

**STAFF REPORT FOR CALENDAR ITEM NO.: 10
FOR THE MEETING OF: October 12, 2023**

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Adopt Board Policy No. 022: Conflict of Interest Policy for TJPA's Design-Build Procurements for The Portal project.

EXPLANATION:

TJPA is undertaking Phase 2/Downtown Rail Extension (DTX)/The Portal project ("Project") to extend Caltrain commuter rail from its current terminus at Fourth and King streets to the Salesforce Transit Center and deliver the California High-Speed Rail Authority's future high-speed rail service to the center.

The San Francisco Peninsula Rail Program Memorandum of Understanding (MOU), effective June 5, 2020, described, in part, an organizational structure to support the efforts of the TJPA to develop the DTX project to ready for procurement status. Among the elements of the MOU was the requirement to develop a project delivery and contracting strategy, including the analysis of project delivery alternatives. The MOU specified that this work was to be co-led by SFCTA and TJPA. On July 14, 2022, the TJPA Board of Directors approved the DTX Project Delivery approach consistent with the Project Delivery Alternatives Study. The approach includes, among other things, the use of a progressive design-build delivery method for the civil and tunnel scope of the Project.

For the purposes here, "design-build" means a project delivery process in which both the design and construction of a project are procured from a single entity. It includes "progressive design-build," in which a single entity is selected through a qualifications-based selection at the earliest feasible stage of the project and which offers flexibility to retain a different entity for the construction phase of the project after a specified portion of the design phase is complete.

The TJPA has a Conflict of Interest Code for the agency (last amended April 26, 2023) that meets the requirements of state law. The TJPA's Conflict of Interest Code applies to Board members, Board officers, and certain agency staff and consultants based on their range of duties and scope.

It is typical, however, for state and local public agencies in California using the design-build delivery method to additionally adopt an organizational conflicts of interest policy specifically related to their design-build procurements. Such a policy provides guidance to proposers about how the agency intends to apply federal, state, and local laws related to conflicts of interest in their design-build contracting. Moreover, California Public Contract Code section 22162(c) provides that local agencies entering design-build contracts pursuant to the authority provided in Public Contract Code sections 22160-22169 "shall develop guidelines for a standard organizational conflict-of-interest policy, consistent with applicable law, regarding the ability of a person or entity, that performs services for the local agency relating to the solicitation of a

design-build project, to submit a proposal as a design-build entity, or to join a design-build team.”

While there are a variety of laws that define conflicts of interest and regulate the award of public contracts, organizational conflicts of interest policies typically focus on application of California Government Code section 1090. Section 1090 prohibits public officers and employees from making, or participating in making, government contracts in which the official or employee has a financial interest. California courts have applied Section 1090 to a public agency’s independent contractors when the contractors “have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf.” *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 245.

TJPA staff, in consultation with TJPA’s construction counsel, have developed the proposed Conflict of Interest Policy for Design-Build Procurements (“Design-Build Conflict Policy”) attached hereto. The proposed Design-Build Conflict Policy is separate and distinct from the TJPA’s Conflict of Interest Code, which continues in full force and effect.

In drafting the proposed Design-Build Conflict Policy, TJPA reviewed similar policies adopted by Caltrans, California High-Speed Rail Authority, Caltrain, and others such as the Judicial Council of California, and Alameda, San Diego, Santa Clara, and Santa Cruz counties, as well organizational conflict of interest statements in procurement documents issued by SFMTA.

The proposed Design-Build Conflict Policy applies to any design-build procurement for the Project. At this time, as described in the July 2022 Project Delivery Alternatives Study, TJPA is anticipating the use of the progressive design-build delivery method for the civil and tunnel scope of the Project.

The proposed Design-Build Conflict Policy generally identifies the type of work, scope of services, and roles and responsibilities that are expected to give rise to a conflict of interest and prohibit a contractor from proposing for a design-build procurement. Contractors are expected to review this guidance, assess how it applies to their particular facts and circumstances, and notify TJPA if they believe there is a conflict (or potential conflict) related to a design-build procurement. TJPA will review the facts on a case-by-case basis and determine, in its sole discretion, if the proposer has an Organizational Conflict of Interest and is disqualified from the design-build procurement opportunity.

Contractors that fail to disclose potential conflicts may be subject to penalties, which may include voiding of a contract and disgorgement of profits.

RECOMMENDATION:

Adopt the attached Board Policy No. 022: Conflict of Interest Policy for Design-Build Procurements.

ENCLOSURES:

1. Resolution
2. Board Policy No. 022: Conflict of Interest Policy for Design-Build Procurements

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Transbay Joint Powers Authority (TJPA) is a joint powers agency organized and existing under the laws of the State of California; and

WHEREAS, Pursuant to state law and the Joint Powers Agreement creating the TJPA, dated April 4, 2001, the TJPA has primary jurisdiction over and will implement the Transbay Program, including the portion of the Transbay Terminal/Caltrain Downtown Extension/Redevelopment Project commonly referred to as Phase 2/Downtown Rail Extension (DTX)/The Portal; and

WHEREAS, Pursuant to state law and the Joint Powers Agreement, the TJPA is authorized, in its own name, to do all acts necessary to fulfill the purposes of the Joint Powers Agreement, including, but not limited to, making and entering into contracts; and

WHEREAS, On July 14, 2022, the TJPA Board of Directors approved the DTX Project Delivery approach consistent with the Project Delivery Alternatives Study. The approach includes, among other things, the use of a progressive design-build delivery method for the civil and tunnel scope of the Project; and

WHEREAS, The design-build method of project delivery, using a best value procurement methodology, can result in benefits such as reduced project costs, expedited project completion, and design features that are not achievable through the traditional design-bid-build method; and

WHEREAS, Consistent with California Public Contract Code section 22162(c), and prior to commencing any design-build procurement process for The Portal, the TJPA wishes to enact an organizational conflicts of interest policy, providing guidelines regarding conflicts of interest as applied to design-build procurements for The Portal; and

WHEREAS, TJPA staff has recommended a Conflict of Interest Policy for Design-Build Procurements; and

WHEREAS, The Conflict of Interest Policy for Design-Build Procurements is separate and distinct from the TJPA's Conflict of Interest Code, which continues in full force and effect; now, therefore, be it

RESOLVED, That the TJPA Board of Directors adopts Board Policy No. 022: Conflict of Interest Policy for Design-Build Procurements, as presented herewith.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting on October 12, 2023.

Secretary, Transbay Joint Powers Authority

TRANSBAY JOINT POWERS AUTHORITY

Board Policy No. 022

Category: Financial Matters

CONFLICT OF INTEREST POLICY FOR DESIGN-BUILD PROCUREMENTS

1. Policy Background

The Transbay Joint Powers Authority (“TJPA”) has primary jurisdiction with respect to all matters concerning the financing, design, development, construction, and operation of the Transbay Program. The TJPA is a joint exercise of powers authority created by the City and County of San Francisco, the Alameda-Contra Costa Transit District, the Peninsula Corridor Joint Powers Board, and the California High Speed Rail Authority. The TJPA is managed by TJPA staff and is overseen by an eight-member Board of Directors, including Caltrans (ex officio).

The TJPA is undertaking The Portal Project (also known as the Downtown Rail Extension (DTX) Project) (“Project”) to extend Caltrain commuter rail from its current terminus at Fourth and King streets to the Salesforce Transit Center. The Project will also connect the California High-Speed Rail Authority’s future high-speed rail service to the Transit Center. The TJPA Board has approved the use of a progressive design-build delivery method for the civil and tunnel scope of the Project; staff has identified optional scope the TJPA Board may elect. This scope and expected delivery method is subject to change in the TJPA Board’s discretion.

For the purposes of this Conflict of Interest Policy for Design-Build Procurements (“Policy”), “design-build” means a project delivery process in which both the design and construction of a project are procured from a single entity and includes without limitation “progressive design-build,” in which such single entity is selected through a qualifications-based selection at the earliest feasible stage of the project and which offers flexibility to retain a different entity for the construction phase of the project after a specified portion of the design phase is complete.

2. Policy Purpose

This Conflict of Interest Policy for Design-Build Procurements (“Policy”) applies to any design-build procurement and resulting contract for the Project, and any procurement and contracting by the selected design-build entity or its subsidiaries for engineering services, inspection, or technical support in the administration of the design-build portion of the Project. This Policy prescribes ethical standards of conduct applicable to persons and entities entering

into a design-build contract with the TJPA and their subcontractors of all tiers, broadly defined herein as “Proposers,” to include prime contractors, constituent joint venture partners, team members, consultants, subcontractors, and in appropriate cases, suppliers, at all tiers.

The TJPA adopted this Policy in furtherance of California and federal laws that prohibit organizational conflicts of interest in public contracting. For example, California law prohibits public officers and employees from making contracts in which they are financially interested. Gov. Code § 1090. Section 1090’s prohibitions apply to independent contractors “when they have duties to engage in or advise on public contracting that they are expected to carry out on the government’s behalf.” *People v. Superior Court (Sahlolbei)* (2017) 3 Cal.5th 230, 245. The Federal Transit Administration (“FTA”) similarly prohibits funding recipients from making contracts that result in an organizational conflict of interest. (FTA, Best Practices Procurement & Lessons Learned Manual, FTA Report No. 0105, § 2.6 [citing 2 C.F.R. § 200.112].)

This Policy is distinct from and in addition to the TJPA’s Conflict of Interest Code and the TJPA’s Procurement Policy (Board Policy No. 001) Section IV.F (Organizational Conflicts of Interest).

3. Policy Goals

This Policy is intended to accomplish the following procurement goals:

- Promoting integrity, transparency, competitiveness and fairness in the TJPA’s design-build procurement for the Project.
- Preventing Proposers from obtaining or appearing to obtain an unfair competitive advantage with respect to the TJPA’s design-build procurement for the Project.
- Providing guidance to enable Proposers to make informed decisions while conducting business with the TJPA.
- Protecting the validity of the TJPA’s design-build procurement for the Project.

The TJPA recognizes that these goals must be balanced against the need to not unnecessarily restrict the pool of potential Proposers available to participate in the TJPA’s design-build procurement for the Project. The TJPA recognizes that Proposers must maintain business relationships with other public and private sector entities in order to continue as viable businesses. It is not the intent of the TJPA to disqualify Proposers based merely on the existence of a business relationship with another entity, but rather only when disqualification is required under law and this Policy.

4. Thresholds for Organizational Conflicts of Interest

“Organizational Conflict of Interest” means a circumstance arising out of a Proposer’s existing or past activities (including projects outside of the TJPA’s jurisdiction), business or

financial interests, familial relationships, contractual relationships, and/or organizational structure (i.e., parent entities, subsidiaries, etc.) that results or would result in:

- Impairment or potential impairment of a Proposer's ability to render impartial assistance or advice to the TJPA or of its objectivity in performing work for the TJPA,
- An unfair competitive advantage for any Proposer bidding or proposing or offering on an TJPA design-build procurement, or
- A perception or appearance of impropriety or unfair competitive advantage with respect to TJPA's design-build procurement (regardless of whether any such perception is accurate).

Based upon the guidance of State and Federal laws, codes, regulations and policies, Proposers will NOT be allowed to propose or join a design-build team in the following circumstances:

- The Proposer performed program management, program controls, and/or construction management services for the design-build component of the Project, related to contracting or advising on contracting for the design-build component of the Project.
- The Proposer is the TJPA's general engineering consultant (GEC) for the design-build component of the Project, or is a subconsultant to the GEC that has engaged in or has advised the TJPA (through the GEC) on contracting for the design-build component of the Project.
- The Proposer has engaged in or has advised the TJPA on contracting for the design-build component of the Project, including the preparation of Request for Qualifications or Request for Proposals.
- The Proposer has materially assisted the TJPA in management of or assistance in the management of contracting for the design-build component of the Project.
- The Proposer has performed work on a previous contract that specifically excludes them from participating as a Proposer or joining a design-build team for the Project.
- The Proposer is under contract to perform oversight on the Project on behalf of the TJPA or Project stakeholders, now or in the future.
- The Proposer has obtained substantive advice from or otherwise substantively discussed the procurement of the design-build component of the Project with any person or entity with an Organizational Conflict of Interest as to the design-build component of the Project resulting in an unfair competitive advantage.

- The Proposer’s employees are identified in the TJPA’s Conflict of Interest Code or otherwise file a Form 700 resulting from their work for the TJPA.
- The Proposer is a subsidiary of a parent organization, and the parent organization or another subsidiary of the parent organization has an Organizational Conflict of Interest as to the design-build component of the Project.
- The Proposer serves currently, or would serve, in a capacity of acting as the TJPA’s agent for review, approval, or acceptance of the Proposer’s own prior work product.

Proposers MAY be allowed to propose or join a design-build team in the following circumstances, provided that the Proposer can demonstrate (through substantiating documentation, as requested by the TJPA) that its work did not include engaging in or advising on contracting for the design-build component of the Project, broadly interpreted:

- The Proposer performed preliminary design services, prepared preliminary designs, feasibility studies, and conceptual designs for the Project.
- The Proposer provided environmental support services, including data collection and drafting of environmental documents for NEPA and CEQA compliance.
- The Proposer performed program management, program controls, and/or construction management services, including planning and pre-construction, for other components of the Project or the Transbay Program.

Proposers are cautioned that determination of a conflict of interest in cases involving prior services connected to the Project is highly fact-specific.

5. Proposers’ Obligations to Identify and Disclose Any Potential Organizational Conflict of Interest

Proposers participating in and bidding, proposing, or offering on a design-build contract for the Project must agree to comply fully with and be bound by the applicable provisions of federal, state, and local laws related to conflicts of interest, including without limitation (a) Section 15.103 of the City of San Francisco’s Charter; (b) Article III, Chapter 2 of City’s Campaign and Governmental Conduct Code; and (c) Section 87100 et seq. and Section 1090 et seq. of the California Government Code.

Proposers participating in and bidding, proposing, or offering on a design-build contract for the Project are obligated to identify and promptly disclose any potential Organizational Conflicts of Interest to the TJPA pursuant to this Policy and the written requirements established in the procurement documents. Proposers disclosing potential Organizational Conflicts of Interests are encouraged to propose mitigation measures for the TJPA’s consideration.

Proposers shall use all reasonable efforts to arrange their affairs so as to prevent Organizational Conflicts of Interest from arising.

Proposers must undertake reasonable due diligence, including necessary conflict searches, to determine whether new actual, perceived or potential Organizational Conflicts of Interest have arisen whenever engaged in a proposal process or whenever working under a design-build contract for the Project.

An Organizational Conflict of Interest may arise at any time, and a Proposer's obligation to disclose is ongoing. Each Proposer shall consider whether disclosure is required in connection with changed circumstances, including by example only new hires, changes in the company's board of directors, mergers and acquisitions, changes in property ownership, and new business relationships including joint ventures and contractor/subcontractor relationships.

Proposers whose responsibilities to the TJPA include review, supervision or oversight of work by other entities must pay careful attention to their relationships with the other entities and their affiliates and must take care to avoid relationships with such other entities that would give rise to an Organizational Conflict of Interest. Due diligence must extend to investigation of current and past relationships that exist within or outside of the TJPA's jurisdiction and, if the Proposer is a corporate entity, to officers or directors of the Proposer.

The failure to disclose any actual, perceived or potential Organizational Conflict of Interest may result in serious consequences to the Proposer and its affiliates (see Remedies).

6. Disclosure and Determination Process

A Proposer's disclosure to the TJPA of a potential Organizational Conflict of Interest in relation to the design-build component of the Project must contain a detailed description of:

- The facts and circumstances giving rise to the actual or potential Organizational Conflict of Interest. Disclose all relevant facts relating to past, present or planned interest(s) of the Proposer's team (including the Proposer, Proposer's proposed consultants, subconsultants and subcontractors and their respective chief executives, directors and key personnel) which may result in, or could be viewed as, an Organizational Conflict of Interest in connection with any design-build procurement for the Project, including present or planned contractual or employment relationships with any current employee of the TJPA.
- All work performed in relation to the design-build component of the Project.
- Provide relevant records of such work performed for the TJPA so that all information can be evaluated and made available to all potential design-build teams, if necessary.
- Contracts with any related entity to perform services related to the design-build component of the Project and the status of such contracts (e.g., active, expired, terminated).
- In cases where Proposers on different design-build teams belong to the same parent company, each Proposer must describe how the subconsultants and subcontractors

would avoid conflicts through the qualification bid phases of the design-build procurement.

- Any efforts the Proposer has taken or proposes to take to mitigate the conflict.

The TJPA may request additional information or records to support its review. Upon review of the information provided above and from any other source, the TJPA will determine, in its sole discretion, if the Proposer has an Organizational Conflict of Interest and is disqualified from the design-build procurement opportunity. The TJPA may publicly disclose/publish information and relevant records related to its review and determination.

7. Remedies for Conflicts and Failure to Comply with Policy

If the TJPA determines, in its sole discretion, that a Proposer has an Organizational Conflict of Interest or has failed to comply with this Policy in any respect (including any failure to disclose an actual, perceived or potential Organizational Conflict of Interest), the TJPA may, among other things, take the following actions:

- Preclude and/or disqualify the Proposer, as well as any other persons or legal entities on the Proposer's team, from participation in the TJPA's design-build procurement;
- Require the Proposer, as well as any other persons or legal entities on the Proposer's team, to implement mitigating measures;
- Amend the contract under which the Proposer is performing work for the TJPA;
- Cancel or terminate the contract, including the possibility of termination for default; and/or
- Exercise any and all other remedies available at law or in equity.

If the TJPA cancels a contract as specified above, it will have no obligation, responsibility or liability to reimburse all or part of the costs incurred or alleged to have been incurred by the Proposer, its affiliates or other team members. Additionally, the TJPA shall be entitled to recover any and all payments made to the Proposer subsequent to the date when the Proposer became aware of or should have become aware of the existence of the Organizational Conflict of Interest.

8. Application of the Policy to Proposer's Employees

If the TJPA determines that a potential or actual Organizational Conflict of Interest exists for a particular Proposer, an Organizational Conflict of Interest shall also be considered to apply to any employee of such Proposer that has participated in a material way in the performance of work (or other facts and circumstances) giving rise to the determination. If such individual leaves the Proposer's employment, the potential or actual Organizational Conflict of Interest shall apply to such individual in the same manner as it applies to the Proposer. 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 satisfactory to the TJPA in its sole discretion.

9. Limitations of this Policy

This Policy does not purport to address every situation that may arise in the context of the TJPA's design-build procurement for the Project.

This Policy does not mandate a particular decision or determination by the TJPA.

This Policy does not address all applicable requirements that may affect persons and entities wishing to enter contracts with the TJPA.

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.

Nothing in this Policy restricts or binds the authority of a court of competent jurisdiction to make a final determination of whether an Organizational Conflict of Interest exists. The TJPA is not required to delay its procurement process during the pendency of any legal challenge.

Proposers may request an Advice Letter or an Opinion from the Fair Political Practices Commission with respect to specific factual circumstances. The TJPA may defer to an opinion of the Fair Political Practices Commission, timely issued and based on the same facts before the TJPA.