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**

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.

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.

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

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.

State of California
DEPARTMENT OF TRANSPORTATION

California State Transportation Agency

Tab 55

M e m o r a n d u m

To: CHAIR AND COMMISSIONERS
CALIFORNIA TRANSPORTATION COMMISSION

CTC Meeting: August 17-18, 2016

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

From: NORMA ORTEGA
Chief Financial Officer

Prepared by: Nizar Melehani
Acting, P3 Program Manager
Planning and Modal

Subject: SUPPLEMENTAL FUNDS FOR PRESIDIO PARKWAY P3 PROJECT RESOLUTION FA-16-03

RECOMMENDATION:

The California Department of Transportation (Department) and the San Francisco County Transportation Agency (SFCTA), joint partners on the Presidio Parkway Public-Private Partnership (P3) Project (Project), recommend that the California Transportation Commission (Commission) allocate $91.1 Million in supplemental funds for Project expenses.

ISSUE:

This supplemental allocation addresses two categories of Project expenses identified below:

- Proposed Settlement: The Department, SFCTA, and Golden Link Concessionaire, LLC (Developer) have been working diligently to resolve, in a global settlement, certain outstanding potential disputes at the lowest possible cost and in the best interests of the State, the Project, and the parties. The total amount of claims made by the Developer are in excess of $225 million. The proposed settlement of $90.1 million, includes final resolution of remaining outstanding potential disputes between the parties. The settlement would include the dismissal of pending litigation commenced by the Developer on July 20, 2015 in the Superior Court for the State of California, County of San Francisco (*Golden Link Concessionaire LLC v. State of California Dept. of Transportation* Case No. CGC-15-546962) with prejudice.
- Contract Obligations: The Department's request for Supplemental Funds also includes contractual obligations and related costs associated with the landscaping allowance work, hazardous materials management, and owner-controlled insurance of $1 million.

BACKGROUND:

Unlike traditional project delivery methods, such as Design-Bid-Build, the P3 was structured on the premise that the Developer will secure independent financing and will finance the design and construction of the Project. As set out by the FHWA in the table below, the risks appropriately transferred in a P3 project are unique to the project type and delivery methods utilized.

Risk	Traditional (DBB)	Presidio Parkway P3 (DBFOM)
Change in Law	Public	Public
Change in Scope	Public	Public
Construction	Private	Private
Design	Public	Private
Final Acceptance	Public	Private
Financing	Public	Private
Force Majeure	Public	Shared
Ground Conditions	Public	Private
Hazardous Materials	Public	Shared
Independent Verification/Validation	Public	Public
Landscaping	Public	Shared
NEPA Approvals	Public	Public
O&M	Public	Private
Permits	Public	Shared
Quality Assurance/Quality Control	Public	Private
Right of Way	Public	Shared
Security	Public	Shared
Utilities	Public	Shared

Under a Design-Build-Finance-Operate-Maintain (DBFOM) P3 model such as this Project, the responsibilities for designing, building, financing, operating and maintaining a project are bundled together and transferred to or shared with private sector partners. However, even in this model there are some responsibilities -or risks - that are better managed by the owner and are therefore kept by the owner. In determining which risks are to be transferred to the private sector, the owner must first determine who is in a better position to manage the particular risk. Transferring too little risk to the private sector would negate the benefits of partnering. Alternatively, transferring too much risk, such as a risk that the private sector is unable to manage, would result in high-risk premiums, likely making the project cost prohibitive. In identifying and allocating risk appropriately, best practices dictates that if a risk is difficult to assess or manage, it may be appropriate to share it between the public and private sectors.

Project Overview

The Project is located in the City and County of San Francisco on Doyle Drive (State Route 101) and Richardson Avenue from Lombard Street to the Golden Gate Bridge Toll Plaza. The Project replaced the structurally deficient roadway built in 1936, serving as the southern access to the Golden Gate Bridge connecting Marin and San Francisco counties and providing a major regional traffic link between the Peninsula and North Bay Area counties. The Project posed several significant challenges that included: the need to keep the existing roadway open to traffic during construction; participation of four federal agencies with overlapping jurisdictions; construction within an environmentally sensitive National Park, with the requisite permitting processes; and operation and maintenance of bridge and tunnel structures with technological challenges. Furthermore, the Department was required to negotiate a Right of Entry (ROE) Agreement with the Presidio Trust (the landowner) and the SFCTA for access to the land on which the Project was being built, for the right to construct the Project on Presidio Trust property.

In May 2010, the Commission approved an original $1,401.79 million budget for the Presidio Parkway P3 Project. In January 2011, after submission of the Project to the Legislature for a mandatory review, the Department, in cooperation with the SFCTA, reached commercial close and executed the P3 Agreement with the Developer. Under the terms of the P3 Agreement, the Developer had the obligation to design, build, finance, operate and maintain the Project.

Project Funding

In addition to funding from the Federal Highway Administration (FHWA), the Project is funded from 12 funding sources by two public sponsors. The Department and the SFCTA entered into a Cooperative Agreement in January 1, 2010 that stated:

> *Partners are FUNDING PARTNERS for this Agreement…Should PARTNERS determine that the PROJECT costs will exceed amounts identified within the FUNDING SUMMARY, PARTNERS accept equal obligation to secure any additional funds, beyond, those committed in this Agreement, necessary to complete the PROJECT.*

The May 25, 2012 Funding Agreement between the Department and SFCTA modified the project funding to state:

> *Should State and Authority hereafter mutually agree that Project Costs, (sic) will exceed amounts identified within the Funding Summary, State and Authority agree to cooperate to seek to secure any additional funds, beyond those committed in this Agreement, that are necessary to complete the project.*

In June 2012, after a rigorous initial project debt competition and financing through the Transportation Infrastructure Finance Investment Act (TIFIA) loan program, the Developer reached financial close. Subsequently, in June 2013, the Commission approved a revised $1,080.54 million budget. In June 2016, the Commission added $29 million to pay for Department ordered changes to the project.

Contract Documents

There are three volumes of documents that make up the Contract Documents for the Project: Volume I is the P3 Agreement; Volume II details the Technical Requirements; and Volume III is the Manuals and Guidelines.

Project Milestones

The P3 Agreement sets forth two major milestones which must be achieved by the Developer. First is Substantial Completion, which means the Project is open to traffic and complete except for certain improvements and punch list items. The Substantial Completion date, September 24, 2015, was a commitment made by the Developer in its proposal and memorialized in the First Amendment to the P3 Agreement. While the contractual Substantial Completion was set for September 24, 2015, through innovative staging and scheduling, the Developer was able to open the facility to traffic, one component of Substantial Completion, on July 13, 2015, almost three months in advance of the required date, leaving just punch list items to be completed by the contractual Substantial Completion date. This was a major milestone which entitled the Developer to receive the Milestone Payment totaling $187 million. Achieving Substantial Completion also entitled the Developer to partial quarterly installments of the Availability Payments (AP) for the maintenance and operation of the Project.

Final Acceptance is the second major milestone which is also set in the First Amendment to the P3 Agreement. It requires completion of all improvements and punch list items, including landscaping, local street improvements, and clearance and restoration of construction areas to their original condition. Because of delays on the Project, a new date for Final Acceptance is being discussed by the Parties.

Pending Litigation

Litigation for declaratory relief was commenced by the Developer on July 20, 2015 in the Superior Court for the State of California, County of San Francisco (*Golden Link Concessionaire LLC v. State of California Dept. of Transportation* Case No. CGC-15-546962). The parties agreed to stay the litigation to allow the parties to engage in negotiations. Those negotiations have resulted in the proposed settlement. Upon approval of the funding for the proposed settlement, the litigation will be dismissed with prejudice, prohibiting the Developer from filing another lawsuit on the same issues, and both parties will bear their own costs and fees.

BASIS FOR SUPPLEMENTAL FUNDS

A. Proposed Settlement

The proposed settlement is intended to resolve all outstanding potential disputes between the Parties for which the Developer is contractually entitled to "relief" for cost and/or time and for matters for which the Parties have disagreements specific to interpretation of administrative, technical, or legal terms and conditions of the P3 Agreement. Article 9 of the P3 Agreement covers both the process for the Developer filing potential claims and the process by which the Developer seeks compensation for specified Relief Events. While the process for the filing of the "potential dispute" is the same, it is important to distinguish between the two.

The P3 Agreement permits the Developer to seek relief and the Department is required to compensate the Developer for events that occur and are outside the Developer's reasonable control. Notwithstanding the foregoing, a "Relief Event" excludes any event or circumstance to the extent caused by the negligence, willful misconduct, breach of contract, or violation of law or Governmental Approval by the Developer or any Developer-related entity. The rationale behind providing "relief" to a Developer for unknowns is that regardless of the due diligence exercised by the Developer it is unreasonable to transfer such risk to the Developer. The P3 Agreement (Appendix 1) includes 23 specified events for which the Developer is entitled to relief in the form of either cost and/or time. Each Relief Event has a corresponding deductible which must be met before the Department will compensate the Developer. Such examples of Relief Events include but are not limited to the following:

- Uncontrollable occurrences like *force majeure* events;
- Changes in law or project criteria that were not known to the Developer and in some cases the Department;
- Department Changes;
- Department's failure to perform or observe any material covenants or obligations under the P3 Agreement or other Contract Documents;
- Department-Caused Delay.

Pursuant to the P3 Agreement, the Developer may file potential claims if it believes it is entitled to costs based on delays or extra work, extensions of time, for work it believes it is not required to perform under the Contract Documents. This is an essential process to allow the Department to be alerted by the Developer of the possibility of a claim for additional time or money and is an expected part of the project. Throughout the course of the Project, the Developer has filed several potential claims based on interpretation of design standards and administrative matters, some of which have been previously resolved, the remainder of which are being resolved in the proposed settlement between the parties. Furthermore, for any potential claims not resolved during the life of the contract, the parties can file litigation after Final Acceptance of the Project.

The Developer filed 47 notices of potential claims, which have been a mix of entitlements for Relief Events and those which are based on disagreement with the Department's interpretation of administrative and technical provisions in the Contract Documents. Of the 47 potential claims which have been filed, 24 of these have either been withdrawn or resolved. The remaining 23 potential claims filed by the Developer are being resolved by the Parties. Identified below are three categories of Relief Events, for which the Developer is contractually entitled to compensation, and a listing of disputes related to interpretation of technical and administrative provisions in the Contract Document. Dollar values listed with each item are the Developer's full claimed amount, all of which will be resolved under the proposed settlement. Total claims exceed $225 million.

Relief Event 1 - Certain delays in Department's acquisition of Right of Way, and the lack or loss of Department's continued rights in Right of Way;

The Presidio Trust is the "landowner" and a ROE Agreement has been executed allowing the Department and its Developer to design and construct the Project. Under the P3 Agreement, Presidio Trust is a Governmental Entity within whose jurisdiction the Developer is required to perform the design and construction activities necessary to complete the Project. The Developer's entitlement is based on the Presidio Trust limiting the continued rights of the Department, and its Developer, to design and build the Project within the Right of Way. The following Developer claims could be Relief Events under the terms of the P3 Agreement.

1. Vegetation Preservation Plan (VPP) ($716,958): The Developer claims even after the Department provided a conditional approval of the VPP and the Treatment Oversight Panel (TOP) had no further comments on the VPP, the Presidio Trust provided specific comments on the VPP and requested that the Presidio Trust's Technical Requirements for Forested Areas be incorporated as a standard for the Work.

2. Presidio Trust (PT) Geotechnical Criteria ($22,040,094): The Developer claims the Presidio Trust requested the implementation of their newly developed geotechnical and seismic criteria. The Trust has generated these criteria to be utilized for the design and construction of several features on the Presidio Parkway Project. The Developer claims these requirements are not in conformance with the Contract Documents and were developed after the Developer's designs had reached the Release for Construction stage.

3. Design Changes due to the Quartermaster Reach (QMR) Wetland Restoration Project ($1,320,227): The Presidio Trust has an ongoing, adjacent project entitled Quartermaster Reach (QMR) wetland restoration project and issued criteria for the design of the Tennessee Hollow and Girard bridge foundations within the QMR restoration project, after the Project had been awarded to the Developer.

4. Swords to Plowshares Parking Lot ($1,358,020)**:** The Developer claims the Presidio Trust required a complete replacement of the Swords to Plowshares parking lot, including but not limited to moving the parking lot further to the south and constructing new retaining walls, access, drainage, and landscaping for work that is not within the scope of the Contract Documents.

5. Gorgas Avenue/Richardson Avenue Intersection Design and Traffic Studies ($536,767): The Developer claims the Presidio Trust demanded the Developer perform design development and analysis for various options along Gorgas at the Richardson intersection that was not required under the Contract Document.

6. Main Post Tunnel (MPT) Substation Power ($312,376): The Developer claims that a lack of coordination between the Department and PG&E to provide a utility line to the MPT substation impacted the sequence of activities that must occur after the line is installed and has caused a delay.

7. Main Post Tunnel Substation Location ($5,640,00): The location for the Main Post Tunnel Substation was defined by the Contract Documents to be placed at the midpoint of the Northbound Main Post Tunnel. The Developer's conceptual design package for the Main Post Tunnel included the substation designed at the location shown in the Contract Documents. According to the Developer, the Presidio Trust was not in agreement with the location as shown.

Relief Event 2 -Department failure to perform or observe any of its material covenants or obligations under the Agreement or other Contract Documents;

The P3 Agreement transferred the risk of working with and seeking permits from Governmental Entities, including the Presidio Trust and permitting agencies like the Regional Water Quality Control Board (RWQCB) to the Developer, however this is a shared Department-Developer risk. The Department's obligations under P3 Agreement Section 3.2.3 outline the shared obligation in providing assistance and cooperation to the Developer in securing such permits. The Developer is expected to have been diligent in preparing the necessary documentation to receive the requested permits from the Presidio Trust. But in some cases, despite the Department's intercession as required under Section 3.2.3, the delays to the Project persisted. The following Developer claims could be Relief Events under the terms of the P3 Agreement.

8. Reimbursement for Management of the Presidio Trust ($56,690,674) : The Developer claims the Presidio Trust has challenged the design authority of the design-build joint venture (DBJV) regarding the design of the Presidio Trust facilities by requesting that the DBJV provide a large amount of additional analysis, reports, and memos beyond what is defined by the Contract Documents.

9. Landscape Delays (amount unknown at this time): The Developer claims a potential delay to Final Acceptance due to the Landscape Work caused by the Presidio Trust's evolving landscape design criteria and refusal to accept the landscape design. The Developer has demanded a time extension and compensation for the Landscape Delays. The Developer is anticipating a 138-day delay.

Relief Event 3 - Delays in obtaining major permits by the applicable major permits deadline or, once obtained, the unlawful revocation or suspension of a major permit by the relevant Governmental Entity

The P3 Agreement transferred the risk of obtaining Major Permits and governmental approvals from Governmental Entities, including the Presidio Trust to the Developer. However, this is a shared

Department-Developer risk as the P3 Agreement set a reasonable timeframe within which the entity should be expected to respond to the Developer as a Major Permit Deadline under Appendix 21. The Department's obligations under P3 Agreement Section 3.2.3 again supports providing assistance and cooperation to the Developer in securing such permits. But, despite the Department's intercession as required under Section 3.2.3, the delays to the Project persisted. The following Developer claims could be Relief Events under the terms of the P3 Agreement.

10. Presidio Trust Permit Process ($27,338,000): The Developer claims the Presidio Trust has required the Developer to apply for multiple Excavation Clearance Permits (dig permits) in order to commence construction work. The Developer also claims the Presidio Trust is improperly using the permit process as an additional approval process in order to control the work and extract further scope, concessions, or construction costs from the Developer. Delays in issuance of permits by the Presidio Trust have caused significant delays to critical path work, increased efforts from multiple permit applications, and added requirements resulting in additional costs.

11. Storm Water Treatment Permit Modification ($2,542,000): The Developer claims the additional acreage, increased from 27.3 acres to 33.37 acres, requested by the Regional Water Quality Control Board (RWQCB) is more than the area available on the Project Right of Way for construction of the Best Management Practice (BMP) facilities. In addition to the revised treatment area, the RWQCB required a sizing methodology that impacted the Project's tributary area to size BMP.

Disputed Technical (Design) Determination - The potential claims below are based on a disagreement between the Parties as to the interpretation of certain design requirements and standards outlined in the Contract Documents. These interpretative design disputes are outlined below.

12. Re-Route Phase 1 Electrical and Lighting Systems ($250,000): The Developer claims re-routing of the power feeds from the substation at the MacArthur Tunnel to the substation at the Battery Tunnel for 8 street lights constructed in Phase 1 was not part of the Contract documents and is Extra Work.

13. PVC in Tunnels ($3,560,000): The Developer elected to use embedded PVC conduits. Department has stated that embedded PVC conduit may not be used in the tunnels.

14. Main Post Tunnel Redesign ($20,340,000): The Developer designed tunnels using a pin roof connection. The Department stated that a fixed connection detail was required and the Developer failed to satisfy the Department's concerns with regard to the pin connection.

15. Allowance Landscaping for Recreated Bluffs ($5,000,000): The Project Allowance Landscaping includes certain elements of work for which the Contract Documents describe an allocation of cost and risk sharing between the Developer and the Department. The Developer claims that the earthwork to recreate the historic bluffs is part of the costs of the Allowance Landscaping.

16. Battery Bluffs, Landscape Outside the Temporary Construction Easement (TCE) ($4,326,354): The Developer claims the scope of work as detailed in Volume 2, Division II, Landscaping is bound by the limits of the (TCE) secured by the Department from the Presidio Trust under the Right of Entry Agreement. Based on the Landscape Design Criteria provided by the Department, the Developer claims all landscaping identified in the criteria was bound by the (TCE) as described in the Contract Documents and no landscaping was shown outside the TCE in the area north of the Battery Tunnels at Battery Bluff. The Developer is requesting additional compensation and time extension for landscaping outside the TCE at the Battery Bluffs.
17. Multiple Use Trail (MUT) at Lyons Street ($118,731): The Developer claims the Presidio Trust has demanded that the Developer construct the connection of the MUT from Lyon Street to Gorgas Street as shown in the Architectural Criteria. The Developer also claims that this work is not part of the Contract Documents scope and this area is not within the TCE and therefore additional compensation will be due to the Developer for the new scope of work.
18. Soils Management for Planting Soils ($40,085,556): The Developer claims that the Presidio Trust requested that the Developer prepare a soils management plan for earthwork activities. The Developer complied with the Trust's request and provided numerous plans describing earthwork activities, including testing, cut to fill, off-haul and stockpiling plans. The Presidio Trust requested further iterations and additional information as each plan was provided. The Presidio Trust developed their own Supplemental Soils Management Requirements (SSMRs) for Horticultural Soil which was provided to the Department and the Developer in draft form. The Developer claims that the Presidio Trust ignored their comments on the SSMRs and proceeded to evaluate and permit certain earthwork activities based on the SSMRs which are not required under the Contract Documents and thereby imposed significant Extra Work on the Developer, resulting in additional costs.
19. Storm Drain Force Main HDPE (amount unknown at this time): The Developer used a high density polyethylene (HDPE) pipe in place of a welded steel pipe. The Department commented on the plans stating that the welded steel pipe was to be used. The Developer stated that the specifications did not require it. The Developer filed a potential claim for compensation should the Department require the replacement of the HDPE pipe with a welded steel pipe.
20. Plant Disposal and Replacement (amount unknown at this time): The Developer has been storing plants in a nursery onsite for use in the landscaping on the Project. The Department informed the Developer that as of June 2016 they would no longer be able to store plants in the nursery. The Developer filed a potential claim for the costs of removing and relocating the plants as well as for the loss of plants due to the relocation.

Disputes related to Administrative Provisions

21. Presidio Trust (PT) Service Fees ($4,000,000): During Phase 1, the Department entered into an agreement with the Presidio Trust to reimburse the Presidio Trust for the costs of their review, inspection and oversight for their facilities. The Developer was also required to enter into such an agreement with the Presidio Trust for Phase 2. The Developer claims the Contract Documents do not require the Developer to enter into such an agreement with the Presidio Trust.

22. Three Day Closure for Traffic Switch ($3,540,000): The Project required a full highway closure of US 101 from State Route I to Lombard Street in order to complete the permanent alignment for traffic. The Developer's Project Schedule originally intended for this to occur the weekend of May 15, 2015 but the Project encountered numerous impacts that caused delays, pushing the traffic switch out until July.

23. Finance Interest Charges ($23,000,000): The Developer filed a potential claim for interest charges on the financing it alleges was required to pay for work required pursuant to other potential claims.

B. Contractual Obligations - The Department's request for Supplemental Funds is based in part on contractual obligations and related costs associated with the landscaping allowance work, hazardous materials management, and owner-controlled insurance. Each is discussed in more detail below.

Landscaping Allowance Work

At the time of the execution of the P3 Agreement, final landscaping requirements and criteria of the Presidio Trust were not yet known to the Department or the Developer. Accordingly, Article 4.12.2 of the P3 Agreement, sets forth the shared cost of designing and constructing landscaping equitably between the parties as follows:

- Developer would bear the cost of landscaping up to $12 million.
- Department would receive 85% of savings in landscaping costs below $12 million.
- Department and Developer would each bear 50% of landscaping costs in excess of $12 million but less than or equal to $24 million (a total risk of $18 million for the Developer.)
- Department would bear 100% of landscaping costs in excess of $24 million.

The landscaping allowance work is a shared Department-Developer risk under the P3 Agreement and is separated into landscaping work returned to the Presidio Trust (Presidio Trust Landscaping Work) and landscaping work and associated soil improvements within the State's right of way per the Contract Documents (ROW Landscaping Work). Irrespective of the shared cost of designing and constructing landscaping, under the P3 Agreement the Developer was required to perform all landscaping work and all costs above $24 million were the responsibility of the Department.

In light of the significant landscaping delays already experienced by the Developer related to the Presidio Trust, the parties have agreed that the Developer will complete the remaining ROW Landscaping Work. The parties anticipate that the final costs for the remaining ROW Landscaping Work will be less than the Developer's $18 million share and the Department should receive a credit for that amount. Currently the credit back to the State is anticipated to be approximately $1.2 million. The remaining Presidio Trust Landscaping Work will be removed from the Developer's scope and will be delivered separately from the P3 Project. The Department's reasoning for removing the Presidio Trust Landscaping Work is that since the Department is solely responsible for all landscaping work above $24 million, it is in the best interest of the State to issue a deductive scope of work for the Presidio Trust Landscaping Work in order to more efficiently manage and complete the work.

Regarding the remaining Presidio Trust Landscaping Work, the Department is currently working with the Presidio Trust and other stakeholders to finalize the scope and the costs of the landscaping within the Presidio Trust's right of way. The Department is working with the SFCTA and the Presidio Trust for participation in funding and completing the Presidio Trust Landscaping Work. While it is undetermined how much the Presidio Trust might contribute, the SFCTA intends on committing up to $2 million, pending governing board action. This is consistent with the Funding Agreement dated May 25, 2012 wherein the Department and SFCTA agreed to cooperate to seek to secure any additional funds necessary to complete the Project.

The parties will memorialize the details of the deductive scope of work related to the Presidio Trust Landscaping Work and ROW Landscaping Work in an amendment to the P3 Agreement.

Hazardous Materials

Pursuant to the Hazardous Materials provisions of the P3 Agreement (Section 4.10) the Developer is responsible for the management, handling and remediation of Hazardous Materials. The costs for off-site disposal of Hazardous Materials that exist in the Project Right of Way at any time during construction, including those that migrate from elsewhere into the Project Right of Way after a certain point in time (Pre-Existing Hazardous Materials), are a shared Department-Developer risk and are contractually allocated as follows:

- Developer is responsible for the costs for the first 9,450 cubic yards of excavated soils contaminated with Pre-existing Hazardous Materials that must be disposed of at a Class 1 disposal facility, and the first 53,550 cubic yards of excavated soils contaminated with Pre-existing Hazardous Materials that can be disposed of at a Class 2 disposal facility.
- Department and Developer shall each be responsible for 50% of the costs for the next 1,890 cubic yards of Class 1 Pre-existing Hazardous Materials that must be disposed of at a Class 1 disposal facility, and for the next 10,710 cubic yards of Class 2 Pre-existing Hazardous Materials that can be disposed of at a Class 2 disposal facility.
- Department will pay 100% of the costs of any additional off-site disposal of Pre-existing Hazardous Materials.

The parties have agreed as part of the proposed settlement that the entire risk of the removal and disposal of Hazardous Materials will be borne by the Developer and the Department will not be required to share in the cost, regardless of whether the quantities removed exceed the amount set forth above.

The parties will memorialize the details of the costs of the Hazardous Materials now borne completely by the Developer in an amendment to the P3 Agreement.

Owner-Controlled Insurance Program

The Department set up an owner-controlled insurance program (OCIP) during project construction. It provides general liability insurance for construction activities, contractors' pollution liability insurance, and worker's compensation. Developer and all its contractors at all tiers are obligated to sign up to these coverages. Developer is required to provide insurance coverages not within the OCIP, as outlined in Appendix 9 of the P3 Agreement. The policies for which the Developer is required to provide insurance include but is not limited to Builder's Risk, Workers' Compensation, Employers' Liability Compliant with California Statute, Commercial General Liability, Commercial Automobile Liability as well as Contractors Pollution Liability.

A delay in the overall project timeline and Final Acceptance of the Project requires the extension of OCIP coverage. Based on the current changes, it is estimated that $1 million is needed for OCIP service cost for the remainder of the Project activities. The Developer will bear the costs for extension of any additional insurances for which the Developer is contractually obligated.

C. Next Steps

The proposed settlement of all outstanding potential claims has been aggressively negotiated between the Parties for the better part of a year. The Department believes that the proposed settlement of $91.1 million is fair and reasonable, given Developer claims that exceed $225 million. The alternative of rejecting the proposed settlement and proceeding with litigation will likely add to the risk of higher payouts. The complexity of the project and of the P3 contracts will contribute to an unpredictable trial outcome. The settlement avoids the risk inherent in a jury trial. If this supplemental fund request is approved, the Department and Developer will begin preparing an amendment to the P3 Agreement. As with any "Major Projects" the Department has already engaged FHWA and, based on our ongoing discussions, believes that the supplemental funds will be approved for federal reimbursement.

Because the Project is the first P3 delivered under the authority granted in SBX2 4, it will naturally be a topic of debate regarding this particular delivery method. While this supplemental funds request will no doubt figure into that conversation, useful conclusions are unlikely to emerge until a thorough post-project analysis can be conducted. A thorough examination will ultimately yield data-based conclusions about the impact of changing delivery methods after the first phase of a complex project, about limitations of risk transfer and assumptions and consequences of the level of contingency funds assigned to a project. The effects of those decisions, among others, along with the unusual complications of building without land ownership and under the oversight of a uniquely structured authorizing agency, deserve robust analysis. The Department is committed to conducting an exhaustive analysis and will publish a report on lessons learned and best practices with regards to the Project, and future P3 projects.

FINANCIAL RESOLUTION:

Resolved, that $91,100,000 be allocated from the Budget Act of 2016, Budget Act Items 2660-302-0042 and 2660-302-0890, to provide funds to complete construction on the Presidio Parkway P3 Project.

Project's Location:

RE-ENVISIONING DOYLE DRIVE

PRESIDIO PARKWAY

Public Private Partnership
Presidio Parkway Project

CTC Meeting

August 18, 2016

Caltrans FHWA

CONSTRUCTION TIMELINE & PROJECT FEATURES

PRESIDIO PARKWAY

PHASE I & PHASE II TIMELINE

Construction Overview

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Construction Overview

Main Post Tunnels

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Construction Overview

Battery Tunnels

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Construction Overview

High Viaducts at HWY 1 and 101 Interchange

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Construction Overview

HWY 101 between Main Post and Battery Tunnels

Project Update

- The Developer (GLC) reached Substantial Completion before the Contract date of September 2015
- For achieving Substantial Completion, the Developer received the $185 million Milestone Payment
- Project successfully transitioned into the Operations and Maintenance Phase

BASIS FOR SUPPLEMENTAL FUNDS

- Proposed Settlement:
  - Parties have been working to resolve outstanding potential disputes at the lowest possible cost.
  - The total amount of claims made by the GLC are in excess of $225 million.
  - The proposed settlement of $90.1 million, includes final resolution of remaining outstanding potential disputes between the parties.
  - The settlement would include the dismissal of pending litigation with prejudice.
- Contract Obligations:
  - Supplemental Funds request includes contractual obligations associated with landscaping allowance work, hazardous materials management, and owner-controlled insurance of $1 million.

BASIS FOR SUPPLEMENTAL FUNDS

Notices of Potential Claims (NOPC)

- NOPCs based on Design Criteria/Requirements
- NOPCs Based on 3rd Party Claims (Presidio Trust)
- NOPC Based on Administrative

OUTSTANDING WORK ITEMS

- Main Post Tunnel Bluff
- Parking Lots
- Drainage and Street Construction
- Grading to Subgrade on Presidio Trust Land
- Final Grade and Landscaping for US 101 ROW
- Final Grade and Landscaping Outside the ROW

PROJECT COST IMPACT

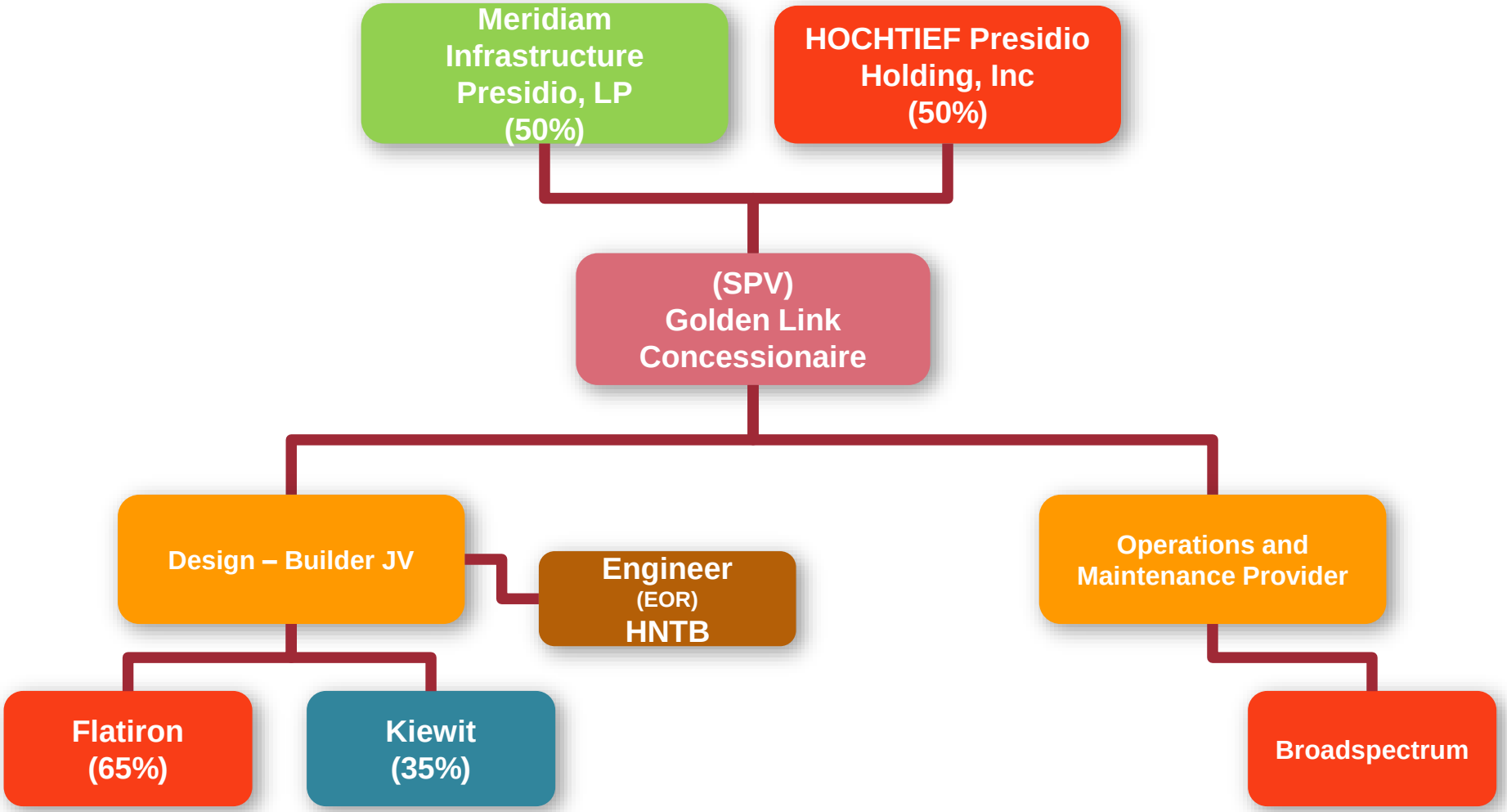
Total 30-Year Cost – Year of Expenditure (YOE) [in millions]

	Milestone Payment	TIFIA Milestone Payment	Total Availability Payments	Risk/ Transaction Cost	Additional Costs[1]	Additional Landscaping[1]	Total YOE (30-year) Cost	NPV
CTC Approved [May 2010]	$173.43	N/A	$1,131.07	$97.29	-	-	$1,401.79	$484.98
GLC's Bid [October 2010]	$173.43	N/A	$909.27	$97.29	-	-	$1,179.99	$429.10
Final GLC Cost [Financial Close] CTC Approved [June 2013]	$185.43	$91.0	$716.50	$87.61	-	-	$1,080.54	$429.20
Updated GLC Cost [Post Fund Transfer]	$185.43	$91.0	$694.48	$87.61	-	-	$1,058.52	$423.80
Updated GLC Cost [Post Fund Transfer]	$185.43	$91.0	$694.48	$87.61	$90.00	$30.00	$1,178.52	$498.20

1. Additional costs to be $55 mm on July 31 and $35 mm on Dec 31 of 2016. Additional landscaping totals $30 mm and paid in equal monthly payments from May 31 to Dec 31 2017.

CONCLUSION

- Post-project analysis will be conducted to yield data-based conclusions
- Impact of combining delivery methods of a complex project
- The assumptions and the limitations of risk transfer to the Private sector
- Limitations of risk transfer and unusual complications of building without land ownership
- Assumptions and consequences of the level of contingency funds assigned to a project

Presidio Parkway

P3 Developer: Golden Link Concessionaire, LLC