



California High-Speed Rail **BRIEFING: June 29, 2023 Board Meeting** **Agenda Item #2**

TO: Board Chair Richards and Authority Board Members

FROM: Chief Counsel Alicia Fowler

DATE: June 29, 2023

RE: Proposed Amendments to the Authority's Organizational Conflict of Interest Policy for Acceptance by the California High Speed Rail Authority Board of Directors

Summary

The Board of Directors asked Vice Chair Nancy Miller, Board member Martha Escutia, and staff, to amend the Authority's current Organizational Conflict of Interest Policy ("Policy"). To further that process the Authority took public comment on a proposed draft Policy and staff worked with Vice Chair Nancy Miller and Board member Martha Escutia to finalize an amended Policy. The purpose of this agenda item is to provide insight on the process employed by the Authority to draft the amended Policy and to get the Board of Director's acceptance of the amended Policy.

Background

The Policy¹ 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. The Policy is based upon state and federal procurement laws, regulations, court and administrative decisions, best practice guidelines, and the Caltrans' Organizational Conflict of Interest Policy.

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 high-speed rail project.

¹ The Authority's Organizational Conflict of Interest Policy (OCIP) is separate and distinct from the Authority's Conflict of Interest (COI) Policy. The COI Policy is required under the California Political Reform Act, which regulates campaign financing, personal conflicts of interest, lobbying, and governmental ethics. The Authority's COI Policy applies to state employees and certain consultants. The Fair Political Practices Commission has primary responsibility for administering the Political Reform Act. The Commission's objectives are to ensure that public officials act in a fair and unbiased manner in the governmental decision-making process, to promote transparency in government, and to foster public trust in the political system. The COI is overseen by the Fair Political Practices Commission (FPPC).

In November 2022, Vice Chair Nancy Miller and Board member Martha Escutia were asked by Chair Richards to direct staff on the process for updating the Policy. Vice Chair Nancy Miller and Board member Martha Escutia met with staff and reviewed draft proposals for changes to the Policy and directed a public comment period be undertaken on the proposed changes to the Policy. The Authority held a public comment period to receive input on the draft Policy from December 21, 2022, to February 21, 2023. Notice of that public comment period was placed on the Authority's website and sent to an extensive list of interested stakeholders. The draft Policy was also sent to the Authority's Business Advisory Council ("BAC") on January 13, 2023. Authority staff presented to the BAC on the topic on January 25, 2023.

The proposed changes to the Policy included a number of minimal edits to simplify and clarify text. The substantive changes included the following:

1. Lessening the focus on the Design-Build contracting structure and broadening the types of delivery methods addressed in the Policy;
2. Clarification that potential bidders should be identifying potential organizational conflicts of interest related to contractor review, supervision or oversight of work by other entities on the HSR project if the contractor has a financial relationship with those entities on projects outside the Authority's program;
3. Clarification that Proposals include both Statements of Qualifications and bids;
4. A definition of Regional Consultant that clearly incorporates Engineering and Environmental consultants;
5. A clear description of the process for a bidder or consultant to seek an organizational conflict determination.
6. A statement that the responsibility for determining an actual or apparent conflict rests with the Authority, not the entity seeking a determination;
7. Additional factors to be considered when a bidder performs work on multiple contracts;
8. Updated hypotheticals to match recent conflict examples; and
9. Removal of the contract compatibility matrix.

Staff worked with Vice Chair Nancy Miller and Board member Martha Escutia to ensure that the input received was reflected in the proposed changes to the Policy. The attached amended Policy is the result of that work.

In addition, Vice Chair Nancy Miller, Board member Martha Escutia, and staff agreed to the following actions in response to input received during the public comment period and from both Board members:

- a. The Authority will develop a checklist for the participants in a procurement which includes a time estimate for an Authority response to an organizational conflicts determination request. The checklist and timeline will be included in future procurement documents.
- b. Information for each procurement posted on the Authority's website will include information about the Authority's Policy, including the checklist and timeline.
- c. The Authority now requires a statement, signed under penalty of perjury by the firm Executive, that the firm considered the Policy and performed conflicts checks prior to submitting its bid or statement of qualification.
- d. Procurement documents will include a requirement that Contractors self-certify annually that required organizational conflict mitigations are in place, and Authority contract managers will enforce this requirement. Contract managers will continue to provide oversight for mitigations required after an organizational conflict of interest determination.
- e. The Authority will consider developing a new matrix, if appropriate, to assist stakeholders considering organizational conflicts of interests, that would be a standalone document and separate from the Policy itself.

Prior Board Action

The Board had an informational meeting on the Policy on February 1, 2022. The Board asked Vice Chair Nancy Miller and Board member Martha Escutia to review and consider updates to the Policy in November 2022.

Discussion

Two underlying principles—preventing unfair competitive advantages and preventing the existence of conflicting roles that could bias a contractor’s judgment—guide organizational conflict of interest policies of federal and state agencies everywhere and are embedded in federal acquisition regulations. Federal courts are very deferential to public agency decisions on organizational conflicts, and typically uphold them unless the agency acted in an arbitrary or capricious manner, abused its discretion, or acted illegally.

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 or offering 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 to the public.

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.”

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 organizational conflict of interest determinations find that a contractor may participate in the desired procurement and/or contract.

Vice Chair Nancy Miller, Board member Martha Escutia, and staff working on the [Proposed] Policy presented to the Board for acceptance, considered all of the above principals in making the recommended changes.

Legal Approval

The Legal Office is presenting this agenda item and approves the materials presented as consistent with California law.

Budget and Fiscal Impact

This item does not have a quantifiable budget or fiscal impact, but in general, clear Organizational Conflict of Interest policies benefit procurements by attracting more proposals and also reducing risk of protests by unsuccessful proposers, which may reduce procurement costs over time.

REVIEWER INFORMATION	SIGNATURE
Reviewer Name and Title: Brian Annis Chief Financial Officer	Signature verifying budget analysis: Signed 6/22/23
Reviewer Name and Title: Alicia Fowler Chief Counsel	Signature verifying legal analysis: Signed 6/22/23

Recommendations

It is recommended that the amended Organizational Conflict of Interest Policy be accepted by the Board for Authority use from the date of acceptance forward.

Attachments

Current Organizational Conflict of Interest Policy

December 2022 Proposed Revisions for Public Comment Period

Amended Organizational Conflict of Interest Policy (redline from Dec 2022 version)

Amended Organizational Conflict of Interest Policy (clean for acceptance)