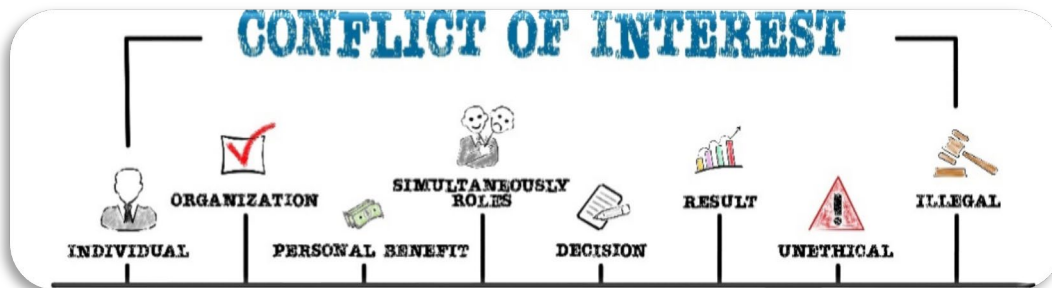


Potential Conflict of Interest May Require Voiding a \$40 Million Construction Management Contract and Not Paying \$5.4 Million of Invoices

Office of the Inspector General



Investigation Results

BART may be required to void the remaining \$27 million in capacity on a \$40 million construction management contract and \$5.4 million in unpaid invoices on that and another contract because a BART manager had roles in making the contracts with the firm while the manager's spouse worked for the firm.¹ The family relationship means the manager may have a financial interest in the contract, in the form of the economic benefit resulting from the spouse's income, which is prohibited under California Government Code § 1090. Some case law and Fair Political Practices Commission (FPPC) opinions can be interpreted to mean the BART manager may not have a financial interest in the contracts and that the contracts may therefore not need to be voided. However, it is difficult to conclude with certainty that the manager did not have a financial interest in the contract due to different circumstances between those cases and this situation. Those differences include the BART manager's spouse receiving an annual profit-sharing distribution that may result, in part, from the payments the firm receives from its contracts with BART. Because of those differences the complexity in interpreting Government Code § 1090, we are recommending that BART seek outside expertise before drawing a firm conclusion.

Some of the work the contractor performed under these contracts was federally funded. The Federal Transit Administration's (FTA) regulations regarding conflict-of-interest prohibitions are more restrictive than Government Code § 1090. The FTA regulations also include a prohibition against being involved in the administration of the contract. The same BART manager was involved in performing contract administration tasks after these contracts were awarded. If this violation is substantiated, the FTA has the option of requiring the contractor to repay what it was paid with federal funds.

Neither the firm nor the BART manager met their responsibilities to disclose the potential conflict of interest in compliance with BART's Codes of Conduct, and the manager did not formally disclose the financial conflict of interest on their annual FPPC Forms 700, Statement of Economic Interests, as required by law.

Factors that contributed to the lack of disclosure were inconsistencies in the language in and between BART's Contractor and Employee Codes of Conduct, the lack of clear guidance and training regarding FPPC Form 700 requirements, and a lack of clarity in the Request for Proposal (RFP) documents regarding conflict-of-interest disclosure requirements.

 The allegations of potential violations of Government Code § 1090 and FTA conflict-of-interest rules came to our attention during the course of another investigation we are conducting.

¹ Each work plan is a separate contract.



Recommendations

For the General Manager:

1. Permanently reassign to another manager all work related to contracts with the contractor that employs the BART manager's spouse and sibling to avoid even the appearance of a conflict of interest between the BART manager and the contractor.
2. Seek an expert outside opinion from the FPPC or other appropriate source to determine if the conflicts of interest violate California Government Code § 1090. If they do, void remainder of the affected contracts with the firm and notify Accounts Payable to not pay the \$5.4 million in unpaid invoices, as required by law and notify the contractor of these actions and the reasons why.
3. Review and update the Contractor and Employee Codes of Conduct to ensure discussions of conflicts of interest are clear and consistent for both contractors and employees, including when and to whom to report them, and that they incorporate appropriate provisions of both federal and state conflict-of-interest prohibitions.
4. Revise boilerplate language in RFP and other bid documents to consolidate information on conflict-of-interest prohibitions, appropriate federal and state references, BART's Contractor Code of Conduct reference, and reporting requirements in a single location.
5. Create a template that contractors are required to use to disclose potential personal, financial, and contractual conflicts of interest. Include a preamble on the template that refers bidders to the consolidated conflict-of-interest information in the bid documents and a statement that bidders are required to sign indicating that they have read and understand the disclosure requirements.
6. Revise the Proposal Evaluation and Award Confidentiality and Conflict of Interest Certification as necessary to align it with the updated Employee Code of Conduct (see Recommendation 3) and expand its use of to include all staff who are involved in any way in the procurement and contract administration process for a project. The timing of when an employee signs the form should align with when their participation in the process is to begin.
7. Develop and require employees to participate in training to ensure their understanding of the Employee Code of Conduct and the conflict-of-interest prohibitions in Government Code § 1090, et. seq. and FTA regulations. This training should occur at least biennially to ensure employees have an ongoing understanding of the requirements.
8. Establish and implement a process for review of all future FPPC Forms 700 (Statement of Economic Interests) employee submissions and inform respective management of any identified potential conflicts.


For the District Secretary:

9. Revise the cover letter sent to inform BART staff of their responsibility to file a Form 700 to include language reminding them that they are personally responsible for understanding their reporting requirements and verifying the completeness and accuracy of their forms and that they should consult the FPPC with specific filing requirement questions.

Management agreed with most of our recommendations and the District Secretary agreed to our recommendation. See Appendix I on page 11 for their responses and Appendix II on page 15 for our comments regarding management's response to Recommendation #2.



Background and Investigation

 In August 2020, the BART Board of Directors authorized the General Manager to enter into contracts with eight firms for \$40 million each to provide on-call construction management services. A BART manager (“manager”), also called the “Agreement Manager,” was previously employed by one of the eight firms, which also employs the manager’s spouse and sibling. These relationships create potential conflicts of interest under California Government Code § 1090 and federal contracting regulations for that one contract, as described below. This report focuses on the one contract, the construction-management firm, and the BART manager affected by the relationships.

The manager was one of the signatories on the Executive Decision Document (EDD), which is the document the Board of Directors (“Board”) relies on for decisions regarding contract awards; presented the EDD to the Board; and recommended that the Board approve the contract. The Director of Procurement signed the contract, but the manager signed the Advance Agreement for Provisional Cost Reimbursement (“Advance Agreement”), which was incorporated into the contract as an attachment. In addition to having a role in making the \$40 million contract, from late 2020 through January 2022, the manager was also directly involved in the approval process for 22 work plans, valued at \$36 million, issued under this and another on-call contract to the same firm.

California Government Code § 1090 prohibits state and local government employees, including those of special districts, from being involved in the making of a contract if that person also has a financial interest in the contract. According to the Fair Political Practices Commission (FPPC), the “making of a contract” for purposes of § 1090 includes “final approval of the agreement, as well as involvement in preliminary discussion, planning, negotiation, and solicitation of bids,” not just the moment of signing.² A financial interest can occur in a contract in a variety of ways, and violations of § 1090 can result in criminal (if the violation is willful), civil, and administrative penalties. California courts have recognized that Section 1090's prohibition must be broadly construed and strictly enforced and that violations can result in contracts being voided.

The FPPC requires public officials and employees to follow ethical guidelines and to eliminate improprieties, including the appearance of potential corruption, to safeguard the public’s trust in government. This is accomplished, in part, by requiring public officials and certain public employees to file FPPC Form 700, Statement of Economic Interests, to be transparent about their financial interests. The FPPC expects individuals to understand what the Form 700 requires and for individuals to verify its content under penalty of perjury.³ However, not all employees are required to fill out Form 700, which can allow some potential conflicts of interests to not be disclosed.

Some work under the above-mentioned contracts was paid with federal funding, which means they are also subject to the Federal Transit Administration’s (FTA) conflict-of-interest prohibitions, as described in [FTA Circular 4220.1F, Third Party Contracting Guidance](#). The FTA Circular is more restrictive than Government Code § 1090 in that it also prohibits someone with a financial or other interest from being involved in the administration

“No employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the forgoing individuals may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those individuals previously listed has a financial or other interest in the firm selected for award.”
 -- FTA Circular 4220.1F


² <https://www.fppc.ca.gov/learn/section-1090.html>.

³ FPPC, Frequently Asked Questions: Form 700 Disclosure, Question/Answer #2, available at https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Form%20700/2020-21/Form_700_FAQs_2020.pdf.

of a contract. The FTA regulation does not define what is considered a financial or other interest, and the FTA does not have a specific process for employees of agencies that receive federal funding to report real or apparent financial or other conflicts of interests.

The Request for Proposals (RFP) for the on-call contracts did not specifically require disclosure of financial or other relationships that could be potential conflicts of interest under Government Code § 1090 or FTA Circular 4220.1F. However, the RFP says that all proposers shall comply with the requirements of the District Contractor Code of Conduct, which does require that such disclosures be made, in writing.

Key Findings

 Neither the firm that has contracts with BART nor the BART manager who served as the “Agreement Manager” for the contracts fulfilled their responsibilities to disclose, in writing, potential conflicts of interest under Government Code § 1090 and FTA regulations prior to the contracts being awarded. This puts the contractor at risk of having the remainder of its \$40 million on-call construction management contract with BART voided if the conflicts of interest are determined to be a violation of Government Code § 1090. It also means that payments on invoices totaling \$5.4 million would be disallowed, as would payments for work performed but not yet invoiced. It also puts the contractor at risk of having to pay back any contract payments received from federal funding if the manager’s role in making and administering the contract are confirmed as actual conflicts of interest under FTA Circular 4220.1.F.

The firm did not notify Procurement, as required by the District Contractor Code of Conduct, that it previously employed the BART manager or that the manager’s spouse and sibling work for the firm. The BART manager did not disclose on their FPPC Forms 700 for 2019 and 2020 that their spouse works for the firm until we notified the manager about this investigation. The manager provided only verbal notification to BART that a sibling works for the firm. Appropriate written notifications would have ensured that BART identified the relationships to avoid potential violations of Government Code § 1090 and the FTA’s stricter conflict-of interest prohibitions.

Inconsistencies in the District Contractor and Employee Codes of Conduct, the lack of clarity in the RFP regarding conflict-of-interest disclosure requirements under Government Code § 1090 and FTA Circular 4220.1.F, and an inadequate process for identifying potential conflicts of interest for BART employees involved in the procurement and contract administration processes contributed to the lack of disclosure. Because federal grant recipients’ procurement procedures are required to comply with applicable federal, state, and local laws and regulations, BART’s Codes of Conduct should incorporate, at least by reference, the conflict-of-interest prohibitions at all levels of government to eliminate any ambiguity for what contractors and employees are required to report. The following sections explain these issues.

- [Government Code § 1090 and FPPC Form 700](#). California courts have recognized that § 1090’s prohibition must be broadly construed and strictly enforced to close loopholes. Because a violation can only occur if a contract has been made, the determination of whether there is a violation requires an analysis of whether the manager was involved in the making of the contracts and, if so, whether the employee had a financial interest in it.



The Advance Agreement sets forth the terms under which compensation may be made for individual work plans. Contractors may only change certain costs, such as individual direct labor rates, upon approval by the Agreement Manager.

The manager's approval of the Advance Agreement for the on-call contract, signing the EDD and presenting the contract to the Board for approval, and being in the approval workflow for individual work plans means the manager had a role in the making of the contracts. Thus, we moved to looking at whether the manager had a financial interest in the contracts.

In its guide, [Providing Conflict of Interest Advice](#), the League of California Cities says that § 1090 is difficult to apply in many circumstances because "financial interest" is defined more by exceptions that "do not disclose any obvious theme or relationship," rather than being explicitly defined.⁴ The circumstances in this instance are not straight forward because of the multiple income streams that the manager's spouse receives through employment with BART's contractor. Those income streams include salary, a company match to the employee's contributions to a 401(k) account, annual bonuses, and a profit-sharing plan. The FPPC publication, [A Quick Guide to Section 1090](#), references the court case, *People v. Honig*, when it says that officials have a financial interest in a contract *if they might profit from it in any way*.⁵

BART's Office of the General Counsel provided some case law and FPPC advice letters for our review. While those provided some reasons to say there may not be a § 1090 violation, there were also references to case law that gave us reason not to draw a definitive conclusion that there was not a violation. For example, a reference to one case said, "While it may truly be said that he would not derive direct pecuniary gain from the contract, he certainly would indirectly be so benefited," and another case that said, "forbidden interests extend to *expectations of benefit* by express or implied agreement and may be inferred from the circumstances." We do not believe the BART manager had any expectation of receiving a direct benefit through the Agreement Manager role. Nevertheless, we cannot dismiss the fact that the firm has a profit-sharing plan whereby its employees derive some benefit from the firm's contracts with BART, and by default, the BART manager benefits from that based on having an economic interest in the spouse's finances.

The spouse of BART's manager receives an annual profit-sharing distribution, which results, in part, from the firm's contracts with BART.

The manager for these contracts filed Forms 700 for 2019 and 2020 but did not disclose required information regarding the manager's spouse's income that came from a firm for which the manager served as the Agreement Manager prior to the contracts being awarded. The manager filed amended Forms 700 for 2019 and 2020 to properly reflect the spousal income, as well as other previously omitted but required disclosures, after receiving our notification letter about this investigation. During an interview, the BART manager told the OIG that that they did not disclose the spousal income based on directions from their immediate supervisor that the manager only needed to complete the first page of Form 700. The manager said their supervisor was aware of the spouse's employment at the firm and said the spouse could not work on any BART projects. We confirmed that the spouse was removed from BART projects. The supervisor also precluded the manager from being on the evaluation panel for proposals received in response to BART's RFP for on-call construction management services. Despite that, the manager became involved in the making of the contracts by signing

⁴ A Guide for Local Agency Counsel: Providing Conflict of Interest Advice, League of California Cities, pg. 56, available at https://www.calcities.org/docs/default-source/advocacy/conflict-of-interest-guide1240b84a-e02b-4ba3-9b4b-909ae4713742.pdf?sfvrsn=bb62333c_3.

⁵ FPPC, A Quick Guide to Section 1090, Question 4, available at <https://fppc.ca.gov/content/dam/fppc/NS-Documents/LegalDiv/section-1090/Section%201090%20-%20Quick%20Guide%20-%20Oct%202020.pdf> (Note 26 is a reference to *People v. Honig*).

the Advance Agreement and the EDD, presenting the EDD to the Board of Directors, and recommending that the Board of Directors approve the motion to award the \$40M on-call contract, as well as through the approval process for individual work plans.

If properly completed, the Form 700 could have provided BART with a means to identify a potential conflict of interest that could affect the award of a contract under either Government Code § 1090 or the FTA regulations. However, BART did not have a review process to verify that Forms 700 are complete or a process to compare completed Forms 700 with information provided by contractors in response to RFPs to identify potential conflicts of interest.

- **BART Codes of Conduct.** Both the contractor and the employee had responsibilities to notify BART of the potential conflict of interest under the BART Contractor Code of Conduct and the BART Employee Code of Conduct, respectively. However, there are inconsistencies between the responsibilities cited for contractors and employees, and the language in the Contractor Code of Conduct seems to place a higher burden of responsibility on contractors than on employees for disclosing potential conflicts of interest between a contractor and a BART employee.



- **BART Contractor Code of Conduct.** BART's Contractor Code of Conduct includes a "Duty to Disclose Conflicts of Interest" section that requires bidders, proposers, and contractors seeking to do or doing business with BART to "promptly disclose in writing" to BART's Procurement manager any potential conflicts of interest. It provides specific types of potential conflicts of interest to report, including any financial or close personal relationship between the bidder, proposer, or contractor or their employees and a District official, as well as the contractor's current or former employment of any District official or former District official. The Contractor Code of Conduct defines District officials to include any BART employee and says the disclosure is required "regardless of whether the facts actually constitute a conflict of interest under any law," but it does not specifically mention Government Code § 1090 or FTA Circular 4220.1F. The Contractor Code of Conduct does not define the terms "financial relationship" or "close personal relationship." However, a "financial relationship" presumably would exist between the contractor's employee who is married to the BART manager, and a "personal relationship" would exist between the BART manager and the spouse and sibling who are employees of the contractor.

The firm submitted signed declarations in its 2018, 2019, and 2020 proposals that listed previous BART projects it had worked on and concluded, "There is no potential conflict of interest in connection with the above work and services to be performed under this agreement." The firm did not comply with their ongoing and specific duty to disclose its prior employment of the BART manager or its current employment of the manager's spouse and sibling in any of the three years, as required by BART's Contractor Code of Conduct. Further, the firm's 2020 proposal listed the BART manager's spouse as a team member who was "locally available and may be assigned work under an awarded Agreement." BART accepted the contractor's statement despite several BART individuals, including those in management, acknowledging that they knew about the relationships. In other words, BART accepted false information from the contractor.

- **BART Employee Code of Conduct.** BART’s Employee Code of Conduct incorporates the prohibitions of California law concerning conflicts of interest, including the prohibition against officers and employees being financially interested in any contract made by them in their official capacity and specifically cites Government Code § 1090, et seq. It says this includes “the prohibition against officers and employees making, participating in, or using their position to influence governmental decisions in which they have a reason to know they have a financial interest.” Such conflicts of interest can be identified for employees who are required to file FPPC Form 700, which requires the employee to disclose nongovernmental spousal and other income.

The Employee Code of Conduct also incorporates the FTA’s prohibitions concerning real or apparent conflicts of interest by employees who participate in the selection, award, or administration of contracts supported by federal funds. Although there is not a specific form for identifying conflicts of interest under the federal regulations, a review of employees’ FPPC Forms 700 could help identify potential conflicts of interest under the federal regulations. However, as mentioned above, BART did not have an established process for reviewing employees’ FPPC Forms 700.

The BART manager participated in the making of the on-call construction management contract in 2020 and 22 work plans issued this contract and another on-call contract. The manager was required to file FPPC Form 700 but, as mentioned above, did not disclose the spousal income from the firm on either their 2019 or 2020 Form 700 until after the OIG requested an interview with the manager for this investigation. Because some of the consultant's services were funded with FTA funds, the employee should have been required to disclose the spousal and sibling relationships to ensure there was no conflict of interest under the FTA regulations. Although the manager said they told their supervisor of the family relationships, there was no written record of the disclosure. Putting required disclosures in writing ensures there is a record of it, which would protect both BART and the employee.

BART requires members of its Source Selection Committees to sign a statement, Proposal Evaluation and Award Confidentiality and Conflict of Interest Certification, that they do not have any conflicts of interest with regard to a specific procurement action in which they will participate. The statement requires them to certify that they have read the Employee Code of Conduct and that no relationships exist that might cause BART to be criticized on the basis that such an interest would impair the person’s objectivity in participating in the contract selection process. The statement cites as examples the present employment by an immediate family member or other connections, real or apparent, with an actual or potential proposer and requires Source Selection Committee members to promptly report, in writing, any such interests or connections. Although the statement says it is required to be completed by members of the Source Selection Committee and any advisors or other personnel who may be assigned to assist in the procurement process, only members of the Source Selection Committee were required to complete the certification.

- **Inconsistencies Between Contractor and Employee Codes of Conduct.** Although BART’s Contractor and Employee Codes of Conduct identify certain behaviors or situations that represent a conflict of interest, inconsistencies between the language in each make it unclear as to what BART actually considers to be a reportable conflict of interest. However, the language in the Contractor Code of Conduct seems to place a higher burden of responsibility on contractors than on employees for disclosing potential conflicts of interest between a contractor and a BART employee. Although best practices recommend that codes of

conduct be reviewed at least annually and updated as needed, these Codes of Conduct have not been updated since the Board of Directors adopted them in 2013. Reconciling the discrepancies between the Codes of Conduct would ensure an equal balance in the requirements for disclosing potential conflicts of interest and reduce the chance for relevant relationships to remain undisclosed. Examples of the discrepancies include:

- Contractors are required to “promptly disclose in writing” to BART any close personal relationships between any of their staff and a BART employee/official, any negotiations with or outstanding offer of employment to a BART employee/official, and former employment of a BART employee/official. The requirement applies prior to and during any employment or contract, “regardless of whether the facts actually constitute a conflict of interest under any law.” The Contractor Code of Conduct does not define what BART considers as “close personal relationships” that must be reported. In contrast, the Employee Code of Conduct prohibits employees from participating in or influencing decisions relating to any person or entity with whom the employee is negotiating or has any arrangement concerning prospective employment. The Employee Code of Conduct requires employees to disclose such circumstances, but it does not specifically require disclosure of former employment or close personal relationships with a prospective or current BART contractor.
- Contractors are required to disclose to BART any financial relationship between any of their staff and a BART employee/official, “regardless of whether the facts actually constitute a conflict of interest under any law.” In contrast, the Employee Code of Conduct requires employees to not be “financially interested in any contract made by them in their official capacity.” It references Government Code § 1090 in that regard but does not provide more specific information regarding Government Code § 1090.
- The Conflict of Interest section in the Employee Code of Conduct incorporates the FTA’s “prohibitions concerning real or apparent conflicts of interest on the part of officers and employees who participate in the selection, award, or administration of contracts supported by federal funds.” The words “supported by federal funds” seem to suggest that the funding source, rather than the circumstances, determines if a conflict of interest exists. Further, the Employee Code of Conduct does not reference the title of the FTA regulation until two pages later, under the Solicitation or Acceptance of Gratuities and Favors section. The late reference makes it unclear if it is for the same FTA regulation. In contrast, the Contractor Code of Conduct does not reference the FTA regulation; instead, it is referenced in RFPs that involve federal funds.
- Guidance in the Contractor Code of Conduct regarding whom BART expects to be notified of a conflict of interest is not clear. The Interpretation section says contractors may contact the Ethics Officer with questions regarding the Code of Conduct, and the Enforcement section says a contractor’s violation of law or of the Code of Conduct should be reported to the District Ethics Officer. However, the Duty to Disclose Conflicts of Interest section requires contractors to disclose any potential conflicts of interest, in writing, to BART’s manager of Procurement. The Contractor Code of Conduct does not provide information about how to contact the District Ethics Officer. No information is available on BART’s website to inform contractors who the District Ethics Officer is or how to contact that person, either by doing a search on the words, “Ethics Officer,” or by reading through the Doing Business section.

In contrast, the Employee Code of Conduct makes no mention of the Ethics Officer. It requires department managers to review the proposed scope of work of their contracts and bring any potential organizational conflicts of interest to the attention of the Contract Management Division. It defines an organizational conflict of interest, in part, as one where a contractor may be unable “to provide impartial and objective assistance or advice to the District due to other activities, relationships, contracts, or circumstances.” No guidance is provided for how the department manager would be expected to know that any of those circumstances exist. There is also no guidance or requirements for managers to review the Forms 700 that some BART employees are required to file. Such a review would provide managers an opportunity to ask questions regarding the completeness of the forms and also identify potential conflicts of interest resulting from relationships.

- Federal Conflict of Interest Provisions.** Language in the Employee Code of Conduct and in the RFP put a responsibility on both the BART manager and the contractor to disclose the relationship between the BART manager and the manager’s spouse and sibling who work for the contractor. As previously stated, the Employee Code of Conduct references the potential conflict-of-interest prohibitions in FTA Circular 4220.1F, Third Party Contracting Guidance. Although the Contractor Code of Conduct does not reference the FTA Circular, the RFP informed potential proposers that they were subject to the FTA’s conflict-of-interest provisions. The FTA Circular says, “No employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing individuals may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those individuals previously listed has a financial or other interest in the firm selected for award.”



As previously stated, BART’s manager had responsibilities in both the contract award and administration processes. The manager also provided a reference for the firm for a proposal it was submitting to another government agency for work similar to what it does for BART. Allowing the BART manager to participate in these processes for a contract with a firm that the manager’s spouse worked for was a violation of the FTA’s conflict-of-interest regulation and puts the contractor at risk for having to repay funds it received for contracts that the manager was involved with.

- Lack of Clarity in RFP Regarding Conflict-of-Interest Disclosure Requirements.** Although the Contractor Code of Conduct requires notification to the District Ethics Officer regarding potential conflicts of interest, the RFP made no mention of the Ethics Officer. Further, the RFP includes several references to conflicts of interest, but they are not consolidated in one location. One page says a prime awardee and its subconsultants may be precluded from performing services when there is a conflict of interest resulting from other projects for which they are providing services. Several pages later are references to the FTA Circular, Government Code § 1090, et. seq., and 87100, et. seq. The FTA Circular and Government Codes are again referenced in an exhibit to the document, along with a reference and link to the District Contractor Code of Conduct. The Code of Conduct is described as providing “a comprehensive statement of pertinent regulations and obligations governing the





conduct of consultants doing business with the District,” although it does not; it only describes some activities that can create a conflict of interest. Although the District Contractor Code of Conduct says that proposers have an obligation to disclose potential conflicts of interest in writing, the RFP says only that “proposers may be required to disclose financial interests.”

The RFP required proposers to provide a statement of all work performed by the firm or its affiliates that is related to any BART project and was performed within five years of the date for receipt of proposals. Although the RFP required proposers to comply with the Contractor Code of Conduct requirement to disclose potential personal or financial conflicts of interest, there was no specific requirement in the RFP to report such conflicts, and BART did not have another means of verifying that such conflicts of interest did not exist. Several people we interviewed during this investigation commented that “everyone knew” about the relationship. However, the relationship was not documented, and not requiring the contractor to disclose the relationship in writing increases the risk that a conflict of interest may not be identified and avoided, as was the case for this contract.

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Providing independent oversight of the District’s use of revenue.



Appendix I – Management Response to Recommendations

BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG FINDINGS & RECOMMENDATIONS

Report Title: Potential Conflict of Interest May Require Voiding a \$40 Million Construction Management Contract and Not Paying \$5.4 Million of Invoices

1	Recommendation:	Permanently reassign to another manager all work related to contracts with the contractor that employs the BART manager's spouse and sibling to avoid even the appearance of a conflict of interest between the BART manager and the contractor.
	Responsible Department:	D&C, GM
	Implementation Date:	Implemented January 2022
	Corrective Action Plan:	Manager in question was immediately removed from all projects until issue further investigated. The program management function has been temporarily reassigned to the General Manager's office under a different manager. Management is taking additional steps, such as updating standard operating procedures, to mitigate potential conflicts of interest.
2	Recommendation:	Seek an expert outside opinion from the FPPC or other appropriate source to determine if the conflicts of interest violate California Government Code § 1090. If they do, void remainder of the affected contracts with the firm and notify Accounts Payable to not pay the \$5.4 million in unpaid invoices, as required by law and notify the contractor of these actions and the reasons why. ⁶ OIG Note: Please see our response on page 15.
	Responsible Department:	Legal; GM
	Implementation Date:	April 2022
	Corrective Action Plan:	After an exhaustive review of the situation, management believes all agreements, work plans, and invoicing with this firm are fair and reasonable. Management worked with the General Counsel's office and management is of the opinion that no financial interest was realized by the employee or the firm. Management believes that all other remedial measures taken and recommendations we are adopting from the IG will greatly enhance and improve on internal controls to mitigate future conflicts of interest.
3	Recommendation:	Review and update the Contractor and Employee Codes of Conduct to ensure discussions of conflicts of interest are clear and consistent for both contractors and employees, including when and to whom to report them, and that they incorporate appropriate provisions of both federal and state conflict-of-interest prohibitions.

⁶ We slightly revised the wording in Recommendation #2 after we sent our recommendations to management for their response. We removed the California Attorney General as a potential source from which to obtain an outside opinion after receiving guidance that their office recently issued that made it clear to us that the issue regarding the potential conflict of interest discussed in this report does not fall under their purview. Therefore, we do not cite that option here.



BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG FINDINGS & RECOMMENDATIONS

Report Title: Potential Conflict of Interest May Require Voiding a \$40 Million Construction Management Contract and Not Paying \$5.4 Million of Invoices

	Responsible Department:	Administration; Internal Audit; Legal
	Implementation Date:	Commenced March 2022, implementation May 2022.
	Corrective Action Plan:	Management is reviewing Contractor and Employee Codes of Conduct, Conflict of Interest Code (COIC), and procurement (RFP/bid/proposal evaluation) and contract documents to ensure that they reflect current federal and state conflict of interest rules/codes. Additionally, management will review to ensure that all BART codes and policies are internally consistent and align with each other.
4	Recommendation:	Revise boilerplate language in RFP and other bid documents to consolidate information on conflict-of-interest prohibitions, appropriate federal and state references, BART's Contractor Code of Conduct reference, and reporting requirements in a single location.
	Responsible Department:	Administration (Procurement); Internal Audit; Legal
	Implementation Date:	Commenced March 2022, implementation May 2022 (related to Recommendation #5, which we want to implement concurrently).
	Corrective Action Plan:	See Recommendation #3.
5	Recommendation:	Create a template that contractors are required to use to disclose potential personal, financial, and contractual conflicts of interest. Include a preamble on the template that refers bidders to the consolidated conflict-of-interest information in the bid documents and a statement that bidders are required to sign indicating that they have read and understand the disclosure requirements.
	Responsible Department:	Administration (Procurement); Internal Audit; review by Legal
	Implementation Date:	May 2022
	Corrective Action Plan:	BART will include a separate Conflict of Interest disclosure form in each contract for contractors to specifically disclose and attest to any potential conflict of interest.
6	Recommendation:	Revise the Proposal Evaluation and Award Confidentiality and Conflict of Interest Certification as necessary to align it with the updated Employee Code of Conduct (see Recommendation 3) and expand its use of to include all staff who are involved in any way in the procurement and contract administration process for a project. The timing of when an employee signs the form should align with when their participation in the process is to begin.
	Responsible Department:	Administration; Internal Audit; Legal; OCIO
	Implementation Date:	Commenced March 2022, implementation June 2022.



BART OFFICE OF THE GENERAL MANAGER RESPONSE TO OIG FINDINGS & RECOMMENDATIONS

Report Title: Potential Conflict of Interest May Require Voiding a \$40 Million Construction Management Contract and Not Paying \$5.4 Million of Invoices

	Corrective Action Plan:	See Recommendation #3. In addition, BART management will review, update, and enhance the existing internal Conflict of Interest Certification processes to include additional staff who are involved in procurement and contract administration. The design is currently underway to include an annual position-based certification and a project/agreement/contract-specific certification of conflict of interest. This new multi-layered system of certifications would provide BART with more robust controls surrounding Conflict of Interest certifications and achieve the required Federal-level standard (per FTA Circular 4220.1F) of including the administration of contracts.
7	Recommendation:	Develop and require employees to participate in training to ensure their understanding of the Employee Code of Conduct and the conflict-of-interest prohibitions in Government Code § 1090, et. seq. and FTA regulations. This training should occur at least biennially to ensure employees have an ongoing understanding of the requirements.
	Responsible Department:	Administration; Legal
	Implementation Date:	Implemented March 2022
	Corrective Action Plan:	Legal has developed and provided, via BART's online training system, directed training for all staff noted as a Designated Officer (Form 700 filer) for the FPPC Form 700 listing from BART's Conflict of Interest Code (COIC). These automated training sessions include Government Code § 1090, et. seq. and FTA regulations. The training notification coincides with the annual Form 700 requirement.
8	Recommendation:	Establish and implement a process for review of all future FPPC Forms 700 (Statement of Economic Interests) employee submissions and inform respective management of any identified potential conflicts.
	Responsible Department:	DSO; Administration; Internal Audit
	Implementation Date:	Implemented March 2022
	Corrective Action Plan:	The Form 700 process has been enhanced to use a web-based online filing system that will allow for better monitoring of the completeness of the required submissions. The tracking of Form 700 filings will no longer be a manual process and will permit follow-up on late or missing submissions. During the filing period, the DSO provides reminder messages to required filers, and lists of required filers who have not submitted to management (primarily AGMs) noting late or missing Form 700s.
9	Recommendation:	Revise the cover letter sent to inform BART staff of their responsibility to file a Form 700 to include language reminding them that they are personally responsible for understanding their reporting requirements and verifying the completeness and



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	accuracy of their forms and that they should consult the FPPC with specific filing requirement questions.
Responsible Department:	DSO; Administration; Internal Audit
Implementation Date:	Implemented March 2022
Corrective Action Plan:	<p><u>Response from General Manager’s Office:</u> The cover letter language has been revised to include reminders of personal responsibility and provides FPPC contact information. In addition, further electronic communication and training have been provided to the Designated Officers (Form 700 recipients) to further support their understanding of the reporting requirements.</p> <p><u>Response from District Secretary’s Office:</u> Annual letter template revised on or about March 30, 2022 (approximate); updated and/or confirmed revision to other letter templates on April 5, 2022.</p>



Appendix II – OIG Comments Regarding Management’s Response to Recommendation #2

The OIG appreciates management’s response, and we are pleased that they fully agree with eight of our nine recommendations. However, we disagree with their reasoning in Recommendation 2 to support that no financial interest was realized by the employee or the firm. The agreements, work plans, and invoicing being fair and reasonable are not criteria for determining if a violation of Government Code § 1090 occurred. FPPC publication, [An Overview of Section 1090 and FPPC Advice](#), says, “*The prohibition applies even when the terms of the proposed contract are demonstrably fair and equitable, or are plainly to the public entity’s advantage*” [emphasis added]. The penalties for not voiding the contract could be even more punitive for the firm and BART if it is later confirmed that a violation of Government Code § 1090 did indeed occur. We believe it is better to void the contract than to take that risk.

Government Code § 1090 prohibits a government employee or official from having a role in making a contract in which they have a financial interest. Our report confirms that the BART manager clearly had a role in making several contracts with a firm that employs the manager’s spouse and sibling. What is less clear, based on case law, is whether the manager had a financial interest in those contracts. The most compelling evidence that the manager did is that the spouse received an annual profit-sharing distribution from the firm. It is difficult to conclude that the contracts the firm has with BART did not contribute to at least some of the firm’s profits, a portion of which were then distributed among its employees. As stated in the report, the court case, *People v. Honig*, concluded that officials have a financial interest in a contract *if they might profit from it in any way*. Case law and Attorney General opinions state that prohibited financial interests may be indirect as well as direct; that the term, “financial interest,” must be liberally interpreted; and that the certainty of financial gain is not necessary to create a conflict of interest.

The FPPC issued [Advice Letter A-15-021](#) in 2015 that said, “Section 1090 prohibited a city councilmember and city council from approving a contract between the city and the firm that employs the councilmember’s spouse where the contract could have affected the financial health of the firm and impact, among other things, the spouse’s year-end bonus.” That same opinion acknowledged that the spouse’s base compensation would not be dependent upon or changed as a result of the firm having a contract with the firm, but also that “the fact that no financial gain will flow to him directly from that contract is not controlling.” It acknowledged that the annual contribution to the spouse’s Employee Stock Ownership Plan was based on the firm’s annual profitability and the potential for year-end bonuses for the employees, including the spouse. It concluded that the councilmember had a financial interest in the contract, based on those facts, and said, “This is exactly the type of interest Section 1090 attempts to thwart.”

The OIG had ongoing discussions with the Office of the General Counsel during this investigation and reviewed one court case and two FPPC advice letters that they provided. We raised some questions and after several conversations, the Office of the General Counsel confirmed that the circumstances in this investigation sufficiently differed from the case law they provided for our review to say it is not completely clear how a court would rule based on these circumstances. We believe that the annual profit-sharing distributions the BART manager’s spouse receives from the firm more closely align with the circumstances in FPPC Advice Letter A-15-021, as described above.

We acknowledge that it is undesirable to have to void a contract and not pay a contractor for work it performed in good faith. As the District is aware though, the firm assumed these risks when it failed to meet District, contractual, and federal rules on disclosure of this potential financial conflict of interest. We believe it is better to avoid the more punitive penalties that could occur if the contract is not voided now and it is later verified that a violation of Government Code § 1090 occurred.