# Memorandum

**To:** CHAIR AND COMMISSIONERS

**CTC Meeting:** August 17-18, 2016

**Reference No.:** 2.5e.(3)
Action

**From:** SUSAN BRANSEN
Executive Director

**Subject:** **SUPPLEMENTAL FUNDS REQUEST FOR THE PRESIDIO PARKWAY PROJECT TO SETTLE OUTSTANDING DEVELOPER CLAIMS & STATE CONTRACT OBLIGATIONS AND THE REMOVAL OF PRESIDIO TRUST LANDSCAPE WORK FROM THE DEVELOPER'S SCOPE OF WORK**

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## ISSUE:

Should the Commission approve an allocation of supplemental funds totaling $91.1 million requested by the California Department of Transportation (Caltrans) and San Francisco County Transportation Authority (SFCTA) to satisfy outstanding claims filed by Golden Link Concessionaire LLC (developer) and other state contract obligations related to the Presidio Parkway Project? In addition, should the Commission approve the Caltrans and SFCTA request to remove remaining Presidio Trust Landscape Work from the developer's project scope of work for Caltrans to deliver as a future landscape project?

## RECOMMENDATION:

Staff recommends that the Commission approve the $91.1 million supplemental funds request for the Presidio Parkway Project to settle all known developer claims and State contract obligations subject to Federal Highway Administration approval of the costs for Federal reimbursement at the customary federal/state cost sharing percentages. In addition, staff recommends that the Commission approve the landscape scope modification requested under the following conditions: 1) The Presidio Trust Landscape Work remains a Presidio Parkway Project commitment and is not a State Highway Operation and Protection Program (SHOPP) commitment; 2) Caltrans submits the Presidio Trust Landscape Work for Commission consideration and approval once the scope, cost and schedule for the work is finalized with the Presidio Trust; and 3) Caltrans submits to the Commission a future Presidio Parkway Project supplemental funds request for the Presidio Trust Landscape Work when funds are required to fund the landscape work. Finally, staff recommends that a proportional share of all Presidio Parkway Project supplemental allocations be charged against future San Francisco County, State Transportation Improvement Program (STIP) shares per the Commission-approved STIP Guidelines.

**BACKGROUND:**

The Commission approved Phase II of the Presidio Parkway Project (project) for public-private partnership (P3) procurement with a preliminary $1.4 billion budget in May 2010 at the request of Caltrans and SFCTA. The project achieved "commercial close" in January 2011 and "financial close" in June 2012. With refined post "financial close" estimates, Caltrans at the June 2013 meeting presented the following revised $1.08 billion project funding plan that was approved by the Commission:

**Revised Commission Approved Presidio Parkway Phase II Funding Plan**

| *Funding Type* | *Milestone Payment* | *TIFIA Short Term Payment* | *Risk Reserve* | *Transaction Costs* | *Availability Payments* | *Total* |
|---|---|---|---|---|---|---|
| | | | | | | |
| GG Bridge District | | $75.00 M | | | | $75.00 M |
| Marin - STIP | $4.00 M | | | | | $4.00 M |
| Sonoma - STIP | $1.00 M | | | | | $1.00 M |
| TIGER - Regional Share | $46.00 M | | | | | $46.00 M |
| **Subtotal Regional** | **$51.00 M** | **$75.00 M** | **$0.00 M** | **$0.00 M** | **$0.00 M** | **$126.00 M** |
| | | | | | | |
| SFCTA - Prop K | $4.39 M | $16.00 M | | $15.57 M | | $35.96 M |
| SFCTA - STIP | $67.00 M | | | | | $67.00 M |
| SFCTA - SLPP | $19.36 M | | | | | $19.36 M |
| SFCTA - MTC Loan | $34.00 M | | | | | $34.00 M |
| **Subtotal SFCTA** | **$124.75 M** | **$16.00 M** | **$0.00 M** | **$15.57 M** | **$0.00 M** | **$156.32 M** |
| | | | | | | |
| State - SHOPP | $9.68 M | | $36.84 M | $15.99 M | | $62.51 M |
| State - SHA | | | | $19.21 M | $716.50 M | $735.71 M |
| **Subtotal State** | **$9.68 M** | **$0.00 M** | **$36.84 M** | **$35.20 M** | **$716.50 M** | **$798.22 M** |
| | | | | | | |
| **Total Cost (June 2012)** | **$185.43 M** | **$91.00 M** | **$36.84 M** | **$50.77 M** | **$716.50 M** | **$1,080.54 M** |

As project construction proceeded, Caltrans requested Commission allocations from the $36.84 million project risk reserve to cover unanticipated costs. By May 2015, the risk reserve was fully allocated by the Commission. In June 2016, the Commission allocated $29 million in supplemental funds from the State Highway Account to pay for Caltrans-ordered changes to the project.

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**Proposed Settlement**

The current $91.1 million supplemental request is based on a proposed settlement with the developer intended to resolve all known outstanding disputes and claims. The developer claims in excess of $225 million in costs. According to Caltrans, the claims are primarily due to Presidio Trust permit approval delays and mandates of extra work beyond the specified work set forth in the January 2011, P3 contractual agreement (P3 agreement) between Caltrans and the developer.

The P3 agreement allows for "relief events" that occur and are outside the developer's reasonable control. In the event of certain relief events, Caltrans agreed in the P3 agreement to compensate the developer for the event costs. The developer filed 47 claims, which have a mix of entitlements for relief and disagreements with Caltrans' interpretation of administrative and technical P3 agreement provisions. Twenty-four of the claims have been either resolved or withdrawn by the developer. The remaining 23 claims would be resolved by the proposed settlement at a cost to the State of $91.1 million.

Staff discussed the supplemental funds request with Caltrans and reviewed Caltrans-provided materials including the P3 agreement. Based on these discussions, and a review of the documentation provided, the proposed settlement appears to be in the best interest of the State. Litigating the developer claims will likely expose the State to substantial court costs and increase the possibility for a larger payout than the proposed settlement agreement.

Even with this settlement, the Commission should be aware that in addition to the supplemental funds request forthcoming for the Presidio Trust Landscape Work, other unknown claims may arise requiring more funds from the State Highway Account, as the developer must complete work before project "final acceptance" is achieved and must operate and maintain the project for the next 30 years.

**Presidio Trust Landscape Work**

According to Caltrans, final Presidio Trust landscape requirements and criteria were unknown at the time the P3 agreement was executed with the developer (and remain unknown). Therefore, the P3 agreement set forth a shared landscape cost formula between the State and the developer. In essence, the developer is responsible for the cost of the first $18 million in project landscape requirements and the State assumes responsibility for landscape costs in excess of $18 million. Irrespective of the cost sharing formula, under the P3 agreement the developer is required to perform all landscape work, but Caltrans must compensate the developer for any costs over $18 million. Caltrans is now proposing that the project landscape work be separated into landscape work within the State's operational right-of-way and landscape work in areas to be returned to Presidio Trust control after project final acceptance. Specifically, as a part of the settlement agreement, Caltrans is requesting that the developer be relieved of the contractual requirement to perform landscape work in areas that will return to Presidio Trust control, but is required to finish the landscape work within the State's operational right-of-way.

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Since the settlement agreement relieves the developer of all landscape work in areas that will return to Presidio Trust control for future Caltrans delivery of the work, it is important that the Commission retain review and approval over that work. The landscape work is to remain a Presidio Parkway Project commitment and is not to be treated as a SHOPP commitment by Caltrans. Once the scope, cost and schedule of the Caltrans landscape work is finalized with the Presidio Trust, that scope and cost is subject to Commission review. Funds for the landscape work will be allocated by the Commission as a future Presidio Parkway Project supplemental funds allocation.

**STIP Guidelines**

Caltrans and SFCTA entered into a funding agreement on May 25, 2012, and a Cooperative Agreement on January 1, 2010. The May 25, 2012, Funding Agreement Article 5.9 states – "All rights and remedies provided in this Agreement are *cumulative and not exclusive of any other rights or remedies* that may be available to the parties, whether provided by law, equity, statute, *in any other agreement between the parties* or otherwise." Emphasis added.

The "other agreement between the parties" would include the January 1, 2010 Public-Private Partnership Cooperative Agreement between Caltrans and SFCTA where Article 2.7 states – "PARTNERS accept equal obligation to secure any additional funds, beyond those committed in this Agreement, necessary to complete the PROJECT."

The Commission is not a party to the January 1, 2010 Cooperative Agreement or the May 25, 2012 Funding Agreement. Therefore, the Commission is not in a position to enforce the provisions of these agreements. If Caltrans wants to enforce the provisions of the agreements, it is Caltrans' prerogative. The Commission can only enforce the provisions of its own STIP Guidelines.

STIP Guideline Article 49 states – "In the absence of an alternative cost sharing arrangement *approved by the Commission at the time of allocation*, project costs, including increases and savings, *will be apportioned in the same percentage as programmed*." Emphasis added.

In June 2013, the Commission approved the $1.08 billion Presidio Parkway Phase II funding plan. San Francisco County's overall contribution was $156.3 million (with $67 million coming from the STIP). In addition, SFCTA was responsible for securing $80 million in contributions from the Golden Gate Bridge District, Marin County and Sonoma County. After approving the financial plan, the Commission allocated the $67 million in San Francisco County STIP funds. At the time of STIP allocation to the Presidio Parkway Project the Commission was not asked to nor did it approve an alternative cost sharing arrangement. Therefore, consistent with STIP Guidelines, when supplemental funds are allocated to complete the Presidio Project, San Francisco County shares will be apportioned in the same percentage as programmed.

Staff appreciates SFCTA's proposal to provide $2 million in Proposition K local transportation sales tax funds in exchange for the Commission's agreement that: 1) this satisfies SFCTA's obligations under the May 25, 2012 Funding Agreement, and 2) no further San Francisco County

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STIP share contributions are required for settlement of outstanding claims. However, even if this proposed alternate cost sharing arrangement is acceptable to Caltrans, the proposal does not comply with STIP Guidelines. Per STIP Guideline Article 49, an alternative cost sharing arrangement must be approved by the Commission at the time of allocation and cannot be approved after allocation. In addition, as stated above, the Commission is not a party to the May 25, 2012 Funding Agreement.

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