



To: LOSSAN Executive Committee

From: Colin Burns

Date: June 15, 2022

Re: Draft Analysis of Governing Documents for Potential Conflicts regarding Managing Director

EXECUTIVE SUMMARY

The LOSSAN Agency tasked this firm with reviewing the Governing Documents to determine whether those documents created a conflict between the LOSSAN Agency, the Managing Director, and the Managing Agency.

It is our opinion that there is no conflict that would prevent a successful working relationship between the LOSSAN Agency, Managing Director, and Managing Agency. The Managing Agency framework is commonly utilized by Joint Powers Authorities. The potential for conflict between LOSSAN Agency oversight of its Managing Director and OCTA supervision of its employees is balanced through a Dual Qualification system whereby the Managing Director must be both (1) approved by the Board and (2) an employee of the Managing Agency.

The alternative of hiring an in-house workforce would likely cause an increase in costs. Because costs are passed through to the State, any such increase would likely require State concurrence. Such change would also likely require an amendment to the Bylaws, which require a supermajority (8 affirmative) vote.

DOCUMENTS REVIEWED

- Strategic Vision Interagency MOU
- Senate Bill 1255
- Joint Powers Agreement
- Amendment to the Joint Powers Agreement
- Interim Work Plan
- Interagency Transfer Agreement
- Amended Bylaws
- Administrative Support Agreement
- Board Policy 1
- Board Policy 2
- LOSSAN Code of Conduct
- Administrative Services Agreement

BACKGROUND OF THE LOSSAN AGENCY

In 1985, the Los Angeles-San Diego State Rail Corridor Study Group, created pursuant to Senate Bill 1095, analyzed the feasibility of increasing intercity passenger service in the LOSSAN corridor and recommended the creation of a joint powers agency to oversee implementation of additional intercity rail passenger.

In 1989, MTA, SCAG, OCTA, NCTD, MTS, SANDAG and Caltrans formed the LOSSAN Joint Powers Authority to implement the study group's recommendations.

In 2012, the functions of the LOSSAN Joint Powers Authority were significantly expanded by Senate Bill (SB) 1225, the Intercity Passenger Rail Act. SB 1225 authorized the Department of Transportation to enter into an Interagency Transfer Agreement under which a reconstituted LOSSAN Joint Powers Authority would assume responsibility for administration of the state-supported intercity passenger rail service between San Diego, Los Angeles, and San Luis Obispo, commonly referred to as Pacific Surfliner. (Gov't Code, § 14702.2.)

In 2013, pursuant to SB 1255, the LOSSAN Agency entered into an amendment to the Joint Powers Agreement that detailed the expanded role and responsibilities for the LOSSAN Agency in assuming administration and management of the Pacific Surfliner. Following a competitive request for proposals, OCTA was selected as Managing Agency.

On July 1, 2015, the Department of Transportation transferred administrative responsibility for the Pacific Surfliner to the LOSSAN Agency through an Interagency Transfer Agreement. OCTA, as Managing Agency, provides all administrative and other support services for LOSSAN Agency to administer the Pacific Surfliner, including providing a Managing Director.

ANALYSIS OF GOVERNING DOCUMENTS

LOSSAN Joint Powers Agency has powers common to Joint Powers Authorities which include the power to employ agents and employees (2013 AJPA § 4.4) and to select such a Managing Agency. (2013 AJPA § 4.12). LOSSAN Agency has utilized the Managing Agency framework.

Managing Agency

The "Managing Agency" is selected by the LOSSAN Agency to provide all necessary administrative support to perform the Agency's duties and responsibilities. (2013 Amended JPA "AJPA" Definitions, 1.17.) The Managing Agency is subject to the policy direction and control of the Governing Board, and further to the terms, conditions and requirements of its contract with the LOSSAN Agency. (2013 AJPA § 8.0; see also Bylaws (2015), § Q)

Managing Director

The Managing Director is appointed by, and serves at the pleasure of, the LOSSAN Governing Board. (2013 AJPA Definitions, 1.18.) The Executive Committee also has authority to ... (b.) Provide direction to the Managing Director ... (d.) Evaluate the Managing Director and provide such evaluation to the Governing Board for action and to the Managing Agency for information. (Bylaws (2015), Art. IV, §§ D, G.)

The Managing Director shall be an employee of the Managing Agency. (2013 AJPA § 8.0; § 14; see also Bylaws (2015), § R.)

The powers and duties of the Managing Director are:

- a. To develop and maintain the organizational and reporting structure, work responsibilities, job descriptions, and performance evaluation criteria for Managing Agency employees designated to support the LOSSAN Rail Corridor Service.
- b. To hire and fire employees consistent with the Managing Agency personnel policies, recommend personnel classifications and other personal actions for the Managing Agency employees designated to support the LOSSAN Rail Corridor Service.
- c. To recommend approval of contract employees dedicated to support the LOSSAN Rail Corridor Service and oversee their activities.
- d. To direct the activities of Managing Agency employees and Managing Agency contractors assigned to the LOSSAN Rail Corridor Service.
- e. To administer all contracts.
- f. To cause to be prepared by a Certified Public Accountant and submitted to the Agency as soon as practical after the end of each fiscal year, a post audit of the financial transactions and records of the Agency for the preceding year.
- g. To keep the Governing Board advised as to the needs of the Agency.
- h. To have full charge of the administration of the business affairs of the Agency.
- i. To see that all ordinances, rules, and regulations, motions, or resolutions are implemented and enforced.
- j. To prepare and submit to the Governing Board on or before the last meeting of March of each year a proposed budget for the succeeding fiscal year. As part of the annual budget process, recommend the annual budget and staffing resources and support

functions for the LOSSAN Rail Corridor Service, including job classifications, salary ranges and organizational functions and duties.

k. To update the Governing Board annually on efforts to institutionalize a corporate identity, including but not limited to the establishment and maintenance of branding (logo, public communication, marketing), website, employee workspace design, and distinct corporate identity (domain, email, business cards, letterhead, etc.).

l. To oversee marketing, budget and programs for the LOSSAN Rail Corridor Service.

m. The Managing Director is authorized to make disbursements of funds of the Agency not to exceed \$100,000 each, or as otherwise directed by Governing Board resolution, for the business of the Agency, provided that this limitation shall not apply to salary or to other disbursements that are necessary to meet contractual obligations that have been approved by the Agency per the authorized budget.

n. The Managing Director is authorized to contract for and execute, on behalf of the Agency, supplies, equipment and materials, and personnel service contracts not to exceed \$100,000, or as otherwise directed by Governing Board resolution, without prior Governing Board approval.

o. The Managing Director shall keep or cause to be kept a book of minutes of all meetings of the Governing Board.

p. The Managing Director shall give or cause to be given notice of all meetings as may be required by law, by these By Laws, or by motion or resolution of the Governing Board.

q. The Managing Director shall: (1) Oversee the functions of the Treasurer and Auditor. (2) Execute a bond with one or more corporate sureties approved by the Governing Board in the sum of \$250,000 payable to the Agency, conditioned upon the faithful performance of the duties of the office, and the payment of all money received by the Managing Director according to law and the orders of the Agency. (3) Prepare or cause to be prepared a written report filed with the Governing Board quarterly (July, October, January, and April) and circulated to the Governing Board of each year reporting the amount of money held, the amount and source of receipts since the last report, and the amount and recipient of the amounts paid out since the last report prior to the meeting. (4) Keep a full and complete record of all financial transactions and records of the Agency.

r. The Managing Director shall define an annual work program and report annually to the Governing Board on progress.

s. The Managing Director shall have such other duties, powers, and responsibilities as may from time to time be assigned by the Governing Board.
(Bylaws (2015), Art. IV, § I(6).)

Funding

Funding for the LOSSAN Agency is provided by the State. The LOSSAN Agency prepares an annual Business Plan that includes a budget, which is submitted to the State. (2013 AJPA 10.2) Part of the intent of transferring the service to LOSSAN Agency was cost savings. (Interim Work Plan (2014) § 4.0 “Interagency Transfer Agreement”) OCTA reports that it has worked to achieve cost savings via minimal dedicated staffing. The supporting services, such as accounting, clerk of the board, etc., are captured through the overhead rate and as such are only attributable to hours spent by the dedicated staff. (Interim Work Plan (2014) § 5.0 “LOSSAN Agency Administration.”) In evaluating the initial Interagency Transfer Agreement (ITA), the Secretary of Transportation determined that the transfer has resulted in administrative and operating cost reductions. (ITA 1A (2018) Appx. C “Statement of Cost Reductions and Efficiencies Realized.)

Amending the Governing Documents

A supermajority vote (eight (8) affirmative votes of the voting membership of the Governing Board, which includes at least one member voting in the affirmative from the voting membership of each of the LOSSAN Regions), is required to change the Bylaws. Amendments to the Joint Powers Agreement require unanimous agreement of the voting Member Agencies. (Bylaws, § H.)

APPLICATION

The intent of transferring service from the State to LOSSAN Agency was local control and cost savings. Cost savings are realized through the Managing Agency framework whereby the Managing Agency uses its staff to perform the day-to-day operations of the Agency and thereby avoids the additional cost of employing an in-house staff. The Managing Agency provides a Managing Director.

The Managing Director must be (1) selected by the Board and (2) an employee of the Managing Agency (“Dual Qualifications”). Both conditions must be met for a person to serve as Managing Director.

The Managing Director has authority over various administrative functions outlined in the Bylaws (supervising dedicated employees, administering contracts, having full charge of the administration and business of the LOSSAN Agency, etc). This contemplates a certain amount of discretion to be exercised by the Managing Director. If the Managing Director fails to perform the functions of office, the LOSSAN Board can remove the Managing Director. The Managing Agency then offers a replacement for LOSSAN Board consideration.

The Managing Director is also an employee of the Managing Agency, whose continued employment remains at the discretion of the Managing Agency. This is standard under the Managing Agency framework.

The potential for conflict between LOSSAN Agency's oversight of its Managing Director and OCTA's supervision of its employee is balanced through Dual Qualification. If LOSSAN Agency feels the Managing Director is not implementing Board Policy, it can remove the Managing Director. If the Managing Agency feels the Managing Director is not complying with employment regulations, it may terminate the employee and present a replacement.

The alternative would be to require the Managing Agency to retain an employee it wanted to terminate or require LOSSAN Agency to retain a Managing Director it wanted to remove. Both alternatives are less desirable than the Dual Qualification approach.

Another possibility raised by the Executive Committee was having LOSSAN Agency retain its own employees or employee (Managing Director). In a traditional Managing Agency scenario, the cost of the Managing Agency is split among member agencies in whatever proportion they stipulate. Thus, the member agencies could decide whether the benefits of in-house employees outweigh the additional costs associated with managing an in-house staff.

In LOSSAN Agency's case, however, the cost of operations is passed through to the State. Thus, the decision to transition to an in-house staff would likely require concurrence of the State. It is uncertain whether the State would approve of such action given its focus on cost reductions. While State approval creates an additional burden, LOSSAN Agency may reasonably conclude that burden is outweighed by the benefit of passing through all costs.

CONCLUSION

It is our opinion that there is no conflict that would prevent a successful working relationship between the LOSSAN Agency, Managing Director, and Managing Agency. The Managing Agency framework is commonly utilized by Joint Powers Authorities. The potential for conflict between LOSSAN Agency oversight of its Managing Director and OCTA supervision of its employees is balanced through a Dual Qualification system whereby the Managing Director must be both (1) approved by the Board and (2) an employee of the Managing Agency.

The alternative of hiring an in-house workforce would likely cause an increase in costs. Because costs are passed through to the State, any such increase would likely require State concurrence and may require amending the Bylaws, which requires a supermajority vote.