procurement process. There is no reason why the initial approval cannot be prior to the RfQ, as it does not impart significant additional information other than the strength of the competition between bidders. Conversely, cancelling a P3 procurement immediately prior to the issue of the RfP will waste a lot of the procuring agency's time and money – drafting an RfP and concession agreement and running a short listing process are the points in the process where the agency is doing the majority of the work and incurring a large portion of the cost.

Naturally, having a final approval declined after a 12-18 month bid process with a fully negotiated concession agreement would be very expensive to both sides but it also undermines the State's credibility for future bids and potentially reduces number/quality of bidders or at least increases their risk pricing. This was demonstrated when Texas cancelled the SH121 P3 procurement after selecting Cintra as preferred bidder, two bidders withdrew from other deals which were in procurement and another withdrew from the investment role to focus solely on construction. It is also worth noting TxDOT was forced to pay a \$3m break fee to Cintra recently.

During the meeting some skepticism was expressed by Commissioners regarding the cost of bidding for a P3 compared to usual business bidding costs for transactions of a similar scale and that even large costs were made palatable by the large returns available for attractive P3 projects. It is demonstrable that P3 projects are expensive to bid compared to other transactions (such as a large M&A deal). The expense primarily comes from the 12-18 month bidding period but also from the:

- need to design & cost the project sufficiently to give a fixed price;
- legal costs of agreements between parties (construction contract, loan agreement and concession agreement);
- Due diligence & consultant costs of funders;
- Need for consultants to cover legal, technical, demand forecasting, financial, insurance, environmental, tax, and accounting issues and to audit the financial model.

As regards the perception of high returns, Infrastructure is such an attractive investment for long term investors such as labor pension funds because of the stability and low risk nature of its assets, and with that low risk comes lower returns. Increasing that risk by setting up an uncertain bid process will just drive away the labor funds as the investment will no longer match their portfolio requirements. That will leave the developers funding all of the equity in the transaction, or require the use of more speculative investors – in both cases this equity will have higher return requirements and as result be more expensive.

POST BID CHANGES TO CONCESSION AGREEMENT

Late changes leave public sector in a potentially weak negotiating position with the losing bidders having left the process. Changes will also, much like variations in a construction contract, prevent the agency from holding the bidder to its price and render a bid bond and committed financing package useless. It would also leave the award open to challenge from the losing bidders.

For the Private sector it is worse, having the potential to unwind a carefully balanced negotiated position or worse cause their financing package to collapse.

As stated above most US P3s have a concession agreement commentary process during the tender period and it would be possible for the final pre-bid draft to form the basis of a final review and for that process to be completed prior to the bid date.

REVIEW PERIODS/ STEPS

After the selection of the preferred proposal in the process diagram which accompanies the guidance, there are a large number of sequential steps and a lengthy 60 day commentary period.

Such delays to accommodate the final review of the concession agreement, will cost all the parties money and, after the bid is submitted, it will increase the financing risk. In extremis, it could prevent the Agency from asking for fixed price bid if the hedging costs were prohibitive or funders were unwilling to hold their pricing (as is currently the case). In this case the Public sector would end up sharing financing risk which it is not good value for money.

Perhaps if the review is less extensive and comments are developed in parallel, the time can be reduced.

FINANCIAL PLAN CONCEPT

It is unclear to us what the financial plan seeks to monitor in that it mixes some of the costs/risks to the private sector, with an estimate of the potential exposure of the public sector. Is it intended to measure feasibility, in which case an estimate of a bid needs to be developed (costs, revenues & financing), or is it intended to estimate potential termination costs in which case fair market value is normally used?

It should be noted that P3s are financed using project financings, which are non-recourse to either the project equity investors or the public sector, so the debt service is not a liability of the State.

CONCLUSION

Heritage Oak Capital Partners is delighted that with the implementation of SB4 it will get the opportunity to bid for State P3 projects in its home State and is strongly supportive of the need for a robust and transparent approvals process. P3s are by their nature a long term partnership and elements of the transaction which are not evaluated and explained to stakeholders for the sake of short term expediency are bound to cause problems over a 30-40 year relationship. So, we believe it is just as much in the private sector partner's interest that the rationale for the negotiated deal is understood and is acceptable.

If there are any further questions or any points are in need of clarification please do not hesitate to contact either:

- Alistair Sawers (415) 728 5353 asawers@heritageoakcapital.com ;
- Dan Richard (415) 850 6354 drichard@heritageoakcapital.com .



"Keith Dunn"
<keith@keithdunnconsulting.com>
08/20/2009 11:40 AM

To "Bimla Rhinehart" <bimla_rhinehart@dot.ca.gov>, <andre_boutros@dot.ca.gov>
cc <suzsmith@sctainfo.org>, "Anne Mayer" <amayer@rctc.org>
bcc

Subject SHCC comments on P3Guidelines

History: This message has been forwarded.

Bimla and Andre -

Sorry we are a little late on comments but the Self Help Counties Coalition would like to offer the following three points related to the P3 guidelines:

1. SHCC appreciates the role of CTC as approving agency and support that role.
2. We support the premise that approval by CTC of P3 projects should happen early in the process - possibly even before the RFP is published.
3. Turn around time between approval and contract with the selected team needs to happen quickly.

Thank you for your consideration and we look forward to working with you to implement this important new tool for transportation.

Keith

Keith Dunn
Executive Director
Self Help Counties Coalition
1415 L Street Suite 720 Sacramento, CA 95814
Phone (916) 494-3553 Fax (916) 443-5807

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Board of Supervisors
County of San Bernardino


BRAD MITZELFELT
SUPERVISOR, FIRST DISTRICT



August 19, 2009

Mr. Bob Alvarado, Chairman
California Transportation Commission
1120 "N" St.
Room 2221 (MS-52)
Sacramento, CA 95814

Dear Chairman Alvarado:

I am the County Supervisor for the High Desert area of the County of San Bernardino; the Vice Chair of San Bernardino Associated Governments; and the Chairman of the High Desert Corridor Joint Powers Authority, a joint powers authority comprised of the Counties of San Bernardino and Los Angeles (the "HDC JPA"). The HDC JPA is pursuing the development of a potential new facility between Palmdale and Victorville across the High Desert area in Southern California.

I believe the High Desert Corridor project is well-suited for potential use of the public-private partnership (PPP) tool authorized under SB 4 and, as such, I have been closely monitoring the adoption of guidelines by the California Transportation Commission (CTC), as required by SB 4.

The HDC Board has not had the opportunity to meet since the issuance of draft guidelines so I write today not on behalf of the HDC, but in my capacity as a County Supervisor.

I would like to explain how the HDC JPA would utilize SB 4, and express several concerns over the current draft of the CTC guidelines for PPP applications and approvals. Specifically:

1. **POST PROCUREMENT APPROVAL:** Most dangerous to the advent of PPPs is the proposed requirement in the draft guidelines of two separate CTC approvals. If the second approval is required, it will mean extensive documentation that will add significant delay, cost and risk to agencies such as the HDC JPA and will greatly reduce the likelihood that the private sector will pursue potential opportunities.

Mr. Bob Alvarado
August 19, 2009
Page Two

Requiring agencies to submit full draft RFPs, lease agreements and financial plans before knowing if they can even use the PPP tool will require a significant at risk investment and will add considerable time to project delivery. These items take months and months to develop, cost significant amounts to produce and are optimally developed once procurement has commenced with the input of interested and qualified proposers.

I believe that the private sector will find the risk associated with the CTC's draft approach even more daunting and may not commit the time and resources (often several millions of dollars) to pursue a project through procurement when there remains a risk that Caltrans/a regional transportation agency cannot see it through.

A single selection step by the CTC based on the statutory criteria and the submittal of materially complete documents (that will be part of the RFP package) before RFP issuance is more appropriate, meets the statutory mandates of SB 4 and provides the flexibility that the PPP procurement process requires. If Caltrans/a regional transportation agency makes major changes to the documents through the procurement process after the CTC selection that affects the original selection action and findings, then it would be appropriate for the CTC to review the changes prior to the public hearing required under SB 4 to make sure they are consistent with the statutory criteria and their original findings. If they were, the CTC should approve the changes.

2. **TIMELINES:** The timelines set out in the guidelines may not be consistent with an expeditious procurement process and could put agencies at risk of proposals becoming invalid due to the length of time involved. Should that be the case, the public is the likely loser as the agency may lose the important value of competition and is put in an unenviable position of having to negotiate post-proposal. I would urge the CTC to reduce the 60 day/30 day periods before actions are considered (I note that this may be addressed if a single selection step is utilized).

3. **DUTIES AUTHORIZED BY SB 4:** I support the CTC's oversight role as provided for in SB 4. Procuring agencies will be independently assessing the viability of their projects before they implement procurements and commit to expend considerable time and scarce resources.

With the High Desert Corridor, the HDC JPA will also be working closely with other involved agencies such as Caltrans, SANBAG and Los Angeles MTA. The CTC should take great comfort that agencies that utilize SB 4 will be undertaking extensive due diligence and planning before a PPP procurement is launched, consistent with their responsibilities and their extensive histories as procuring agencies.

Mr. Bob Alvarado
August 19, 2009
Page Three

There is no need to add in elements that are not identified in SB 4, adding a level of new discretion by the CTC. It makes sense that the CTC's actions be revised to be consistent with the statute.

In closing, I thank you for the opportunity to submit my thoughts as you move forward with your consideration of the guidelines. With market viable guidelines in place, I believe the California marketplace and projects such as the High Desert Corridor will greatly benefit. We look forward to working with the CTC over the coming months and years.

Sincerely,

Original signed by

Brad Mitzelfelt
Supervisor, First District
San Bernardino County

Bimla
Rhinehart/HQ/Caltrans/CAGov

To Andre Boutros/HQ/Caltrans/CAGov@DOT

cc

08/19/2009 02:59 PM

bcc

Subject Fw: PS guidelines on CTC programming function

fyi

----- Forwarded by Bimla Rhinehart/HQ/Caltrans/CAGov on 08/19/2009 02:59 PM -----



"Bourgart, Jim@BTH"
<Jim.Bourgart@bth.ca.gov>

To "Rhinehart, Bimla@DOT" <Bimla_Rhinehart@dot.ca.gov>

08/19/2009 01:14 PM

cc

Subject PS guidelines on CTC programming function

Hi Bimla: Per our conversation, I'm suggesting a sentence that might resolve the concern about the Commission's ongoing role and responsibility to program funds and to take that into account when considering P3 projects that come before. I think the following statement makes the point, without belaboring it. Thanks.

"The P3 program and this guidance do not modify the Commission's existing authority and responsibility to program and allocate funding."

Jim Bourgart
Deputy Secretary for Transportation and Infrastructure
California Business, Transportation and Housing Agency
Sacramento, CA 95814
(916) 323-5412
jbourgart@bth.ca.gov



"Bourgart, Jim@BTH"
<Jim.Bourgart@bth.ca.gov>
08/18/2009 11:18 AM

To "Rhinehart, Bimla@DOT" <Bimla_Rhinehart@dot.ca.gov>,
"Boutros, Andre@DOT" <Andre_Boutros@dot.ca.gov>
cc "Bonner, Dale@BTH" <Dale.Bonner@bth.ca.gov>
bcc

Subject BTH comments on CTC P3 guidelines

History:

📧 This message has been forwarded.

Bimla and Andre: Below are the BTH comments and recommendations for the revised CTC guidelines for P3s. These reflect our reading of the law, verified by Legislative Counsel opinion, the input we have received from agencies and the industry, and the discussion at the CTC meeting on August 12. Our general comment is that the guidelines should strictly reflect what is required in the statute and should not add further processes, standards or findings that are not found in the language of the law.

- A project nomination for P3 selection should include the following:

1. A description of the project, including documentation demonstrating that:

a. The project is primarily designed to achieve each of the following performance objectives:

i. improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor;

ii. improve the operation or safety of the affected corridor; and

iii. provide quantifiable air quality benefits for the region in which the project is located.

b. The project addresses a known forecast travel demand, as determined by the Department or regional transportation agency.

2. 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 proposed criteria for making that evaluation.

3. The proposed form of P3 lease agreement associated with the project, including proposed terms and conditions.

4. For a Department project, the Department's determination of the useful life of the project, including the basis used in making that determination.

Project Approval. The Commission will select the project after reviewing the Department's or regional transportation agency's nomination for P3 selection. After reviewing the project nomination, the Commission will approve the project if it finds all of the following:

1. The project is primarily designed to achieve the above-stated performance objectives;

2. The useful life of the project is consistent with the terms of the lease agreement; and

3. If the "best value" method is used, the procedures and criteria for selecting a contracting entity or lessee are appropriate.

Additional comments:

- Caltrans or the RTA may choose to submit all of the above in a project nomination either concurrently or sequentially. Generally, all would be submitted at one time, but there may be situations where it makes sense to do so in stages (e.g., performance objectives documentation first, procurement documentation later).
- Include specific statement that the sponsoring transportation agency "shall retain the discretion for executing the final lease agreement."
- Explicit statement that submission of any post-RFP changes that the project sponsor deems to be "material" is subject to CTC review, but not approval.
- Avoidance of terms and requirements that are not found in statute, such as "business case" and "financial plan."

Thank you for your consideration.

Jim Bourgart
Deputy Secretary for Transportation and Infrastructure
California Business, Transportation and Housing Agency
Sacramento, CA 95814
(916) 323-5412
jbourgart@bth.ca.gov



METROPOLITAN
TRANSPORTATION
COMMISSION

Joseph P. Bort MetroCenter
101 Eighth Street
Oakland, CA 94607-4700
TEL 510.817.5700
TTY/TDD 510.817.5769
FAX 510.817.5848
E-MAIL info@mtc.ca.gov
WEB www.mtc.ca.gov

Scott Haggerty, Chair
Alameda County

August 19, 2009

Adrienne J. Tissier, Vice Chair
San Mateo County

Tom Asenbrado
U.S. Department of Housing
and Urban Development

Ms. Bimla Rhinehart
Executive Director
California Transportation Commission
1120 N Street
Sacramento, CA 95814

Tom Bates
Cities of Alameda County

Dean J. Chu
Cities of Santa Clara County

Dear Ms. Rhinehart,

Dave Cortese
Association of Bay Area Governments

Chris Daly
City and County of San Francisco

Bill Dodd
Napa County and Cities

Dorene M. Giacomini
U.S. Department of Transportation

At the August 12, 2009 California Transportation Commission (CTC) meeting, the CTC debated the draft Policy Guidance for Approval of Public Private Partnership (P3) Projects as authorized by Senate Bill 4, Second Extraordinary Session (SB 4). The great interest expressed in the draft guidelines demonstrates the importance of advancing innovative project delivery and leveraging new funding sources to help the state meet the growing needs of its transportation system.

Federal D. Glover
Contra Costa County

Anne W. Halsted
San Francisco Bay Conservation
and Development Commission

Steve Kinsey
Marin County and Cities

Sue Lemper
Cities of San Mateo County

Jake Mackenzie
Sonoma County and Cities

Jon Rubin
San Francisco Mayor's Appointee

Bijan Saripi
State Business, Transportation
and Housing Agency

James P. Sperring
Solano County and Cities

Amy Rein Worth
Cities of Contra Costa County

Ken Yeager
Santa Clara County

We are excited about the opportunity to utilize design build and P3 contracts to expedite the delivery of critical transportation infrastructure, bringing benefits to the public including improved mobility and reduced emissions, and supporting regional and state economies. However, we are concerned that as currently outlined, the CTC guidelines require a level of review and approval that will add time, uncertainty and risk to the process, dampening competition and reducing our ability to effectively execute a P3. A number of process and implementation topics were discussed at your August 12th Commission meeting, and we would like comment on those most pertinent to the Metropolitan Transportation Commission (MTC).

Though improved over the original draft, the approval process outlined in the August 12th draft policy guidance establishes too many uncertainties as final approval follows the lease negotiation. MTC respects and values the role the CTC plays in protecting the public interest and the state's transportation infrastructure. Balancing this oversight role with the goal of delivering needed transportation projects quickly and effectively is a difficult task. We believe that the CTC can continue to play a strong oversight role through a process that moves key decisions forward and allowing a thorough review prior to the issuance of an RFP.

Steve Heminger
Executive Director

Ann Flemer
Deputy Executive Director, Operations

Andrew B. Fremier
Deputy Executive Director,
Bay Area Toll Authority

Therese W. McMillan
Deputy Executive Director, Policy

Our primary concern with the guidelines is that the final project approval comes too late in the process. We were pleased to see that the revised guidelines released by the CTC on August 12th required that more detailed information be reviewed earlier in the process. By approving the project scope, financial plan, selection criteria and draft lease terms as part of the project approval, the CTC can provide a significant amount of oversight. But requiring a second approval step after lengthy and costly (for both the

private and the public sectors) negotiations adds too much risk and uncertainty to the process. Requiring CTC *approval* of the final lease agreement also negates the authority clearly granted in SB 4 to the department or local transportation agencies giving these agencies the discretion for executing the final lease agreement.

The CTC has a clear and important mandate to protect the public interest and the state's transportation infrastructure. Based on the information required to be submitted as part of the initial project approval, the CTC will have sufficient information early on to evaluate the risk inherent in each project. Once a project is approved by the CTC, the transportation agency should then be empowered to select and negotiate a P3 with clear direction and authority. The final lease agreement should, as required in statute, still be submitted to the CTC for review, but not for approval. So long as the project scope and public benefits are consistent with those approved by the CTC prior to issuance of the RFP, the project should not need a second approval from the CTC.

We believe that with the modifications outlined above, the guidelines can provide the CTC sufficient oversight while still giving the transportation agencies the ability to effectively negotiate and execute lease agreements with the private sector.

Thank you for your consideration of these comments. We are excited about the opportunity to utilize design build and P3 contracts and hope to work with you to expedite the delivery of critical transportation infrastructure. Please contact me (afremier@mtc.ca.gov, 510-817-5840) or Alix Bockelman (abockelman@mtc.ca.gov, 510-817-5850) should you have any questions.

Sincerely,



Andrew B. Fremier
Deputy Executive Director, Operations

CC: Jim Bourgart, BT&H
Bijan Sartipi, Caltrans District 4
Alix Bockelman, MTC



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CHIEF EXECUTIVE OFFICE

Will Kempton
Chief Executive Officer

August 19, 2009

The Honorable Bob Alvarado
Chair
California Transportation Commission
1120 N Street
Room 2221 (MS-52)
Sacramento, CA 95814

Dear Chairman Alvarado:

Thank you for the opportunity to provide feedback on the California Transportation Commission's (CTC) Draft Policy Guidance for the Approval of Public Private Partnership Projects. The Orange County Transportation Authority (OCTA) supports the successful implementation of this authority in a way that promotes private investment in new infrastructure projects and provides an opportunity to create more transportation options for commuters in an era of scarce federal, state, and local resources.

As the Administration negotiated the authority in SBX2 4 (Chapter 2, Statutes of 2009-10 Second Extraordinary Session), officials sought to minimize some of the issues that can create high risk factors in these negotiations, including eliminating the potential for back-end approvals of a lengthy and costly negotiation process.

OCTA shares the Legislature's and Administration's desire for transparency, accountability, and the transfer of risk in the development of these proposals. However, for this program to ultimately be successful, it must contain a degree of certainty for prospective investors as well as protecting the public interest.

In order to provide this certainty, we support the CTC's approval role and oversight on the front-end of the process to ensure that the selected projects are in the best interest of the state. OCTA believes that this approval should occur prior to the solicitation of proposals and prior to the beginning of the negotiation process in order to ensure that changes are not made at the tail-end of a lengthy process that risk the project's success and feasibility.

The legislation provided a highly transparent public process to ensure that the initial terms and key project elements are upheld and that the public trust is not violated. Every party that proceeds under this authority will be subject to close scrutiny under the existing public review and comment process. It is also

The Honorable Bob Alvarado
August 19, 2009
Page 2

unlikely that the State Department of Transportation (Caltrans) or a regional transportation agency would proceed with a project that does not meet the highest public standards or when a high degree of concern has been expressed by the Legislature, the CTC, or the Public Infrastructure Advisory Commission (PIAC).

OCTA recognizes and appreciates that all parties want to see this program be successful, but creating unnecessary uncertainty at the back end of this process will only introduce difficulties and delay the implementation of high priority projects.

We look forward to working with you as the CTC moves forward with adoption of final program guidance. If you have any questions, please do not hesitate to contact me at (714) 560-5584.

Sincerely,



Will Kempton
Chief Executive Officer

wk:ww

c: Honorable Dale Bonner, Secretary, California Business Transportation and Housing Agency
Jim Bourgart, Deputy Secretary, California Business Transportation and Housing Agency
Randell Iwasaki, Director, California Department of Transportation



Abunnasr Husain
<ahusain@rctc.org>
08/19/2009 11:59 AM

To <andre_boutros@dot.ca.gov>
cc Anne Mayer <AMayer@rctc.org>
bcc
Subject Revised RCTC Comments on the SB-4 PPP CTC Application Guidelines

History: This message has been forwarded.

Andre,

I am sending this email on behalf of Michael Blomquist, RCTC Toll Program Director. He sent you RCTC comments on the subject topic yesterday. Please discard those and use the revised attached comments.

Thanks,
Abunnasr

Abunnasr Husain
Toll Project Manager - RCTC
3850 Vine Street, Suite 210
Riverside, CA 92507



(951) 787-7966 RCTC Comments to CTC Guidelines for SBX2 4 Public Private Partnerships Final.docx

Comments on Public Private Partnership Application Guidelines

Comment #1: Two-Step Process

The CTC's proposed two-step selection process allows for preliminary action only after the Department or regional transportation agency (RTA) has developed the terms of a draft lease agreement and RFP and requires submittal of the financial plan. This concept will cause the Department and an RTA to spend considerable money and time to prepare these documents all before knowing if they can use the P3 tool. To effectively prepare such documents requires a significant cost and time and major interaction with shortlisted proposers. The proposed approach will result in a great likelihood that the Department, RTAs and/or proposers will not pursue the opportunities or take the risk of moving forward, thereby reducing the number or likelihood of projects using the tools under SB 4. In addition, while the 8/12/09 draft guidelines do indicate that preliminary steps may be taken in the procurement before CTC preliminary action, it is highly unlikely that proposers will want to undertake that effort before it knows whether the Department/RTA can even move forward with the procurement. Ultimately, withholding the CTC's selection of the project until after these steps have occurred puts this money and time at considerable risk and would likely discourage project applications and/or competitive procurements.

Requested Changes

1. Specify that the preliminary steps that Caltrans/RTAs may take before CTC selection include issuance of a request for information/expression of interest, an RFQ, shortlisting, issuance of draft RFP documents, one-on-one meetings and such other related steps.
2. Eliminate the two-step selection process. Provide for a single action based on draft documents which will be included in the RFP procurement package, which would be submitted to the CTC before issuance of the RFP. If there are material changes in the final post-procurement/negotiated documents that relate to the statutory criteria and the findings made in connection with the selection, CTC would need to approve those changes before the final public hearing, to the extent of the statutory criteria and their earlier findings. If the changes remained consistent with the statutory criteria and the earlier findings, the CTC would approve the changes.
3. Allow for more flexibility in submittals and interim submittals. For instance, if an RFP has materially changed since the draft version submitted to the CTC, allow for it to be submitted without requiring submittal of a full proposal report. Similarly, information pertaining to the statutory criteria (e.g., air quality, etc.) should be allowed to be submitted before the draft RFP and lease agreement.

Comment #2: Timing and Extent of Full Action

The CTC's proposed two-step selection process allows for full action only after the procurement and after the Department or RTA has negotiated the terms of a draft lease agreement. The Department or an RTA as well as private partners will spend millions of dollars and considerable time to successfully complete a competitive PPP procurement including preparing procurement documents and comprehensive proposals and conducting the procurement process and contract negotiations. Withholding the CTC's full selection of the project until after these steps have occurred puts this money and time at considerable risk and would likely discourage project applications and/or competitive procurements. It is also inconsistent with the statute, which provides that the CTC selects the projects on the front end, not after the procurement. The nature of any further CTC action after selection should be limited to addressing material changes to the documents. In such case, the CTC action should assess the material changes in light of the findings made in connection with the original action and should not provide for any additional discretion.

Requested Changes

1. See Comment #1

Comment #3: Timing of Project Selection Steps

We are concerned about the time required to obtain CTC project selection. Financial proposals are generally limited to 90-180 days from date of submittal (with more recent trends being shorter in the current economic climate). The agency who will sign the lease agreement and who will be financially responsible for the project has considerable due diligence to perform prior to requesting CTC project selection. To obtain preliminary project action, final project action, and approval of material changes to the lease documents from the CTC could collectively add over 120 days based on the current guidelines (plus the statutorily mandated 60 day review and comment period for BTH/PIAC/the Legislature. This extensive time could add cost and delay to the project, could render otherwise attractive proposals invalid and would subject the Department/RTAs to bearing considerable financial risk (without competitive procurement pressures) should renegotiations of financial proposals occur due to delay.

Requested Change

Limit complete project selection to a single Commission action. The applicant would be required to place a project application on the Commission's meeting agenda at least 60 days prior to the meeting. The CTC would commit to rendering a decision at that meeting.

Comment #4: Number of Public Hearings

It appears that three public hearings would be required for the Department or RTA. The first and second public hearings are required to obtain CTC preliminary action and final action, respectively. The third public hearing would be held by the Department or RTA after the final CTC action and procurement but before lease agreement execution. The purpose of a public hearing is to receive input from stakeholders before the government agency takes action. Once the procurement process is finished and the lease agreement is negotiated, all the discretionary public actions are completed except for the formal execution of the agreement.

Requested Change

Limit the requirement to a single CTC public hearing prior to commencement of a competitive procurement.

Senate Bill No. 4

CHAPTER 2

An act to add Sections 14661.1 and 70391.7 to the Government Code, to add and repeal Section 20688.6 of, and to add and repeal Chapter 6.5 (commencing with Section 6800) of Part 1 of Division 2 of, the Public Contract Code, and to amend Section 143 of the Streets and Highways Code, relating to public contracts.

[Approved by Governor February 20, 2009. Filed with Secretary of State February 20, 2009.]

LEGISLATIVE COUNSEL'S DIGEST

SB 4, Cogdill. Public contract: design-build: public private partnerships.

(1) Existing law designates the Judicial Council as the entity having full responsibility, jurisdiction, control, and authority over trial court facilities for which title is held by the state, including the acquisition and development of facilities.

Existing law requires the Department of Corrections and Rehabilitation to design, construct, or renovate prison housing units, prison support buildings, and programming space as specified.

Existing law authorizes the Director of General Services, when authorized by the Legislature, to use the design-build procurement process for a specific project to contract and procure state office facilities, other buildings, structures, and related facilities. Existing law requires a bidder participating in the process to provide written declarations, subject to misdemeanor penalties.

This bill would also authorize the Director of General Services or the Secretary of the Department of Corrections and Rehabilitation, as appropriate, to use the design-build procurement process in contracting and procuring a state office facility or prison facility, and would authorize the Judicial Council to use that same process in contracting and procuring a court facility, but would limit this authorization to 5 total projects, to be approved by the Department of Finance, as specified. The bill would require the Department of General Services, the Department of Corrections and Rehabilitation, and the Judicial Council to submit to the Joint Legislative Budget Committee, before January 1, 2014, a report containing a description of each public works project procured through the design-build process, as specified. The bill would require a bidder participating in the process to provide written declarations, subject to misdemeanor penalties, and would thereby impose a state-mandated local program.

(2) Existing law sets forth requirements for the solicitation and evaluation of bids and the awarding of contracts by public entities for the erection, construction, alteration, repair, or improvement of any public structure,

building, road, or other public improvement. Existing law also authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis. Existing law, until January 1, 2011, authorizes transit operators to enter into a design-build contract, as defined, according to specified procedures.

This bill would, until January 1, 2014, allow certain state and local transportation entities, if authorized by the California Transportation Commission, to use a design-build process for contracting on transportation projects, as specified. The bill would require a transportation entity to implement, or contract with a third-party to implement, a labor compliance program for design-build projects, except as specified. The bill would also require these transportation entities to report to the commission, and the commission to submit a mid-term and a final report to the Legislature, regarding the design-build process as specified. The bill would establish a procedure for submitting bids that includes a requirement that design-build entities provide a statement of qualifications submitted to the transportation entity that is verified under oath. Because a verification under oath is made under penalty of perjury, the bill would, by requiring a verification, create a new crime and thereby impose a state-mandated local program.

(3) Under existing law, any work of grading, clearing, demolition, or construction undertaken by a redevelopment agency is required to be done by contract after competitive bidding if the cost of that work exceeds a specified amount.

This bill would, until January 1, 2016, authorize a redevelopment agency, with the approval of its duly constituted board in a public hearing, to enter into design-build contracts for projects, as defined, in excess of \$1,000,000, in accordance with specified provisions. This bill would authorize up to 10 design-build contracts, would require an agency to apply to the State Public Works Board for authorization to enter a design-build contract, as provided, and would require the State Public Works Board to notify the Legislative Analyst's Office when 10 projects have been approved. This bill would also require an agency using the design-build method to submit a report to the Legislative Analyst's Office, as provided, and for the Legislative Analyst to report to the Legislature before January 1, 2015, on the agency's use of the design-build method, as provided.

This bill would require specified information to be verified under oath, thus imposing a state-mandated local program by expanding the scope of existing crime.

(4) 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. Existing law limits the number of projects authorized pursuant to these provisions to 2 in northern California and 2 in southern California.

This bill would extend the authorization for these agreements to January 1, 2017, and would delete the restriction on the number of projects that may be undertaken pursuant to these provisions. The bill would require the projects to be primarily designed to achieve improved mobility, improved operations or safety, and quantifiable air quality benefits.

(5) Existing law requires that the negotiated lease agreements be submitted to the Legislature for approval or rejection. Under existing law, the Legislature has 60 legislative days to act after submittal of the agreement and the agreement is deemed approved unless both houses of the Legislature concur in the passage of a resolution rejecting the agreement. Existing law prohibits the Legislature from amending these lease agreements.

The bill would eliminate that prohibition and the provision requiring approval or rejection by the Legislature. The bill would require that all lease agreements first be submitted to the California Transportation Commission for approval, then to the Legislature and the Public Infrastructure Advisory Commission, as defined, for review, as specified. The bill would also require the Public Infrastructure Advisory Commission to perform specified acts and would authorize that commission to charge the department and regional transportation agencies a fee for specified services.

(6) Existing law authorizes the department and regional transportation agencies to utilize various procurement approaches, including, among other things, acceptance of unsolicited proposals, as specified.

This bill would prohibit the department or a regional transportation agency from awarding a contract to an unsolicited bidder without receiving at least one other responsible bid.

(7) Under existing law, for these projects, tolls and user fees may not be charged to noncommercial vehicles with 3 or fewer axles.

This bill would eliminate that prohibition.

(8) Existing law imposes various contract requirements for these projects, including permitting compensation for a leaseholder for losses in toll or fee revenues in certain instances if caused by the construction of supplemental transportation projects, but prohibits the compensation to exceed the reduction in revenues.

This bill would prohibit that compensation from exceeding the difference between the reduction in revenues and the amount necessary to cover the costs of debt service, as specified. The bill would additionally require the agreements to include an indemnity agreement, as specified, and to authorize the contracting entity or lessee to utilize the design-build method of procurement for transportation projects, subject to specified conditions. The bill would also require contracting entities or lessees to have specified qualifications.

The bill would authorize the department or the regional transportation agency, when evaluating a proposal submitted by a contracting entity or lessee, to award a contract on the basis of the lowest bid or best value, as defined.

The bill would provide that the Department of Transportation is the responsible agency for the performance of certain tasks and the preparation

of certain documents, relative to projects on the state highway system, where a regional transportation agency is otherwise the sponsor of the project. The bill would state that the department may perform those functions with department employees or with consultants contracted by the department.

(9) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

6800. The Legislature hereby finds and declares all of the following:
 The design-build method of procurement authorized under this chapter
 should be evaluated for the purposes of exploring whether the potential
 exists for reduced project costs, expedited project completion, or design
 features that are not achievable through the traditional design-bid-build
 method. A demonstration program will allow for a careful examination of
 the benefits and challenges of design-build contracting on a limited number
 of projects. This chapter shall not be deemed to provide a preference for the
 design-build method over other procurement methodologies.

CHAPTER 6.5. THE DESIGN-BUILD DEMONSTRATION PROGRAM

6800. The Legislature hereby finds and declares all of the following:
 The design-build method of procurement authorized under this chapter
 should be evaluated for the purposes of exploring whether the potential
 exists for reduced project costs, expedited project completion, or design
 features that are not achievable through the traditional design-bid-build
 method. A demonstration program will allow for a careful examination of
 the benefits and challenges of design-build contracting on a limited number
 of projects. This chapter shall not be deemed to provide a preference for the
 design-build method over other procurement methodologies.

- 6801.** For purposes of this chapter, the following definitions apply:
- (a) "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 transportation entity.
 - (b) "Commission" means the California Transportation Commission.
 - (c) "Design-build" means a procurement process in which both the design and construction of a project are procured from a single entity.
 - (d) "Design-build entity" means a partnership, corporation, or other legal entity that is able to provide appropriately licensed contracting, architectural, and engineering services as needed pursuant to a design-build contract.
 - (e) "Design-build team" means the design-build entity itself and the individuals and other entities identified by the design-build entity as members of its team.

(f) "Department" means the Department of Transportation as established under Part 5 (commencing with Section 14000) of Division 3 of the Government Code.

(g) "Local transportation entity" means a transportation authority designated pursuant to Division 19 (commencing with Section 180000) of the Public Utilities Code, any consolidated agency created pursuant to Chapter 3 (commencing with Section 132350) of Division 12.7 of the Public Utilities Code, the Santa Clara Valley Transportation Authority established under Part 12 (commencing with Section 100000) of Division 10 of the Public Utilities Code, and any other local or regional transportation entity that is designated by statute as a regional transportation agency.

(h) "Transportation entity" means the department or a local transportation entity.

6802. (a) Subject to the limitations of this chapter, a local transportation entity, if authorized by the commission, may utilize the design-build method of procurement for up to five projects that may be for local street or road, bridge, tunnel, or public transit projects within the jurisdiction of the entity.

(b) Subject to the limitations of this chapter, the department, if authorized by the commission, may utilize the design-build method of procurement for up to 10 state highway, bridge, or tunnel projects.

6803. (a) Only 15 design-build projects shall be authorized under this chapter. The projects selected shall vary in size, type, and geographical location.

(b) The commission shall determine whether a transportation entity may award a design-build contract based on lowest responsible bid or best value. The commission shall balance the number of transportation entities that may use the low bid and best value selection methods in order to ensure that the number of design-build contracts awarded will enable the commission to determine the costs and benefits of using each method.

(c) In order to be eligible for consideration as one of the 15 design-build projects authorized under this chapter, the proposed project shall be subject to the existing process under the state transportation improvement program (Chapter 2 (commencing with Section 14520) of Part 5.3 of Division 3 of Title 2 of the Government Code), the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) of Division 1 of Title 2 of the Government Code), the traffic congestion relief program (Chapter 4.5 (commencing with Section 14556) of Part 5.3 of Division 3 of Title 2 of the Government Code), or the state highway operations and protection program established pursuant to Section 14526.5 of the Government Code.

(d) The commission shall establish a peer review committee to conduct an evaluation of the 15 projects selected to utilize the design-build method of procurement.

(e) The commission shall develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity, that performs services for the transportation entity relating to the solicitation of a design-build project, to submit a

proposal as a design-build entity, or to join a design-build team. This conflict-of-interest policy shall apply to each transportation entity entering into design-build contracts authorized under this chapter.

6804. (a) For contracts awarded prior to the effective date of either the regulations adopted by the Department of Industrial Relations pursuant to subdivision (b) of Section 1771.55 of the Labor Code or the fees established by the department pursuant to subdivision (b), a transportation entity authorized to use the design-build method of procurement shall implement a labor compliance program, as described in Section 1771.5 of the Labor Code, or it shall contract with a third party to implement, on the transportation entity's behalf, a labor compliance program subject to that statute. This requirement does not apply to a project where the transportation entity or design-build entity has entered into any collective bargaining agreement or agreements that bind all of the contractors performing work on the projects.

(b) For contracts awarded on or after the effective date of both the regulations adopted by the Department of Industrial Relations pursuant to subdivision (b) of Section 1771.55 of the Labor Code and the fees established by the department pursuant to this subdivision, the transportation entity shall pay a fee to the department, in an amount that the department shall establish, and as it may from time to time amend, sufficient to support the department's costs in ensuring compliance with and enforcing prevailing wage requirements on the project, and labor compliance enforcement as set forth in subdivision (b) of Section 1771.55 of the Labor Code. All fees collected pursuant to this subdivision shall be deposited in the State Public Works Enforcement Fund, created by 1771.3 of the Labor Code, and shall be used only for enforcement of prevailing wage requirements on those projects.

(c) The Department of Industrial Relations may waive the fee set forth in subdivision (b) for a transportation entity that has previously been granted approval by the director to initiate and operate a labor compliance program on its projects, and that requests to continue to operate the labor compliance program on its projects in lieu of labor compliance by the department pursuant to subdivision (b) of Section 1771.55 of the Labor Code. This fee shall not be waived for a transportation entity that contracts with a third party to initiate and enforce labor compliance programs on the transportation entity's projects.

6805. The procurement process for the design-build projects shall progress as follows:

(a) The transportation entity shall prepare a set of documents setting forth the scope and estimated price of the project. The documents 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, workmanship, preliminary plans, and any other information deemed necessary to describe adequately the transportation entity's needs. The performance specifications and any plans shall be prepared by a design professional who is duly licensed and registered in California.

(b) Based on the documents prepared as described in subdivision (a), the transportation entity shall prepare a request for proposals that invites interested parties to submit competitive sealed proposals in the manner prescribed by the transportation entity. The request for proposals shall include, but need not be limited to, the following elements:

(1) Identification of the basic scope and needs of the project or contract, the estimated cost of the project, the methodology that will be used by the transportation entity to evaluate proposals, whether the contract will be awarded on the basis of the lowest responsible bid or on best value, and any other information deemed necessary by the transportation entity to inform interested parties of the contracting opportunity.

(2) Significant factors that the transportation entity reasonably expects to consider in evaluating proposals, including, but not limited to, cost or price and all nonprice-related factors.

(3) The relative importance or the weight assigned to each of the factors identified in the request for proposals.

(4) For transportation entities authorized to utilize best value as a selection method, the transportation entity reserves the right to request proposal revisions and hold discussions and negotiations with responsive bidders and shall so specify in the request for proposals and shall publish separately or incorporate into the request for proposals applicable rules and procedures to be observed by the transportation entity to ensure that any discussions or negotiations are conducted in good faith.

(c) Based on the documents prepared under subdivision (a), the transportation entity shall prepare and issue a request for qualifications in order to prequalify the design-build entities whose proposals shall be evaluated for final selection. The request for qualifications shall include, but need not be limited to, the following elements:

(1) Identification of the basic scope and needs of the project or contract, the expected cost range, the methodology that will be used by the transportation entity to evaluate proposals, the procedure for final selection of the design-build entity, and any other information deemed necessary by the transportation entity to inform interested parties of the contracting opportunity.

(2) (A) Significant factors that the transportation entity reasonably expects to consider in evaluating qualifications, including technical design and construction expertise, skilled labor force availability, and all other nonprice-related factors.

(B) For purposes of subparagraph (A), skilled labor force availability shall be determined by the existence of an agreement with a registered apprenticeship program, approved by the California Apprenticeship Council, that has graduated at least one apprentice in each of the preceding five years. This graduation requirement shall not apply to programs providing apprenticeship training for any craft that was first deemed by the Department of Labor and the Department of Industrial Relations to be an apprenticeable craft within the five years prior to the effective date of this article.

(3) A standard form request for statements of qualifications prepared by the transportation entity. In preparing the standard form, the transportation entity may consult with the construction industry, the building trades and surety industry, and other public agencies interested in using the authorization provided by this chapter. The standard form shall require information including, but not limited to, all of the following:

(A) If the design-build entity is a partnership, limited partnership, joint venture, or other association, a listing of all of the partners, general partners, or association members known at the time of statement of qualification submission who will participate in the design-build contract.

(B) Evidence that the members of the design-build entity have completed, or demonstrated the experience, competency, capability, and capacity to complete projects 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 assures the transportation entity that the design-build entity has the capacity to complete the project.

(C) 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.

(D) Evidence that establishes that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance.

(E) Information concerning workers' compensation experience history and a worker safety program.

(F) A full disclosure regarding all of the following that are applicable:

(i) 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), settled against any member of the design-build entity.

(ii) Any debarment, disqualification, or removal from a federal, state, or local government public works project.

(iii) Any instance where the design-build entity, 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.

(iv) Any instance where the design-build entity, or its owners, officers, or managing employees defaulted on a construction contract.

(v) Any violations of the Contractors' State License Law, as described in Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, including 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 settled against any member of the design-build entity.

(vi) Any bankruptcy or receivership of any member of the design-build entity, including, but not limited to, information concerning any work completed by a surety.

(vii) Any settled adverse claims, disputes, or lawsuits between the owner of a public works project and any member of the design-build entity 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.

(G) If the proposed design-build entity is a partnership, limited partnership, joint-venture, or other association, a copy of the organizational documents or agreement committing to form the organization, and a statement that all general partners, joint venture members, or other association members agree to be fully liable for the performance under the design-build contract.

(H) An acceptable safety record. A bidder's safety record shall be deemed acceptable if its experience modification rate for the most recent three-year period is an average of 1.00 or less, and its average total recordable injury/illness rate and average lost work rate for the most recent three-year period does not exceed the applicable statistical standards for its business category or if the bidder is a party to an alternative dispute resolution system as provided for in Section 3201.5 of the Labor Code.

(4) The information required under this subdivision shall be verified under oath by the design-build entity and its members in the manner in which civil pleadings in civil actions are verified. Information required under this subdivision that is not a public record under the California Public Records Act, as described in Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code, shall not be open to public inspection.

(d) For those projects utilizing low bid as the final selection method, the competitive bidding process shall result in lump-sum bids by the prequalified design-build entities. Awards shall be made to the lowest responsible bidder.

(e) For those projects utilizing best value as a selection method, the design-build competition shall progress as follows:

(1) Competitive proposals shall be evaluated by using only the criteria and selection procedures specifically identified in the request for proposals. However, the following minimum factors shall be weighted as deemed appropriate by the contracting transportation entity:

- (A) Price.
- (B) Technical design and construction expertise.
- (C) Life-cycle costs over 15 years or more.

(2) Pursuant to subdivision (b), the transportation entity may hold discussions or negotiations with responsive bidders using the process articulated in the transportation entity's request for proposals.

(3) When the evaluation is complete, the top three responsive bidders shall be ranked sequentially based on a determination of value provided.

(4) The award of the contract shall be made to the responsible bidder whose proposal is determined by the transportation entity to have offered the best value to the public.

(5) Notwithstanding any other provision of this code, upon issuance of a contract award, the transportation entity shall publicly announce its award, identifying the contractor to whom the award is made, along with a written decision supporting its contract award and stating the basis of the award. The notice of award shall also include the transportation entity's second- and third-ranked design-build entities.

(6) The written decision supporting the transportation entity's contract award, described in paragraph (5), and the contract file shall provide sufficient information to satisfy an external audit.

6806. (a) The design-build entity shall provide payment and performance bonds for the project in the form and in the amount required by the transportation entity, and issued by a California admitted surety. In no case shall the amount of the payment bond be less than the amount of the performance bond.

(b) The design-build contract shall require errors and omissions insurance coverage for the design elements of the project.

(c) The commission shall develop a standard form of payment and performance bond. In developing the bond form, the commission shall consult with entities authorized to use the design-build procurement method under this chapter and with representatives of the surety industry to achieve a bond form that is consistent with surety industry standards and practices, while protecting the public interest.

6807. (a) The transportation entity, in each design-build request for proposals, may identify specific types of subcontractors that must be included in the design-build entity statement of qualifications and proposal. All construction subcontractors that are identified in the proposal shall be afforded all the protections of Chapter 4 (commencing with Section 4100) of Part 1 of Division 2.

(b) In awarding subcontracts not listed in the request for proposals, the design-build entity shall do all of the following:

(1) Provide public notice of availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the transportation entity.

(2) Provide a fixed date and time on which the subcontracted work will be awarded.

(3) Establish reasonable qualification criteria and standards.

(4) Provide that the subcontracted construction work shall be awarded either on a best value basis or to the lowest responsible bidder. For construction work awarded on a best value basis, the design-build entity shall evaluate all bids utilizing the factors described in paragraph (1) of subdivision (e) of Section 6805, and shall award the contract to the bidder determined by the design-build entity to have offered the best value.

(c) Subcontractors awarded subcontracts under this chapter shall be afforded all the protections of Chapter 4 (commencing with Section 4100) of Part 1 of Division 2.

6808. (a) Notwithstanding any other provision of this chapter, for a project authorized under subdivision (b) of Section 6802, 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 quality of materials, equipment, and workmanship, preliminary plans, and any other information deemed necessary to described adequately the needs of the transportation entity.

(b) The department may use department employees or consultants to perform the services described in subdivision (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.

6809. Nothing in this chapter affects, expands, alters, or limits any rights or remedies otherwise available at law.

6811. (a) Not later than June 30 of each year after the design-build contract is awarded, the awarding transportation entity shall submit a progress report to the commission. The progress report shall include, but shall not be limited to, all of the following information:

- (1) A description of the project.
- (2) The design-build entity that was awarded the project.
- (3) The estimated and actual costs of the project.
- (4) The estimated and actual schedule for project completion.
- (5) A description of any written protests concerning any aspect of the solicitation, bid, proposal, or award of the design-build project, including, but not limited to, the resolution of the protests.
- (6) An assessment of the prequalification process and criteria utilized under this chapter.
- (7) A description of the labor compliance program required under Section 6804 and an assessment of the impact of this requirement on a project.
- (8) A description of the method used to evaluate the bid, including the weighting of each factor and an assessment of the impact of this requirement on a project.
- (9) A description of any challenges or unexpected problems that arose during the construction of the project and a description of the solutions that were considered and ultimately implemented to address those challenges and problems.
- (10) Recommendations to improve the design-build process of construction procurement authorized under this chapter.

(b) The commission shall submit an annual report to the Legislature that includes the information provided pursuant to subdivision (a).

6812. The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

6813. This chapter shall remain in effect only until January 1, 2014, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2014, deletes or extends that date.

SEC. 5. Section 143 of the Streets and Highways Code is amended to read:

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.

SEC. 6. (a) Notwithstanding any other provision of law, the peer review committee established pursuant to subdivision (d) of Section 6803 of the Public Contract Code shall continue to operate until it has fulfilled the reporting requirements of this section.

(b) The committee shall conduct an evaluation of all transportation projects using the design-build method of construction procurement authorized under Chapter 6.5 (commencing with Section 6800) of Part 1 of Division 2 of the Public Contract Code.

(c) The evaluation pursuant to subdivision (b) shall examine the procurement method, comparing those projects using low bid and best value, and shall consider whether the projects were on time and on budget. The evaluation shall also compare the design-build projects to similar transportation projects that used the design-bid-build method of construction procurement.

(d) (1) The California Transportation Commission shall submit a midterm report of its findings to the Legislature no later than June 30, 2012.

(2) The California Transportation Commission shall submit a final report of its findings to the Legislature no later than June 30, 2015.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

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