

South Bay Cities Council of Governments

September 26, 2013

TO: SBCCOG Board of Directors

FROM: Measure R Oversight Committee

SUBJECT: South Bay Highway Program Project Funding Reallocation / Deobligation Policy

BACKGROUND

Metro's standard funding agreement templates include provisions that place SBHP Lead Agencies at potentially-significant financial risk if they are not able to deliver their project scope, budget and schedule as described in their funding agreement. Although the SBCCOG is not a signatory to the funding agreements, the SBCCOG has its own funding agreement with Metro to deliver the SBHP program consistent with the Cooperative Agreement between Metro and the SBCCOG.

Since a default or deobligation related to a SBHP project could adversely affect the Metro/SBCCOG agreements, the SBCCOG Measure R Oversight Committee has developed an aggressive project progress and risk assessment procedure that is reported on a monthly basis. While there is no immediate risk of default or deobligation in the SBHP, the Oversight Committee expressed concern that a few projects might not meet the 5-year deadline for completing SBHP Early Action projects. The Oversight Committee requested that a deobligation policy be written to clarify the role of the SBCCOG in assisting SBHP lead agencies and Metro to avoid the need for Metro to exercise deobligation terms and conditions in its funding agreements for SBHP projects and to provide assistance to lead agencies should a potential cure notice or deobligation action arise.

The attached draft SBHP Reallocation / Deobligation Policy (Exhibit 1) has been reviewed by the Measure R Oversight Committee and Infrastructure Working Group at their respective August 2013 meetings.

RECOMMENDATION

Recommend SBCCOG Board approval of the draft SBHP Reallocation / Deobligation Policy (Exhibit 1).

**DRAFT SBCCOG South Bay Highway Program (SBHP)
Measure R Funds Reallocation / Deobligation Policy**

Scope:

This policy addresses the reallocation and / or de-obligation of Measure R funds as a result of lead agencies not meeting Metro funding agreement requirements and the SBCCOG's Early Action Program Requirements.

Background:

Under the Metro/SBCCOG Measure R Cooperative Agreement:

3. "SBCCOG Oversight Responsibilities. SBCCOG will provide oversight of the SBHP Projects by assisting SBHP Project Lead Agencies, except for Caltrans, as necessary to comply with the terms of their LACMTA project funding agreements. Such tasks will include:

a. SBHP Project Lead Agencies will be required to submit the applicable reports to LACMTA, who will share a copy with SBCCOG, either in a hardcopy format or electronically within 5 working days. If the report shows any project delays or risks for cost increases, then SBCCOG will work with the SBHP Project Lead Agency to mitigate and reduce any impacts.

b. If the SBHP Project Lead Agency determines it will need to request additional SBHP funding, the lead agency shall request a hearing before the SBCCOG Measure R Oversight Committee to request the additional funds and justify the increased budget. The Measure R Oversight Committee will consider the request at its earliest available regular meeting. If a request can be accommodated within the current year Metro Budget for the SBHP, the Committee will recommend approval by the SBCCOG Board of Directors and transmittal to Metro staff with a request for approval of the change and inclusion in the next available Metro Board update of Metro's Measure R Highway Operational Improvements Project List: Proposed List and Ten-Year Allocation.

c. If changes to a SBHP Project require changes to its programmed annual Metro funding amount or will require schedule changes for other programmed commitments, then, prior to recommending the request to the SBCCOG Board SBCCOG will need to obtain consensus among its other affected member cities to make sure there is no net impact to the Approved Project List or Metro-approved SBHP budget for the year in which the funding changes are being sought. Any changes that require a change in the Metro SBHP annual budget will be included in the subsequent Annual Metro Budget Request and submitted to LACMTA for approval and implementation.

c. ... If a potential cost overrun or significant schedule delay is identified for a SBHP Project, any recovery recommendations that have been agreed to by the SBHP Project Lead Agency, SBCCOG Oversight Committee and LACMTA staff shall be documented in the subsequent SBCCOG SBHP Quarterly Contract Status Report. The report shall be in writing and delivered to LACMTA within 30 days after the end of each quarter."

The Metro Funding Agreement (FA) to make Measure R funds available to lead agencies contains the following provisions should the lead agency and the SBCCOG not be able to resolve the issues threatening project progress:

Part I Clause 6:

“If GRANTEE is consistently behind schedule in meeting milestones or in delivering the Project, LACMTA will have the option to suspend or terminate the FA for default as described in Part II, Sections 9 and 11 herein below.”

Part II Section 9:

TIMELY USE OF FUNDS / REPROGRAMMING OF FUNDS:

9.1 Grantee must demonstrate timely use of the Funds by:

- (i) expending the Funds granted under this FA for allowable costs within five years or 60 months from July 1 of the Fiscal Year in which the Funds are programmed, unless otherwise stated in this FA. All Funds programmed for FY 2011-12 are subject to lapse by June 30, 2016. All Funds programmed for FY 2012-13 are subject to lapse by June 30, 2017. All Funds programmed for FY 2013 -14 are subject to lapse by June 30, 2018.

9.2 In the event that the timely use of the Funds is not demonstrated as described in Part II, Section 9.1 of this FA, the Project will be reevaluated by LACMTA as part of its annual Recertification/De-obligation process and the Funds may be reprogrammed to another project by the LACMTA Board of Directors in accordance with the Ordinance, which may require that any reprogrammed funds be returned to the sub-region. In the event that all the Funds are reprogrammed, this FA shall automatically terminate.

Part II Section 11: REMEDIES:

11.1 In the event of a Default by Grantee, LACMTA shall provide written notice of such Default to Grantee with a 30-day period to cure the Default. In the event Grantee fails to cure the Default, or commit to cure the Default and commence the same within such 30-day period to the satisfaction of LACMTA, LACMTA shall have the following remedies: (i) LACMTA may terminate this FA; (ii) LACMTA may make no further disbursements of Funds to Grantee; and/or (iii) LACMTA may recover from Grantee any Funds disbursed to Grantee as allowed by law or in equity.

As a result, conditions can arise where project delays can jeopardize the funding to the extent that a FA can be terminated with a consequential loss or return of the Measure R funds.

Policy

The SBCCOG’s oversight policy as applied to the Measure R funding of the South Bay Highway Program (SBHP) is to pro-actively track progress at both the Program and project level. Project level progress is reviewed monthly by the SBCCOG’s Measure R Oversight Committee and Infrastructure Working Group. An annual review of project status by the project lead agency, SBCCOG and Metro allows for the early

identification of both impediments to project progress and potential cost increases along with actions to resolve such issues and for consideration of changes in project scope, funding allocations and schedule. Through these project oversight processes, the SBCCOG has the goal of continuously working with the lead agencies to avoid situations which could invoke the premature termination of a project's funding.

When oversight first identifies the potential of a project not being completed within the five-year window as defined in clause 9.1(i) of the FA, or no later than 12 months prior to the end of the FY in which the funds must be expended, the SBCCOG will secure from the Lead Agency either:

1. A commitment to complete the project within the timescale and commitment of completion of the project using Lead Agency funds for any shortfall in funding, or
2. A request for re-programming of funding, or
3. A request to de-obligate the project's funding

Should the first two options fail to produce the desired results and Metro is threatening to de-obligate the funds or has given such notice, then the SBCCOG will work with the Lead Agency to appeal the Metro action at the Oversight Committee and reach a resolution that will not de-obligate the funds. This coordination will include consultation with the highest levels of the Lead Agency management, including elected officials.

If the SBCCOG anticipates the threat of default, or in the event that a written notice of default is issued by Metro, the SBCCOG shall work with the lead agency and, within 20 days of the anticipated or actual receipt of the notice, cure the default or create and start to implement a plan which commits to curing the default.

In the event that the FA is terminated for reasons other than the successful completion of the project as defined by the scope of work, then the Lead Agency must provide any shortfall in funding to bring the project to a safe closure. The steps to a satisfactory closure should be mutually agreed upon by the Lead Agency and Metro, especially for projects that are already under construction to ensure a safe termination of the project.

Although Metro has the right to demand repayment of any of its funds, Metro's historic practice is to request a formal letter from the lead agency informing Metro that the lead agency has determined it will not proceed further with the project, providing an explanation for the reasons the project will not be completed, and the date that the lead agency will close the project down. Metro will determine its proportionate share of funding previously expended and its proportionate share of unexpended funding within the funding agreement. No reimbursements will be made by Metro for expenses incurred after the project termination date provided by the lead agency. Prior to terminating the funding agreement, Metro will audit the funding agreement invoices. As long as funds reimbursed under the funding agreement were eligible expenses appropriately charged to the funding agreement prior to the project termination date, Metro will not request a repayment of the expenses incurred prior to the project termination date. Once the project is closed out, Metro will deobligate its remaining proportion of the funding and the funds will return to the SBHP program for reallocation.

Should no FA be in place by such a time that would permit the completion of the project within the five-year period from July 1 of the Fiscal Year in which the funds were programmed, then the SBCCOG will re-evaluate the project with a view to either requesting a re-scoping of the project, re-programming the allocated funds on a new schedule, and or removing the project from the allocated project list. These actions will be incorporated in the next round of annual program budget review and allocation.

For any funding allocation changes that cannot be accommodated within the current fiscal year Metro funding allocation, the SBCCOG will work to secure any change in the programming of funds within the

next Metro Board update of Metro's Measure R Highway Operational Improvements Project List: Proposed List and Ten-Year Allocation. To ensure the necessary approvals are obtained at the November SBCCOG Board meeting each year, appeals to Metro and recommended courses of action will need to be requested by the Lead Agency by the end of August and recommended by the SBCCOG Measure R Oversight Committee at its October meeting. Any written notifications by Metro as to changes in available SBHP funding or prospective defaults and terminations would need to be received by the SBCCOG by the end of August each year in order to allow timely submittal of the Metro Budget Request by the SBCCOG in November as described in the Cooperative Agreement between Metro and the SBCCOG.