ATTACHMENT A

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Pillsbury Winthrop Shaw Pittman LLP
725 South Figueroa Street, 36th Floor | Los Angeles, CA 90017-5406 | tel 213.488.7100 | fax 213.629.1033

Michael R. Rizzo
tel: +1.213.488.7202
michael.rizzo@pillsburylaw.com

August 16, 2021

VIA Hand Delivery

Orange County Transportation Authority
Contracts Administration and
Materials Management Department
600 South Main Street, 4th Floor
Orange, California 92688
Attention: BID PROTEST

Re: Protest of WSP USA Services, Inc. to Award of RFP 0-2690 Back Office System and Customer Service Operations Services (BOS/CSC) for the 405 Express Lanes in Orange County

Dear CAMM Management:

On behalf of our client WSP USA Services, Inc. (WSP USA), we hereby submit this protest of an intended contract award under Request for Proposal (RFP or Solicitation) No. 0-2690. We furnish the protest in accordance with the Orange County Transportation Agency[1] Contract Administration and Materials Management (CAMM) Procedures, Rev. 15 (July 2020), Paragraph Q (Vendor Protests)[2] and CAMM Policy Manual, Rev. 13 (August 2019), Section IV, E, 7. *See* Exhibit 2 (hereafter "the Manual). Under these procedures, WSP USA had seven (7) calendar days from the date of "selection/award" to tender this protest. The OCTA Board of Directors voted to award the 405 Express Lane Back Office Contract (the Contract) to Cofiroute USA (CUSA) on Monday, August 9, 2021. This August 16, 2021 Protest, therefore, is timely and should be included in your Agency's administrative record.

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[1] Hereafter either "OCTA," "the Authority," "the Agency," or "your Agency."

[2] Exhibit 1. We attach only the excerpts of this provision because we do not have a full copy of the CAMM Procedures.

<u>Summary of Protest and Resolution Sought</u>: The Contract has federal, state, and local funding. We demonstrate herein that, during the process that led to the Board of Directors' August 9, 2021, vote to award the Contract to CUSA, OCTA impermissibly deviated from the evaluation criteria it published, approved, and committed to use to judge the merits of the parties' proposals when it disregarded the unanimous votes of both the Evaluation Committee[3] and the Finance and Administration Committee (Finance Committee) to award the contract to WSP USA. We show that CUSA violated a mandatory RFP term by failing to disclose financial campaign contributions of CUSA agents as required in the RFP. We also establish that CUSA and its agents again violated the RFP when they did not comply with the OCTA Code of Conduct as required. For these reasons, or any one of them alone, OCTA should rescind the August 9, 2021, vote in favor of CUSA and, instead, immediately begin negotiations with WSP USA to finalize the Contract. As we explain in detail *infra* at pages 19-20, we believe no other resolution will assist OCTA's mission of allowing the public to use the I-405 Express Lanes within the Agency's desired time frame. Accordingly, no other resolution will allow the Agency to timely repay, through toll revenue, the federal loans it has accepted. And no other resolution will promote federal, state and local competition requirements designed to promote and reward fair competition.

I. <u>Name and Address of Protester</u>

WSP USA Services, Inc.
1100 W Town and Country Road, Suite 200
Orange, CA 92868

II. <u>Solicitation Number and Project Description</u>

REQUEST FOR PROPOSALS (RFP) 0-2690 Back Office System and Customer Service Operations Services (BOS/CSC) for the 405 Express Lanes in Orange County

III. <u>Statement of the Grounds for Protest and All Supporting Documentation</u>

In this subsection, we brief the grounds for this protest and provide citations to the supporting documentation and evidence. We provide a comprehensive exhibit list

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[3] The RFP Evaluation Committee's three OCTA representatives and three external members included subject matter experts with professional experience evaluating and overseeing back office system and customer service center operations providers. Two of the OCTA representatives worked for the Express Lanes Program and one worked for OCTA's Highways Program. With respect to the external members, one came from the Metropolitan Transportation Commission, another from the Kansas Turnpike Authority, and the third from the Santa Clara Valley Transportation Authority. *See* Exhibit 3, at p. 16, Attachment A; Exhibit 12 (RFP Addendum 10), Section III.B, at p. 32.

at Appendix A. The exhibit list fully describes each document referenced, so we provide only short citation to each exhibit in the body of this section. We furnish electronic copies of each exhibit on the flash drive that accompanies this protest.

A. Introduction to Argument

During calendar year 2015, the OCTA Board of Directors approved the commencement of a design-build Interstate 405 (I-405) improvement project commonly referred to as DB 405. *See* Exhibit 3, Staff Report, at pp. 1-2. In accordance with its plans, the improvement project was intended to add (1) a general purpose lane to I-405 between State Route 73 (SR73) and Interstate 605 (I-605), and (2) another lane in each direction of I-405 (also between SR73 and I-605) that will combine with existing high occupancy vehicle lanes to provide dual express lanes (405EL). *Id.*

OCTA funded DB 405 initial planning and finance efforts during 2015-2016. Following the conclusion of these preliminary efforts, on June 22, 2020, the OCTA Board of Directors approved the release of solicitation number 0-2352 (the "June 22, 2020 RFP")[4] to select a private company to provide back office system and customer support services for 405EL. *Id.* at p. 3. The Agency then conducted additional market outreach and, following that, issued the operative RFP (solicitation number 0-2690) on December 10, 2020 (the "December 10, 2020 RFP").[5] Both RFPs sought design, development, implementation and maintenance of a back office system (BOS) and customer service center (CSC) for 405EL. Both RFPs also required bidders to propose toll-related services such as back-office software; a telephone system; violations and processing collections methodology; customer account management; financial management; and transponder inventory management, among other services. Exhibit 3, at p. 3.

OCTA released the June 22, 2020 RFP only after its Board of Directors voted to approve it. *Id.* OCTA also released the December 10, 2020 RFP following a Board approval vote. Both votes necessarily included <u>a commitment by OCTA to follow specific evaluation criteria</u>. The RFP evaluation criteria did not change from June to December. The criteria mandated by the Board had five components:

- <u>Qualifications, related experience and references (15% of the evaluation);</u>

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[4] The June 22, 2020 RFP is Exhibit 13. OCTA cancelled this initial solicitation because it "didn't get sufficient response in the marketplace because people assumed that it was ... just kind of a flat slam-dunk towards Cofiroute." *See* Exhibit 5, Board Transcript, at 31:20-31:25 (Director Hennessey); *see also* Exhibit 3, at p. 3 ("Based upon insufficient competition for this procurement, General Counsel notified the Board that after consultation with Executive Management, it would be in the best interest of OCTA to cancel RFP 0-2352 in November 2020.").

[5] Cited references are to the December 10, 2020 RFP (Exhibit 4) unless otherwise stated.

- Staffing and project organization (15%);
- Implementation work and technical approach to the BOS (30%);
- CSC operations and work plan approach (20%); and
- Cost and price (20%).

Id. at p. 4; *see also* Exhibit 4, at pp. 28-30; Exhibit 13, at pp. 28-30.

In fact, these evaluation criteria never changed. The weights assigned to each criterion never changed either. Most notably, the cost and price criterion weight was 20 percent from the initial June 22, 2020 RFP release date until August 9, 2021, when the OCTA Board (1) deviated from the evaluation criteria it committed to use to judge the merits of the parties' proposals, and (2) disregarded both the Evaluation Committee's and Finance Committee's unanimous votes to award the contract to WSP USA. "Familiarity," "comfort with an incumbent vendor," and "having one vendor lead both SR91 and I-405" were not and never became evaluation factors OCTA could legally consider.

The RFPs approved by the OCTA Board of Directors also made clear that OCTA would receive project funding from the United States Department of Transportation – thereby implicating federal law, federal regulation, federal public policy and federal agency oversight. Quite obviously, a failure to adhere with federal requirements jeopardizes federal funding going forward.

OCTA received three proposals by the December 10, 2020 RFP's March 22, 2021 deadline. It deemed two of the proposals responsive: the proposal submitted by WSP USA and a competing proposal submitted by CUSA. *See* Exhibit 3, at p. 4. The Evaluation Committee conducted discussions with both offerors on May 19, 2021, to gain a better understanding of each proposal and the parties' respective qualifications. *Id.* at p. 5. Pursuant to OCTA's request, both parties submitted best and final offers on June 10, 2020. Your Agency's Evaluation Committee scrutinized both offers between that date and July 14, 2021. *Id.* at pp. 1, 5. This Evaluation Committee prepared a detailed report outlining – by each of the five required evaluation factors – how it scored the proposals. *Id.* at p. 17, Attachment B.

- Both CUSA and WSP USA received a score of 12.25 on the qualifications, experience and references criterion.
- WSP USA received substantially higher scores for staffing approach (11.75 to 9.5); the BOS work plan (23 to 20.5); and the CSC work plan (16.67 to 14.67).
- CUSA narrowly defeated WSP USA on cost/price (20 to 19.44).

The Evaluation Committee was particularly impressed with the WSP USA staffing plan. The Evaluation Committee noted that "all proposed key personnel from WSP have at least ten years of experience, with six having over 20 years of experience. *Id.* at p. 8. The committee expressed strong reservations about CUSA's proposed staffing (*id.* at p. 9):

> *[S]ome of the proposed key personnel did not demonstrate the required experience. The CSC operations manager in the implementation phase brings forth nearly 30 years of experience in CSC operations; however, she has limited tolling industry experience. The proposed QA manager for both phases currently serves as the roadside coordinator for the 91EL Traffic Operations Center but has limited QA experience. CUSA's interview and demonstration supported the firm's relevant experience, staffing, technical approach, and Project understanding. However, after the interviews, questions remained about the risk involved in CUSA's plan to promote employees from within with limited or no directly-relevant experience for key positions and utilizing employees who are currently supporting the 91EL operations.*

The Evaluation Committee also demonstrated a thorough understanding of the different interactive voice response technologies (IVR) that each party proposed for BOS implementation. In its proposal, WSP USA revealed that it planned to employ a more advanced technology developed by a vendor named TTEC. WSP USA decided to use TTEC to obtain a competitive advantage after learning about TTEC's successful IVR deployment at Ford Motor Company, FedEx, Qantas Airlines, Citizen's Bank, Nissan, and Volkswagen.[6] The scoring shows that the committee deemed WSP USA's BOS and CSC implementation approach superior to CUSA, which proposed the IVR technology it introduced in 2019 and currently uses on a SR91 project. *See* Exhibit 3, at pp. 10-11.

WSP USA earned a total score of 83 points. CUSA received 77 points. Thus, the Evaluation Committee, in the report endorsed by OCTA Chief Executive Officer Darrell Johnson (Exhibit 3), unanimously recommended to the Board of Directors, through the Finance Committee, that OCTA make an award to WSP USA. *Id.* at p. 14, Attachment B.

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[6] As we demonstrate *infra*, CUSA speculated incorrectly that WSP USA would use technology furnished by Electronic Transaction Consultants Corporation (ETC). CUSA's lobbyists then misinformed the Board of Director members. Unfortunately, certain directors who voted for CUSA relied on the information provided by CUSA's agents and made grossly inaccurate statements about WSP USA's proposed technology during the August 9 Board meeting.

The next step in the process involved oversight by the Finance Committee.[7] Following its July 28, 2021 deliberations, the Finance Committee unanimously voted to make the recommended Contract award to WSP USA. Of course, the Finance Committee has particular expertise in price and cost – the fifth evaluation factor (with a 20 percent weight). It noted that WSP USA proposed a higher price than did CUSA. The committee understood, however, that given WSP USA's superiority in personnel, strategy and technology, WSP USA nonetheless offered the taxpayers of Orange County a better value. We urge your Agency to listen again to these deliberations. We attach that audio file here: http://octa.granicus.com/player/clip/2064?view_id=2&redirect=true (*see* Item 11 at 7:30-53:20).

Recognizing the uphill battle it faced, CUSA then unleashed its lobbyists on the OCTA Board of Directors. We understand that between July 28, 2021 (the date the Finance Committee convened), and August 9, 2021 in particular, those lobbyists met repeatedly with OCTA Board members. As we demonstrate, they were persistent. They spread misinformation in those meetings and in written communications – including in a letter CUSA submitted to each Board member the evening (a Sunday) before the August 9 vote. *See* Exhibit 7. The lobbyists played up the importance of the relationships CUSA had formed during its performance of an SR91 project, even though such relationships were not a permissible evaluation criterion. The lobbying efforts proved successful. On August 9, by a tally of ten to six during a second vote that followed a deadlock, the Board voted that CUSA, not WSP USA, should be awarded the Contract.

These events implicate three significant issues that WSP USA seeks to resolve through this protest. First, the Board of Directors did not stay within the limits of its authority. The Board had authority to approve the Evaluation Committee's recommendation. The Board also had authority to reject the recommendation and, consequently, remand the contract award recommendation to the Evaluation Committee for further deliberations *consistent with the evaluation criteria*. It even had authority to defer the vote for any reason or none at all. The Board, however, did not have authority under OCTA's rules to disregard unanimous recommendations supported by subject matter experts who carefully scrutinized the parties' proposals, and instead direct the Contract award to CUSA. But that is precisely what the Board did.

Second, even if the Board had authority to direct the Contract award to CUSA, the Board needed to establish its decision on the basis of the mandatory RFP evaluation criteria the Board approved on two occasions during the past 14 months.

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[7] The Finance Committee is comprised of the following six members of the Board: Michael Hennessey, Steve Jones, Brian Goodell, Patrick Harper, Gene Hernandez, and Joseph Muller. *See* http://www.octa.net/About-OCTA/Who-We-Are/Board-of-Directors/Board-Committees/.

That did not happen. In fact, many of the reasons that Board members cited to vote for CUSA are either altogether absent from these criteria or contrary to them. Chairman Do explained that, while CUSA would need to "scale up" from what it had proposed to meet the requirements, its 20 years of service to the Agency were enough to influence his vote. Director Chaffee voted for CUSA on the basis of his subjective preference that the OCTA use the same vendor on both the SR91EL and 405EL projects. Moreover, when explaining that he was likely to vote against the Evaluation Committee's recommendation, Director Chaffee discussed an unsubstantiated concern about an event that allegedly occurred 10 years earlier in Washington state. Even if this event were true (we show herein it was not), the event was not subject to consideration given the RFP's limitation to evaluate events of this type to the previous five years. Director Wagner focused largely on the slight price difference to support CUSA, seemingly unpersuaded by the fact that price/cost should be given only 20 percent weight.[8] We highlight these and other examples of Board members using their own subjective criteria in lieu of the published evaluation criteria the Section III.C.1.d, *infra.*[9]

Finally, CUSA has lobbying and campaign contribution disclosure issues that require rectification. On the lobbying issue, CUSA agreed that it would comply with OCTA's Code of Conduct. That Code of Conduct (Exhibit 6) requires honesty and integrity in the communication of bidders and their agents. CUSA's lobbyists did not communicate with honesty. They inaccurately characterized a WSP USA subcontractor's performance in Washington state. They misrepresented the maturity of WSP USA's proposed technology. They also misrepresented that WSP USA had not implemented its technology in like circumstances. On the campaign contribution issue, CUSA failed to disclose certain contributions made by CUSA's lobbying agents. Because CUSA violated mandatory RFP provisions tied to these issues, it submitted a non-responsive bid and should be disqualified.

Contractors and agencies within California – particularly those who use federal funds – must follow federal, state and local rules. When an agency's Board of Directors does not adhere strictly to the authority vested in it, California's courts resolve that failure by ordering the agency to follow its rules. Further, California courts do not allow agencies to award contracts on the basis of personal preferences

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[8] Exhibit 5 is a verbatim transcript of the August 9, 2021, Board meeting that WSP USA prepared, using Veritext Legal Solutions, for your convenience. We cite to that transcript throughout. We also attach here the link to the August 9 audio recording so your Agency can substantiate the veracity of WSP USA's transcript citations: http://octa.granicus.com/player/clip/2070?view_id=2&redirect=true.

[9] Notably, there also is no evidence that any dissenting Board member has specialized education, training or experience in evaluating technical or cost proposals for back office system technology and customer service operations. No Board member made it clear that she or he had read the proposals either.

missing from or contradictory of established evaluation criteria. Finally, California courts have made clear that agencies cannot award contracts to companies that violate mandatory RFP requirements – particularly those related to important public policy concerns such as lobbying and campaign contribution disclosure.

WSP USA respectfully requests a fair and impartial review of this protest at the administrative level so WSP USA does not need to involve California courts to resolve these issues. WSP USA is confident that such a review will result in a contract award to WSP USA – the Evaluation and Finance Committees' unanimous selection based on Board-approved selection criteria, and the only responsible and responsive bidder.

B. Relevant Legal, Regulatory, and Contract Provisions

In Appendix B, we furnish the full text of the applicable California statutes and regulations we refer to in this protest so you can review them as you consider the protest grounds. We also furnish the substance of the Contract provisions cited herein and implicated by the protest issues. *See* Appendix B.

The CAMM Manual requires the OCTA to maintain a Procurement History File for this and every RFP. *See* Exhibit 2, Section II.K, p. 9. WSP USA's outstanding Public Records Act request seeks the documents in this file. We intend to add the OCTA's Procurement History File to WSP USA's exhibits following receipt of them. We indicate on the Exhibit List (Appendix A) that these documents will become Exhibit 15 when we supplement WSP USA's Protest Exhibits.

C. Argument

As we demonstrate in Argument 1 below, the Board of Directors did not stay within the authority granted to it under controlling OCTA regulations when it voted to award the Contract to CUSA. The Board of Directors also disregarded the evaluation criteria that it previously approved, twice, in voting to award the contract to CUSA. For these reasons, we respectfully request a CAMM recommendation that OCTA rescind the vote to award the Contract to CUSA and direct the award to WSP USA.

1. The Board Presented No Legally Valid Reason to Deviate from the Evaluation Committee's Unanimous Recommendation to Award the Contract to WSP USA

The Evaluation Committee adhered with applicable law and mandatory evaluation criteria. By contrast, the Board of Directors disregarded the evaluation criteria and decided, on the basis of comfort and prior relationships, that the Agency should award the Contract to CUSA. The Evaluation Committee acted legally and objectively. The Board of Directors departed from the rules established to ensure a fair playing field and, on that basis, acted arbitrarily.

a. The Evaluation Committee Determined the Agency Should Award the Contract to WSP USA on the Basis of the Evaluation Criteria

The Evaluation Committee brought together technical experts from a variety of organizations, including OCTA's Express Lanes Programs and Highways departments, the Metropolitan Transportation Commission, Kansas Turnpike Authority, and Santa Clara Valley Transportation Authority. *See* Exhibit 3, p. 4; *see also* Exhibit 12, (RFP Addendum 10), Section III.B, at p. 32 (describing the committee composition). This committee conducted a multi-phase review of the proposals. An initial review was conducted on May 4, 2021. Interviews and technology demonstrations were then held with WSP USA and CUSA on May 19, 2021, followed by a review of best and final offers on June 10, 2021. *See* Exhibit 3, pp. 3-5.

The Evaluation Committee's review was extensive and thoroughly explained in a 27-page letter. *See* Exhibit 3. As summarized in the following matrix, after its comprehensive assessment of the proposals against the stated evaluation criteria, the evaluators unanimously found WSP USA's proposal to be superior to CUSA's:

FIRM: WSP USA Services Inc.							Weights	Overall Score
Evaluator Number	1	2	3	4	5	6		
Qualifications, Related Experience, and References of Firm	4.00	4.50	4.00	4.50	4.00	3.50	3.00	12.25
Staffing/Project Organization	4.00	4.00	4.00	3.50	4.00	4.00	3.00	11.75
Implementation Work Plan and Technical Approach to BOS*	4.00	4.00	4.00	3.50	3.50	4.00	6.00	23.00
CSC** Operations Work Plan and Approach	4.00	4.00	4.00	4.50	4.50	4.00	4.00	16.67
Cost and Price	4.86	4.86	4.86	4.86	4.86	4.86	4.00	19.44
Overall Score	83.4	84.9	83.4	82.4	82.4	81.9		83
FIRM: Cofiroute USA, LLC							Weights	Overall Score
Evaluator Number	1	2	3	4	5	6		
Qualifications, Related Experience, and References of Firm	4.00	4.50	3.50	4.00	4.50	4.00	3.00	12.25
Staffing/Project Organization	3.50	3.00	2.50	3.00	3.50	3.50	3.00	9.50
Implementation Work Plan and Technical Approach to BOS*	3.50	3.50	3.00	3.00	4.00	3.50	6.00	20.50
CSC** Operations Work Plan and Approach	3.50	4.00	3.50	4.50	3.00	3.50	4.00	14.67
Cost and Price	5.00	5.00	5.00	5.00	5.00	5.00	4.00	20.00
Overall Score	77.5	79.5	70.0	77.0	80.0	77.5		77

See Exhibit 3, Attachment B. This matrix demonstrates that *every member* of the Evaluation Committee found WSP USA's proposal to be superior to the CUSA proposal overall: WSP USA established its supremacy in three evaluation criteria in particular. Price/cost was the only criterion where the Evaluation Committee deemed that CUSA had an advantage, and that advantage was small (*less than six tenths of one point* out of a possible 20 points).

b. **The Finance Committee Unanimously Recommended Award to WSP USA**

Once the Evaluation Committee completed its analysis, it drafted and forwarded its findings and unanimous recommendations to the Finance Committee. *See* Exhibit 3, at p. 14. The Finance Committee convened on July 28, 2021 and, after a presentation by Board Staff, discussions, and deliberations, it too unanimously voted to award the Contract to WSP USA.

Notably, the Finance Committee has particular expertise in issues such as price and cost. The Finance Committee clearly understood that WSP USA's higher-priced proposal presented a better value to the Board – as defined by the criteria established by the Board and announced in the RFP – than did the CUSA proposal. The audio recording [http://octa.granicus.com/player/clip/2064?view_id=2&redirect=true] substantiates these events. *See, e.g.,* Director Muller[10] at 52:09-52:49 (stating, "I worked really, really hard tried to figure out why we should stay with [CUSA], and [Director Hernandez], you got it right … I worked really hard, but listening to the comments of the [Finance Committee] and Staff so I'm really struggling trying to justify not going with their recommendation, and so I think I am going to go ahead and support that [resolution to approve selection of WSP USA]").

The Finance Committee's unanimous decision following the Evaluation Committee's unanimous decision should have resulted in a recommendation to award the Contract to WSP USA being placed on the Board's Consent Calendar. *See* Exhibit 2 (Manual) at Section III.B.3, at p. 16 (stating that "[i]f the approval by the Committee is unanimous, it will move on to the Board as a Consent Calendar item"). Such an action would have led to the full Board approving award to WSP USA summarily with the slate composed of other non-disputed items. Following this typical procedure would have avoided the unsupportable actions that took place at the Board meeting, when members abandoned required selection criteria, gave weight to misinformation presented by CUSA lobbyists, and took the remarkable action to vote to award the Contract to CUSA.

c. The Board of Directors Did Not Have Authority to Vote to Award the Contract to CUSA

The issue of Contract award was moved to the Board as a Regular Calendar item rather than a Consent Calendar item. The result was a wide-ranging discussion by the Board that mostly strayed from the required evaluation criteria. The events culminated in the Board rejecting the Evaluation and Finance Committees' unanimous recommendations to approve Contract award to WSP USA, and, ultimately, voting to award the Contract to CUSA. The Board exceeded its authority when it took the latter action.

The Board's procurement policies vest the Board with the authority to "**approve** all procurements for values that exceed the CEO's authorization." *See* Exhibit 2 (Manual), Section III.B, at p. 16 (emphasis added); *see also id.* at Section III.A.2, at p. 15; *Id.* at Section VI.B.6, at p. 38; *id.* at Section IV.B.11.k.1, p. 43 ("when the Board of Directors approves the selection of Consultant"). A strict reading of this provision might lead to the conclusion that the Board could do nothing more than approve the award to WSP USA. A more logical reading – which comports with plain meaning – suggests that the Board could approve or disapprove the award. Rejecting the Evaluation and Finance Committees' unanimous

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[10] Director Muller voted to approve the recommendation of award to WSP USA as a member of the Finance Committee and then voted against the recommendation at the Board meeting twelve days later.

recommendations and fashioning its own award decision, however, without (1) proper vetting through the Evaluation Committee and Finance Committee, or (2) regard to the RFP evaluation criteria, is action beyond the authority vested in the Board as the above provisions show. Moreover, even if the Board had authority to direct an award contrary to the unanimous recommendations of the Evaluation and Finance Committees, there is no authority for the proposition that the Board can do so on the basis of erroneous information or by employing evaluation criteria not itemized in the RFP.

WSP USA's reading of the Board's procurement policies provides bidders due process, consistent with other OCTA regulations. Specifically, the Manual requires advanced notice to offerors that they are not recommended for award. *See* Exhibit 2 (Manual), Section VI.B.11.j.4, at p. 42 ("Once the final recommendation has been made by the Evaluation Committee, the CA will notify all firms that submitted proposals in writing indicating who the recommended firm is and provide a statement indicating when the proposal evaluation data will be available."). This notice affords presumptively losing offerors a chance to prepare to address the Board – just as CUSA did in this procurement – and seek to convince the Board to reject the staff's recommendations.

The Board clearly had authority to approve the Evaluation Committee's recommendation (as routed through and unanimously approved by the Finance Committee) or to defer the vote. It also had authority to remand the contract award recommendation to the Evaluation Committee for further deliberations and revised recommendations. The Board did not have authority, however, to disregard the unanimous recommendations from the Evaluation and Finance Committees and direct an award to the losing offeror CUSA as it did. Under applicable legal principles, this course of action was arbitrary and capricious and cannot stand. We hope your Agency will resolve this error so a California court will not need to order the proper resolution.

d. <u>The Board of Directors Disregarded Mandatory Evaluation Criteria in Favor of Personal Preferences</u>

The Public Contract Code imposes limitations on each agency's discretion to award contracts, especially where, as here, federal funds are involved. *See* CA Pub. Contract Code, § 1100; *id.* at § 10344(c). The Code is designed to, among other things, provide bidders with a fair opportunity to compete and to eliminate favoritism and corruption. *Id.* at § 100; *see also Michaelis, Montanari & Johnson v. Superior Court*, 38 Cal.4th 1065, 1073 (2006) (stating that public contracting requirements are "intended to assure a healthy degree of competition, to guard against discrimination, favoritism, or extravagance and to assure the best social, environmental, and economic result for the public"). To effectuate these goals, "Bidders cannot be required to guess at the standards by which they will be measured." *Eel River Disposal & Res. Recovery, Inc. v. Humboldt*, 221 Cal. App.4th 209, 235 (2013).

It is black-letter federal and California law that in public procurements, the evaluation criteria set forth in the RFP are mandatory. *See, e.g., Schram Constr., Inc.*, 187 Cal. App.4th at 1052 (university's award was improper where it relied upon criteria to select a bidder that was not contained in solicitation); *Pozar v. Department of Trans.*, 145 Cal. App. 3d 269, 271 (1983) (agency must comply with the terms in its own solicitation); *Y & K Maintenance, Inc.*, B-405310.6, Feb 2, 2012, 2012 CPD ¶ 93 (sustaining a protest because the agency failed to evaluate a proposal consistent with the RFP's stated evaluation criteria); *Omniplex World Servs. Corp.*, B-290996.2, Jan. 27, 2003, 2003 CPD ¶ 7 (finding an agency improperly relied on an unstated requirement to exclude an offeror from the competitive range). For this reason, the California Public Contract Code, at Section 10344(c), directs that "[t]he contract shall be awarded to the bidder whose proposal is given the highest score by the Evaluation Committee."

Here, the Board established the evaluation criteria, and the weight attributable to each criterion, on June 22, 2020, when it first approved the release the June 22, 2020 RFP. Then, the Board approved the evaluation criteria a second time when it voted to allow the release of the December 10, 2020 RFP. *See* Exhibit 3 at pp. 1-2; *see also* Exhibit 2 (Manual), Section III.B, at p. 16; *id.* at Section VI.B.6 p. 38. During the August 9, 2021, Board meeting, certain members set aside the very evaluation criteria the Board had mandated on two prior occasions. Unfortunately, this violated bedrock principles of public procurement and all notions of fundamental fairness.

If the Board was dissatisfied with the mandatory evaluation criteria established in the June 22, 2020, or December 10, 2020 RFPs, it could have directed responsible CAMM procurement personnel to revise the criteria, issue a different set of criteria, or change the weighing of criteria. Instead, the Board approved the mandatory evaluation criteria (which WSP USA relied upon) as written. This caused both CUSA and WSP USA to write their proposals in the manner each believed would best satisfy the criteria. This also caused the Evaluation Committee to evaluate each proposal against the established criteria rather than against the subjective preferences of Board members. Of course, this process would give both parties fair notice. Following the process also allowed both parties an equal, fighting chance to prevail.

The Board of Directors undid the intensive work by the offerors and comprehensive analysis by the subject matter experts who evaluated the parties' proposals against the established evaluation criteria. On August 9, the Board changed the rules of the race after it was already run and evaluated the offers against their own personal preferences.

Chairman Do set the stage, instructing Board members that (*see* Exhibit 5 (Board Transcript), at 35:13-35:16):

as directors, we look at different factors, and then we come up with our own solution – or conclusion.

Following this instruction, mandatory rules, procedures and evaluation requirements were set aside and the Board considered a wide range of unannounced evaluation considerations, including: (1) granting CUSA additional credit for its experience with OCTA; (2) favoring a technical solution that was comparable to that used on SR91 (3) exploring demonstrably untrue and exceptionally prejudicial speculation about the performance of one of WSP USA's proposed subcontractors on prior projects, (4) making price the paramount factor, and (5) speculating about un-proposed technical solutions that an offeror may or may not be capable of delivering in the future (and at what price). None of these considerations were appropriate. None of them form a valid basis to make award to CUSA, much less to overrule the unanimous recommendations of the Evaluation and Finance Committees.

(1) *Improper Emphasis on Past Performance with OCTA*

No RFP evaluation criteria afforded more past performance credit for experience with OCTA and less for experience with other agencies. This would have been prohibited, as the Manual provides that "[e]qual weighting will be given to firms for past experience where working with the Authority and elsewhere." *See* Exhibit 2, Section VI.B.7.e.2, at p. 39. Nonetheless, the Board granted considerably more weight to CUSA's performance with OCTA. For example, Director Chaffee cited CUSA's prior work for OCTA as a deciding factor when voting against WSP USA, stating (*see* Exhibit 5, at 19:3-19:5):

I think I would like to have the comfort of going with a vendor that has worked for us for so long…

Director Chaffee was not alone in this sentiment. Chairman Do stated (*see* Exhibit 5, at 14:22-14:25):

But I think what we have today, what we have enjoyed from Cofiroute, like I said, close to 20 years of good experience should count for something.

Director Wagner underscored that the Agency could and should hold WSP USA to a higher standard, notwithstanding its broader and more diverse experience than CUSA (*see* Exhibit 5, at (28:6-28:12); 29:5-28:10):

> *WSP and [its subcontractor] ETC have a larger and more diverse portfolio. But at the end of the day, we -- OCTA -- we are in Cofiroute's portfolio, and I didn't hear in the presentation, or I don't read in the staff report, any dissatisfaction with the job Cofiroute did with us in its portfolio.*
>
> ...
>
> *I just -- you know, I hate to second guess staff, but I just don't think the – you know, the argument's been made, the loop – you know, the circle's been closed here to in fact justify bringing on a new vendor, making the kinds of changes that are suggested here.*

Director Muller likewise downgraded WSP USA's experience with other agencies and upgraded CUSA for work it has done with OCTA (*see* Exhibit 5, at 42:13-42:16):

> *Director Wagner is correct. We are part of [CUSA's] portfolio. We know this company. We know how they operate, and that's worth something.* (*See* Exhibit 5, at 42:13-42:16).

Vice Chair Murphy also had similar sentiments, stating (*see* Exhibit 5, at 52:16-52:17):

> *My inclination is to stick with people that we've had positive experiences with.*

These statements demonstrate that the Board favored CUSA because of its prior work with OCTA. But this was not an established evaluation criterion. Accordingly, this favoritism violated the RFP, the Manual, and federal and California law that establish the mandatory nature of evaluation criteria in public procurements.

(2) *Improper Consideration on Combining Operations for SR91 and the I-405 Express Lanes*

The RFP did not place any weight on having the same vendor perform the SR91 and the I-405 express lane projects. That did not dissuade the Board from establishing this as an ad hoc evaluation criterion on August 9. According to Director Chaffee (*see* Exhibit 5, at 19:3-19:11):

> *I see less risk in that than going to a totally new vendor, and the issue of having two separate vendors on a similar claim, one on the 405, one on the 91. I would feel more comfortable if they were the same, and so I would -- I'm probably going to vote no on this ...*

Director Muller shared a similar statement (*see* Exhibit 5, at 41:6-41:17):

> *My back office should be the same. It doesn't make a lot of sense to me. It's not efficient to have to operate two separate back offices. When I asked could you combine them, the answer was -- well, it was kind of a loaded question when I asked it, the answer is, "No, you're not going to be able to combine these two back offices. You're going to have to build a new one."*

If the Board had wanted OCTA to demand that proposed 405EL BOS and CSC technical solutions mimic those used on the SR91 express lanes project, it was incumbent on the Board to instruct the CAMM staff to establish this as an evaluation factor. Instead, OCTA told offerors it will not combine portions of the 405EL activities with the 91EL activities. *See* Exhibit 12 (RFP Addendum 10), response to question no. 155, at pdf p. 46/650 ("Does the Authority foresee combining violations from the 91 EL program to violations acquired on the 405 EL at some point").

(3) *Improper Exploration of Alleged (Albeit Wrong) Past Performance*

The Solicitation committed to evaluate past performance under the Qualifications, Related Experience, and References of the Firm evaluation factor. *See* Exhibit 12, (RFP Addendum 10), Section III.A.1, at p. 30). OCTA made clear that it would scrutinize pending and recent litigation as a component of past performance. The RFP allowed OCTA to evaluate current litigation and that conducted and resolved during the previous five years. *See* Exhibit 4, RFP Form C (Status of Past and Present Contract Forms), referenced in Exhibit 12 (RFP Addendum 10), at p. 25.

Board members, however, expressed unease about an unsubstantiated (and demonstrably incorrect) concern about WSP USA subcontractor Electronic Transaction Consultants Corporation (ETC) that allegedly occurred 10 years earlier in Washington state. Here is one example, from Director Chaffee (*see* Exhibit 5, at 15:20-15:23):

> *I was concerned when I learned about the recommended vendor being late on a provision with the state of Washington, and apparently they paid a penalty[.]*

No director should have considered this information – even if it were true – as it occurred ten years earlier. *See* Exhibit 8. Further, as explained in Section III.C.2.a., *infra*, ETC paid no penalty whatsoever. <u>To the contrary, the State of Washington lauded ETC's contract performance</u>. *See* Exhibit 9.

(4) *Improper Emphasis on Price*

The Board also disregarded the 20% weight afforded the cost and price factor and the Manual's admonition that the Authority make awards "to the proposer whose proposal offers the greatest business value to the Authority **based upon an analysis of a tradeoff of technical factors and price** to arrive at the proposal that represents the 'best value.'" *See* Exhibit 2 (Manual), Section VI.B.11(k), at p. 43.

Director Wagner heavily emphasized price (*see* Exhibit 5, at 28:13-19):

> *We've got a statement in here that the planning, technical, and operational aspects of the work and onsite staff available support the higher price, but nobody's identified shortcomings in Cofiroute in those areas that, to my mind, justify this significant additional increase in taxpayer dollars going to fund this.*

Director Wagner acknowledged his support for the Board deviating from the RFP's 20% weight afforded to cost/price (*see* Exhibit 5, at 38:21-39:1):

> *We have a process. We followed it. Doesn't mean we can't overrule it here. Absolutely. But if that's going to be our criteria, that cost is much more important than the others, we need to weigh in and change that when we put this out to bid.*

Of course, the Board did not put the revised criteria on the street and allow offerors an opportunity to compete on a fair footing. Instead, it changed the evaluation criteria and weight at the Board meeting without affording WSP USA a chance to revise its proposal to meet revised criteria and weight.

Further, the RFP instructed bidders to send price proposals and technical proposals in sealed volumes so the Evaluation Committee could evaluate price and technical approach separately, as is standard practice for best value award decisions. *See* Exhibit 12 (RFP Addendum 10), Section I.F.3, at p. 7 (requiring offerors to submit cost and price information separately from their technical proposals). This made sense since the technical aspects of the proposals were to be given significantly more weight than price (80 percent to 20 percent). Director Muller, however, showed his deviation from this concept when he stated (*see* Exhibit 5, at 39:13-39:21):

> *I had some concerns, and the more I thought about it over the last week, more of those concerns kept coming to the surface. We had a group of evaluators that looked at the separate proposals without cost in mind. And I guess that's fine, but I guess if they would've put the cost in front of it, maybe they would've had a different opinion.*

(5) *Improper Credit for the Potential to add Technical Features*

The Board gave CUSA credit for technical solutions it had not yet even proposed. Rather than accepting the Evaluation Committee's conclusion that WSP USA offered superior technical features, **Chairman Do offered the remarkable proposition that** (*see* Exhibit 5, at 14:15-14:16):

> *if necessary [CUSA] can scale up to provide the amenities that we want.*

Vice Chairman Murphy agreed (*see* Exhibit 5, at 52:18-52:23):

> *if there's concerns about the levels of the proposals in terms of the technology or the rest, that's something that would be taken care of in the next round of things in terms of the final analysis and the stipulations.*

Accordingly, in the Board's ad hoc technical evaluation, the Board limited WSP USA to what it had proposed. Conversely, it credited CUSA with boundless technical possibilities that CUSA had not offered. If this decision is not reversed, offerors like WSP USA will be burdened with the unachievable task of exceeding the brilliance of solutions unfairly credited by the Board to their competitors that are limited only by the Board members' imaginations. **No Court would deem this anything other than arbitrary and capricious**.

(6) *None of the Improper Evaluation Factors Support Making an Award to CUSA*

The Board member comments highlighted above illustrate that the Board chose to substitute its judgment for that of the evaluators. It demonstrates that the Evaluation Committee used the RFP evaluation factors and weights – and that the Board of Directors set the RFP aside in favor of their subjective preferences. Of course, this occurred without finding any fault with the Evaluation Committee's application of the evaluation criteria or the Finance Committee's unanimous decision to recommend that WSP USA perform the Contract.

For example, Director Hennessey – who consistently supported selecting WSP USA for award – commended the staff and Finance Committee for their work (*see* Exhibit 5, at 34:18-35:3):

> *I do also want to extend my thanks to the members of the Finance Committee. They had a really robust dialogue and a debate, and I think members of our committee came in with one point of view and wound up with another point of view after the give-and-take of this*

> *thing and a thorough examination. So I just want to -- you know, however this comes out, I just want to thank the finance committee for doing what is an excellent job for doing their job robustly...*

And Chairman Do endorsed Director Hennessey's assessment that the Board wasn't second guessing the staff and was instead just "exercise[ing] our own independent judgment" because "we're at a different point now." *See* Exhibit 5, at 35:7-37:6.

As shown, Chairman Do admonished the directors to develop their own evaluation criteria at the final Board meeting – without notice to the bidders or deference to the experienced Evaluation and Finance Committees – and vote on the basis of their own individual preferences. The law does not allow this. *See, e.g.,* CA Pub. Contract Code § 10344(c); *Eel River Disposal & Res. Recovery, Inc.*, 221 Cal. App.4th at 235; *Schram Constr., Inc.*, 187 Cal. App.4th at 1052; *Pozar*, 145 Cal. App. 3d at 271; *Y & K Maintenance, Inc.*, B-405310.6, Feb 2, 2012, 2012 CPD ¶ 93.

Consequently, we respectfully request that the Agency rescind the August 9, 2021 vote in favor of CUSA and, instead, approve award to WSP USA and immediately begin negotiations with WSP USA to finalize the Contract. This is the only viable resolution following rescission of the Board's vote.

In other words, the Agency cannot re-solicit *for a third time* for many reasons:

- TIME: As this RFP process has demonstrated, a re-solicitation would require six months of time, at a minimum. The Agency, however, wants to "Go-Live" within 738 days of the currently contemplated Contract award date, not within 738 days of the re-solicitation award date. A re-solicitation will result in a six month or more delay in commuters enjoying the express lanes.

- COMPETITION: As we have demonstrated in this protest, competition is a bedrock principle, regardless of whether this Agency uses Transportation Infrastructure Finance and Innovation Act (TIFIA) funds. The Board of Directors, however, has made it clear that it prefers CUSA, notwithstanding what the bid documents require or what an experienced evaluation team recommends. Accordingly, should the Agency order a re-solicitation, there will be no competition because no company other than CUSA will invest the time and money knowing it will be unsuccessful even if the Evaluation and Finance Committees unanimously recommend that it be awarded the Contract.

- REPAYMENT: The Agency likely has a TIFIA repayment plan premised on toll revenue commencing in accordance with a successful conclusion of this RFP. A re-solicitation, and the delay concomitant with it, will defer that revenue stream and require this Agency to find other loan repayment sources.

2. **OCTA Must Disqualify CUSA's Bid Because CUSA Violated Mandatory Ethics and Conflict of Interest Requirements**

OCTA accepted California taxpayer and federal funding to assist in its administration and payment of the 405 Express Lane Back Office Project. In federally funded projects, awarding agencies (whether federal, state or local) must avoid even the appearance of impropriety. *See NKF Eng'g, Inc. v. United States*, 805 F.2d 372 (Fed. Cir. 1986) (contracting officer has authority to disqualify a bidder based solely on appearance of impropriety when done to protect the integrity of the contracting process). Contractors who lobby with inaccurate information during the award process or otherwise interfere with a fair evaluation are subject to automatic disqualification. *See Compliance Corp.*, B-239252, Aug. 15, 1990, 90-2 CPD ¶ 126, *aff'd on recon.*, B-239252.3, Nov. 28, 1990, 90-2 CPD ¶ 435 (A contracting officer may disqualify a bidder from competition whose actions fall short of a statutory violation, but call into question the integrity of the contracting process.).

The California Supreme Court also believes the public has a "legitimate and substantial interest" in a transparent and open public procurement process: The competitive bidding process is intended to assure a healthy degree of competition, to guard against discrimination, favoritism, or extravagance, and to assure the best social, environmental, and economic result for the public. Accordingly, the public may have a legitimate and substantial interest in scrutinizing the process leading to the selection of the winning proposal. *Michaelis, Montanari & Johnson v. Superior Court*, (2006) 38 Cal.4th 1065, 1073-1074.

For precisely these reasons, OCTA established strict lobbying and conflict of interest disclosure requirements in the RFP. OCTA modeled the requirements after terms OCTA codified in its Manual (Exhibit 2) and Code of Conduct (*see* Exhibit 6). Contractors must comply with the OCTA Code of Conduct. *See* Exhibit 12 (RFP Addendum 10) Section I.N, at p. 9 ("All offerors agree to comply with the Board's Code of Conduct").

The requirements addressed below were mandatory. CUSA did not adhere to them. Accordingly, the Agency has no choice – it must throw out the CUSA bid and award the Contract to WSP USA.

a. CUSA Lobbyists Did Not Adhere to Mandatory RFP Requirements

OCTA made clear in the RFP that offerors must adhere to the Agency's Code of Conduct. *See* Exhibit 12 (RFP Addendum 10) Section I.N. That Code of Conduct states: "OCTA is a public agency that shall conduct its business with integrity in an honest and ethical manner. Any attempt to evade or circumvent any requirements of this policy or of any rules or laws applicable to OCTA and its employees is improper." *See* Exhibit 6, Section I. Accordingly, the Agency demanded fair, honest and accurate communications from offerors and their agents, including their lobbyists. Failure to follow that mandatory requirement is grounds to disqualify a bidder. *See Woodbury v. Brown-Dempsey*, 108 Cal. App. 4th 421, 134 Cal. Rptr. 2d 124 (2003) (contractors who are directed to, or who agree to, satisfy requirements are under a mandatory obligation to do so). Offerors either comply with the mandatory requirement or, if they are non-compliant, must be excluded from the competition. *Konica Bus. Machs. U.S.A., Inc. v. Regents of Univ. of Cal*, 206 Cal. App. 3d 449, 454 (1988) ("A basic rule of competitive bidding is that bids must conform to specifications, and that if a bid does not so conform, it may not be accepted.")

CUSA disclosed in its lobbying forms that four individuals lobbied on behalf of CUSA. We understand that the lobbying occurred on a regular basis both before and after the CAMM Evaluation Committee released its July 7, 2021, recommendation of contract award to WSP USA. These individuals were: Craig Reinhardt of Smith Public Affairs; Roger Faubel of Faubel Public Affairs; Peter Whittingham (Whittingham Public Affairs); and Gary Hausdorfer.[11]

CUSA's lobbyists did not always furnish the OCTA Board members with accurate information. For example, during the August 9, 2021 OCTA Board meeting that facilitated the remarkable reversal of the contract award from WSP USA to CUSA, Directors Chaffee and Muller apparently voted for CUSA in part because they believed (on the basis of erroneous information the lobbyists provided) that a WSP subcontractor had paid a $2 Million fine on a similar project in Washington state to settle performance claims. *See* Exhibit 5 (Transcript), at pp. 41-42. This was both legally irrelevant and factually wrong. It was legally irrelevant because the alleged event occurred more than 10 years ago. Under the RFP, evaluators were entitled to consider only relevant litigation that has transpired during the previous five years. *See* Exhibit 4 (RFP) Form C (Status of Past and Present Contract Forms), referenced in Exhibit 12 (RFP Addendum 10), at p. 25. It was factually wrong because WSP USA's subcontract partner, ETC, paid $0.00 (zero dollars) related to this issue. *See*

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[11] Mr. Hausdorfer is a familiar name and face to OCTA. Mr. Hausdorfer roamed OCTA halls regularly when he served as CUSA's President and Chief Executive Officer for 19 years until he left CUSA in March 2021 to become the President and Chief Executive Officer of the Diamond Group. https://www.linkedin.com/in/gary-hausdorfer-b14866b/

Exhibit 8 ("there was no cash involved in the settlement, [and] the agreement includes extension of the contract with ETC from 2014 to 2018"). ETC performed in an exemplary fashion for the State of Washington. In fact, the letter of thanks WSP USA obtained in its due diligence lauds ETC in every respect, including schedule. *See* Exhibit 9.

CUSA and its lobbyists also misrepresented WSP USA's IVR technology. In the CUSA Sunday evening letter to the Board (Exhibit 7), for example, CUSA represented "WSP teamed up with [ETC], with ETC providing the back-office system." *See* Exhibit 7, at p. 2. That is inaccurate. As WSP USA made clear, WSP USA teamed with TTEC to provide the IVR and other areas of innovation that the Evaluation Committee lauded. CUSA wrote that "ETC has proposed future technology for the 405 that has yet to be successfully implemented." *Id.* at p. 3. Again, this is false information. WSP USA demonstrated in its proposal that it used TTEC, not ETC, and that the TTEC technology has operated previously in the customer service centers of numerous major corporations. The letter also queries irresponsibly "whether the system proposed by WSP has been successfully implemented anywhere." *Id.* at p. 4. The answer, which was readily apparent in WSP USA's proposal, was a resounding yes! TTEC successfully deployed the technology at, among other customers, the Ford Motor Company, Qantas Airlines, Citizen's Bank, Nissan and Volkswagen. For all of these reasons, the evaluation staff had no obligation to "move the committee off the idea that WSP's solution was technologically superior to Cofiroute's." *Id.* In the Evaluation Committee's expert opinion, WSP USA's technology was superior.

As demonstrated, the information CUSA and its lobbyists presented was false and misleading. Accordingly, CUSA and its agents did not adhere to the OCTA Code of Conduct requirement of honesty and business integrity. This gives the Agency grounds to disqualify CUSA from the competition.

Unfortunately, the spin provided by CUSA and its lobbyists changed the outcome of this competition. The experienced OCTA Evaluation Committee, which carefully analyzed both proposals against the RFP's evaluation criteria, chose WSP USA <u>unanimously</u>. The OCTA Board's Finance Committee seconded that <u>unanimous</u> recommendation. Armed with *misinformation* furnished by lobbyists, the Board of Directors abandoned the approved selection process and selected CUSA, at least in part, on false, misleading, and otherwise inappropriate criteria. We urge the Agency to right that wrong.

b. <u>CUSA's Undisclosed Campaign Contributions Also Violated Mandatory RFP Requirements</u>

CUSA had a mandatory, affirmative obligation to disclose, via RFP Form B, the campaign contributions of CUSA and its agents. *See* Exhibit 12 (RFP Addendum

10), Section II. B.2, at p. 24 ("The prime Contractor, Subcontractors, lobbyists and agents are *required* to report all campaign contributions from the proposal submittal date up and until the date the Board of Directors makes a selection" (emphasis added)).

WSP USA obtained CUSA's lobbyist and campaign contribution forms on Thursday, August 12, 2021, in response to a Public Records Act request. *See* Exhibit 10. The forms demonstrate unequivocally that Faubel Public Affairs lobbied on behalf of CUSA during the disclosure time period. WSP USA has learned, through the Orange County Registrar Office's Campaign Finance Disclosures report (*see* Exhibit 11), that Lisa Faubel – the Controller of Faubel Public Affairs – made significant campaign contributions to OCTA Board of Director members within a year of the parties' March 2021 submission of original proposals[12]:

- $2,100 to Andrew Do;
- $500 to Don Wagner;
- $1,100 to Lisa Bartlett; and
- $250 to Katrina Foley[13]

CUSA violated a mandatory requirement by not disclosing the Lisa Faubel contributions on RFP Form B. For this reason also, CUSA should be disqualified.

B. Conclusion

For the reasons set forth herein, we respectfully request that OCTA set aside its August 9, 2021, vote in favor of CUSA. As shown, both the law and fundamental

[12] Relatives of Peter Whittingham also made significant campaign contributions, including $1,000 to Chairman Do, $500 to Director Wagner, $500 to Director Shaw and $2,100 to Director Foley. While CUSA may not be required to disclose these contributions, we wanted to bring them to your attention.

[13] Under the ethics rules and Code of Conduct admonitions against conflicts of interest, Board members should recuse themselves when bidders identify in bid documents that they or their agents have made campaign contributions to voting Board of Director members. The Board vote on this contract had no recusals.

fairness demand that OCTA award the Contract to WSP USA. Further, practicalities dictate that re-solicitation is not a resolution option.

Sincerely,

Michael R. Rizzo
Aaron S. Ralph
Counsel for WSC USA Services, Inc.

Appendix A: Exhibit List

1. Vendor Protest Procedures (Paragraph Q) Excerpt from OCTA Contract Administration and Materials Management (CAMM) Procedures, Rev. 15 (July 2020)

2. OCTA Contract Administration and Materials Management (CAMM) Policy Manual, Rev. 13 (August 2019) ("the Manual")

3. Memorandum from Darrell E. Johnson to: Finance and Administration Committee, Subj: Contractor Selection for the Back-Office System and Customer Service Center Operations for the 405 Express Lanes in Orange County (July 14, 2021) ("Staff Report")

4. RFP 0-2690 Back Office System and Customer Service Operations Services (BOS/CSC) for the 405 Express Lanes in Orange County ("the RFP" or "December 10, 2020 RFP")

5. Transcript of OCTA Board Meeting, August 9, 2021, 9:00am, Agenda Item 16: 21-3563 Contractor Selection for the Back-Office System and Customer Service Center Operations for the 405 Express Lanes in Orange County

6. OCTA Code of Conduct (HROD-BOD-101.00CONDUCT) (November 16, 2018)

7. Letter from Cofiroute USA to: Chairman Do and OCTA Board of Directors, Subj: Cofiroute USA Comment Submission re: Agenda Item 16 – Contractor Selection for the Back-Office System and Customer Service Center Operations for the 405 Express Lanes in Orange County (dated August 9, 2021, and sent on Sunday, August 8, 2021)

8. Business Wire, *ETC Corporation and WSDOT Reach Settlement* (July 18, 2012)

9. Washington State Department of Transportation Thank You Card to Electronic Transaction Consultants Corporation (ETC) (July 1, 2021)

10. Cofiroute USA, LLC Form B FINAL (March 22, 2021)

11. Orange County Registrar's Office Contribution Report, Schedule A (CA Form 460)

12. Addendum 10 (February 25, 2021) to RFP 0-2690 Back Office System and Customer Service Operations Services (BOS/CSC) for the 405 Express Lanes in Orange County ("RFP Addendum 10")

13. RFP 0-2352 Back Office System and Customer Service Center Operations Services for the 405 Express Lanes In Orange County (June 22, 2020) ("June 22, 2020 RFP")

14. Addendum 2 (December 16, 2020) to RFP 0-2690 Back Office System and Customer Service Operations Services (BOS/CSC) for the 405 Express Lanes in Orange County ("RFP Addendum 10") ("RFP Addendum 2")

15. RFP 0-2690 Procurement History File (to be furnished)

Appendix B: Statutory, Regulatory and Contract Provision References:

Competitive Bidding

1. The Public Contract Code applies to the State, its cities and counties, to public authorities and public agencies, and to any other political subdivision or public corporation in the state. *See* Pub. Contract Code § 1100. This statue states as follows:

> "Public entity," as used in this part, means the state, county, city, city and county, district, public authority, public agency, municipal corporation, or any other political subdivision or public corporation in the state.

2. California enacted the Code to accomplish four primary goals. The statute provides as follows:

> The Legislature finds and declares that placing all public contract law in one code will make that law clearer and easier to find. Further, it is the intent of the Legislature in enacting this code to achieve the following objectives:
>
> (a) To clarify the law with respect to competitive bidding requirements;
>
> (b) To **ensure full compliance with competitive bidding** statutes as a means of protecting the public from misuse of public funds;
>
> (c) To **provide** all qualified bidders with **a fair opportunity** to enter the bidding process, thereby stimulating competition in a manner conducive to sound fiscal practices; and
>
> (d) To **eliminate favoritism**, fraud, and corruption in the awarding of public contracts.

Pub. Contract Code § 100 (emphasis added). Through this lens, California procurements must be conducted.

3. The Exhibit 2 CAMM Policy Manual required this Contract to follow a competitive procurement process:

Manual Section V, E makes clear that the Agency will use sole source procurements only when as item is available from a single source or there is a public exigency or emergency. Otherwise, the Authority must use a competitive, negotiated RFP that includes price among the factors considered and does not require award to the lowest bidder. *Id.* at Section V. B, at p. 38.

4. The Solicitation was a competitive procurement seeking proposals responsive the RFP. The solicitation did not seek a sole-source. *See* Exhibits 4 and 12 Key RFP dates; pp. i-ii; references to "offerors" *seriatim.*

<u>The Evaluation Criteria:</u>

1. The RFP established five evaluation criteria with weights:

Qualifications, Related Experience, and References of the Firm	15%
Staffing and Project Organization	15%
Implementation Work Plan and Technical Approach to BOS	30%
CSC Operations Work Plan and Approach	20%
Cost and Price	20%

OCTA required offerors to submit their cost and price proposals "in a sealed envelope, separate from the Technical Proposal package" so cost/price and technical approach could be evaluated separately. *See* Exhibit 12 (RFP Addendum 10), Section I.F.3, at p. 7.

2. Qualifications, Related Experience, and References had six subfactors:

- Overall strength of team.
- Strength of prime and all major Subcontractor's financial condition.
- Experience of the team and relevant project experience in BOS and CSC Operations implementation, as well as operations and maintenance (experience with similar scopes of work, current installations of the BOS, current similar operations).
- Strength and relevance of reference projects.
- Strength and relevance of reference checks.

- Other on-going project commitments and priorities.

Id. at Section III.A.1, at p. 30.

3. Evaluation of litigation-related information was limited to relevant litigation during the previous five years. Exhibit 4 at Form C (Status of Past and Present Contract Forms), referenced on p. 25 of Exhibit 12 (RFP Addendum 10).

4. The CAMM Policy Manual provides that "[e]qual weighting will be given to firms for past experience where working with the Authority and elsewhere." *See* Exhibit 2, Section VI.B.7.e.2, at p. 39.

NOTE: Not included among the evaluation factors or elsewhere in the RFP is consideration of whether or how well the offeror's proposed 405EL solution could be integrated with the existing 91EL solution. In fact, the Agency told offerors that it will not combine portions of the 405EL activities with the 91EL activities. *See* Exhibit 12 (RFP Addendum 10), response to question no. 155 at pdf p. 46/650 ("Does the Authority foresee combining violations from the 91 EL program to violations acquired on the 405 EL at some point").

RFP Revisions:

OCTA reserved the right to revise the RFP, but only by written addendum. *See* Exhibit 12 (RFP Addendum 10), Section I.C, at p. 2 ("Any changes made by the Authority to the requirements will be made by written addendum to this RFP."); *see also* Exhibit 2 (Manual), Section VI.B.9 ("All changes to the RFP shall be addressed by a written addendum to the RFP and signed by the CA.").

NOTE: Although the Authority issued a dozen amendments, none of them changed the five evaluation criteria or their relative weights.

Federal Nexus:

1. "Funding for this project includes TIFIA,[14] federal, state, and local funds, and toll revenues." *See* Exhibit 4, at Section II, L.

2. RFP Addendum 2 reiterates the federal nexus: "[f]unding for the Work on the 405 Express Lanes is funded by a combination of funds, including Transportation Infrastructure Finance and Innovation Act (TIFIA) funds. **As such all federal requirements apply to this project**." *See* Exhibit 14, Att. A, at p. 10 (emphasis added).

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[14] The United States' Transportation Infrastructure Finance and Innovation Act.

3. California public contract law has a selection process that local agencies must follow when they award consultant contracts with federal funding. *See* CA Pub. Contract Code §§ 10335-10339, 10344; *see also* Caltrans LAPM, Chapter 10, page 65. OCTA used this process – through which the contractor/consultant is selected following mandatory, step-by-step RFP evaluation procedures. CA Pub. Contract Code § 10344(c). The procedures directs that "[t]he contract shall be awarded to the bidder whose proposal is given the highest score by the evaluation committee." *Id.*

<u>OCTA Award Process</u>

1. The Manual (Exhibit 2, Section VI.B.1, at p. 38) explains that OCTA will make best value awards in competitive, negotiated procurements:

> Contract awards will be made to the responsible firm whose proposal is most advantageous to the Authority with price and other factors considered. In determining which proposal is most advantageous, the Authority may award to the proposer whose proposal offers the greatest business value to the Authority **based upon an analysis of a tradeoff of technical factors and price** to arrive at the proposal that represents the "best value" to the Authority.

2. For procurements of this magnitude, OCTA establishes factor trade-offs and relative factor importance. *See* Exhibit 2 (Manual), Section III.B, at p. 16 ("The Board of Directors shall approve the issuance of all RFP's and IFB's in excess of $1,000,000 **including the weighted criteria**.") (emphasis added); *see also id.* at Section VI.B.6, at p. 38).

3. The Manual provides that "[o]nce the final recommendation has been made by the Evaluation Committee, the CA will notify all firms that submitted proposals in writing indicating who the recommended firm is and provide a statement indicating when the proposal evaluation data will be available." *Id.* at Section VI.B.11.j.4, at p. 42).

4. The Manual provides: "[t]he Board **shall approve** all procurements for values that exceed the CEO's authorization" which is $1,000,000. *See* Exhibit 2, Section III.B, at p. 16 (emphasis added); *see also id.* at Section IV.B.11.k.1 ("For procurements greater than $250,000, the award of the contract shall occur when the Board of Directors **approves** the selection of the Consultant and authorizes the Chief Executive Officer to execute a contract."); Section III.A.2 (p. 15) and Section VI.B.6, at p. 38. Before sending an award decision to the Board for a vote, however, the procurement is first reviewed by a Board Committee. The Manual explains that "[i]f

the approval by the Committee is unanimous, it will move on to the Board as a Consent Calendar item." *Id.* at Section III.B.3, at p. 16.

5. The RFP provided for an Evaluation Committee "comprised of Authority staff and may include outside personnel" to evaluate offerors against the factors established by the Board. Exhibit 12 (RFP Addendum 10), Section III.B, at p. 32. This Evaluation Committee was supported by a technical review committee "comprised of subject-matter experts." *Id.* These experts were to "review the technical components of the Proposals and provide their written assessment of their strengths and weaknesses, to assist the Evaluation Committee in their evaluation of the Proposals." *Id.* The Evaluation Committee was to "evaluate the written Proposals **using criteria identified in Section III A**. [Evaluation Criteria]." *Id.* (emphasis added).

Lobbying and Contribution Disclosures

1. The parties had to disclose campaign contributions. *See* Exhibit 12 (RFP Addendum 10), Section II.B.2, at p. 25 ("The prime Contractor, Subcontractors, lobbyists and agents are *required* to report all campaign contributions from the proposal submittal date up and until the date the Board of Directors makes a selection" (emphasis added)).

2. The RFP Addendum 10 incorporates the OCTA Code of Conduct. *See id.*, Section I.N, at p. 9.

3. The Code of Conduct states: "OCTA is a public agency that shall conduct its business with integrity in an honest and ethical manner. Any attempt to evade or circumvent any requirements of this policy or of any rules or laws applicable to OCTA and its employees is improper." *See* Exhibit 6, Section I.