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September 25, 2015

By email: deliveryapproach@hsr.ca.gov

Rebecca Harnagel
California High-Speed Rail Authority
770 L Street, Suite 620 MS 2
Sacramento, CA 95814

Re: Ashurst LLP Response to Request for Expressions of Interest for Delivery of an Initial Operating Segment (RFEI HSR#15-02)

Dear Ms. Harnagel:

In response to RFEI HSR#15-02 (the "**RFEI**"), we enclose a submission prepared by Ashurst LLP addressing a specific question raised by the Authority during our conference call earlier this month.

We would be happy to further discuss our submission or any other aspect of your delivery strategy if you wish.

Respectfully,

[redacted]

Jason Radford, Partner

ashurst

September 25, 2015

Ashurst LLP Response to Request for Expressions of Interest for Delivery of an Initial Operating Segment (RFEI HSR#15-02)

Further to our conference call held on September 9, 2015 regarding the Authority's delivery strategy set out in the RFEI, this submission is made in response to the Authority's specific question raised on the call regarding the advantages of including private sector financing as part of the procurement and delivery strategy.

1. RESPONSE TO RFEI

As the Authority clearly understands, the debate over the pros and cons of different procurement methodologies is complicated and needs to be assessed in the context of the objectives and requirements of the Authority and its stakeholders and the specific requirements and challenges of the Project itself.

Sweeping generalizations are dangerous without application to the details of the project under consideration. We have advised numerous governments and bidders/financiers on rail projects around the globe and have never encountered projects where our structuring advice around procurement processes and the related contractual nexus has been replicated exactly.

Nevertheless, we set out below two key advantages to including private sector financing in rail project procurement. These advantages typically apply to each part of the procurement including the rolling stock procurement. They need to be weighed against the disadvantages of private financing including the (overly simplistic) comparison with the traditional costs of tax-exempt municipal finance. As we discussed, careful consideration does need to be given to the overall amount of private financing required: one factor which commonly limits the amount of private financing available for a project is the level of exposure to liquidated damages upon delays in construction. The two key advantages are:

a) **Greater likelihood of on-time delivery**. Historically infrastructure procurements involving private finance have a significantly better record for being completed on time than infrastructure procured on traditional cost-plus or design-build basis. This is predominantly because the debt principal repayment dates will commence shortly after the originally scheduled completion date, and there will not be flexibility from the creditors to move these dates. This puts significant pressure on the private sector developer to come up with a solution to ensure that the project is completed on time

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rather than attempt to negotiate an extension with the procuring authority.[1] This is augmented by the rigor associated with the diligence process undertaken by the rating agencies and lenders. This rigor ultimately benefits the public sector client in terms of timely, on-budget delivery – a factor often overlooked when comparing the cost of private capital.

b) **Infrastructure quality higher**. Because the risk of on-going maintenance is transferred to the private sector, the developer is incentivized to ensure that the infrastructure that it delivers has fully accounted for the full lifecycle costs of the system. This allows for the optimization of design-build costs and long-term maintenance programming, resulting in systems that are built and maintained for the long term. Private sector financing places an additional incentive on the developer to ensure the project is maintained well enough to repay the debt. In a DBM contract the contractor will have already been paid for the delivery of the infrastructure and will not be as strongly incentivized by the on-going maintenance fee. In the event that the authority terminates a DBFM project during the maintenance phase due to performance failures, the debt and equity investors will typically take a loss on their investment, whereas on a DBM project the authority can only claim against the developer for its losses.

2. FIRM EXPERIENCE

We set out in this section a brief statement of our experience with similar projects as requested at Section 11.3 of the RFEI.

Ashurst is one of the few international law firms that plays a leading role in the global rail industry. For example, our major rail experience includes acting for: (i) Transport for London in respect of the $30bn Crossrail project (Europe's largest infrastructure project), (ii) the MTR consortium as winning bidder for the $4bn Northwest Rail Link PPP in Sydney, Australia, (iii) the Kuwait Government in respect of the $20bn Kuwait Metro project, (iv) advising a bidder for both Phase I and Phase II of the Haramain High-Speed Rail Link in Saudi Arabia, (v) advising the winning consortium in respect of the Perpignan-Barcelona International High-Speed Rail Line between France and Spain, (vi) the funder in respect of a proposal for the Indonesian High-Speed rail, (vii) Transport for London in respect of all six extensions to the DLR railway in London, and (viii) Transport for NSW in Australia in respect of the procurement of the SLR railway in Sydney. Our clients have included governments, contractors, operators, rolling stock, systems and signalling providers and financiers.

In the US, Ashurst's lawyers have had a role acting for bidders, concessionaires or rolling stock providers on each of the public-private partnership ("P3") rail projects procured over the last ten years. More broadly, Ashurst is widely recognized as one of

[1] For example see National Audit Office (2003) PFI: Construction, Performance, Report by the Comptroller and Auditor, General HC 371, Session 2002-2003, 5 February. Survey suggested that 70% of traditionally procured projects were delivered late compared to 24% of PPP projects. Other studies have shown a less significant difference but the trend is consistent in favour of DBFOM.

the prominent P3 legal advisers globally, and, notably, over the past year has acted on three of the most significant P3 transactions in the US P3 sector.