

THIS PRINT COVERS CALENDAR ITEM NO. 10.4

**SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY**

DIVISION: Chief Strategy Officer

BRIEF DESCRIPTION:

Recommending that the SFMTA Board of Directors amend the existing SFMTA Contract Approval Delegation and Requirements Policy to delegate to the Director of Transportation authority to approve and execute grant agreements where the SFMTA, as grant recipient, provides unilateral indemnity to granting public agencies within certain limits.

SUMMARY:

- In 2009, the SFMTA Board passed Resolution No. 09-191, delegating to the Director of Transportation (Director) broad authority to approve and execute grant agreements where the SFMTA is the recipient;
- In 2019, the SFMTA Board adopted the SFMTA Contract Approval Delegation and Requirements Policy (“Delegation Policy”), which consolidated and superseded previous contracting delegations, including the 2009 delegation;
- The Delegation Policy authorizes the Director to approve grant agreements that provide for mutual indemnity with a granting public agency, but requires approval by the SFMTA Board where the SFMTA unilaterally indemnifies the granting public agency;
- Grant agreements that provide for unilateral indemnity of the granting public agency are more common than agreements that provide mutual indemnity, which are uncommon;
- Delegating to the Director authority to approve and execute grant agreements that provide for mutual indemnity of the granting public agency would reduce administrative paperwork, streamline the grants process, enable the Director to immediately enter certain grant agreements with our funding partners, and allow the SFMTA to accept and expend limited grant funds expeditiously;
- This action would amend the Delegation Policy to authorize the Director to approve grant agreements that unilaterally indemnify the grantor where the grantor is a public agency and the City Attorney or the City’s Risk Manager advise that the potential liability under the indemnity does not pose an undue risk to the SFMTA.

ENCLOSURES:

1. SFMTAB Resolution

APPROVALS:

DIRECTOR



DATE

August 30, 2023

SECRETARY



August 30, 2023

ASSIGNED SFMTAB CALENDAR DATE: September 5, 2023

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PURPOSE

Recommending that the SFMTA Board of Directors amend the existing SFMTA Contract Approval Delegation and Requirements Policy to delegate to the Director of Transportation authority to approve and execute grant agreements where the SFMTA, as grant recipient, provides unilateral indemnity to granting public agencies within certain limits.

STRATEGIC PLAN GOALS AND TRANSIT FIRST POLICY PRINCIPLES

Approval of the proposed resolution will support the following SFMTA Strategic Plan goals:

Goal 4: Financial Capacity - To ensure financial stability and effective resource utilization.

4.2: Ensure efficient and effective use of resources.

This item does not directly address any Transit First Policy Principles, but by streamlining the process for grant-agreement approvals, the proposed policy would support and facilitate the more efficient implementation of projects that enhance safety and public transportation.

DESCRIPTION

In 2009, the SFMTA Board passed Resolution No. 09-191, delegating to the Director of Transportation (Director) broad authority to approve and execute grant agreements where the SFMTA was the grant recipient. The resolution imposed no restrictions on this delegated authority.

In 2019, the SFMTA Board adopted the Delegation Policy, which consolidated and superseded previous contracting delegations, including the 2009 delegation. The purpose of the Delegation Policy was to reduce administrative paperwork and streamline the approval process for various expenditure contracts, leases, licenses, revenue contracts, miscellaneous agreements, contract amendments, and grant agreements, with limits prescribed in the Delegation Policy.

Regarding indemnity provisions in grant agreements where the SFMTA is the grant recipient, the Delegation Policy pulled back authority previously given to the Director under the 2009 delegation. Specifically, it limits the Director's authority to approve grant agreements that provide for mutual indemnity between the SFMTA and a granting public entity. But, it requires SFMTA Board approval where the SFMTA would unilaterally indemnify the grantor. (*See* Delegation Policy, Sections C.2 and C.5.a.)

Mutual indemnity involves a reciprocal commitment where both parties to an agreement agree to compensate each other for specific losses, damages, or liabilities that could arise from either party's performance under the agreement. Conversely, a unilateral indemnity involves a commitment where one party (the indemnitor) agrees to compensate the other party (indemnitee)

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for such losses, damages, or liabilities that could arise from the indemnitor's (and in some cases the indemnitee's) performance under the agreement, but without a reciprocal obligation from the indemnitee.

In practice, the Director's limited authority over indemnity provisions in grant agreements that provide for mutual indemnity is not useful. This is because such agreements are not common. Usually when a public agency gives a grant, its main responsibility is to provide the grant money, not the types of services that might lead to a need for a mutual indemnity. Mutual indemnities between public agencies are more common in agreements between agencies where both parties work together provide services to a common constituent or for a common project.

Grant agreements that provide for unilateral indemnity from the grantee to the granting public agency are more common. Several factors contribute to this, including: (i) protecting the grantor's interests from potential liabilities or losses that might arise from the grantee's activities; (ii) minimizing the grantor's financial risk; (iii) legal or regulatory compliance (e.g., grantors, especially government agencies, might have legal or regulatory obligations that require them to protect public funds and interests); and (iv) budgetary and resource constraints.

Grantees typically accept unilateral indemnity obligations towards grantors as a trade-off to access essential funds. In common, competitive grant scenarios, grantees might have limited negotiation power. Grantees might view the potential benefits of the grant as outweighing the risk associated with unilateral indemnity, especially if the risk is low or there is a strong relationship of trust between the grantee and grantor.

Recently, the SFMTA secured a Clean California Program grant from Caltrans to make improvements to Yerba Buena Gardens. This grant required a unilateral indemnity obligation from the SFMTA in favor of Caltrans and, thus, required approval of the SFMTA Board.

Delegating authority to the Director for approving and executing grant agreements where the SFMTA provides unilateral indemnity to granting public agencies would reduce administrative paperwork, streamline the grants process, enable the Director to immediately enter certain grant agreements with our funding partners, and allow the SFMTA to accept and expend limited grant funds expeditiously.

If the SFMTA were to receive future Clean California Program grants, including an active pursuit for a grant to clean Muni bus stops and subway stations in preparation for the 2023 Asia-Pacific Economic Cooperation Leaders' Meeting in November, or other grants with unilateral indemnity clauses, the Director would be delegated the authority to enter into these agreements within certain limits without asking the SFMTA Board to take further action. In the case of unexpected or new opportunities with short grant-application and disbursement timelines, the delegation is critical.

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This action would amend Section C.2 of Delegation Policy as follows:

The Director is authorized to approve applications for grant funds, to approve agreements to accept, expend grant funds, and to transfer grants funds to a public agency that will be a sub-recipient of said grant funds, indemnify the grantor where the grantor is a public agency and the City Attorney or the City's Risk Manager advise that the potential liability under the indemnity does not pose an undue risk to the SFMTA. (~~up to the limits stated in Section C.5, below~~).

STAKEHOLDER ENGAGEMENT

As this change will not have a direct impact upon stakeholders, engagement was not conducted at this time. Throughout the implementation of projects and programs to be funded by accepted grants, the SFMTA will follow its adopted Public Outreach and Engagement Requirements.

ALTERNATIVES CONSIDERED

The SFMTA Board could choose higher or lower delegation limits, could reserve approval of certain types of contracts to itself, or delegate additional or less authority to the Director. In the absence of delegated approval authority to the Director, staff must present all grant agreements requiring unilateral indemnity to the SFMTA Board for approval, which can add weeks to the grant process, delay project implementation or progress, and delay payments to contractors and vendors.

FUNDING IMPACT

If approved, this change may lead to an increase in the number of grants the Director has the authority to approve and execute, giving the Agency access to funds from specific grants more quickly.

ENVIRONMENTAL REVIEW

On August 29, 2023, the SFMTA, under authority delegated by the Planning Department, determined that amending the existing SFMTA Contract Approval Delegation and Requirements Policy to delegate to the Director of Transportation authority to approve and execute grant agreements where the SFMTA, as grant recipient, provides unilateral indemnity to granting public agencies within certain limits is not a "project" under the California Environmental Quality Act (CEQA) pursuant to Title 14 of the California Code of Regulations Sections 15060(c) and 15378(b).

A copy of the CEQA determination is on file with the Secretary to the SFMTA Board of Directors and is incorporated herein by reference.

OTHER APPROVALS RECEIVED OR STILL REQUIRED

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The City Attorney's Office has reviewed this calendar item.

RECOMMENDATION

Recommending that the SFMTA Board of Directors amend the existing SFMTA Contract Approval Delegation and Requirements Policy to delegate to the Director of Transportation authority to approve and execute grant agreements where the SFMTA, as grant recipient, provides unilateral indemnity to granting public agencies within certain limits.

SAN FRANCISCO
MUNICIPAL TRANSPORTATION AGENCY
BOARD OF DIRECTORS

RESOLUTION No. _____

WHEREAS, In 2009, the SFMTA Board of Directors passed Resolution No. 09-191, delegating to the Director of Transportation (Director) broad authority to approve and execute grant agreements where the SFMTA is the recipient; and,

WHEREAS, In 2019, the SFMTA Board of Directors adopted the SFMTA Contract Approval Delegation and Requirements Policy (“Delegation Policy”), which consolidated and superseded previous contracting delegations, including the 2009 delegation; and,

WHEREAS, The Delegation Policy authorizes the Director to approve grant agreements that provide for mutual indemnity with a granting public agency, but requires approval by the SFMTA Board where the SFMTA unilaterally indemnifies the granting public agency; and

WHEREAS, Grant agreements that provide for unilateral indemnity of the granting public agency are more common than agreements that provide mutual indemnity, which are uncommon; and,

WHEREAS, Delegating to the Director authority to approve and execute grant agreements that provide for mutual indemnity of the granting public agency would reduce administrative paperwork, streamline the grants process, enable the Director to immediately enter certain grant agreements with our funding partners, and allow the SFMTA to accept and expend limited grant funds expeditiously; and,

WHEREAS, On August 29, 2023, the SFMTA, under authority delegated by the Planning Department, determined that amending the existing SFMTA Contract Approval Delegation and Requirements Policy to delegate to the Director of Transportation authority to approve and execute grant agreements where the SFMTA, as grant recipient, provides unilateral indemnity to granting public agencies within certain limits is not a “project” under the California Environmental Quality Act (CEQA) pursuant to Title 14 of the California Code of Regulations Sections 15060(c) and 15378(b); and therefore be it

RESOLVED, That the San Francisco Municipal Transportation Agency Board of Directors amends the existing SFMTA Contract Approval Delegation and Requirements Policy to delegate to the Director of Transportation authority to approve and execute grant agreements where the SFMTA, as grant recipient, provides unilateral indemnity to granting public agencies within certain limits.

I certify that the foregoing resolution was adopted by the San Francisco Municipal Transportation Agency Board of Directors at its meeting of September 5, 2023.

Secretary to the Board of Directors
San Francisco Municipal Transportation Agency