

## CALIFORNIA INFRASTRUCTURE AND ECONOMIC DEVELOPMENT BANK (I-Bank)

### STAFF REPORT

#### **REQUESTED ACTION:**

Staff requests permission to revise existing I-Bank Board (Board) direction as to what public development facilities costs are eligible for reimbursement in the Infrastructure State Revolving Fund Program. In addition, staff requests permission to restate and clarify existing Board instructions regarding the interpretation of certain definitions within Section 63010 of the Bergeson-Peace Infrastructure and Economic Development Bank Act (California Government Code Section 63000 et seq.) (Act).

#### **BACKGROUND INFORMATION:**

Pursuant to the authority of the Act, the I-Bank has adopted Criteria, Priorities and Guidelines (Criteria) for a program to finance public development facilities known as the Infrastructure State Revolving Fund Program (ISRF Program).

The I-Bank is authorized under the Act and the Criteria to, among other things, finance the “costs” of the categories of “public development facilities” located in the State, as requested by “sponsors” (Project Sponsors), all as defined in the Act, pursuant to the authority and requirements of the Act.

Reimbursement Related Information: The ISRF Program is funded in part by the issuance of bonds by the I-Bank (ISRF Program Bonds), and ISRF Program transactions must be structured 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. In relation to the issuance of each series of ISRF Program Bonds, the I-Bank agrees to conform the ISRF Program financings to the applicable federal tax law.

Federal tax law limits the use of ISRF Program Bond proceeds to reimburse costs paid by a Project Sponsor prior to the issuance of the ISRF Program Bonds used to fund the Project Sponsor’s ISRF Program financing. In general:

Up to 20% of each ISRF Program financing can be used to reimburse the Project Sponsor for “preliminary expenditures” notwithstanding when those “preliminary expenditures” were incurred or paid. For this purpose, “preliminary expenditures” include the costs of architectural, engineering, surveying, soil and environmental testing and reports, studies (including environmental impact, rate and feasibility studies), CEQA reports, the issuance of ISRF Program Bonds, and similar costs not including land acquisition, site preparation or similar costs incident to the commencement of construction.

ISRF Program financings can be used to reimburse capital costs paid by the Project Sponsor within 60 days prior to the later of (1) the I-Bank's statement of official intent to issue bonds for the purpose of reimbursing costs (contained in the Board resolution approving the ISRF Program financing or (2) the Project Sponsor's statement of official intent to use ISRF Program Bond proceeds for the purpose of reimbursing costs (contained in the resolution of the Project Sponsor's legislative board included in the Project Sponsor's financing application for ISRF Program financing). No reimbursement may be made within 18 months after the later of (1) the date the costs were paid or (2) the date the project was placed in service, but no more than three years after the cost is paid.

Resolution 00-32, adopted on June 9, 2000, sets forth certain limits on costs eligible for reimbursement under the ISRF Program. Resolution 00-32 and the related Staff Report are attached for reference (see **Attachment A**).

Interpretation Related Information: The specific categories of "public development facilities" eligible to be funded pursuant to the ISRF Program are attached for reference (see **Attachment B**). Resolution 00-32 also a) sets forth the Board's direction for the interpretation of the definitions listed as "public development facilities", including when public parking facilities are eligible pursuant to the definition of "public transit", (b) delegates to the Board Chair the authority to determine whether a specific project is eligible under one or more of the "public development facilities" categories, and c) sets forth the Board's direction for the interpretation as to how a non-profit corporation sponsors can evidence that it has been "formed on behalf of" a Project Sponsor (see **Attachment A**).

Subsequent to Resolution 00-32, the Board has adopted Criteria that include the direction regarding "public transit" facilities.

To the recollection of I-Bank staff, it has never been necessary for staff to seek the guidance of the Board Chair as to how to interpret "public development facilities" categories. The determination as to whether a project is statutorily permitted is vested by the Legislature in the Board as a whole, and the Board exercises that authority every time it approves an ISRF Program financing.

#### **PURPOSE FOR REQUESTED ACTIONS:**

Reimbursement: The Criteria express the Board's intention that the ISRF Program be used to finance public development facilities in need of ISRF Program financing, and staff acknowledges that the use of ISRF Program funds as a replacement for funding otherwise available to the Project Sponsor is inconsistent with this expression.

However, due to reimbursement limitations set forth in Resolution 00-32, Project Sponsors have been limited in their ability to incur most capital costs prior to the execution of an ISRF Program financing agreement, which typically is 2 – 3 months following the Board's approval of the ISRF Program financing. In addition, from time-to-

time the reimbursement limitations of Resolution 00-32 have either inhibited the I-Bank's ability to finance costs of a ISRF Program project that would have otherwise been eligible under the Act and the laws and agreements pertaining to the ISRF Program Bonds or have made it difficult for Project Sponsors to evidence their readiness to proceed within six months of receiving a financing commitment, as required by the Criteria.

Interpretation: In the interest of avoiding having a plethora of resolutions providing guidance on ISRF Program matters, staff is attempting to restate all of those provisions of Resolution 00-32 which have not already been restated in the Criteria, and, in the process or restating these provisions, to clarify them.

**PROPOSED DIRECTION:**

If approved, Resolution 09-06 will supersede Resolution 00-32.

Determination of Costs Eligible for Reimbursement:

If Resolution 09-06 is approved, capital costs will be eligible to be reimbursed from the proceeds of an ISRF Program financing if those capital costs are paid by the Project Sponsor on or after this Board's approval of the ISRF Program financing, which typically could mean 2-3 months earlier than allowed under Resolution 00-32. This will continue to restrict the use of ISRF Program financing proceeds to projects that are "in need" of ISRF financing, while at the same time assist Project Sponsors in determining their ability to proceed within six months of receiving a financing commitment.

In addition, the definition of what constitutes "preliminary costs" will be consistent with the definition of "preliminary costs" in federal tax law.

Direction for Interpretation of Statutory Definitions:

If approved, Resolution 09-06 will direct staff, for the purpose of determining whether a proposed ISRF Program financing should be brought to this Board for consideration, to broadly interpret the definition of public development facilities in the Act so as to include not only the categories of facilities specifically set forth in Government Code Section 63010(q), and the facilities specifically included as representative of each category of facility, but to also include facilities that appear to be rationally included within the stated categories of facilities. Resolution 09-06 includes one example related to interpreting the category of "Power and Communication" so as to include solar facilities. The example is not intended to be a limitation but rather one example of how to broadly interpret the separate categories.

Additionally, Resolution 09-06 will instruct staff for the purpose of interpreting the definition of "sponsor" pursuant to Section 63010(u), how to determine when a non-profit corporation is "formed on behalf of" a Project Sponsor.

**RECOMMENDATION:** Staff recommends approval of Resolution 09-06 to revise existing Board direction as to what public development facilities costs are eligible for reimbursement in the Infrastructure State Revolving Fund program and to restate and clarify existing Board instructions regarding the interpretation of certain definitions within Section 63010 of the Act.

**Attachment A – Resolution 00-32 and June 9, 2000 Staff Report**

## RESOLUTION NO. 00-32

### RESOLUTION OF THE CALIFORNIA INFRASTRUCTURE AND ECONOMIC DEVELOPMENT BANK APPROVING THE INTERPRETATION OF STATUTORY DEFINITION FOR PUBLIC DEVELOPMENT FACILITIES; INTERPRETATION OF THE STATUTORY DEFINITION OF NON-PROFIT CORPORATION SPONSORS; AND REIMBURSING PRE-INCURRED COSTS.

**WHEREAS**, Government Code Section 63000 *et seq.* (the "Act") lists fifteen categories of Public Development Facilities that are eligible for financing through the Infrastructure State Revolving Fund ("ISRF") Program; and

**WHEREAS**, many of the definitions of Public Development Facilities in the Act are vague; and

**WHEREAS**, the Act states that the only eligible non-profit corporation Sponsors are "non-profit organizations formed on behalf of a Sponsor" and the meaning of this is unclear; and

**WHEREAS**, the Act does not explicitly address what costs can be reimbursed.

**NOW, THEREFORE, BE IT RESOLVED** by the Board of Directors of the California Infrastructure and Economic Development Bank, as follows:

**Section 1.** Staff is directed to broadly interpret the definitions of Public Development Facilities so long as the interpretation is rationally related to the title of category of Public Development Facilities. The Board delegates authority to the Chair to make the determination as to whether a specific project is eligible under one or more the Public Development Facility definitions.

**Section 2.** Public parking facilities are eligible pursuant to the definition of Public Transit in any one or more of the following instances: (1) the public parking facility is connected to public transit facilities; (2) the public parking facility is necessary to effectuate an economic development project; and (3) the public parking facility is necessary to effectuate a larger infrastructure project.

**Section 3.** Non-profit corporations are eligible applicants if the non-profit corporation was created by an adopted ordinance, statute, or resolution of any subdivision of the State or local government including departments, agencies, commissions, cities, counties, special districts, assessment districts and joint powers authorities.

**Section 4.** Costs incurred prior to the execution of a financing agreement between the Infrastructure Bank and the Sponsor that are eligible for reimbursement from ISRF financing proceeds include project development costs such as architectural, engineering and other consultants. The cost of land related to an eligible project is

eligible for reimbursement, subject to federal regulations for tax-exempt financing. Costs not eligible for reimbursement include construction or asset purchase costs.

**Section 4.** This resolution shall take effect from and after its adoption.

**PASSED, APPROVED, AND ADOPTED** at a meeting of the California Infrastructure and Economic Development Bank on June 9, 2000, by the following vote:

AYES: Hatamiya, Porini, Angelides

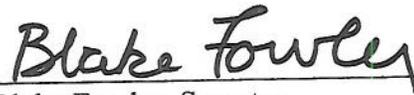
NOES: None

ABSENT: None

ABSTAIN: None

By   
Lon S. Hatamiya, Chair

Attest:

By   
Blake Fowler, Secretary

STAFF SUMMARY

**ISSUE:** Staff is seeking approval of the following items: 1) interpretation of the statutory definition of eligible projects; 2) interpretation of the statutory limitation that the only eligible nonprofit corporation sponsors are “non-profit organizations formed on behalf of a sponsor”; and 3) approval of paying pre-incurred costs from CIEDB loan proceeds.

BACKGROUND INFORMATION:

**Eligible Projects.** Government Code Section 63010(q) lists fifteen different categories of “Public Development Facilities” that are eligible for financing through the Infrastructure State Revolving Fund (ISRF) Program. Many of the definitions are vague because of odd sentence construction and the use of such terms as “including, but not limited to.” For example, below are the statutory definitions of several project categories:

“Public safety facilities *including, but not limited to*, police stations, fire stations, court buildings, jails, juvenile halls, and juvenile detention facilities” (emphasis added).

“Educational facilities *including* libraries, child care facilities, *including, but not limited to*, day care facilities, and employment training facilities” (emphasis added).

“Port facilities *including* docks, harbors, ports of entry, piers, ships, small boat harbors and marinas, *and any other* facilities, additions, or improvements in connection therewith” (emphasis added).

“Defense conversion *including, but not limited to*, facilities necessary for successfully converting military bases consistent with an adopted base reuse plan” (emphasis added).

“Public transit *including* air and rail transport of goods, airports, guideways, vehicles, rights-of-way, passenger stations, maintenance and storage yards, and related structures, including public parking facilities, equipment used to provide or enhance transportation by bus, rail, ferry, or other conveyance, either publicly or privately owned, that provides to the public general or special service on a regular and continuing basis.”

Since the statutory definitions of the categories of Public Development Facilities are vague, staff has been receiving a high volume of inquiries from potential applicants regarding whether or not their project is an eligible project. In order to prevent a

situation in which an applicant spends a significant amount of time (and in some cases money) completing the entire application process only to find out that the Board does not believe the project is eligible, staff recommends the following:

First, the Board shall direct staff to broadly interpret the definitions of eligible projects so long as the interpretation is rationally related to the title of the project category. Former staff to the authors of the Infrastructure Bank's enabling law have stated to Bank staff that the authors' intent in drafting the definitions of eligible projects was to give the Bank flexibility in financing a variety of projects. Staff believes this broad interpretation of statutes is also consistent with a comment that Member Angelides' made during the December 20, 1999 Board meeting when he stated, in reference to a written public comment inquiring about the eligibility of a particular type of project, "We ought to be liberal but true to the law, progressively true to the law." Staff also believes that using a broad interpretation of eligible projects is consistent with legislative intent. .

Second, staff recommends that the Board delegate authority to the Chair to make the determination as to whether a project is eligible in situations where it is difficult to determine eligibility using the above rule of interpretation. In order to make such a determination, staff shall provide the Chair with a written memorandum that describes the project and that contains a recommendation whether or not the project should be eligible.

One particular type of project that staff has received numerous inquiries about that is not related to the title of the project category is public parking facilities. Although the definition of Public Transit (see above) specifically mentions public parking facilities, it is unclear from the definition as to whether the parking facility must be directly connected to some type of public transit. Thus, staff requests direction from the Board as to whether public parking facilities that are not specifically designed to enhance transportation by bus, rail or ferry are eligible.

**Eligible Sponsors.** Government Code Section 63010(u) defines eligible applicants as follows:

"Sponsor means any subdivision of the state or local government including departments, agencies, commissions, cities, counties, *non-profit corporations formed on behalf of a sponsor*, special districts, assessment districts, and joint powers authorities within the state or any combination of these subdivisions that has, or proposes to acquire, an interest in a project and that makes application to the bank for financial assistance in connection with a project in a manner prescribed by the bank....." (emphasis added)

The meaning of "non-profit corporation formed on behalf of a sponsor" is unclear since the sentence construction of the definition of Sponsor is circular in nature: "Sponsor means .....non-profit corporations formed on behalf of a sponsor."

In order to clarify the eligibility of non-profit corporations, staff recommends that non-profit corporations be eligible applicants if they were created by an adopted ordinance, statute or resolution of any subdivision of the State or local government including departments, agencies, commissions, cities, counties, special districts, assessment districts, and joint powers authorities.

**Pre-Incurred Costs.** The Infrastructure Bank is designed to finance infrastructure projects. These projects commence with planning, move to architect, design and engineering costs, then to construction and purchase. The State Administrative Manual, and State cost accounting and invoicing requirements generally require that the only costs which the State will pay are those incurred after the effective date of the agreement between the State and the entity requesting reimbursement. In the case of the ISRF program, that means the financing agreement.

While the Infrastructure Bank law, 63000 *et seq.* of the Government Code, does not explicitly cover this issue, it is clear that it sets up an alternative method of determining what costs can be reimbursed.

The ISRF Program can only finance "public development facilities," a statutory list of infrastructure systems, such as street and sewer systems. For example, planning or engineering are not considered facilities. Therefore when someone applies to the Infrastructure Bank, it is for an entire facility. Staff can not analyze the repayment feasibility of such a facility unless fairly final and complete information is presented concerning the facility. For example, if the project is still in the initial planning stage, the final costs would be unknown, and without firm costs, and therefore a firm financing amount request, staff can not calculate the ability of the applicant to repay the project financing.

By the time the applicant has progressed far enough in the facility planning stage to provide firm cost estimates, the applicant will have incurred architect and engineering costs. Since the statutory definition of "Costs" which the Infrastructure Bank is authorized to pay includes those categories of costs, it was clearly the intent of the Legislature to allow the payment of early development costs as part of the financing.

Taking these two statutory requirements together (only finance complete facilities and pay development costs), it is clear that the Legislature also intended that some of the costs eligible for reimbursement would be incurred prior to the execution of the financing agreement, and therefore would be reimbursed after the execution of the financing agreement. There is no other way to reconcile the difference between the facility and cost definitions.

The policy issue arises in determining exactly what costs can be incurred prior to the effective date of the financing agreement. Staff recommends that no construction or asset purchase costs be reimbursed. Reimbursement would be reserved for development costs such as architectural, engineering and consultants fees, costs which generally must be incurred prior to applying for financing.

**RECOMMENDATION:** Staff recommends adoption of Resolution 00-32.

## Attachment B – Public Development Facilities

Government Code section 63010(q):

**"Public development facilities"** means real and personal property, structures, conveyances, equipment, thoroughfares, buildings, and supporting components thereof, excluding any housing, that are directly related to providing the following:

(1) "City streets" including any street, avenue, boulevard, road, parkway, drive, or other way that is any of the following:

(A) An existing municipal roadway.

(B) Is shown upon a plat approved pursuant to law and includes the land between the street lines, whether improved or unimproved, and may comprise pavement, bridges, shoulders, gutters, curbs, guardrails, sidewalks, parking areas, benches, fountains, plantings, lighting systems, and other areas within the street lines, as well as equipment and facilities used in the cleaning, grading, clearance, maintenance, and upkeep thereof.

(2) "County highways" including any county highway as defined in Section 25 of the Streets and Highways Code, that includes the land between the highway lines, whether improved or unimproved, and may comprise pavement, bridges, shoulders, gutters, curbs, guardrails, sidewalks, parking areas, benches, fountains, plantings, lighting systems, and other areas within the street lines, as well as equipment and facilities used in the cleaning, grading, clearance, maintenance, and upkeep thereof.

(3) "Drainage, water supply, and flood control" including, but not limited to, ditches, canals, levees, pumps, dams, conduits, pipes, storm sewers, and dikes necessary to keep or direct water away from people, equipment, buildings, and other protected areas as may be established by lawful authority, as well as the acquisition, improvement, maintenance, and management of floodplain areas and all equipment used in the maintenance and operation of the foregoing.

(4) "Educational facilities" including libraries, child care facilities, including, but not limited to, day care facilities, and employment training facilities.

(5) "Environmental mitigation measures" including required construction or modification of public infrastructure and purchase and installation of pollution control and noise abatement equipment.

(6) "Parks and recreational facilities" including local parks, recreational property and equipment, parkways and property.

(7) "Port facilities" including docks, harbors, ports of entry, piers, ships, small boat harbors and marinas, and any other facilities, additions, or improvements in connection

therewith.

(8) "Power and communications" including facilities for the transmission or distribution of electrical energy, natural gas, and telephone and telecommunications service.

(9) "Public transit" including air and rail transport of goods, airports, guideways, vehicles, rights-of-way, passenger stations, maintenance and storage yards, and related structures, including public parking facilities, equipment used to provide or enhance transportation by bus, rail, ferry, or other conveyance, either publicly or privately owned, that provides to the public general or special service on a regular and continuing basis.

(10) "Sewage collection and treatment" including pipes, pumps, and conduits that collect wastewater from residential, manufacturing, and commercial establishments, the equipment, structures, and facilities used in treating wastewater to reduce or eliminate impurities or contaminants, and the facilities used in disposing of, or transporting, remaining sludge, as well as all equipment used in the maintenance and operation of the foregoing.

(11) "Solid waste collection and disposal" including vehicles, vehicle-compatible waste receptacles, transfer stations, recycling centers, sanitary landfills, and waste conversion facilities necessary to remove solid waste, except that which is hazardous as defined by law, from its point of origin.

(12) "Water treatment and distribution" including facilities in which water is purified and otherwise treated to meet residential, manufacturing, or commercial purposes and the conduits, pipes, and pumps that transport it to places of use.

(13) "Defense conversion" including, but not limited to, facilities necessary for successfully converting military bases consistent with an adopted base reuse plan.

(14) "Public safety facilities" including, but not limited to, police stations, fire stations, court buildings, jails, juvenile halls, and juvenile detention facilities.

(15) "State highways" including any state highway as described in Chapter 2 (commencing with Section 230) of Division 1 of the Streets and Highways Code, and the related components necessary for safe operation of the highway.

(16)(A) Military infrastructure, including, but not limited to, facilities on or near a military installation, that enhance the military operations and mission of one or more military installations in this state. To be eligible for funding, the project shall be endorsed by the Office of Military and Aerospace Support established pursuant to Section 13998.2.

(B) For purposes of this subdivision, "military installation" means any facility under the jurisdiction of the Department of Defense, as defined in paragraph (1) of subsection (e) of Section 2687 of Title 10 of the United States Code.