



## California High-Speed Rail BRIEFING: February 1, 2022; Agenda Item #2

**TO:** Board Chair Richards and Authority Board Members  
**FROM:** Chief Counsel Alicia Fowler  
**DATE:** January 26, 2022  
**RE:** Explanation of the Authority's Organizational Conflict of Interest Policy

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### Summary

The Board of Directors requested a presentation and discussion on the Authority's Organizational Conflict of Interest Policy ("Policy"). The purpose of this informational agenda item is to provide insight on the process employed by the Authority to determine if a business desiring to work on or currently working on the High-Speed Rail Project ("Project") has an organizational conflict of interest prohibiting its participation and if so, whether mitigation is possible.

This memorandum addresses the Policy and topic generally. Discussion of specific determinations, either active or resolved, is not appropriate and could expose the Authority to unnecessary legal and bid protest risks.

### Background

The Policy was developed to comply with our federal grant agreements, which require the Authority to have procedures for identifying and preventing real and apparent organizational conflicts of interests. The Policy is intended to ensure a fair and transparent procurement process that maximizes competition and minimizes exposure to bid protests and litigation. When contractors trust that our Policy will be implemented consistently and fairly, they have confidence in a truly competitive bidding process.

The Policy was created in 2011 with stakeholder input and following a public comment period. The Policy was amended in November of 2020, again with stakeholder input, to address the evolving nature of the project. The Policy is based upon state and federal procurement laws, regulations, court and administrative decisions, best practice guidelines, and the Caltrans Policy for its Design-Build program.<sup>1</sup>

### *Organizational Conflicts of Interest*

There are generally two instances in which an organizational conflict of interest ("OCOI") will be found to exist for companies seeking work on the Project: 1) an entity has an **unfair** competitive advantage in a procurement,

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<sup>1</sup> See California Gov. Code § 1090 et seq.; Federal Transit Administration Best Practices Procurement Manual; 40 C.F.R. Part 1500 et seq.; California Public Contract Code § 10365.5; National Environmental Policy Act of 1969, § 102; 42 U.S.C.A. § 4332; F.A.R. subpart 9.5; *Alion Science & Technology Corp.*, B-297342, Jan. 9, 2006, 2006 CPD; and *Aetna Gov't Health Plans, Found. Health Fed. Servs., Inc.*, Comp. Gen. B-254397, et al., July 27, 1995, 95-2 CPD.

or 2) an entity's objectivity in performing its contractual obligations for the Authority would be compromised such that it could not provide impartial assistance.

It is important to note that simply having prior experience with the Authority does not act as an absolute bar on future contracts. Competitive advantages exist and are permissible; rather, OCOIs arise when a contractor has inside and nonpublic information that may give it an **unfair** competitive advantage<sup>2</sup> or when its prior or current work would put it in a position where its objectivity could be compromised, and mitigation is not possible.

For example, an engineering firm that works for a design-builder on the Project could not also work for the Authority's construction management consultant tasked with verifying and validating construction drawings from the design-builder. A conflict exists because the engineering firm could not fulfill its fiduciary duty to the design-builder which must maximize profits while, at the same time, fulfill its duty to the Authority to assure the design-builder's work product meets contract requirements. This could also create a situation where the engineering firm is reviewing its own work. And a consultant hired to assist with the development of a procurement could not then bid on such procurement. A conflict exists because the consultant could advise and participate in the procurement development to create a competitive advantage for itself.

These two underlying principles—preventing unfair competitive advantages and preventing the existence of conflicting roles that could bias a contractor's judgment—guide OCOI policies of federal and state agencies everywhere and are embedded in federal acquisition regulations. Federal courts are very deferential to public agency decisions on OCOIs, and typically uphold them unless the agency acted in an arbitrary or capricious manner, abused its discretion, or acted illegally.<sup>3</sup>

Additionally, the California Supreme Court held in 2017 that Government Code section 1090, which prohibits public officials from participating in contracts in which they have a financial interest, applies to independent contractors (including consultants and corporations) "when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf."<sup>4</sup> This holding supports the above-referenced principle of maintaining impartiality when performing contractual duties. Yet, it also means that independent contractors and corporations may be held civilly—and criminally—liable under Government Code section 1090. This recent court decision is especially relevant for the Authority, which has numerous advisory consultants under contract in an "agency partner" role. Such consultants are typically prohibited from taking on other work on the Project.

### *The Policy in Practice*

The Policy comes into play most often during competitive procurements for new contracts issued by the Authority. When a business requests a determination regarding a potential OCOI, the inquiry comes to the Authority's Legal Division. The assigned attorney reviews the information submitted and communicates with the requestor for clarification and additional information requests. Scopes of work for relevant contracts are reviewed. The attorney conducts an analysis, based on the specific facts, under the Policy. A legal memorandum with a recommendation is prepared. The Assistant Chief Counsel reviews and discusses with the assigned attorney. Once the memorandum is finalized following that review, the Chief Counsel performs an additional review. Once all issues raised are considered, the Chief Counsel makes a determination and informs the requestor by letter, which includes the facts upon which the determination is made and citations to applicable sections of the Policy.

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<sup>2</sup> *Snell Enters., Comp.* Gen. B-290113, B-290113.2, June 10, 2002, 2002 CPD ¶ 115.

<sup>3</sup> *ARINC Eng'g Servs. v. United States* (2007) 77 Fed. Cl 196.

<sup>4</sup> *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230 at 245.

The Authority's decision is final, yet a requestor may protest through the applicable procurement and ultimately could seek a remedy through the court. However, nothing prevents the requestor from making additional determination requests based upon changed facts or requestor-proposed mitigation remedies, and in practice requestors have utilized this method of interaction. All requests and renewed requests are addressed promptly to assure the requestor can make informed business decisions. Requestors are always free to seek their own legal counsel, and many do, to assist in the analysis and communications with the Authority.

An "Organizational Conflict of Interest" is defined in the Policy as follows:

"...a circumstance arising out of a Contractor's existing or past activities, business or financial interests, familial relationships, contractual relationships, and/or organizational structure (i.e., parent entities, subsidiaries, Affiliates, etc.) that results or would result in:

- (i) impairment or potential impairment of a Contractor's ability to render impartial assistance or advice to the Authority or of its objectivity in performing work for Authority,
- (ii) an unfair competitive advantage for any Contractor bidding or proposing on an Authority procurement, or
- (iii) a perception or appearance of impropriety with respect to any of the Authority's procurements or contracts or a perception or appearance of unfair competitive advantage with respect to a procurement by the Authority (regardless of whether any such perception is accurate.)"

If a potential conflict is recognized, the Policy requires consideration of numerous factors to determine whether the contractor may participate in the contract in question and whether any mitigation or safeguards may be implemented to permit participation despite a conflict. Such safeguards are commonly applied to allow participation and include things like ethical walls and release of work product.

Additionally, the Policy states that "the Authority recognizes that its goals must be balanced against the need to not unnecessarily restrict the pool of potential proposers or bidders available to participate in Authority procurements and contracts."

As stated above, contractors and consultants are generally not "conflicted" out simply because they've done prior work on the Project. Many contractors do work on several different areas of the Project under separate contracts. The vast majority of OCOI determinations find that a contractor may participate in the desired procurement and/or contract.

Since 2017 the Authority has issued at least 67 determinations on potential OCOIs. Of these, the Authority determined the contractor was permitted to participate in the desired procurement and/or contract 52 times. Of the 52 positive determinations, some 20 included mitigation measures being applied to prevent a possible conflict. The Authority issued negative determinations prohibiting the contractor from participating 15 times; five of these were consultants responsible for an active Environmental Impact Report/Environmental Impact Statement ("EIR/EIS") and were required to wait until the Record of Decision was issued (per federal requirements) to bid and several others were contractors who serve(d) in an oversight role for the Authority. None of the Authority's OCOI determinations have been legally challenged and none have resulted in a bid protest.

To add perspective, since 2017 the Authority has entered into at least 220 contracts with contractors/consultants and those contractors/consultants (and those with earlier contracts) have contracted with dozens, and likely hundreds, more subcontractors/consultants, sometimes at multiple tiers. Out of the 15 determinations finding participation prohibitions, only one was a small business. The Authority has 657 small businesses, disadvantaged business enterprises, and disabled veteran business enterprises active on the Project.

There are a few areas of the project for which prior work is more likely to result in a determination that a conflict exists and participation in the subject contract is not possible (or not possible for a certain period of time.) These include environmental consultants responsible for an active EIR/EIS (as required under federal law and guidelines), construction management consultants, and consultants who serve in a project-wide advisory “partner” role, including the Early Train Operator, Program Delivery Support, the Financial Advisor, and the Enterprise Risk Management Advisor.

**Legal Approval**

The Legal Office is presenting this agenda item and approves the materials presented.

**Budget and Fiscal Impact**

This is an informational item on the Authority’s Organizational Conflict of Interest Policy, and by itself, does not have a budget or fiscal impact.

REVIEWER INFORMATION	SIGNATURE
Reviewer Name and Title: Brian Annis Chief Financial Officer	Signature verifying budget analysis: Signed January 26, 2022
Reviewer Name and Title: Alicia Fowler Chief Counsel	Signature verifying legal analysis: Signed January 26, 2022

**Recommendations**

This is an informational item, and no action is recommended.

**Attachments**

Organizational Conflict of Interest Policy