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# Public Private Partnership Upheld For Construction of Presidio Parkway

***September 7, 2011 by Edward Lozowicki and Robyn Christo***

In 2009, the California legislature amended Section 143 of the Streets and Highways Code and greatly expanded availability of the public-private partnership ("P3") as a mechanism to finance transportation infrastructure projects. In early 2010, under the authority of the newly amended Section 143, the California Department of Transportation ("CalTrans") began to implement part of the Presidio Parkway Project ("Project") as a P3.

The two-phase Project involves replacement of the 75-year-old, seismically-deficient southern approach to the Golden Gate Bridge (also known as Doyle Drive). Phase I (which is currently underway) will be delivered via a traditional design-bid-build model. Phase II, however, is set to be financed and constructed through a P3 contract between CalTrans and its selected bidder, Golden Link Partners.

The process of implementing Phase II as a P3 was attacked on November 2, 2010, when Professional Engineers in California Government ("PECG") (a union representing state-employed engineers and other professionals) challenged the P3 as violating various provisions of Section 143.

PECG's combined petition for writ of mandate and complaint for declaratory and injunctive relief was dismissed at the trial level and PECG appealed. The appeal was expedited (so as not to delay the Project or interfere with CalTrans' negotiated rights of entry on surrounding federal land) and, on August 8, 2011, the Court issued a succinct opinion, in which it rejected all three of PECG's arguments employing basic canons of statutory construction. *Professional Engineers in California Government v. Department of Transportation* (August 8, 2011, A131449) __ Cal.App.4th __

PECG first argued that the P3 was invalid because CalTrans was not acting as the "responsible agency" as required by Section 143(f)(1)(A). PECG argued that because CalTrans did not actually perform preliminary (i.e., pre-P3) engineering work on the Project (consultants did) it could not be the responsible agency. The Court employed a "common sense" reading of the statute and determined that CalTrans was only required to be *responsible for the work*, not to *actually perform the work*. Furthermore, the Court found it "unreasonable to invalidate an earlier phase of a lengthy, ongoing project because of a change in the law meant to enhance and encourage such projects."

PECG next argued that the Project did not qualify as a P3 because it would rehabilitate or reconstruct an existing facility and not "supplement an existing facility" as required by Section 143(a)(6). The Court agreed that Section 143 does require a project to supplement existing facilities. Because the Project involves a series of supplemental new improvements to existing facilities, however, it meets this requirement "under any standard definition."

Finally, PECG argued that in order to be a valid P3, the Project must "require" funding through tolls and user fees. The argument stemmed from language found in Section 143(j)(1), which provides that P3 agreements "shall authorize" the imposition of tolls and user fees and "shall require" that such authorized fees be applied to payment of various costs. The Court quickly rejected this argument, finding that "the clause providing [that] P3 agreements 'shall require' [] any toll revenues be used to defray certain costs . . . falls short of *requiring* the use of tolls and user fees as a *necessary* funding element or the *sole* funding source in every P3."

**Comment:** This is the first appellate case construing Senate Bill 2X4 (2010) which greatly expanded authority for the state of California and regional transportation agencies to utilize P3 agreements. Most significant is the Court's holding that tolls or user fees are not required. This opens the door for public agencies to use creative financing techniques such as availability payments or lease provisions to pay the P3 entity for the project's costs.

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