Navigating Conflict Issues in Engaging Professional Consultants

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Sorting Out the Conflicts: Consultants and Alternate Methods of Project Delivery

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INTRODUCTION

The intent of this paper is to address two evolving trends in public contracting in California. When taken together, these trends raise unique challenges for contracting entities and their legal counsel. The first is the movement away from the traditional design/bid/build approach to project delivery and towards design/build and other methods of "alternate project delivery." These delivery methods often alter the roles that consultants, particularly design professionals, play in the delivery of public projects. The other trend is the changing interpretations of the prohibitions on conflicts of interest with regard to consultants that are contained California Government Code Section 1090.[1] The changing role of consultants under these new project delivery methods comes at a time when the courts have stated a wider scope for the application of Section 1090's prohibition on consultants being self-interested in contracts. This new scope includes the application of the law to consulting firms and applies criminal sanctions to violations of that law. Thus, at a time when consultants are taking on new roles in the contracting sphere, they must also navigate a different legal landscape. And cities, as they explore potentially more effective project delivery methods, must be diligent regarding these changing rules and roles. This paper will also be of benefit to cities that are not using alternate contracting approaches, but can benefit from additional guidance as to the roles of consultants in their employ.

In order to devote sufficient attention to these unique issues, and to not restate information already provided elsewhere, we want to direct the reader to three existing papers available from the League:

1. Harrison and Prinzing, "Navigating Pitfalls Under Government Code Section 1090 When Contracting Consultants" (2018)

2. Gehrig, "Alternate Project Delivery Methods for Public Works Projects in California" (2009)

3. Conneran, "The ABC's of PPP's: The Basics Regarding Public-Private Partnerships" (2009)

We recommend that the reader consult these valuable resource materials on the finer points of the topics they address. The goal of this paper is to explore common areas of concern that arise as a result of the changing roles of consultants under these new project delivery methods and to suggest approaches that will assist cities with their general contracting approaches under the new consultant rules. While we want to avoid unnecessary duplication of the wisdom contained in these prior guides, at the same time we need to make this paper independently useful. Therefore, we will present a very basic outline of the issues that arise with regard to consultants and Section 1090, but will trace the historical development of the statute at it bears on the current regulatory landscape.

GOVERNMENT CODE SECTION 1090—CALIFORNIA'S HISTORIC BAN ON SELF-DEALING IN PUBLIC CONTRACTS

Most simply stated, Section 1090 prohibits public officers and employees from participating in the making of contracts in which they have a financial interest. Contracts made in violation of this stricture are void, and parties that have an interest in such contracts can be criminally prosecuted under Government Code Section 1097. For purposes of this paper, our focus is on

[1] All code references are to the California Government Code unless specifically noted.

not only who qualifies as a "public officer of employee" but, and perhaps more importantly, what is meant by "participating in the making of a contract," particularly under these new approaches to project delivery. Issues such as the ability of boards to act on contracts, the application of the rule of necessity for contract approval and the various types of remote interests and non-interests under Section 1090 et seq. are beyond the scope of the paper.[2]

The evolution of the application of Section 1090 to consultants.

Section 1090 provides in relevant part: “Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members.” Section 1090 is an old statute, derived from common law that dates to 1851, which prohibited self-dealing.[3] As stated by the California Supreme Court, Section 1090 "[C]odifies the long-standing common law rule that barred public officials from being personally financially interested in the contracts they formed in their official capacities." (*Lexin v Superior Court* (2010) 47 Cal.4th 1050, 1072.) "The common law rule and section 1090 recognize “[t]he truism that a person cannot serve two masters simultaneously.... [Citations.]" (*Id.* at 1073.) Another court stated the concept this away: “The evil to be thwarted by section 1090 is easily identified: If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality.” (*Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1330.)

As might be expected with a statute that is derived from the common law, the reach of Section 1090 has been extended from time to time by the courts as they are presented with new situations that raise concerns with potential corruption. Some of these court decisions have later been embodied as revisions to the statute itself. The statute originally adopted as Government Code 1090 in 1943 did not mention "employees" and was not initially applied to outside contractors. In 1956, the court in *Shaeffer v Berinstein* ((1956) 140 Cal.App.2d 278) found that the statute should be applied to an outside attorney, who had been "employed" by a city as special counsel, and had arranged to purchase properties being sold at a tax sale through a shell company. The court, in making its ruling regarding the attorney involved in the tax deed scam, relied upon a city charter provision that specifically mentioned "officers and employees," and held that Section 1090 applied to the defendant outside attorney as well. (*Id.* at 291.) The statute was then modified in 1963 to add the words "or employees" in two places. (Stats. 1963, Ch. 2172.) It is significant to note that California Supreme Court, in the recent decision in *People v. Superior Court (Sahlolbei),* commented that the Legislature had endorsed *Schaefer* in its adoption of the 1963 amendment, as the case appears in legislative history of that amendment. (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 236-7.)

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[2] Readers are directed to the Harrison and Prinzing paper cited above, the League's publication, "Providing Conflict of Interest Advice," and the Attorney General's publication "Conflicts of Interest."

[3] "As early as 1851, the Legislature acted to bar any government official or legislator from being “interested in any Contract made by such Officer or Legislature of which he is a member; or be[ing] a purchaser, or be[ing] interested in any purchase at any sale made by such Officer, or a seller at any purchase made by such Officer in the discharge of his official duties.” (Stats. 1851, ch. 136, § 2, p. 522; see *Brandenburg v. Eureka Redevelopment Agency*, supra, 152 Cal.App.4th at p. 1362, 62 Cal.Rptr.3d 339.) The prohibition was later codified in former section 920 of the Political Code and, in 1943, moved with only minor changes to the Government Code. (Former Pol.Code, § 920, enacted 1872, repealed by Stats.1943, ch. 134, § 1, p. 956; see now Gov.Code, § 1090.)" (*Lexin v Superior Court* (2010) 47 Cal.4th 1050, 1072, n. 10)

Subsequent decisions (many involving attorneys) extended and confirmed the reach of 1090 to outside parties. (See *Campagna v. City of Sanger* (1996) 42 Cal.App.4th 533, 541–542 and *People v. Gnass* (2002) 101 Cal.App.4th 1271, 1287, fn. 3; 1302, fn. 10) Several of these decisions contained terms and concepts that are now commonly used by the FPPC in determining whether a consultant is covered by Section 1090.

One of the first cases to extend 1090 to consultants was *California Housing Finance Agency v. Hanover/California Management & Accounting Center, Inc.* (2007) 148 Cal.App.4th 682) (hereafter *Hanover*). In that case, the director of insurance of a state housing finance agency conspired with the agency's legal counsel to form a business to process payments for mortgage insurance, collecting a "processing fee" for its services. A subsequent case, cited by the more recent consultant cases, is *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114 (hereafter *Hub City*), in which the court found that the term "public official" included "*independent contractors whose official capacities carry the potential to exert considerable influence over the contracting decisions of a public agency.*" "An individual's status as an official under that statute turns on the extent to which the person influences an agency's contracting decisions or otherwise acts in a capacity that demands the public trust. (See *Hanover, supra,* 148 Cal.App.4th at pp. 692–693.)" The phrase "influence over the contracting decisions of a public agency," which first appears in *Hub City*, shows up repeatedly in the FPPC advice letters, and with good reason—if the official has such influential role, they are in a position to easily steer contracts in a way that benefits their own personal financial interests.

However, until the ruling in *Davis v. Fresno Unified School District* (2015) 237 Cal.App.4th 261 (hereafter *Davis*), it was not clear that a consulting <u>firm</u> could be held liable for a violation of 1090. In *Davis*, a taxpayer challenged a school district's use of a statute that permitted such agencies to utilize the "lease/leaseback" method of project delivery. Under that procedure, the district leases a site to a contractor/developer, who then constructs the facility desired by the school district and subleases the facility back to the school district. At some point after construction is completed, the lease is terminated and the facility reverts back to the school district, presumably after sufficient "rent" has been paid to make the contractor/developer whole. The procedure does not require the work to be competitively bid and, in this case, there was an allegation that the contractor that entered into the arrangement had improperly participated in the development of the preliminary plans and specifications for the desired improvements, in essence helping to design the project they later contracted (via a lease) to build.

A prior case, *People v. Christiansen* (2013) 216 Cal.App.4th 1181, 157 Cal.Rptr.3d 451 (hereafter *Christiansen*), had declined to apply criminal sanctions in a case involving a school district employee who had a separate consulting business, relying on the common law definition of "employee" to hold that criminal liability should not be imposed on a party, who is acting as a consultant and who may have been unaware of the application of 1090 to a person in their position. The *Davis* court distinguished *Christiansen*, preferring to rely upon *Hub City* and *Hanover*. (*Davis, supra,* 237 Cal.App.4th at 827.) The court in *Sahlolbei* later overruled *Christiansen* altogether, finding that the line of 1090 cases from *Schaefer* to *Hub City* had not applied the common law employee definition with regard to consultants. (*Sahlolbei, supra,* 3 Cal.5th 230 at 247.) "As the case law makes clear, section 1090 liability extends only to independent contractors who can be said to have been entrusted with "'transact[ing] on behalf of the Government' (*Stigall*, supra, 58 Cal.2d at p. 570, 25 Cal.Rptr. 441, 375 P.2d 289)." (*People v Superior Court (Sahlolbei*) (2017) 3 Cal.5th 230, 240.)

Much of the work in sorting out conflict issues in the consultant arena involves both determining (1) whether the consultant is acting as a public official and (2) whether they are participating in the making of a contract in which they have a financial interest. In many ways these issues become intertwined, as the ability to exercise considerable influence over the contracting decisions of a public agency helps define the consultant's status as a public official and, assuming that influence is exercised with regard to a particular contract, their role in "making" the contract. But the state of the law is now clear that consultants, whether individuals or firms, can violate Section 1090 if they exert their "considerable influence," over contracting decisions of a government agency in a way the provides them (or the firm) with a financial benefit. The exertion of that influence is the prohibited "participation in the making" of the contract. The following sections focus on some unique ways in which contracts are now being made, with the aim of applying these new rules on consultants and their conflicts to those situations.

THE EVOLUTION OF APPROACHES TO PUBLIC CONTRACTS

For many decades, public construction contracting has relied on the traditional approach known as Design-Bid-Build, where a design is obtained by the agency (from its staff or through a design professional under contract) and then included in a contract package advertised for bid. These contracts were almost always awarded on the basis of the lowest monetary bid. This practice has served a number of important public policies, which were felt (by the Legislature at least) to surmount other concerns of cost and efficiency.

When outside design professionals are engaged, this will almost always be done in accordance with the "little Brooks Act" (Gov't. Code §4526), the state equivalent to the federal Brooks Act, which requires that design professionals be selected based upon their qualifications. Only if the agency and design professional were unable to reach agreement on price and terms could the agency proceed to consider the next most qualified designer. This practice ensures that design work is only undertaken by the best qualified professionals—furthering the Legislature's goal of allowing agencies to avoid the cut-rate designer. The little Brooks Act has helped to ensure the quality of the services provided for public construction projects.

Public construction contracts, on the other hand, were to be awarded strictly on the basis of price. After a public opening of bids, the contract was awarded to the lowest responsible bidder, leaving little room for consideration of their abilities unless a contractor was found to be non-responsible, a fairly difficult standard to meet. While this practice helps to prevent corruption and favoritism in the award of public projects (although occasional bid-rigging does occur) it may result in poor quality work or in the award of projects to contractors who, having cut their prices to the bone to obtain the contract, become quite aggressive in submitting change orders for additional compensation and ultimately filing construction claims to ensure a healthy profit. Such claims are often based on alleged flaws in the contract documents (supported by a legally-implied warranty on the part of the public entity as to their completeness and correctness), which left agencies caught between a designer who they believe may have erred in their design and a contractor alleging such flaws. Anecdotes abound of contractors being aware of flaws and ambiguities in contract documents but, rather than raising questions during the solicitation process, waiting to exploit them post-award. Another concern is a lack of dialogue between those who design a project and those who are asked to build it, resulting in disconnects between the conceptual and constructable.

A new approach surfaced from the private sector, the idea of entering into a single "design/build" contract, with the designer and the contractor teaming up to submit a proposal as a single entity to both design and construct the facility. Under this approach, the owner normally

develops a conceptual or "bridge" design (often to the 30% stage) and then uses it as the basis for soliciting proposals from design/builders. This approach was seen as desirable for two primary reasons. First, it only required a single contracting process and could therefore be awarded and constructed more quickly. Second, by putting the designer and builder on the same "team," it not only reduced the finger-pointing and claims, it also allowed the teammates to consult with each other early in the process, permitting the builder to provide advice and suggestions on the constructability of the designer's design. Of course, selecting a designer and contractor in a single process for public projects required new statutory authority to avoid the conflict between statutes requiring qualifications-based awards for design professionals and those requiring an award to the lowest bidder. For most public agencies (other than charter cities) special legislation authorizing this new "design/build" contracting method was necessary.

While there have been a number of statutes authorizing design/build for various agencies, the statute with the widest application was enacted by SB 785 in 2014 and is codified at Public Contract Code Section 22160 *et seq*.. This statute authorizes local agencies, including cities, to utilize the design/build method, and authorizes the "best value" method for awarding contracts, permitting agencies to balance the skill and quality of the proposed contractor with the price. Significantly, this new statute, which applies to a wide range of "local agencies," has a requirement that any entity using the statute, must adopt an "organizational conflicts of interest policy." (See Pub. Contract Code § 22162(c).) A fuller discussion of the concept of an "organizational conflict of interest" follows later in this paper, and we provide examples of the policies some agencies have adopted.

Another alternate contracting approach, one not yet available to cities, is known as the "Construction Manager at Risk" or the "Construction Manager/General Contractor" ("CM/GC"). This approach centers around a Construction Manager or "CM," who is often procured based on qualifications, but generally after the design of the project has been commenced by a different firm. The CM options include having the CM be "at risk," which means they are bound to a guaranteed maximum price following a price-setting process and can award subcontracts (or perform the work themselves). Although used in the private sector, this approach runs counter to several statutory schemes (public bidding, subcontractor listing, etc.) and involves the potential self-award of contract work. The latter approach is particularly troublesome with regard to Section 1090, as it provides the CM with the ability to award a separate contract to itself to perform some of the contract work. There are only a few public agencies, including counties, the University of California, and some transit agencies, that are currently permitted by statute to use this method (although charter cities may have the flexibility to do so if their charter so provides).

A more common alternative, one that has been particularly popular among educational agencies, is the Lease-Leaseback method, where a publicly-owned site is leased to a contractor, who constructs the new facility and then leases it back to the public agency. This method, which avoids competitive bidding, has been the subject of some recent court decisions that have been critical of the way in which the method was applied, particularly when the leasehold is terminated quickly after construction is completed, giving the appearance of an attempt to circumvent competitive bidding rather than an attempt to finance the project using the lessee's capital. One reason this method is popular is the ability of the agency to choose the party with whom it enters into the transaction. As discussed above, conflict of interest issues have arisen when the eventual lessee/contractor has been involved not only in pre-contract negotiations, but also in the initial design of the building. (See *Davis v. Fresno Unified School District, supra,* 237 Cal.App.4th 261*; McGee v. Balfour Beatty Construction LLC* (2016) 247

Cal.App.4th 235; and *California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115.)

Additional, and more complicated, contracting arrangements may be approved for larger projects that involve the financing and on-going maintenance of projects, perhaps over a long term. The contracts go by various acronyms, such as DBOM (Design/Build/Operate/Maintain) and DFBOM (Design/Finance/Build/Operate/Maintain). There are multiple issues to be considered by agencies using these methods, including the length and complexity of the contracts, as well as the involvement of multiple parties at different stages of the project.

Where can conflicts arise?

Under the traditional design-bid-build process, it was fairly easy to monitor potential conflicts—the designer just couldn't serve as the contractor. That was simple enough. Occasionally, there could be questions with regard to parties playing roles at the beginning or end of the project, such as if the designer serves as the construction manager or if a former city employee or consultant who played a role in the decision to undertake the project seeks to participate in a subsequent phase of the project. Conflicts can also arise with regard to sub-consultants on the design team (under a number of arrangements). A number of these scenarios are discussed below in the review of the advice letters issued by the FPPC. But, in general, the clear delineation of the roles of designer and contractor in Design-Bid-Build contracts limits the range of potential conflicts.

The design/build context provides more opportunities for conflicts, particularly with the need for design services on both sides of the main contract. The design/build contract requires a preliminary design, often called a "bridge design," that outlines the basic parameters of what is being sought, leaving the main details of the design to the design/build team. Nevertheless, some design knowledge is required on the owner side of the process, and this can require the use of outside consultants, particularly for highly technical projects where city staff does not possess the necessary expertise to assemble the design/build RFP package. While a city can and should clearly inform the consultant who prepares the bridge design that they will be ineligible to bid on the larger contract, if the project involves a particular technical discipline, a city may have difficultly engaging a consultant to undertake the smaller, preliminary work to assemble the preliminary design. In these situations, the specialized consultants with the necessary technical expertise may decline to assist the public owner in the pre-bid work, lest they be prevented from bidding on the larger (and likely more lucrative) design/build work.

Another issue arises out of the recent trend of mergers of major engineering firms, or their combining with contractors to form design/build entities. This can arise when outside consultants are providing staff-level services as temporary or "seconded" employees. In one instance, a firm employing a seconded engineer, who was acting in a staff capacity supervising a large construction contract, merged with the very firm whose work that engineer was supervising. That required that the seconded employee be quickly reassigned, lest they be supervising the very firm they worked for. This can get complicated when mergers are announced in the press but are not actually consummated for some time, and even then may be accomplished by means of a holding company, further clouding the issue of the corporate identity of the consultant and contractor. In addition, both engineering and contracting firms have begun to develop each other's expertise in-house to enable them to contract for design/build work without having to partner with the other discipline.

As we have seen in *Davis* (and similar cases, *McGee v. Balfour Beatty Construction LLC* (2016) 247 Cal.App.4th 235 and *California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115), firms that are seeking to enter into lease/leaseback arrangements with school districts have been involved at the front-end design work prior to entering into the lease/leaseback transaction. While these cases involved demurrers, the appellate courts in both instances ordered a trial on the 1090 issues arising from behavior that involved pre-lease design work. The *Christiansen* case involved the defendant's work with a large firm that is an active bidder on public projects involving alternate project delivery methods. While such conflicts will not necessarily arise on all projects using alternative project delivery methods, the use of these methods is new to many public agencies and the number of market participants are limited, which may increase the chances for misconduct arising. In fact, as is often the case with innovative ideas, they are initially marketed by firms seeking to be engaged to do the work. This entrepreneurial approach, combined with a lack of standard practices and experience on the part of the public agencies, may increase this risk. However, it should be viewed as a reason to proceed carefully, rather than to reject these approaches altogether.

One potential concern is that, with some of these agreements running 20 or 30 years in the operational phase, firms that could be barred by their early participation in the "making" of the initial contract, may come back (via contract or even merger) later in the contract term to work on the other side. There is also the concern that, as is the case with many complex projects, that the only parties who are technically sophisticated about a project are the ones who will end up bidding. Not surprisingly, these parties often lobby agencies to adopt their technology, and some seek to be paid for providing that advice, not realizing that accepting such work may preclude them from later participating in its implementation. It can be a challenge to keep track of all of the parties and their shifting roles.

Another series of issues arise when agencies undertake major "programs" that involve multiple projects, which are inevitably proceeded by "Master Plans" or "Capital Improvement Programs." These types of planning documents, while certainly advisable for intelligent project implementation, end up involving many consultants and sub-consultants, often in technical disciplines, who wish to work as consultants or sub-consultants on the individual projects as they are undertaken, which can be years or even a decade after the initial planning document. It is not entirely clear when or how to draw the line on such involvement, even after reviewing the FPPC advice letters on this topic, because each situation is different.

The FPPC has addressed some of these situations, but no comprehensive guidance is available to help agencies sort out who should be disqualified and who can participate among parties that were involved in the early planning stages. One approach would be for the agency to clearly state in their contracts that parties playing certain identified roles will be prohibited from subsequent participation, although agencies may be reluctant to do this for fear of scaring off potential firms. Many include a provision that cites to the various conflict of interest statutes, but leaves it to the consultant to determine if their work at the front end may come back to bite them at the later stages.

However, agencies can go further by requesting potential bidders (such as at the RFQ stage) to fill out a disclosure indicating their past work for the agency. This is especially useful in light of the many mergers that have occurred in the engineering profession, in case work was done by a prior incarnation of the firm. Proposers can also be asked to certify the absence of conflicts. Finally, particularly where the solicitation will involve the formation of multi-disciplinary teams, such as design/build or P3 projects, the agency can formally list the firms that have already participated in the project and will be barred from bidding. Not only will this assist those forming

teams to propose on the project, but it may also cut down on the volume of inquiries to the agency regarding potential conflicts.

A related concept more prevalent in federally-assisted contracts is the "organizational conflict of interest." This concept addresses both perceived financial conflicts, such as having a vested interest in future stages of a project moving forward, but also the issue of fairness if a currently-engaged contractor is to bid on an additional element of a project and has a great deal of inside knowledge that will give them a competitive advantage over a new proposer. Federal policies, primarily Federal Acquisition Regulation 9.5, specify prohibitions on such practices, but also allow for agencies in some cases to cure such issues. For example an agency can provide information on the project to prospective proposers to bring them up to speed on the status of the project, thereby leveling the playing field. By separating out fairness issues from corruption issues, the federal policy provides more flexibility and thereby may allow greater efficiency by permitting a knowledgeable consultant to continue working on a project. An example of comprehensive "organizational conflict of interest policy," along with a disclosure form, used on a recent rail project is attached.[4] You can easily locate "organizational conflict of interest" policies that entities have adopted pursuant to Public Contract Code Section 22162(c) by doing a quick search on the internet.

FPPC ADVICE LETTERS

Given the fairly recent extension of Section 1090 to the full consulting profession, there is not yet a significant body of case law addressing the various issues related to consultant conflicts under Section 1090 (other than the cases we have already discussed). Certainly none of these cases provide wide-ranging advice that we can apply to multiple situations, other than the very critical fact that any consultant, be they an individual or a firm, can be considered to have a conflict. However, if we wish to inform ourselves regarding potential issues and their solution, we must look to the series of advice letters that the FPPC has issued in order to develop a series of data points that will guide in the various permutations that can arise under all of these various contracting scenarios. The FPPC began issuing advice regarding Section 1090 following the enactment of Section 1097.1, adopted by SB 1304 in 2013.

For ease of analysis, I have broken these down into a number of general topics, and will discuss relevant issues that arise for the various contracting methods under each topic.

Follow On Contracts

[4] This solicitation also contained the following provision to address Section 1090: "By submitting a Qualifications Statement, or a proposal in the later stage of this contract award process, the Offeror represents and warrants that no director, officer or employee of the JPB is in any manner interested directly, or indirectly, in the proposal or in the Contract which may be made under it or in any expected profits to arise therefrom, as set forth in Article 4, Division 4, Title I (commencing with Sec. 1090) of the Government Code of the State of California. The Offeror warrants and represents that it presently has no interest, and agrees that it will not acquire any interest, which would present a conflict of interest under California Government Code sections 1090 et seq. or sections 87100 et seq. during the performance RFQ phase, the RFP phase, or the performance of services under this Agreement. The Offeror further covenants that it will not knowingly employ any person having such an interest in the performance of this Agreement. Violation of this provision may result in this Agreement being deemed void and unenforceable. Additional Conflict of Interest requirements will apply during the term of any contract awarded."

An area that is ripe for 1090 conflicts is that of the follow-on contract. While many contracts need to modified, through change order, addendum or amendment (or, heaven forbid, the fourth amendment to the sixth addendum!), this practice, as necessary as it often is, particularly with complicated projects, is vulnerable to a charge that the consultant is now participating in the making of the follow-on contract that is required to extend their services to some additional phase of the project. An early example of this is the 2014 advice letter to *Parsky* (A-14-096), regarding an attorney taking on litigation regarding a construction matter. The FPPC advised that, if the attorney's contract with the agency contemplated that he or she might handle such litigation, it was permissible for them to participate in advising the agency whether or not to initiate such litigation (even if such litigation work was compensated at a higher hourly rate). However, if the contract did not contemplate litigation, they could not participate in that decision. Based on that advice, it would make sense to have the scope of work for attorneys or consultants, who may be in a similar position with regard to a future phase of work, anticipate that additional work or potential litigation. Otherwise, a city may find itself having to get a different counsel to handle the litigation of a matter, despite the fact that the first counsel knows the subject matter quite well. From a practical standpoint, this does not seem like a good result, but, according to the FPPC, such an approach may be necessary if the contract did not contemplate such work ahead of time.

A similar result occurred in *Fowler* (A-15-228), where a consultant that advised a city that its development impact fees needed to be updated was barred from working on the update. The FPPC found that the consultant was "intricately involved" in the work that led up to the city issuing an RFP to have the fee study done. The advice letter emphasizes the extent to which the consultant had become integrated with city staff and elected officials. Viewed from the Commission's perspective, one can certainly see why there were concerns about the fairness of the upcoming RFP process, as well as the prospect that a consultant may recommend that more work be undertaken, anticipating that they will get such work. However, from an efficiency standpoint, the succeeding consultant, assuming they are not just doing a bare accounting function, may need to reestablish those relationships in order to complete the scope of work of the RFP. Assuming that the time spent re-mobilizing is being compensated by the City, there is a clear economic cost to barring the initial consultant from performing the work. On the other hand, from a fairness perspective, one can see how competing consulting firms might perceive the award of the fee study as a fait accompli and might not expend the energy to submit a competing proposal if the initial consultant is eligible.

One must also speculate whether this entire problem could have been avoided if the initial contract had contained an option to do the additional work. That is not to say that the advice of the initial consultant might not be colored by their desire to obtain the additional work, but it would appear that having the city exercise an option or implement an additional phase of a scope of work may not run afoul of 1090 (although we don't have an advice letter precisely on that point). In *Ciciozzi* (A-17-049) a consultant had done a feasibility study for the construction of a new sheriff's facility and then, as the County prepared to issue a design/build RFP based on criteria documents prepared by a different consultant, submitted a proposal to serve as the construction manager for the construction phase. The FPPC found no problem with the consultant taking that role, based on the fact that they had not played a role in the development of the RFP for construction management services nor in the development of the design or technical specifications of the underlying project. A similar result occurred in *Grossman* (A-17-167), where a consultant prepared an "assessment and inventory" of a city's 11 sewer pump stations and then sought an engagement to design the replacement of one of those stations. The FPPC found that the consultant hadn't participated in the making of the second contract by virtue of the work they had done on the "assessment and inventory."

However, a different result occurred in *Simon* (A-17-148), where a consultant had done extensive work in conducting needs assessments, planning activities and preparing funding applications and then sought to be engaged to design the facility and provide architectural services through construction. Despite the fact that the contract provided for a potential increase in the scope of services, the FPPC advised that the consultant could not provide the design services without violating 1090. The rationale was that the consultant had "extensive involvement assisting the County with preliminary work on the jail project" and therefore had "participated in the making of the contract for the architectural design of the new jail and services through the construction process." The letter does not contain further discussion that would help us distinguish it from *Ciciozzi* or *Grossman*, but the length and scope of the involvement of the consultant likely played a role.

The final data point (*Page* A-16-044) is a bit convoluted, but involves a consultant that was hired to perform services on one aspect of a "information technology enterprise services" project and then, after there were problems with the consultant on the second aspect, was allowed to take on that additional work since their contract contained terms that allowed the issuance of a work order to do additional services in place of the other consultant. This advice would seem to support the idea that if a contract contemplates additional services, that such work would not violate 1090. While this seems quite sensible, it also appears that a prudent contracting approach is to include options for potential additional work in the initial engagement to avoid losing an experienced consultant if the unforeseen occurs. However, the result in *Simon* is concerning. One approach may be to have the contract more clearly spell out the scope of the later services, as clearly the concern is adding additional services, not necessarily limiting multiphase engagements.

When is the preparation of a "plan" not part of the making of a "contract"?

A related topic, touched on above, is the situation where the consultant works for the agency in preparing a "feasibility plan" or "capital improvement plan." There are several examples of the FPPC finding that consultants who performed early planning work on projects that resulted in construction contract were not barred from follow-on work involving those contracts. We have previously discussed *Grossman* (A-17-167) in which the consultant did an "assessment and inventory" of the city's pump stations, but then was allowed to design a project to improve one of the stations that it studied. Similarly, in *Ciccozzi (*A-17-49), a consultant did "conditions assessment" and an "Operations Assessment and Facilities Study," but was allowed to serve as construction manager for one of the projects studied. On the other hand, in *Canger* (A-17-205), an architect did a space assessment, but wasn't allowed to bid on the ultimate construction work. In seeking distinction here, one wonders whether the fact that the subsequent contract was for construction may have influenced the decision. However, in *Chadwick* (A-15-147) sub-consultants that worked on a plan were allowed to participate on a construction team, but that could be explained by the rather technical nature of their services. That may have been the case in *Ciccozzi*, supra, where the follow-on work was as a construction manager. The one concern these letters don't seem to reflect is the potential for the initial advice to result in future work for the consultant who provides it. Without an adopted capital improvement plan, there may not be future work for consultants to implement it. It is not clear where to draw the line in assessing the motives of consultants who provide such high-level guidance, then assist in the implementation of their recommendations. One factor might be when multiple projects are contemplated in a plan as opposed to planning work on a single project.

Is life safer for sub-consultants?

There are also a series of advice letters that find that sub-consultants, whose work is often of a technical nature and who do not have as significant a role in guiding contract decisions, are not barred by 1090 from accepting work on the contractor's side of the eventual contract. In *Chadwick* (A-15-147), sub-consultants who provided services to a firm that designed a golf course were permitted to participate on the "build" side of the project, while the design firm was barred. The letter concluded that the sub-consultants did not "exert considerable influence" on contracting decisions. Similarly, in *Green* (A-16-084) a technical expert that developed a materials list was allowed to bid on the work to install those materials, while in *La Salle* (A-17-074), a scheduling expert was allowed to participate in later design contract. These situations seem to have a stronger rationale, given the ability to determine how much influence the particular discipline would have on contracting decisions.

CONCLUSION

The practical "take-aways" from these cases, and the many FPPC advice letters applying the law, can be summarized as follows. General program planning activities, including the preparation of feasibility studies and capital improvements plans, will not generally result in disqualification. However, when the later work involves actual construction, as opposed to consulting services, a less flexible view may apply. Sub-consultants, particularly in technical disciplines, will face few problems in assisting in later stages of a project. A real area of concern involves "follow-on" contracts, where the work of a consultant is needed in later phases of a project, particularly where the advice or work-product of the consultant plays a significant role in the scope of the future work (or whether the project proceeds at all). As we have seen with cases involving attorneys, work that may result in fixed fees, particularly in the bond issuance context, are very problematic. In many cases, however, where future tasks can be identified and the city wants to have the same consultant perform that work, the initial contract can provide the city with the power to expand the scope of work under the terms of the initial contract. In that way, no new contract is being "made," although an argument could still be made that the issuance of a change order or exercise of an option is essentially a new contract. It would be helpful if there could be more certainty in this area, but the all-or-nothing approach of Section 1090 does not easily lend itself to that. For now, the use of the FPPC's advice function is perhaps the best option for obtaining a degree of certainty in making these contracting decisions.

The evolution of the rules concerning the application of Section 1090 to consultants and consulting firms appears to have settled on an approach under which virtually all such parties are potentially public officials/employees, depending upon their ability to exert considerable influence on contracting decisions. As a result, the key questions involve the degree of such parties' participation in the "making" of various types of contracts. These questions have only gotten more complicated with the changing structure of public contract relationships. Unlike the federal context, in which a more fact-based analysis is done to see how much influence is present, with an eye to whether the consultant's bias may cloud the agency's decision, California takes an all or nothing approach. Nevertheless, the impetus behind Section 1090, as acknowledged from the very beginnings of our state, is still quite strong—the need to make sure that public officials, employees and, yes, even outside consultants, are not serving two masters.

APPENDIX C
ORGANIZATIONAL CONFLICTS OF INTEREST
DISCLOSURE STATEMENT

PENINSULA CORRIDOR JOINT POWERS BOARD

ORGANIZATIONAL CONFLICT OF INTEREST POLICY

FOR

CALTRAIN MODERNIZATION PROGRAM

I. Purpose

This Organizational Conflict of Interest Policy (–Policy‖) prescribes ethical standards of conduct applicable to persons and entities entering into contracts with the Peninsula Corridor Joint Powers Board (–JPB‖), and applies to subcontractors/subconsultants as well as prime contractors/consultants. This Policy is supplemental to the JPB's adopted Conflict of Interest Code ("Code") and does not modify or supersede any requirements contained in that Code.

This Policy is intended to accomplish the following goals:

A. Promote full and open competition, integrity, transparency and fairness in the JPB's procurements and contracts;

B. Prevent bidders and proposers from obtaining or appearing to obtain an unfair competitive advantage with respect to the JPB's procurements and contracts;

C. Ensure that consultants/contractors provide services to the JPB in an impartial and objective manner;

D. Provide guidance to enable consultants/contractors to make informed decisions while conducting business with the JPB; and

E. Protect the validity of the JPB's contracts and protect the JPB's interests and confidential and sensitive information concerning the Caltrain Modernization Program (–CalMod Program").

This Policy neither purports to address every situation that may arise in the context of the JPB's procurements and contracts, nor to mandate a particular decision or determination by the JPB. The JPB retains the ultimate and sole discretion to determine on a case-by-case basis whether an Organizational Conflict of Interest (as defined below) exists and what actions may be appropriate to avoid, neutralize or mitigate any actual or potential Organizational Conflict of Interest or the appearance of any such Organizational Conflict of Interest.

II. Definitions (applicable to this Organizational Conflict of Interest policy)

A. An **–Affiliate**ll of a Contractor is:

1. Any shareholder, member, partner or joint venture member of the Contractor,

2. Any person or entity which directly or indirectly through one or more intermediaries controls, or is controlled by, or is under common control with, the Contractor or any of its shareholders, members, partners or joint venture members; and

3. Any entity for which ten percent or more of the equity interest in such entity is held directly or indirectly, beneficially or of record by (i) the Contractor, (ii) any of the shareholders, members, partners or joint venture members of the Contractor, or (iii) any Affiliate of the Contractor under clause (b) of this definition.

For purposes of this definition the term —controlll shall mean the possession, directly or indirectly, of the power to cause the direction of the management of an entity, whether through voting securities, by contract, family relationship or otherwise.

B. **"CalMod Program"** means the Peninsula Corridor Joint Powers Board's approximately $1.5 billion early investment program in the peninsula rail corridor consisting of (1) installation of an advanced signal system (CBOSS/PTC), (2) electrified Caltrain service by 2019 and (3) procurement of electric multiple unit (EMU) rail vehicles. The CBOSS/PTC project is already underway. Corridor electrification currently is in the environmental phase. Rail vehicles procurement currently is in the planning stage. The early investment program not only will modernize Caltrain service but also will be designed to support the Blended System of high speed rail in the future. Funding for the early investment program will be derived from a variety of federal, state (including Proposition 1A high speed rail funds), regional and local sources. For further information about the CalMod program, please visit **www.caltrain.com**.

C. **—Contractor**ll means any individual or legal entity retained by the JPB to perform Program Implementation Services (defined below) for the CalMod Program, or proposing to perform such work, including joint venture members and general partners of any such entity; any consultant, subconsultant or subcontractor of such individual or legal entity (at all tiers); and each individual employee of such individual, legal entity or subcontractor.

D. **—Consultant**ll means any individual or legal entity retained by the JPB to perform Procurement Services for the JPB or proposing to perform such

services, including joint venture members and general partners of any such entity; any subconsultant of such individual or legal entity (at all tiers); and each individual employee of such individual, legal entity or subconsultant. The services performed include, but are not limited to architecture, safety services, quality services, information technology services, real estate acquisition, engineering, environmental services, systems integration services, land surveying, project management, program management, planning, or construction management.

E. **—Organizational Conflict of Interest‖** means a circumstance arising out of a Consultant's or 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 in (i) impairment or potential impairment of a Consultant's or Contractor's ability to render impartial assistance or advice to the JPB or of its objectivity in performing work for JPB, (ii) an unfair competitive advantage for any bidder or proposer with respect to an JPB procurement; or (iii) a perception or appearance of impropriety with respect to any of the JPB's procurements or contracts or a perception or appearance of unfair competitive advantage with respect to a procurement by the JPB (regardless of whether any such perception is accurate).

F. **—Procurement Services‖** mean services provided by a Consultant for the CalMod Program for the benefit of the JPB that relate to, but are not limited to, any of the following:

1. Development and preparation of procurement documents, including requests for qualifications, requests for proposals, invitations for bids, contract documents and technical specifications, but excluding development and preparation of preliminary design, operations planning studies and reports or similar ―low level‖ documents for incorporation by others into a procurement package.

2. Development of bid/proposal evaluation criteria, process or procedures;

3. Management and/or administration of a procurement;

4. Evaluation of bidder/proposer submittals (e.g., qualification submittals, proposals, etc);

5. Negotiation of a contract; and

6. Advising the JPB in any other aspect of the procurement that the JPB determines, in its sole discretion, should be considered "Procurement Services."

G. **"Program Implementation Services"** mean services related to the CalMod Program provided by a Contractor or consultant for the benefit of the JPB relating to, but not limited to, any or all of the following:

1. Electrification: Design, construction, installation, quality control, integration, testing and commissioning of 50+ miles of 25 kV AC 60 Hz overhead Contact system, traction power substations, communications, SCADA, rail signaling conversion from DC to AC, CBOSS/PTC, train control facilities, and wayside improvements;

2. Rail Vehicles – EMUs: design, manufacture, assembly, fabrication, delivery, quality control, burn-in, integrated testing and commissioning of 96 EMUs; and

3. Miscellaneous Capital Improvements: Design and construction of various wayside improvements and adjustments as required by JPB to accommodate the CalMod Program.

III. Applicability

A. This Policy applies to all Consultants and Contractors that have entered into, or wish to enter into, contracts with the JPB to perform work on the CalMod Program.

B. To the extent that the JPB has previously consented in writing to performance of work by a Consultant or Contractor that would not have been permitted under this Policy, adoption of this Policy does not modify or alter the prior consent. The foregoing does not, however, mean that the JPB is required to consent to a Consultant's or Contractor's participation in future proposals or contracts.

IV. Federal Requirements

The JPB must comply with Federal Transit Administration (–FTA‖) and Federal Railroad Administration (–FRA‖) requirements and regulations applicable to federally funded procurements and contracts. Nothing in this Policy is intended to limit, modify, supersede or otherwise alter the effect of other relevant federal, state, or local regulations, statutes or rules.

V. Organizational Conflicts of Interest Disclosure and Determination Process

A. Obligation to Disclose

Each and every Consultant or Contractor who submits or plans to submit a proposal or bid in response to a solicitation for CalMod Program services shall submit a Conflict of Interest Disclosure (COID) that identifies past, present and known future relationships with the a) CalMod Program, and b) California High Speed Rail project within, or having effect within, the geographic limits of the CalMod Program. The COID shall state that the Consultant or Contractor has no past, present or known future conflicts of interest, or it shall disclose past, present or future known or potential conflicts of interest for the review by and consideration of the JPB. Each Consultant or Contractor shall submit its COID to the JPB at:

Cheryl Cavitt, Director of Contracts and Procurement
CalModCOI@Caltrain.com

Consultants and Contractors are referred to the specific solicitation documents for disclosure schedules, JPB review timelines, and other specific requirements of each solicitation.

B. JPB's Determination

The JPB will analyze the disclosure, in accordance with Section VII below, which provides a structure for a case-by-case analysis of actual or apparent Organizational Conflicts of Interest. As provided in Section VII, the JPB will determine on a case-by-case basis whether an Organizational Conflict of Interest exists that would preclude a Consultant's or Contractor's participation in the subject solicitation and if so, whether it may be waived or overcome through mitigating actions.

The JPB's determination will take into consideration services that a Consultant or Contractor has provided or is providing to the JPB (both in the CalMod Program context and outside of that context) and services that a Consultant or Contractor has provided or is providing to the California High Speed Rail Authority.

A fundamental ground rule with regard to the CalMod Program is the following: A Consultant or Contractor that serves as a prime consultant or contractor for either Procurement Services or Program Implementation Services may not also serve as a prime consultant/contractor for the other category of services. It is conceivable that such Consultants or Contractors may be permitted to serve as subconsultants or subcontractors for a prime consultant or contractor in the other category of services, but such work will be subject to the Organizational Conflicts of Interest analysis set forth in Section VII below.

The disclosure to the JPB shall describe the facts and circumstances giving rise to any Organizational Conflict of Interest and shall also propose alternatives/mitigation measures for addressing or eliminating the Organizational Conflict of Interest. If at any time, the JPB becomes aware of an Organizational Conflict of Interest in connection with a Consultant's or Contractor's performance of services for the JPB, the JPB shall similarly notify the Consultant or Contractor and its Affiliates.

The procurement documents or subject contract may provide an alternative process for such disclosure, in which case the alternative process shall control over the process described herein. The failure to disclose any actual, perceived or potential Organizational Conflict of Interest may result in serious consequences to the Consultant or Contractor and its Affiliates as described below.

In the event an Organizational Conflict of Interest is presented, whether disclosed by a Consultant or Contractor or discovered by JPB, the JPB will review the matter, consider alternatives/mitigation measures proposed, and make a determination, in accordance with this Policy, as to whether the particular Consultant or Contractor or bidder/proposer has an Organizational Conflict of Interest with respect to its participation in a procurement or performance of a contract for the JPB. The JPB's determination will be given in writing. The JPB will provide a determination to the Consultant or Contractor in accordance with the schedule in the specific solicitation documents.

The JPB's decision on the matter shall be final and binding and shall not be subject to appeal by the Consultant or Contractor in question or any other Consultant or Contractor.

C. Continuing Obligation to Disclose

An Organizational Conflict of Interest may arise at any time, and a Consultant's/Contractor's obligation to disclose is ongoing. If a Consultant or Contractor becomes aware of an actual, perceived or potential Organizational Conflict of Interest at any time during its participation in a procurement or performance of a contract, the Consultant or Contractor shall promptly disclose the matter as described herein. Consultants or Contractors participating in contracts with the JPB and bidders/proposers for JPB contracts shall use all reasonable efforts to arrange their affairs so as to prevent Organizational Conflicts of Interest from arising. Consultants or Contractors should undertake reasonable due diligence, including necessary conflict searches, to determine whether new actual, perceived or potential Organizational Conflicts of Interest have arisen. Each Consultant or Contractor shall consider whether disclosure is required in connection with new hires, changes in the company's board of directors, mergers, or new business relationships including joint ventures and contractor/subcontractor relationships.

Consultants or Contractors whose responsibilities to the JPB include review, supervision or oversight of work by other entities should pay careful attention to their relationships with the other entities and their Affiliates and should take care to avoid relationships with such other entities that would give rise to an Organizational Conflict of Interest. Due diligence should extend to investigation of past relationships and, if the Consultant or Contractor is a corporate entity, to officers or directors of the Consultant or Contractor.

A Consultant or Contractor shall not be the JPB's agent for review, approval, or acceptance of its own or its Affiliate's work product.

D. Failure to Comply

If the JPB determines, in its sole discretion, that a Consultant or Contractor has failed to comply with this Policy in any respect (including any failure to disclose an actual, perceived or potential Organizational Conflict of Interest) either prior to award of the contract or during performance of the contract, the JPB may, among other things, take the following actions:

1. Preclude and/or disqualify the Consultant or Contractor and its Affiliates, as well as any other persons or legal entities on the Consultant's or Contractor's team, from participation in a JPB procurement;

2. Require the Consultant or Contractor and its Affiliates, as well as any other persons or legal entities on the Consultant's or Contractor's team, to implement mitigating measures;

3. Terminate or amend the contract under which the Consultant or Contractor is performing work for the JPB; and/or

Failure to comply with this Policy may subject the Consultant or Contractor to damages incurred by the JPB in addressing Organizational Conflicts of Interest that arise out of work performed by the Consultant or Contractor.

VI. Conflict of Interest Standards Applicable to Environmental Consultants

Consultants responsible for preparing documents under the California Environmental Quality Act (–CEQA‖) are required to comply with all state and federal laws and regulations applicable to such services, including requirements relating to Organizational Conflicts of Interest. With regard to such conflicts, the JPB will follow the guidance provided by the FTA, including the FTA's Best Practices Procurement Manual (–BPPM‖). Among other things, the BPPM recommends precluding any consultant that is responsible for preparing an Environmental Impact Statement (–EIS‖) from having any financial or other interest in the outcome of the project that is the subject of the EIS until after the EIS is complete. Accordingly, any Consultant that is responsible for preparing an EIS for the CalMod Program will be precluded from providing Procurement Services or Program Implementation Services until after the Record of Decision has been issued.

Subconsultants to a CEQA Consultant may request permission to be released from further CEQA work to allow them to provide or join a team that will or is providing Procurement Services or Program Implementation Services being analyzed in the CEQA document. The JPB has no obligation to agree to release the subconsultant from its responsibilities relating to the CEQA document. The JPB's decision on the matter shall be final and binding and shall not be subject to appeal.

VII. Organizational Conflict of Interest Factors to Consider

The JPB will consider the following relevant factors, including case-specific factors, in determining whether a Consultant or Contractor should be permitted to participate or to continue to participate in a procurement or the performance of a contract:

A. Relevance or Materiality of the Information

1. This factor includes considering whether the Consultant or Contractor has in its possession information that will not and should not be made public or disclosed to other participants in the procurement, as the case may be, or that will give an unfair advantage to the Consultant or Contractor, including the following:

    a. Planning, budgetary, or business information;

    b. The JPB' strategies, tactics, plans, alternatives or other inside information concerning the procurement; or

    c. Information prepared for use by the JPB for the purpose of evaluating proposals, for defining the scope of the work, or for determining terms, conditions or specifications.

2. This factor includes considering the —agell of the information, including whether the length of time between the acquisition of the information, combined with interim developments within a project (e.g., transaction structure, design, changed circumstances, etc.), is sufficient to render the information irrelevant, immaterial, or of little or no value.

3. This factor includes considering the extent to which the information is or will be available to other participants in the procurement and the time other participants had or will have to analyze and assimilate the information.

B. Materiality of the Relationship

1. This factor involves considering whether the subject relationship involves branch offices, subsidiaries, joint venture partners, or a parent company of the Consultant/Contractor, and the degree of separation of work teams and information between the offices and companies.

2. This factor includes considering the substance of a subject relationship, including whether the relationship is so indirect or remote that an actual or perceived Organizational Conflict of Interest is sufficiently mitigated (e.g., no effective risk of passing or use of confidential information or bias in the discharge of functions).

C. Resources and Expertise

1. This factor includes considering the expertise required by the JPB for successful Program Implementation and whether the expertise is readily available from suitably qualified and skilled Consultants or Contractors.

2. This factor includes considering the magnitude of the resources required to deliver the CalMod Program in a quality, cost-effective and timely manner.

3. This factor includes disclosing these exigencies in a competitive process, including to any relevant governing association or body to obtain its concurrence.

D. Professional Governing Body Rules - Common Law

1. This factor includes considering the rules, if any, that are put in place by professional or other governing bodies regarding actual and perceived Organizational Conflicts of Interest and determining whether delivery of a certification or acknowledgement by a prospective or existing Consultant or Contractor of its compliance with any such rules would be sufficient mitigation.

2. This factor includes obtaining the advice of any such professional or governing body to the participation of a Consultant or Contractor.

3. This factor includes considering the case law relevant to Organizational Conflicts of Interest matters.

VIII. Safeguards and Mitigation Efforts

If the JPB, after considering the relevant factors set forth in Section VIII above, including case-specific factors, is of the view that a Consultant or Contractor should be permitted to participate or to continue to participate in a particular procurement or contract, then the JPB, in its sole discretion, may require the Consultant or Contractor to implement suitable safeguards, including those described below, to mitigate any Organizational Conflict of Interest.

A. The JPB may require a Consultant or Contractor to establish ethical walls and related safeguards and procedures, including the segregation of individuals and information within a Consultant or Contractor firm or company, thereby allowing the Consultant or Contractor firm or company to participate or continue to participate in the CalMod Program.

B. Segregated information may include confidential information obtained as a result of a Consultant's or Contractor's or prospective Consultant's

or Contractor's former contracts with the JPB or confidential information obtained from former or current JPB employees.

C. The JPB may require assurances or demonstration of the type of ethical walls and the effectiveness of the ethical walls.

D. The JPB may require information (including in affidavit form) as to when ethical walls were put into place, how they operate, and whether there is any form of notification within the subject firm or company of their existence.

E. The JPB may audit, or direct others to audit on its behalf, for compliance with ethical walls and related safeguards and procedures.

F. The JPB may require such other safeguards or mitigation measures at it deems appropriate to address a specific instance of an Organizational Conflict of Interest.

IX. Application of Policy to Employees

If the JPB determines that a potential or actual Organizational Conflict of Interest exists for a particular Consultant or Contractor, an Organizational Conflict of Interest shall also be considered to apply to any employee of such Consultant or Contractor that has participated in a material way in the performance of work giving rise to the determination. If such individual leaves the Consultant's or Contractor's employment, the potential or actual Organizational Conflict of Interest shall apply to such individual's new employer in the same manner as it applies to the original Consultant or Contractor. However, the individual's new employer (if not an Affiliate of the original employer) will not be considered to have an Organizational Conflict of Interest provided the new employer adopts and implements safeguards and mitigation measures – as described in Section VIII - satisfactory to the JPB its sole discretion.

(END OF APPENDIX C)

Peninsula Corridor Joint Powers Board Organizational Conflict of Interest Disclosure Form for Caltrain Modernization Program

Proposers planning to participate in the Caltrain Modernization (CalMod) Program either as a Prime Consultant or Subconsultant must be in conformance with the "JPB Organizational Conflict of Interest Policy for the CalMod Program" and must complete this form. The Conflict of Interest (COI) Policy is available on the Internet at: http://procurement.samtrans.com

Proposers planning to utilize one or more Subcontractors/Subconsultants must ensure that its Subcontractors/Subconsultants complete this form. If applicable, this form should be submitted by the date provided in the solicitation.

Submittal of this form certifies that:

(a) the Proposer's disclosures are complete, accurate, and not misleading; and

(b) proposed Subcontractors/Subconsultants (all tiers) shall be required to complete this form.

I hereby certify that I am authorized to sign this COI Disclosure Form as a Representative for the Firm identified below:

*** Required**

*** Please select the applicable Project**

- ☐ Design Build of Electrification - 14-PCJPB-P-053
- ☐ Procurement of Electric Multiple Units (EMU) - 14-PCJPB-P-056

*** Legal Name of Proposer Firm:** _____

*** Address:** _____

*** City, State, and ZIP code:** _____

*** Telephone Number:** _____

*** E-mail Address:** _____

*** Name of Authorized Representative:** _____

*** Title of Authorized Representative:** _____

Disclose work being performed or previously performed for the JPB, CHSRA and other agencies

Please select one: ☐ JPB ☐ CHSRA

Describe all work performed as a prime contractor and/or subcontractor or subconsultant, including: (1) identify the contract or work directive no.; (2) dates that work was performed or, if currently underway, date work started and its expected duration; (3) the dollar value of the contract(s); (4) a description of the services provided; and (5) a description of proposed alternatives/mitigation measures.

Worked Performed as: ☐ Prime ☐ Subcontractor/Subconsultant

Please identify the contract or work directive no. _____

Period of performance: **From** _____ **To** _____

Dollar value of contract or work directive _____

Description of services provided:

In the event that real or apparent organizational conflicts exist, please provide a description of proposed alternatives/mitigation measures:

Disclose work being performed or previously performed for the JPB and CHSRA

Please select one: ☐ JPB ☐ CHSRA

Describe all work performed as a prime contractor and/or subcontractor or subconsultant, including: (1) identify the contract or work directive no.; (2) dates that work was performed or, if currently underway, date work started and its expected duration; (3) the dollar value of the contract(s); (4) a description of the services provided; and (5) a description of proposed alternatives/mitigation measures.

Worked Performed as: ☐ Prime ☐ Subcontractor/Subconsultant

Please identify the contract or work directive no. _____

Period of performance: **From** _____ **To** _____

Dollar value of contract or work directive _____

Description of services provided:

In the event that real or apparent organizational conflicts exist, please provide a description of proposed alternatives/mitigation measures:

Disclose work being performed or previously performed for the JPB and CHSRA

Please select one: ☐ JPB ☐ CHSRA

Describe all work performed as a prime contractor and/or subcontractor or subconsultant, including: (1) identify the contract or work directive no.; (2) dates that work was performed or, if currently underway, date work started and its expected duration; (3) the dollar value of the contract(s); (4) a description of the services provided; and (5) a description of proposed alternatives/mitigation measures.

Worked Performed as: ☐ Prime ☐ Subcontractor/Subconsultant

Please identify the contract or work directive no. _____

Period of performance: **From** _____ **To** _____

Dollar value of contract or work directive _____

Description of services provided:

In the event that real or apparent organizational conflicts exist, please provide a description of proposed alternatives/mitigation measures:

Disclose work being performed or previously performed for the JPB and CHSRA

Please select one: ☐ JPB ☐ CHSRA

Describe all work performed as a prime contractor and/or subcontractor or subconsultant, including: (1) identify the contract or work directive no.; (2) dates that work was performed or, if currently underway, date work started and its expected duration; (3) the dollar value of the contract(s); (4) a description of the services provided; and (5) a description of proposed alternatives/mitigation measures.

Worked Performed as: ☐ Prime ☐ Subcontractor/Subconsultant

Please identify the contract or work directive no. _____

Period of performance: **From** _____ **To** _____

Dollar value of contract or work directive _____

Description of services provided:

In the event that real or apparent organizational conflicts exist, please provide a description of proposed alternatives/mitigation measures:

Signature Page

Peninsula Corridor Joint Powers Board Organizational Conflict of Interest Disclosure Form for Caltrain Modernization Program

Conflict of Interest Disclosure Certification

Instructions: Please complete and submit this form electronically via the "Submit Form" button above. In addition, please print and sign this Signature Page and return it via e-mail to: CalModCOI@caltrain.com to complete your certification.

Proposers' signatures certify that the information disclosed:

a) is complete, accurate, and not misleading; and

b) that proposed Subcontractors/Subconsultants (all tiers) shall be required to complete this form.

I hereby certify that I am authorized to sign this COI Disclosure Form as a Representative for the Firm identified below.

Legal Name of Proposer Firm: _____

Name of Authorized Representative: _____

Title of Authorized Representative: _____

Signature: _____

Date: _____

(Rev. 7-17-13)