

## **Presidio Parkway Project**

### **Further Clarifications to Proposers (Issued September 23, 2010)**

**Number 04-1637U4**

#### **Financial Close Deadline Extension Provisions**

The intent of the P3 Agreement is not to provide the Sponsors with the unilateral right to extend the Financial Close Deadline if there arises an excuse from the obligation to close financing under Section 15.2.7 which is not treated as a Relief Event. While the Developer has certain limited and conditional rights to extend the Financial Close Deadline pursuant to 9.2.5.1, no unilateral extension rights are conferred on the Sponsors as a result of a Section 15.2.7 event. The Sponsors' only remedy where Section 15.2.7 applies is to terminate the P3 Agreement pursuant to 19.2.1. The P3 Agreement further provides for the possibility that the parties would agree on a mutual extension of the Financial Close Deadline as part of the negotiations that would ensue after an election to terminate under 19.2.1.

#### **Developer's Right To Terminate**

The P3 Agreement, section 15.2.7.2, will be modified to reflect that, in addition to the existing conditions which excuse the Developer's obligation to achieve Financial Close by the Financial Close Deadline, an additional condition excusing the Developer's obligation to achieve Financial Close by the Financial Close Deadline is an affirmative statement that all potential Lenders or the TIFIA JPO are not prepared to proceed to Financial Close by the Financial Close Deadline because the risk associated with the Department's ability to satisfy its obligations to pay the Milestone Payment or Availability Payments in the amounts and at the times required under the P3 Agreement is unacceptable or condition their commitments on approval of such risk of the Department's ability to pay and invoke such condition in writing on or prior to the Financial Close Deadline.

#### **Change in Law Compensation**

The intent of P3 Agreement, section 9.2.7.3 and the Change in Law definition, is to entitle the Developer to compensation for the amount of any State or local ad valorem property taxes that may be lawfully levied on the Developer's Interest. It is assumed that the exemption from such taxes under Section 143 is the existing law. A court decision holding that such exemption is not enforceable would be a change in interpretation or application and recognized as a Change in Law under clause (b) of that definition. Penalties, interest, and defense costs are not recoverable from the Department.

#### **Payment of Real Estate Transfer Taxes, if any**

Whether the Developer's Interest, or a transfer thereof, is subject to real estate transfer taxes is a legal question that Proposers have as much capability of assessing and analyzing as the Department. Moreover, the Developer will control whether and when to make transfers and how to structure them. Accordingly, the Department will not assume the risk of compensating the Developer for any real estate transfer taxes, penalties and interest that may be imposed by any applicable taxing authority in connection with the P3 Agreement, the Project Lease, or any other component of the Developer's Interest.

#### **Extra Work Compensation**

The P3 Agreement will be modified to add a provision in section 9.3, Payment for Extra Work Costs and Delay Costs, which will provide the following provision:

If the Department elects to compensate Developer through Deferral of Compensation, Developer shall use diligent efforts to obtain (a) funding from the Lenders, or other lenders if permitted by the Funding Agreements, and/or (b) equity support from the shareholders or members of Developer, in either case, to finance the Extra Work Costs and, if applicable, the Delay Costs relating to the Relief Event in advance of receiving the required compensation payments from the Department. If despite such diligent efforts and the additional compensation that would be paid pursuant to under Section 9.4 Developer is unable to obtain such funding and equity support, then the Department's election to compensate through Deferral of Compensation shall be deemed void, and the Department shall pay the applicable Extra Work Costs and Delay Costs through another method set forth in Section 9.3.2.

#### **Changes to Base Map Due to Unavailability of TIFIA**

The intent of the P3 Agreement is to provide that unavailability of TIFIA is an excuse from the obligation to proceed with Financial Close under 15.2.7.3 and 15.2.7.4 rather than to include changes to the Base Maximum Availability Payment due to unavailability of TIFIA financing in the 85% risk sharing under 15.2.8.3. This provides the Developer the opportunity to negotiate with the Department under 19.2.1 on whether and how to achieve a financing without TIFIA, within the Affordability Limit or some other amount that might be acceptable to the Department, and with an equity IRR acceptable to the Equity Members. If the Developer is not satisfied, it may then terminate under 19.2.

#### **Removal of Cap on Compensation for Termination Pursuant to 19.4.2.2 and 19.4.2.3**

The Sponsors have considered removing the cap on compensation for termination pursuant to 19.4.2.2 and 19.4.2.3 which is currently set at 80% of Project Debt Termination Amount. The Sponsors have elected to not remove or modify the cap on compensation based on there being ample precedent indicating that a cap of 80% of outstanding debt has been accepted by financial markets upon termination for uncured developer default.

#### **Drawdown on Equity**

The intent of the ITP, Appendix D clause 1(f), is to require that TIFIA be drawn after equity on a pro rata basis with senior debt disbursements based on total available construction draw amounts. The Financial Proposal and Financial Model must meet with the assumptions provided in the P3 Agreement and Project Documents. During the IPDC the Sponsors will support the Developer's efforts to negotiate the best TIFIA terms possible which may be more favorable than those currently in the ITP.