

CALIFORNIA INFRASTRUCTURE AND ECONOMIC DEVELOPMENT BANK (I-Bank)

STAFF REPORT

ISSUE: Staff requests permission to clarify existing I-Bank Board (Board) delegation of authority to the Executive Director, particularly as that authority relates to the Infrastructure State Revolving Fund loan program (ISRF Program).

BACKGROUND INFORMATION:

Statutory Authorization: Government Code sections 63000 *et seq.* (the Act) set forth the I-Bank's statutory authority. Sections 63022, 63023 and 63025.1 of the Act authorize the Board to delegate extensive powers to the I-Bank Executive Director.

Section 63022 provides that except for "final approval of any bonds, notes, or loans," the Board may assign to the Executive Director "by resolution, those duties generally necessary or convenient to carry out its powers and purposes under this chapter."

Section 63025.1 delineates what "[t]he bank [B]oard may do or delegate...to the executive director." The powers include to:

(s) Enter into any agreement or contract, execute any instrument, and perform any act or thing necessary, convenient, or appropriate to carry out any power expressly given to the bank by this division...

(aa) Do all things necessary and convenient to carry out its purposes and exercise its powers.

Current ISRF Program Delegation: Delegations of authority to the Executive Director, including that relating to the ISRF Program, were first approved by the Board on August 28, 2001 in Resolution 01-34. Resolution 01-34 was subsequently superseded on April 26, 2005 by Resolution 05-11. Resolution 05-11 was subsequently superseded on August 22, 2006 by Resolution 06-37. Resolution 06-37 and the staff report related to that resolution are attached for reference (see **Attachment A**).

Section 2 (f) of Resolution 06-37 delegates to the Executive Director the authority to amend ISRF Program financing agreements, as follows:

- f. Authority to sign **non-substantive technical** amendments or modifications to ISRF Program financing agreements and related documents that do not require Board approval. Examples include extensions of the time period to execute ISRF Program documents, extensions of the time to disburse ISRF Program funds, modifications of financing terms and conditions that do not have an adverse impact on the project and/or security for the I-Bank financing, changes to the

project that are consistent with the eligibility requirements, and changes to project sources and uses chart consistent with the completion of the project. [emphasis added]

On a number of occasions, staff has had difficulty determining whether a proposed amendment to an ISRF Program agreement fit within the definition of “non-substantive” or “technical” as those terms are used in Resolution 06-37, particularly in light of the examples, some of which do not appear to describe “non-substantive” or “technical” amendments. The proposed delegation, reflected in Resolution 09-05, relating to the ISRF Program is intended to more clearly establish what financing terms are considered by the Board to be “material” and “substantive.”

Additional Delegations In Resolution 06-37:

Resolution 06-37 also delegates to the Executive Director the authority to sign resolutions approved by the Board and to appoint certain bond-related service providers for State of California related financings following a request for qualifications or request proposals process. The delegation to sign resolutions approved by the Board has been reiterated in the proposed resolution, Resolution 09-05. The delegation to appoint bond-related service providers has never been exercised, and it is anticipated that any such appointment in the future would be after further action by the Board to approve the process of procuring such services. For that reason, this delegation has not been included in the proposed resolution, Resolution 09-05, and will no longer be of any force or effect.

On November 20, 2008, this Board adopted Resolution 08-35, which augmented and clarified the provisions of Resolution 06-37 as they pertained to conduit revenue bonds. Resolution 09-05, coupled with the delegation approved on November 20, 2008 in Resolution 08-35 related to conduit bond matters, will supersede Resolution 06-37 in its entirety.

ISRF Program:

The I-Bank is authorized under the Act to, among other things, finance public development facilities, as defined in the Act, as requested by sponsors and participating parties. The I-Bank has adopted Criteria, Priorities and Guidelines (Criteria) to finance public development facilities pursuant to the ISRF Program. Public development facilities are financed using a variety of mechanisms, including loans, installment sale, tax increment and lease-leaseback financings, each transaction documented through a variety of agreements, including loan agreements, installment sale agreements, tax increment financing agreements, and facility lease and site lease agreements (Financing Agreements), secured through a variety of agreements, including leases and documents creating liens on real and personal property, including intangible personal property such as revenue streams, funds and accounts (Security Agreements), and which may also otherwise be reflected in agreements, contracts, certificates, orders and instruments that are ancillary and related to those Financing Agreements and Security

Agreements and that are necessary or convenient to accomplish the financing of public development facilities (Additional Documents).

In addition, the ISRF Program is funded in part by the issuance of bonds by the I-Bank (ISRF Program Bonds), and the ISRF Program financings must be financed in conformance with certain federal tax law requirements that apply to the ISRF Program Bonds and in conformance with certain contractual agreements made by the I-Bank in relation to the ISRF Program Bonds.

PROPOSED DELEGATION:

Execution of Resolutions: The proposed delegations I Resolution 09-05 include a delegation to the Executive Director of the authority to execute and deliver, for and on behalf of the I-Bank, all resolutions adopted by the Board, including without limitation those resolutions approving the financing of public development facilities under the ISRF Program. This restates a delegation that has been in place, in one form or another, since August 28, 2001.

Approval and Execution of Agreements: Financing Agreements, Security Agreements and Additional Documents to effect and secure the financing of public development facilities are finalized and executed subsequent to the Board's approval of a particular ISRF Program transaction. From time to time, adjustments to the final terms of the transaction are necessary subsequent to the Board's approval and prior to the execution of these agreements.

The proposed delegation to the Executive Director in Resolution 09-05 includes the authority to approve, execute and deliver agreements which are consistent with the terms of the transaction approved by the Board. In addition, the proposed delegation delegates to the Executive Director the authority to approve, execute and deliver agreements that contain alterations or amendments to the terms of the transaction approved by the Board, provided that the alterations or amendments are consistent with the Criteria, do not materially adversely affect the I-Bank's security, do not in and of themselves materially adversely affect any series of the ISRF Program Bonds, or change the following, which are identified as substantive and material terms of each ISRF Program transaction, except as specifically permitted:

- a. The sponsor or participating party, except to permit the assumption of all the obligations and interests of that sponsor or participating party under all applicable Financing Agreements, Security Agreements and Additional Documents by an entity that is either an eligible sponsor or participating party, as applicable, under the Act.
- b. The maximum principal financing amount.
- c. The maximum maturity date.
- d. The repayment/security pledged to repay the financing.

- e. The method of calculating the interest rate.
- f. The fees paid by the sponsor or participating party of the Project to the I-Bank.
- g. The type of financing (e.g., an installment sale, loan, or lease-leaseback financing).
- h. The description of the Project in a way that would make the Project inconsistent with the subsection of Section 63010(q) of the Act applicable to the Project as approved by the Board.

Approval and Execution of Amendments: From time to time Financing Agreements, Security Agreements, and/or Additional Documents need to be amended. Some amendments are simply administrative in nature, for example, amending the date of a Project Sponsor's annual reporting requirement or correcting an error in the loan amortization table. Other requested amendments are more substantive, such as those that alter the scope of the project to be funded or the allocation of the ISRF financing proceeds in relation to the other financing sources available to fund the ISRF Project.

The proposed scope of the delegation to the Executive Director is intended to facilitate the on-going administration of the ISRF Program. The proposed resolution delegates to the Executive Director the authority to approve and execute amendments that do not alter any of the terms identified by the Board as substantive or material except as specifically permitted, do not materially adversely affect the I-Bank's security, or, in and of itself materially adversely affect any series of the ISRF Program Bonds. All such amendments shall also be consistent with the Criteria except those Criteria provisions pertaining to application for financing approval, or scoring for prioritizing projects.

Effect on Existing Delegation Resolution: Resolution 09-05, coupled with the delegation approved on November 20, 2008 in Resolution 08-35 related to conduit bond matters, would supersede Resolution 06-37 in its entirety.

RECOMMENDATION: Staff recommends approval of Resolution 09-05 delegating certain powers to the Executive Director, including those related to the ISRF Program.

Attachment A - Resolution 06-37 and August 22, 2006 Staff Report

RESOLUTION NO. 06-37

RESOLUTION OF THE CALIFORNIA INFRASTRUCTURE AND ECONOMIC DEVELOPMENT BANK BOARD TO DELEGATE TO THE EXECUTIVE DIRECTOR CERTAIN POWERS

WHEREAS, the California Infrastructure and Economic Development Bank (the “I-Bank”) is formed within state government for the purpose of administering the provisions of the Government Code Section 63000 *et seq.* (the "Act"); and,

WHEREAS, Sections 63022 and 63023 of the Act provide that the I-Bank is governed by the Board and is under the direction of an Executive Director appointed by the Governor; and,

WHEREAS, the Act authorizes the Board to delegate certain powers to the I-Bank Executive Director, and further finds that utilization of this authority will facilitate the efficient and effective administration, and direction of routine operations of the I-Bank; and,

WHEREAS, the Board adopted Resolutions 01-34 and 05-11 delegating certain powers to the Executive Director, and has determined that the delegation of powers and duties should be augmented and restated by this Board.

NOW THEREFORE, the Board of Directors of the California Infrastructure and Economic Development Bank does hereby resolve as follows:

Section 1. The recitals above are true and correct.

Section 2. The authority to perform the following duties is hereby delegated to the Executive Director:

- a. Authority to sign resolutions approved by the Board.
- b. Authority to sign all Board approved bond documents, including Official Statements, Loan Agreements, Lease Agreements, Indentures, Bond Purchase Agreements, Tax Regulatory Agreements and all other documents necessary for the sale, issuance and delivery of revenue bonds.
- c. Authority to sign non-substantive technical amendments or modifications to bond documents and to provide certifications required by the documents that do not require Board approval. Examples include redemption certificates, substitution of trustees, and swap and hedge agreement confirmations, including agreements entered into in advance of Board approval of the bond financing.
- d. Authority to appoint bond trustees, credit enhancement providers and title insurance companies for State of California related financings undertaken by the I-Bank so long as the appointed firm or company was the lowest cost responsible bidder to a competitive Request for Qualifications or Request for Proposal issued by I-Bank staff.
- e. Authority to sign all Board approved Infrastructure State Revolving Fund (“ISRF”) Program financing agreements, including Loan Agreements, Facility Leases, Site Leases, Installment Sales Agreements, Tax Certificates and other documents necessary to effectuate a financing.

- f. Authority to sign non-substantive technical amendments or modifications to ISRF Program financing agreements and related documents that do not require Board approval. Examples include extensions of the time period to execute ISRF Program documents, extensions of the time to disburse ISRF Program funds, modifications of financing terms and conditions that do not have an adverse impact on the project and/or security for the I-Bank financing, changes to the project that are consistent with the eligibility requirements, and changes to project sources and uses chart consistent with the completion of the project.
- g. Authority to evidence the official intent of the I-Bank to authorize the reimbursement of costs incurred by conduit qualified small issue borrowers from the proceeds of tax-exempt borrowing pursuant to Internal Revenue Code section 1.150-2.

Section 3. This resolution supercedes Resolution No. 05-11 adopted on April 26, 2005, and shall take effect from and after its adoption.

PASSED, APPROVED, AND ADOPTED at a meeting of the California Infrastructure and Economic Development Bank of August 22, 2006 by the following vote:

AYES: FISH, LUJANO, SHEEHAN, MARIN AND RICE
NOES: None
ABSENT: None
ABSTAIN: None

Sunne Wright McPeak, Chair

Attest:

Roma Cristia-Plant, Secretary

CALIFORNIA INFRASTRUCTURE AND ECONOMIC DEVELOPMENT BANK (I-Bank)

STAFF REPORT

ISSUE: Staff requests permission to augment the existing I-Bank Board (Board) authority delegated to the Executive Director to include the authority to execute reimbursement certificates for certain private activity bonds, and to execute swap agreement certifications in advance of approval of the issuance of bonds.

BACKGROUND INFORMATION: Government Code sections 63000 *et seq.* (Act) set forth the I-Bank's statutory authority. Sections 63022, 63023 and 63025.1 of the Act authorize the Board to delegate extensive powers to the I-Bank Executive Director. The most recent amendment to the delegated powers was approved by the Board on April 25, 2005, in Resolution 05-11. The previously approved delegated authority in connection with conduit bonds pertains to actions undertaken following the Board's approval of a resolution authorizing the issuance of the bonds.¹

However, there is nothing in the Act limiting the delegated authority to actions taken solely after the approval of the bonds. Section 63022 provides that "[except for final approval of a bond issuance] the board may assign to the [E]xecutive [D]irector, by resolution, those duties generally necessary or convenient to carry out its powers and purposes under this chapter." Section 63025.1 delineates what "[t]he bank [B]oard may do or delegate...to the executive director." The powers include to:

- (b) ...issue bonds...
- (s) Enter into any agreement or contract, execute any instrument, and perform any act or thing necessary, convenient, or appropriate to carry out any power expressly given to the bank by this division...
- (aa) Do all things necessary and convenient to carry out its purposes and exercise its powers.

REIMBURSEMENT RESOLUTIONS: Internal Revenue Code (Code) section 1.150-2 requires that all capital expenditures payable from the proceeds of tax-exempt bonds must be incurred not earlier than 60 days prior to evidence of official intent to reimburse those costs from the proceeds of subsequently issued bonds.

These resolutions are often referred to as either reimbursement resolutions, inducement resolutions or resolutions of official intent, and set the initial date for the incurrence of such allowable reimbursable expenditures. Code section 1.150-2 (e)(1) explains the requirements for this official intent, and reads in its entirety:

Form of official intent. The official intent is made in any reasonable form, including issuer resolution, action by an appropriate representative of the issuer (e.g., a person authorized or designated to declare official intent on behalf of the issuer), or specific legislative authorization for the issuance of obligations for a particular project.

¹ Including loans and commercial paper.

When the borrower is a 501(c)(3) corporation, the Code authorizes the borrower to evidence its own reimbursement intent. It is the I-Bank's current policy to not adopt a reimbursement resolution for those conduit borrowers that have the ability to adopt their own reimbursement resolutions, and this request for Executive Director delegated authority does not apply to such 501(c)(3) conduit bonds issued by the Bank.

However, a private activity borrower, for example a borrower for industrial development bonds (IDBs), is not authorized to evidence its own official reimbursement intent. In these instances, only the issuer of the bonds, or a designated representative of the issuer, can provide the official intent. While the Act authorizes the Board to issue other types of private activity bonds in addition to IDBs (i.e., borrowers for exempt facilities bonds), this request for delegation of authority to the Executive Director to issue the official reimbursement intent is limited to IDBs. It should be pointed out that in the last decade only one exempt facility reimbursement resolution has been approved by the Board.

The Board has the authority to issue bonds, and by resolution has on numerous occasions adopted resolutions evidencing its official intent to authorize the reimbursement of capital expenditures from subsequent bond issuances. The adopted reimbursement resolutions clearly state that the Board is not obligated to subsequently issue the tax-exempt bonds. Reimbursement resolutions for IDBs are routinely placed on the consent portion of the Board agendas. To date, the Board has approved all reimbursement resolutions it has considered.

Code section 1.150-2(e)(1) explicitly authorizes a delegated official to perform an "action by an appropriate representative of the issuer (e.g., a person authorized or designated to declare official intent on behalf of the issuer)." The Board has authority to approve official intent resolutions, and Government Code sections 63022 and 63025.1 authorize the delegation of any Board powers to the Executive Director. Clearly the Executive Director can be granted delegated authority to evidence official intent. Code section 1.150-2 (e)(1) authorizes official intent to be so evidenced in any reasonable form. Such delegated action would not be in the form of a resolution, but in the form of a certification, which is consistent with the authority granted in Code Section 1.150-2(e).

Staff requests this additional delegation of authority since the Board meets only once a month; thus, so long as only the Board has the authority to approve the official intent of the I-Bank, IDB borrowers can only lock-in the commencement date for reimbursable expenses once a month. By delegating this authority to the Executive Director, no such timing limitation would exist, and the I-Bank would be more responsive to the business needs of its IDB borrowers. Consistent with current policy for private activity bonds, the applicant will continue to be required to submit an application, staff will review the application for eligibility and compliance with current statutory, Code and program eligibility criteria prior to the Executive Director executing a reimbursement certification. The Executive Director will notify the Board in the monthly Executive Director's Report of each reimbursement certificate executed since the prior Board meeting.

Staff was unable to identify any other State issuer that has delegated authority to evidence this official intent to its Executive Director. The probable explanation is two-fold. First, only private activity borrowers need the issuer to provide the official intent. The vast majority of State bond issuers issue 501c3 bonds, not private activity bonds. The only other active State issuer of private activity bonds is the California Pollution Control Financing Authority. Second, the Act provides unusually broad powers that can be delegated to the Executive Director.

The current delegation authority is contained in Resolution 05-11, consisting of six lettered paragraphs (a-f) contained in Section 2. The proposed resolution would add a seventh lettered paragraph as follows:

- g. Authority to evidence the official intent of the I-Bank to authorize the reimbursement of costs incurred by conduit qualified small issue borrowers from the proceeds of tax-exempt borrowing pursuant to Internal Revenue Code section 1.150-2.

RATE LOCK HEDGE AND OTHER SWAP INTEGRATIONS: The current delegated authority from the Board to the Executive Director includes the authority to execute swap confirmations. The context of the delegated authority assumes that this authority would only be required after the Board had adopted a resolution approving the issuance of bonds.

Recently an applicant requested that the I-Bank acknowledge an advance interest rate lock so that this rate lock could be integrated into bonds expected to be subsequently authorized and issued by the I-Bank. Staff is requesting an amendment to the delegated authority to clarify that swap, hedge, and related rate lock confirmations could be acknowledged and approved by the Executive Director both prior and after the Board approval of the bond issuance. Such a swap or hedge confirmation is a benefit to the borrower since it allows the costs of the interest rate lock to be included in the bond arbitrage and rebate calculations. As with the above described authority to declare official intent, the certification will include a provision stating that the certification in no way obligates the Board to authorize the issuance of bonds.

Section 2, paragraph (c) of Resolution 05-11, consists of six lettered paragraphs (a-f). The proposed resolution would amend Section 2(c) by inclusion of the following underlined words:

- c. Authority to sign non-substantive technical amendments or modifications to bond documents and to provide certifications required by the documents that do not require Board approval. Examples include redemption certificates, substitution of trustees, and swap and hedge agreement confirmations, including agreements entered into in advance of Board approval of the bond financing.

RECOMMENDATION: Staff recommends approval of Resolution 06-37 authorizing amended delegation powers to the Executive Director to include authority to execute (1) reimbursement certificates, and (2) swap agreement certifications in advance of approval for the issuance of bonds by the I-Bank Board of Directors.