

CALIFORNIA HIGH-SPEED RAIL AUTHORITY'S ORGANIZATIONAL CONFLICT OF INTEREST POLICY

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WHY IS AN ORGANIZATIONAL CONFLICT OF INTEREST (OCOI) POLICY NECESSARY?

- **As the U.S. Supreme Court explained in the context of a federal conflict of interest statute, conflict of interest rules are:**
 - » “...directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government.”
 - » (United States v. Mississippi Valley Co. (1961) 364 U.S. 520, 549, 81 S.Ct. 294, 5 L.Ed.2d 268, **emphasis added**)



OCOI POLICY CREATION AND REVISION

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- **Original Policy (2011)**

- » Created with input from outside counsel, including the Attorney General's Office
- » Included stakeholder/trade input and a public comment period

- **Revised Policy (2020)**

- » Amended to address the evolving nature of the project
- » Addressed stakeholder/trade input and comments, including members of the American Council of Engineering Companies

When contractors trust that our Policy will be implemented consistently and fairly, they have confidence in a truly competitive bidding process.



CONTEXTUAL OVERVIEW OF CONFLICT DETERMINATIONS & SMALL BUSINESS PARTICIPATION

- **Since 2017, the Authority has executed over 220 hundred contracts**
 - » 67 determinations on potential OCOIs were issued
 - » 52 determinations permitted participation
 - » 15 determinations found unmitigable conflicts
 - » Only 1 small business has been precluded due to conflicts
 - » None of the Authority's OCOI determinations have been legally challenged nor resulted in a formal bid protest
- **The Authority has 657 small businesses, disadvantaged business enterprises, and disabled veteran business enterprises active on the Project**



PURPOSE OF THE AUTHORITY'S OCOI POLICY

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- **Fulfill the Authority's federal grant agreement obligations, which require procedures for identifying and preventing real and apparent organizational conflicts of interest**
- **Comply with state and federal law, including procurement laws, regulations, court and administrative decisions, and best practices**
- **Ensure a fair and transparent procurement process**
- **Maximize competition**
- **Minimize exposure to bid protests and litigation**



WHY ARE OCOI POLICIES IMPORTANT?

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- **The integrity, fairness, and public confidence in a public procurement is highest when procurements are conducted with impartiality**
 - » Major international procurement systems recognize integrity as a foundational component of public procurement
 - » Conflict rules directly promote legitimacy and increase competition
- **The failure of a procurement system to address conflicts appropriately can undermine both the process and the performance**
 - » Unaddressed conflicts can undermine competition; contractors may be unwilling to compete in a procurement if the ground rules appear to favor one competitor
 - » Conflicts can reduce the quality and value of the services the Authority receives due to competing loyalties. Divided loyalties may include conflicting interests
 - » Contractor self-interest will create performance risk. Maximize profit or render candid advice to the Authority?



- **State and Federal:**

- » Federal Grant Agreements
- » Federal Transit Administration Best Practices Procurement Manual
- » National Environmental Policy Act
- » Federal Acquisition Regulations
- » State procurement laws
- » Conflict of interest statutes
- » Regulations
- » Court and administrative decisions
- » Caltrans Conflict of Interest Policy

THE POLICY IN PRACTICE

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- **The Policy comes into play most often during competitive procurements for new contracts issued by the Authority**
 - » The inquiry is directed to the Authority's Legal Division
 - » A staff attorney undertakes an investigation and analysis, and prepares a draft legal memorandum with a recommendation
 - » After additional reviews and discussions with the Assistant Chief Counsel and the Chief Counsel the memorandum is finalized
 - » The Chief Counsel makes the final determination and informs the requestor by letter, which discusses the relevant facts and applicable Policy provisions
- **The Authority's decision is final, yet a requestor may file a protest in the procurement or seek remedy through the court**
- **Requestors can seek their own legal counsel to assist in the analysis and communications with the Authority**



POLICY OCOI DEFINITION

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- An **“Organizational Conflict of Interest”** is defined as:

- » “...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).”



ORGANIZATIONAL CONFLICTS OF INTEREST

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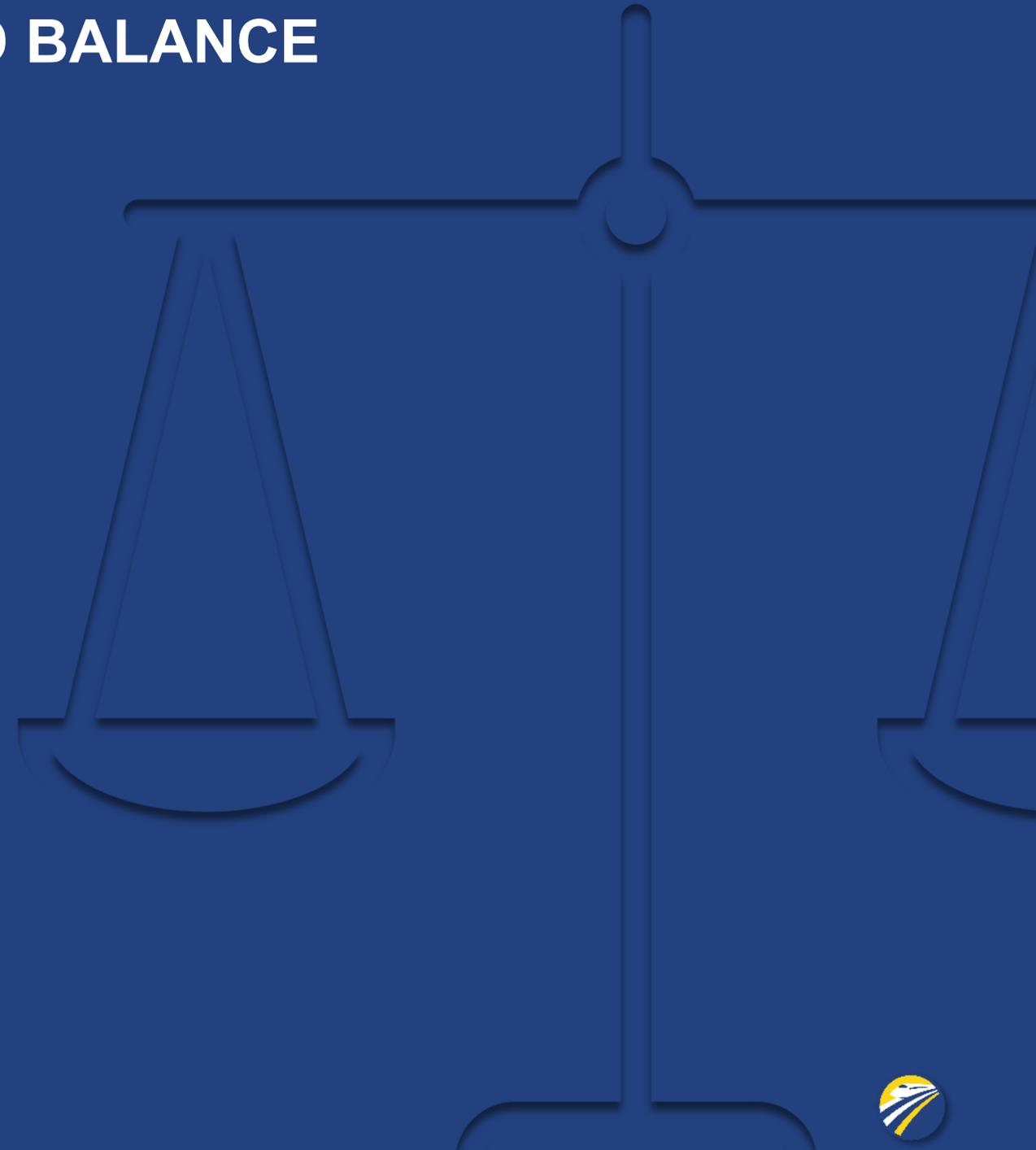
- **Two general situations in which an organizational conflict of interest will be found to exist for a contractor:**
 1. A contractor has an unfair competitive advantage
 - Example: a contractor has inside or non-public information about a procurement
 2. A contractors' objectivity in performing its contractual obligations for the Authority would be compromised such that it could not provide impartial assistance
 - Example: a contractor on Contract A is in a position to oversee its own work on Contract B and mitigation is not possible
- **Courts are very deferential to public agency decisions on OCOs unless the agency acted in an arbitrary or capricious manner, abused its discretion, or acted illegally**



THE POLICY ACHIEVES A GOOD BALANCE

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- **Overly restrictive conflict policies, such as those requiring mandatory disqualifications, can:**
 - » reduce competition by limiting access to certain contractors
 - » limit access to sources of goods or services
 - » increase compliance costs for organizations doing business with the Authority thereby increasing the cost of all goods and services



THE POLICY HAS NECESSARY FLEXIBILITY

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- **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.”**
- **If a potential conflict is recognized, the Policy requires consideration of numerous factors to determine whether the contractor may participate in the contract 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 measures like ethical walls and release of work product.**
- **Contractors 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.**



DISQUALIFYING CONFLICTS ARE NOT COMMON

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- **Since 2017, the Authority has issued at least 67 determinations on potential OCOIs**
 - » The contractor was permitted to participate in the desired procurement and/or contract 52 times
 - » Of the 52 positive determinations, 20 included mitigation measures being applied to prevent a possible conflict
 - » The contractor was found to have unmitigable conflicts only 15 times
 - » Five 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)
 - » Others were contractors who serve(d) in an oversight role for the Authority
 - » None of the Authority’s OCOI determinations have been legally challenged nor resulted in a formal bid protest



SMALL BUSINESSES ARE NOT DISPROPORTIONALLY IMPACTED

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- **Since 2017 the Authority has entered into at least 220 contracts with prime contractors that have contracted with dozens, and likely hundreds, more subcontractors, sometimes at multiple tiers**
 - » Out of the 15 determinations finding participation prohibitions, only one is a small business
 - » The Authority has 657 small businesses, disadvantaged business enterprises, and disabled veteran business enterprises active on the Project



PROGRAM DELIVERY SUPPORT SERVICES PROCUREMENT

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- **The Authority received nine OCOI Policy determination requests, two of which are recent and presently under review. Of the seven original requests, the Authority Legal Office found:**
 - » Three of the seven requestors were precluded from participation in the procurement
 - » No small businesses were precluded
- **As of November 30, 2021, the Rail Delivery Partner (RDP) Small Business utilization totaled almost 29% which is comprised of:**
 - » Small Business 8.17%,
 - » Micro Business 2.75%
 - » Disadvantaged Business Enterprise 15.61%
 - » Disabled Veteran Business Enterprise 2.05%
- **The PDS contract will be subject to a 30% overall Small Business participation goal. Given the similar scope of work and contract structure to the RDP contract, there is no reason that the PDS contract will not have comparable Small Business utilization results and meet the goal.**



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