

POLICY RECOMMENDATIONS FOR OVERSIGHT OF INFRASTRUCTURE SPENDING

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I. INTRODUCTION AND EXECUTIVE SUMMARY

On November 15, 2021, President Joe Biden signed a historic \$1.2 trillion infrastructure bill into law, which focuses on surface infrastructure and broadband projects (including \$550 billion for new projects).¹ Infrastructure spending, when done with transparency, oversight, and community involvement, can lead to tremendous benefits for society, such as improved quality of utilities, job creation, decrease in health care costs, and increased accessibility to essential public services.² Because of the scope, complexity, and cost of infrastructure legislation, clear and robust oversight provisions are critical to ensure that infrastructure projects are carried out in a faithful and fiscally responsible manner. Without such oversight, infrastructure projects at the federal, state, and local level risk falling victim to wasteful practices, fraud, and other abuses.

While oversight is likely to come at a substantial financial cost, evidence suggests that the cost is offset by the financial gains materialized through strategic investment in inspectors general, recovery boards, and

1. Katie Lobosco & Tami Luhby, *Here's What's in the Bipartisan Infrastructure Package*, CNN (Nov. 15, 2021, 5:47 PM), <https://www.cnn.com/2021/07/28/politics/infrastructure-bill-explained/index.html> [https://perma.cc/NP3Y-SX9P].

2. *Mission & History*, COAL. FOR INTEGRITY, <https://www.coalitionforintegrity.org/who-we-are/mission-history/> [https://perma.cc/JGV2-DXPY] (last visited Apr. 6, 2022).

other oversight mechanisms.³ For example, the Special Inspector General for Troubled Assets Relief Program (SIGTARP) recovered \$11 billion in taxpayer dollars over the course of a decade at a cost of \$23 million.⁴ Furthermore, the costs associated with efficient oversight are likely to be outweighed by the costs of fraud, wasteful practices, and other abuses.

This article provides recommendations to help prevent and detect corruption, wasteful practices and abuse at the state and local level. It is based on the comprehensive report “Oversight of Infrastructure Spending Report” produced by Coalition for Integrity.⁵

II. OVERVIEW OF CORRUPTION IN U.S. INFRASTRUCTURE PROJECTS

Different types of infrastructure projects, by nature, present special risks and opportunities for fraud and corruption.⁶ Specifically, larger infrastructure projects or “megaprojects” are complex, unique, involve many parties, lack transparency and include layers of bureaucracy within federal, state, and local municipalities.⁷ The sheer complexity and size of projects, in conjunction with the projects’ uniqueness, make it easier to conceal bribes, inflate invoices, and misappropriate funds.⁸ Additionally, because larger infrastructure projects involve complex transaction chains and many subcontractors, it is harder to monitor them effectively.⁹

Corruption in infrastructure directly affects citizens by undermining the delivery of promised services, lowering the quality and safety of public infrastructure, and imposing additional costs that may be passed on to taxpayers. Internationally, estimates of losses to bribery in construction are as high as 10 to 30 percent of construction costs.¹⁰ Likewise, the United States is not impervious to mismanagement and corruption in

3. See *Oversight is Better than Hindsight: Anti-Corruption Recommendations for the CARES Act*, COAL. FOR INTEGRITY (2020), https://www.coalitionforintegrity.org/wp-content/uploads/2020/06/C4I_Oversight_062820_FINAL-3_compressed.pdf [<https://perma.cc/6GEL-T59X>].

4. OVERSIGHT OF INFRASTRUCTURE SPENDING, COAL. FOR INTEGRITY (2021), <https://www.coalitionforintegrity.org/wp-content/uploads/2021/09/Oversight-of-Infrastructure-Spending-Report.pdf> [<https://perma.cc/2PS5-9L7N>].

5. *Id.* at 1–2.

6. *Id.* at 5.

7. *Id.* (citing Mu Sohail & Sue Cavill, *Accountability to Prevent Corruption in Construction Projects*, 134 J. OF CONSTR. ENG’G & MGMT. 729, 732 (2008)).

8. Peter Matthews, *This is Why Construction is so Corrupt*, WORLD ECON. F. (Feb. 4, 2016), <https://www.weforum.org/agenda/2016/02/why-is-the-construction-industry-so-corrupt-and-what-can-we-do-about-it> [<https://perma.cc/G22U-UPQD>].

9. Sohail & Cavill, *supra* note 7, at 733.

10. Matthews, *supra* note 8.

infrastructure projects.¹¹ A review of high-profile projects such as the California High Speed train,¹² the Central Artery Project in Boston (The Big Dig),¹³ and the awarding of contracts¹⁴ related to disaster relief and clean-up efforts in the aftermath of Katrina reveals cost overruns, fraud, and incidents of bribery and other forms of public corruption.

We have tried to draw lessons from publicly available information on a diverse array of case studies involving corruption in domestic infrastructure projects. One example is BVU OptiNet, a fiber-optic network construction project in southwest Virginia marred by misuse of public funds, evasion of employment taxes, bid-rigging, procurement violations, and State and Local Government Conflict of Interest Act violations.¹⁵ Another example includes Schneider Electric, where energy savings performance contracts were allegedly obtained through kickbacks and bribes.¹⁶ One further example is the California Bullet Train, where lack of transparency and conflicts of interest have indefinitely extended the project and cost taxpayers billions of dollars.¹⁷

III. CASE STUDIES

A. BVU OptiNet Case Study

In 1999, Bristol City Council and Bristol Virginia Utilities Authority (BVU) approved an expansive fiber-optic network construction project called “OptiNet,” designed to provide high-speed internet to rural southwest Virginia.¹⁸ Over the next two years, the scope of the project

11. See COAL. FOR INTEGRITY, *supra* note 3.

12. *Id.* at 65.

13. *Arrests for Big Dig Concrete Fraud*, CBS NEWS (May 4, 2006, 11:01 AM), <https://www.cbsnews.com/news/arrests-for-big-dig-concrete-fraud/> [<https://perma.cc/M86R-BZ4R>].

14. U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-844T, HURRICANES KATRINA AND RITA DISASTER RELIEF: IMPROPER AND POTENTIALLY FRAUDULENT INDIVIDUAL ASSISTANCE PAYMENTS ESTIMATED TO BE BETWEEN \$600 MILLION AND \$1.4 BILLION (2006).

15. See COMMONWEALTH OF VA. AUDITOR OF PUB. ACCT., REVIEW OF BRISTOL VIRGINIA UTILITIES AUTHORITY (2016), <http://www.apa.virginia.gov/reports/BVUA2016-web.pdf> [<https://perma.cc/9XXA-EYXM>].

16. See Press Release, U.S. Dep't Just., U.S. Att'ys' Off., D. Vt., Florida Man Pleads Guilty to Accepting \$2.5 Million in Bribes and Kickbacks (2018), <https://www.justice.gov/usao-vt/pr/florida-man-pleads-guilty-accepting-25-million-bribes-and-kickbacks-0> [<https://perma.cc/74JP-5942>].

17. See *infra* Sec. III.C.

18. See Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate Over Government-Owned Broadband Networks*, ADVANCED COMM'NS L. & POL'Y INST. 56, 58 (2014).

expanded to include not only connecting municipal functions, such as public schools and fire departments, but also providing highspeed internet to residents of rural southwest Virginia.¹⁹ Construction began in 2002, funded by a combination of state and federal grants.²⁰ Between 2002 and 2005, BVU spent over \$43 million on the construction project.²¹ In 2010, BVU became an independent, state-owned authority whose decisions were not subject to City Council approval.²² BVU's decision-making was accountable only to its Board of Directors.²³ As part of the 2009 Recovery Act, the National Telecommunications and Information Administration (NTIA) awarded BVU \$22.7 million in federal funds between 2011 and 2014 to further expand access into eight underserved counties.²⁴

BVU's management solicited gifts and payments from vendors in exchange for receiving contracts, including almost \$28,000 in holiday celebration expenses and tickets to University of Kentucky basketball games.²⁵ Such behavior was widespread among BVU's management—for instance, BVU executives, including its general counsel and board members, solicited “payment of hotel expenses, limousine services, meals and tickets to a Dallas Cowboys football game” from one vendor in exchange for awarding the vendor a \$4.5 million contract.²⁶

Burke Powers & Harty Insurance Agency (“BPH”) provided BVU with “worker’s compensation, automobile liability, property, general liability, and umbrella insurance coverage.”²⁷ Twice, BPH provided BVU management officials with Cincinnati Reds baseball tickets valued at over \$500 in order to “maintain good will and keep BVU’s business.”²⁸

In 2000, BVU hired construction company ETI to work as a subcontractor connecting Lebanon and Abingdon, VA with fiber optic cable.²⁹ In 2009, ETI received a contract to perform “installation and

19. *Id.* at 56.

20. Christopher Mitchell, *Broadband at the Speed of Light*, INST. FOR LOC. SELF-RELIANCE 5–6 (2012).

21. *Id.* at 6.

22. Davidson & Santorelli, *supra* note 19.

23. See COMMONWEALTH OF VA. AUDITOR OF PUB. ACCT, *supra* note 15, at 18.

24. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-823, RECOVERY ACT: BROADBAND STIMULUS AWARDS AND RISKS TO OVERSIGHT (2011).

25. See Press Release, Dep't of Just., U.S. Att'ys' Off., W.D. Va., Former CEO of Bristol Virginia Utilities Authority Pleads Guilty (July 21, 2015), <https://www.justice.gov/usao-wdva/pr/former-ceo-bristol-virginia-utilities-authority-pleads-guilty> [<https://perma.cc/VL72-3N5E>].

26. Press Release, Dep't of Just., U.S. Att'ys' Off., W.D. Va., Former BVU Board Chairman Pleads Guilty (Apr. 6, 2016), <https://www.justice.gov/usao-wdva/pr/former-bvu-board-chairman-pleads-guilty> [<https://perma.cc/F9DM-ZLKV>].

27. *United States v. Pomrenke*, 198 F. Supp. 3d 648, 667 (W.D. Va. 2016).

28. *Id.*

29. *Id.* at 680.

maintenance” contracts on BVU OptiNet “without competitive bidding.”³⁰ BVU’s Vice President and its Chief Financial Officer “solicit[ed] a \$15,000 contribution for an employee Christmas party from ETI” when BVU’s business comprised “30% to 35% of ETI’s revenue.”³¹ Loss of BVU’s business “would have jeopardized ETI financially,” and “ETI was working on a major federally funded project and routinely submitting invoices to BVU that had to be signed by BVU’s CFO.”³²

BVU failed to report income received by BVU employees by compensating employees with gift cards, interest-free loans, country club memberships, and cash bonuses.³³ Since at least 2003, BVU provided employees with cash and gift cards for accomplishments including “service and safety awards, exceptional customer service, [meeting] business sales incentives, . . . volunteer service,” as well as for retirement, birthday, and holiday gifts.³⁴ BVU management distributed these rewards and gifts at their discretion, without reference to any formal policy and without routing the bonuses through the payroll department.³⁵ This practice of using external funding to purchase cash and gift cards continued even after the utility was awarded broadband stimulus funds, leading to nearly \$42,000 in unreported cash and gift card payments between 2010 and 2013.³⁶

BVU also used government funds to pay for employee memberships at the Country Club of Bristol—as well as for the memberships of employee family members.³⁷ Employees charged personal travel expenses to BVU credit cards, including one employee’s family trip to Hawaii.³⁸ While working with ETI between 2009 and 2013, BVU employees asked ETI to falsify invoices—one for \$144,000—and underwrite golf tournaments for BVU employees, guests, and vendors.³⁹

This entire project was marked by “misuse of public funds, evasion of employment taxes, failure to report employee income to the IRS], bid-rigging, procurement violations, and State and Local Government Conflict of Interest Act violations.”⁴⁰ After a September 16,

30. *Id.* at 682.

31. *Id.* at 694–95.

32. *Id.* at 694.

33. Dep’t of Justice, *supra* notes 26, 27.

34. COMMONWEALTH OF VA. AUDITOR OF PUB. ACCT., *supra* note 15, at 86-87.

35. *Id.* at 87.

36. *Id.*

37. *See* United States v. Pomrenke, 198 F. Supp. 3d 648, 658, 667 (W.D. Va. 2016).

38. *See id.* at 665 (describing one employee’s rental car and hotel charges incurred in Hawaii).

39. *Id.* at 682–83.

40. *See* COMMONWEALTH OF VA. AUDITOR OF PUB. ACCT., *supra* note 15, at 8.

2013 meeting of BVU's Board of Directors, during which the Board discussed CEO Rosenbalm's receipt of gifts from vendors and other instances of misconduct, a board member contacted law enforcement "independently, and without support of the Board of Directors."⁴¹ In November 2013, the FBI and IRS began investigating alleged misconduct at BVU, resulting in at least nine corruption-related charges being leveled against BVU employees and eight guilty pleas.⁴²

In August 2018, BVU OptiNet was sold at a substantial loss to a local internet service provider, with government entities recouping only a fraction of their investment.⁴³

B. Schneider Electric Case Study

In 1992, Congress enacted the Energy Policy Act, which authorized the Energy Savings Performance Contract ("ESPC") program as a way to provide agencies with a quick and cost-effective way to finance energy-saving technologies.⁴⁴ ESPCs are agreements between federal agencies and energy service companies ("ESCOs"). Under an ESPC, the company "assume[s] the capital costs of installing energy and water conservation equipment and renewable energy systems."⁴⁵ In addition, the company guarantees the agency a fixed amount of energy cost savings throughout the life of the contract and is paid directly from those cost savings; the agency retains the remainder of the energy cost savings for itself.⁴⁶

In 1998, the U.S. Department of Energy ("DOE") began issuing so-called indefinite-delivery, indefinite quantity ("IDIQ") ESPCs to "significantly reduce energy and operating costs and make progress toward meeting federal sustainability goals."⁴⁷ According to the Office of

41. Press Release, Dep't of Just., U.S. Att'ys' Off., W.D. Va., Former General Counsel for BVU Pleads Guilty (Apr. 7, 2016), <https://www.justice.gov/usao-wdva/pr/former-general-counsel-bvu-pleads-guilty> [<https://perma.cc/ZG44-G7EF>]

42. See *Pomrenke*, 198 F. Supp. 3d at 654.

43. See David McGee, *Sunset, BVU OptiNet Deal Finalized*, BRISTOL HERALD COURIER (Aug. 2, 2018), https://www.heraldcourier.com/news/sunset-bvu-optinet-deal-finalized/article_8b746332-2ee1-5565-b52f-8678020c9277.html [<https://perma.cc/59E7-HX7S>].

44. Pub. L. No. 102-486, 106 Stat. 2776 (1992).

45. *Super Energy Savings Performance Contracts*, FED. ENERGY MGMT. PROGRAM (Aug. 1999), <https://www.nrel.gov/docs/fy99osti/26766.pdf> [<https://perma.cc/9Q5Q-997G>].

46. *Id.*

47. *Energy Savings Performance Contracts for Federal Agencies*, U.S. DEP'T OF ENERGY, OFF. OF ENERGY EFFICIENCY & RENEWABLE ENERGY, <https://www.energy.gov/eere/femp/energy-savings-performance-contracts-federal-agencies> [<https://perma.cc/ZH4>]

Energy Efficiency and Renewable Energy, the DOE has awarded 425 ESPCs since the inception of the program in 1998.⁴⁸ The program has resulted in approximately \$7.46 billion in investments in federal energy efficiency and renewable energy improvements.⁴⁹ In turn, these improvements have resulted in approximately 610 trillion Btu in life cycle energy savings and approximately \$17.2 billion in cumulative energy cost savings for the federal government.⁵⁰ Between 2010 and 2016, federal agencies awarded Schneider Electric Buildings America, Inc. (Schneider Electric) multiple Energy Savings Performance Contracts (ESPCs) collectively worth over \$200 million.⁵¹

On June 14, 2010, Schneider Electric hired Bhaskar Patel as a Senior Project Manager tasked with negotiating subcontract agreements between Schneider Electric and various subcontractors for the ESPCs awarded to Schneider Electric.⁵² Schneider Electric also authorized Patel to recommend subcontractors for the selection of an ESPC award and, post-selection, to oversee and manage subcontractors.⁵³ From December 2010 until April 2016, Patel negotiated, managed, and oversaw subcontracts between Schneider Electric and subcontractors for projects in connection with ESPC awards from federal agencies.⁵⁴ These awards included numerous task orders that were collectively worth \$250 million.⁵⁵

In mid-2016, after a local Vermont subcontractor, who lost out on a bid, reported Patel to authorities, several agency inspectors general launched an investigation into his conduct.⁵⁶ Patel was ultimately charged with kickback and bribery offenses in a two-count information, pleaded guilty, and was recently sentenced to a term of three years' probation in addition to a forfeiture judgment of over \$2.5 million.⁵⁷

4-GSWW] (last accessed June 2, 2020). An IDIQ contract is a type of contract that provides for an indefinite quantity of supplies or services during a fixed period of time. *General FAQs*, SEAPORT (May 3, 2007), <https://www.seaport.navy.mil/Home/FAQ/FAQ-General/> [https://perma.cc/NW6M-T9J6].

48. *Id.*

49. *Id.*

50. *Id.*

51. *United States v. Patel*, No. 5:18-cr-0090-gwc1 (D. Vt. July 19, 2018), ECF No. 1.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. U.S. Att'y's Off., D. Vt., *supra* note 16.

57. Press Release, U.S. Dep't Just., U.S. Att'y's Off., D. Vt., Bhaskar Patel Sentenced in Kickback and Bribery Scheme in Connection with Government Contracts (2020), <https://www.justice.gov/usao-vt/pr/bhaskar-patel-sentenced-kickback-and-bribery-scheme-connection-government-contracts>, [https://perma.cc/D6NA-S4G2].

Law enforcement uncovered a wide-ranging scheme to defraud the federal government whereby Patel solicited and accepted kickbacks from subcontractors in return for awarding them a piece of Schneider's ESPCs.⁵⁸ On December 16, 2020, Schneider Electric entered into a non-prosecution agreement (NPA) with the United States Attorney's Office for the District of Vermont (D. Vt. USAO).⁵⁹ As part of the criminal resolution, Schneider admitted to defrauding the government through design costs incurred by the ESPCs funded by the Department of the Navy, General Services Administration, and Department of Agriculture, through a process of "burying" or "hiding" the costs.⁶⁰

Schneider Electric received partial cooperation credit for voluntarily disclosing, among others, the findings of its internal investigation and additional wrongdoing previously unknown to the government.⁶¹ The NPA states that Schneider Electric also engaged in various remedial measures and terminated employees responsible for misconduct.⁶² The NPA has a three-year term during which Schneider Electric agreed to submit reports to the government regarding its annual compliance reviews, and provides for \$1,630,700 in criminal forfeiture.⁶³ In a separate civil settlement with the DOJ Civil Division and D. Vt. USAO (on behalf of the Department of the Navy, the Department of Homeland Security, the General Services Administration, the Department of Agriculture, and the Department of Veterans Affairs), Schneider Electric agreed to pay \$9.3 million "to resolve False Claims Act and Anti-Kickback Act liability for Patel's kickback scheme and for including inflated estimates and improper costs in proposals, and overcharging federal agencies, under the eight ESPCs."⁶⁴

58. *See id.*

59. Non-prosecution Agreement, U.S. DEP'T JUST., U.S. ATT'Y'S OFF., D. VT. (Dec. 16, 2020), <https://www.justice.gov/usao-vt/press-release/file/1345511/download> [<https://perma.cc/LS5R-KJ75>].

60. Press Release, U.S. Dep't Just., Off. Pub. Affs., Government Contractor Admits Scheme to Inflate Costs on Federal Projects and Pays \$11 Million to Resolve Criminal and Civil Probes (Dec. 21, 2020), <https://www.justice.gov/opa/pr/government-contractor-admits-scheme-inflate-costs-federal-projects-and-pays-11-million> [<https://perma.cc/JFN7-FN4K>].

61. Non-prosecution Agreement, *supra* note 59.

62. *Id.* at 3–4.

63. *Id.* at 4–5.

64. Press Release, U.S. Dep't Just., Off. Pub. Affs., Government Contractor Admits Scheme to Inflate Costs on Federal Projects and Pays \$11 Million to Resolve Criminal and Civil Probes (Dec. 21, 2020), <https://www.justice.gov/opa/pr/government-contractor-admits-scheme-inflate-costs-federal-projects-and-pays-11-million> [<https://perma.cc/KWU7-BE5A>]; *see also* Settlement Agreement, DEP'T OF JUST., U.S. ATT'Y OFF., DIST. VT., (Dec. 17, 2020), <https://www.justice.gov/opa/press-release/file/1347446/download> [<https://perma.cc/SF2X-5TZP>].

C. California Bullet Train Case Study

The California High-Speed Rail Authority (“The Authority”) is a publicly funded rail system that began in 2008 and is currently still under construction.⁶⁵ It is projected to connect Anaheim Regional Transportation Intermodal Center in Anaheim and Union Station in Los Angeles with the Salesforce Transit Center in San Francisco.⁶⁶ In addition, future extensions are planned to connect stations in San Diego and Sacramento adding to the network.⁶⁷ However, to date, a lack of transparency and conflicts of interest surrounding the project have indefinitely extended the production of the high-speed rail, costing taxpayers billions of dollars.

In 2008 California voters approved Proposition 1A, which enacted a law that authorized the construction of the new high-speed rail system, along with authorizing the issuance of \$9 billion in bonds to fund planning, design, and construction of the system.⁶⁸ On October 2, 2009, Governor Arnold Schwarzenegger sought \$4.73 billion in federal funding pursuant to the Recovery Act.⁶⁹ On January 27, 2010, the White House announced that the federal government would award California \$2.344 billion for its high-speed rail initiative.⁷⁰

Even though environmental analysis and financing plans were incomplete, additional federal funds were then appropriated in the next few years to the rail system.⁷¹ Since inception of the project, it has been plagued with fluctuating cost estimates.⁷² Starting in 2008, The Authority released a business plan that estimated Phase 1 of the system would cost between \$32.8–\$33.6 billion.⁷³ Looking forward to 2018, the estimated

65. CA DEP’T TRANSP., FISCAL YEAR 2018–19 THIRD QUARTER REPORT: HIGH-SPEED PASSENGER TRAIN BOND PROGRAM 2 (2019).

66. *About California High-Speed Rail*, CAL. HIGH SPEED RAIL AUTH. (2022), <https://hsr.ca.gov/about/high-speed-rail-authority> [<https://perma.cc/VLS2-K7FX>].

67. *Id.*

68. Proposition 1A, High Speed Passenger Train Bond Program, CA. TRANSP. COMM’N (Nov. 4, 2008), <https://catc.ca.gov/programs/proposition-1a-high-speed-passenger-train-bond-program> [<https://perma.cc/BPQ4-RZU7>].

69. See Gov. Arnold Schwarzenegger, Letter to Sec. Raymond H. LaHood (Oct. 2, 2009), https://www.hsr.ca.gov/docs/about/funding_finance/federal_stimulus/ARRA_Cover_Letter.pdf (webpage unavailable).

70. Press Release, White House, Off. Press Sec’y, Fact Sheet: High Speed Intercity Passenger Rail Program (Jan. 27, 2010), <http://www.whitehouse.gov/the-press-office/fact-sheet-high-speed-intercity-passenger-rail-program-california> [<https://perma.cc/Y4SM-LSYG>] (webpage unavailable).

71. COAL. FOR INTEGRITY, *supra* note 4.

72. *Id.*

73. Press Release, U.S. House of Representatives Committee on Transportation and Infrastructure, California’s High-Speed Rail Plan 6 (2011), <https://obamawhitehouse>.

cost of Phase 1 was revised to \$63.2–\$98.1 billion, a significant jump.⁷⁴ There are three factors cited by the Authority that contributed to this higher estimate: (1) “net design refinements/scope changes,” (2) “contingencies,” and (3) “escalation.”⁷⁵

The California High-Speed Rail Peer Review Group was ultimately established by The Rail Authority to independently evaluate the Authority’s funding plans.⁷⁶ The Peer Review Group included eight members with various areas of expertise established by California statute to “evaluate the authority’s funding plans and prepare its independent judgment as to the feasibility and reasonableness of the plans, appropriateness of assumptions, analyses, and estimates, and any other observations or evaluations it deems necessary.”⁷⁷

In 2018, the California State Auditor issued a report noting the “potential conflict of interest” in the Rail Authority’s oversight structure.⁷⁸ The Authority “placed portions of its oversight of large contracts into the hands of outside consultants, for whom the State’s best interests may not be the highest priority.”⁷⁹ Further, the Contract Management Support Unit (“CMSU”) “which is staffed by consultants rather than Authority employees—performed only weak and inconsistent oversight.”⁸⁰

The California State Auditor’s report stated “although an Authority employee heads CMSU, the [Rail Delivery Partner (“RDP”)] consultants fill its seven positions.”⁸¹ In fact, Authority contract managers for the regional planning contracts directed the Auditor’s questions to RDP consultants “and were generally unable to provide documentation related to contract management that did not originate from the RDP consultants.”⁸² “As a result, the RDP consultants became the de facto contract management body.”⁸³

California was assured throughout the project by consultants that there was no reason to hire in-house engineers and rail experts because the consultants could handle that work and consequently save taxpayer

archives.gov/the-press-office/fact-sheet-high-speed-intercity-passenger-rail-program-california [https://perma.cc/6WZ9-KW42].

74. CAL. HIGH-SPEED RAIL AUTH., 2018 BUSINESS PLAN 36 (2018).

75. *Id.* at 33–34.

76. CAL PUB. UTIL. CODE § 185035.

77. CAL. HIGH-SPEED RAIL AUTH., *supra* note 74.

78. CAL. STATE AUDITOR, CALIFORNIA HIGH-SPEED RAIL AUTHORITY: ITS FLAWED DECISION MAKING AND POOR CONTRACT MANAGEMENT HAVE CONTRIBUTED TO BILLIONS IN COST OVERRUNS AND DELAYS IN THE SYSTEM’S CONSTRUCTION 41 (2018).

79. *Id.* at 2–3.

80. *Id.* at 3.

81. *Id.* at 41.

82. *Id.*

83. *Id.*

dollars.⁸⁴ As a result, “these consultants manage[d] nearly every aspect of the job.”⁸⁵ For instance, they “manag[ed] program implementation, strategy development and policy formulation; and provid[ed] the staffing and resources necessary for program and headquarters project management.”⁸⁶ In May 2019 the Federal Railroad Administration (“FRA”) announced it would terminate an agreement with the California High-Speed Railroad Authority and “deobligate the \$928,620,000 in funding under the agreement.”⁸⁷

In June of 2019, Roy Hill, a top consultant and deputy chief operating officer for the Authority was suspended after the Fair Political Practices Commission (“FPPC”) reviewed his approval of a multi-million dollar contract for a company in which he had heavily invested.⁸⁸ In June 2019, FPPC began investigating Roy Hill after Assemblyman Jim Patterson filed a complaint alleging a conflict of interest.⁸⁹ The Authority suspended Hill, pending the outcome of the FPPC review and also conducted its own internal investigation. The FPPC subsequently “expanded that review into a formal investigation.”⁹⁰ At the conclusion of the investigation, FPPC found that Roy Hill did not violate California’s laws for conflicts of interest and closed the case at the end of 2020.⁹¹

Another rail board member, Ernest Camacho, is president and CEO of Pacifica Services, a business that performs engineering, construction management, and environmental work.⁹² In 2019, Pacifica entered into an agreement to become a subcontractor on a light-rail project being

84. *See Id.*

85. CAL. PUB. UTIL. CODE § 185035; *see also generally* CAL. HIGH-SPEED RAIL PEER REV. GRP., <https://www.cahsrprg.com> (last visited June 12, 2020) [<https://perma.cc/T2CL-SJSR>]; Cal. High-Speed Rail Auth. v. Superior Ct., 228 Cal. App. 4th 676, 689–90 (2014).

86. Ralph Vartabedian, *How California’s Faltering High-Speed Rail Project Was ‘Captured’ by Costly Consultants*, L.A. TIMES (Apr. 26, 2019), <https://www.latimes.com/local/california/la-me-california-high-speed-rail-consultants-20190426-story.html> [<https://perma.cc/DRL8-Z4CZ>].

87. Press Release, The Fed. R.R. Admin., Statement of Federal Railroad Administration on Termination of FY ‘10 Grant Agreement with California High-Speed Rail Authority (May 16, 2019), <https://railroads.dot.gov/newsroom/statement-federal-railroad-administration-termination-fy-’10-grant-agreement-california> [<https://perma.cc/977E-AJXA>]; *see also* Jennifer Medina, *California v. Trump, Round 51, This Time It’s Over \$1 Billion in High-Speed Rail Funding*, N.Y. TIMES, (May 16, 2019), <https://www.nytimes.com/2019/05/16/us/california-high-speed-rail.html> [<https://perma.cc/AJ42-XHKJ>].

88. Vartabedian, *supra* note 86.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

conducted by Tutor Perini.⁹³ Tutor Perini was the lead contractor on the first phase of the high-speed rail in the Valley so “a member of the high-speed rail board who is supposed to oversee Tutor Perini also is under contract to Tutor Perini on a different project.”⁹⁴ The FCCP began investigating Ernest Camacho after Assemblyman Patterson filed another complaint.⁹⁵

In light of another investigation, Joe Hedges, the chief operating officer of the California High-Speed Rail Authority, left the company a week after the conclusion of the firm’s internal investigation in May 2021. The investigation began as early as December 2020, when the rail authority board received an anonymous letter from a state employee.⁹⁶ The letter alleged that “Hedges overruled employee decisions and awarded large unmerited payments to contractors building the project.”⁹⁷ The internal investigation ended up finding that Hedges did not commit fraud.⁹⁸ The railroad authority’s financial records also show that the company received a federal subpoena.⁹⁹ The contents of the subpoena, and which grand jury issued it, are unknown.¹⁰⁰

The High-Speed Rail Authority is a clear example of a project and State that could have benefitted from the proposed recommendations below, including required conflict-of-interest disclosures and a public website to track infrastructure spending.

IV. PROPOSED RECOMMENDATIONS

The Infrastructure Investment and Jobs Act, commonly referred to as the Bipartisan Infrastructure Bill, incorporates several measures to combat potential corruption. These include requirements that federal agencies award grants on a competitive basis, regularly publish reports on the implementation of grant programs, and fund oversight functions. However, these measures do not go far enough. Agencies must—through

93. *Id.*

94. *Id.*

95. The Fresno Bee Editorial Board, *Questions of Unethical Dealing Hit High-Speed Rail*, THE FRESNO BEE (Oct. 7, 2019), <https://www.fresnobee.com/opinion/editorials/article235687417.html> [<https://web.archive.org/save/https://www.fresnobee.com/opinion/editorials/article235687417.html>] (webpage unavailable).

96. Vartabedian, *supra* note 86.

97. *Id.*

98. Rich Pedroncelli, *In Major Shakeup, No. 2 Exec at California Bullet Train Agency Leaves Following Investigation*, KTLA5 (May 25, 2021), <https://ktla.com/news/local-news/in-major-shakeup-no-2-exec-at-california-bullet-train-agency-leaves-following-investigation/> [<https://perma.cc/J358-VHWA>].

99. Vartabedian, *supra* note 86.

100. *Id.*

implementing regulations—go further to ensure transparency, accountability, and integrity in infrastructure spending.

We have several recommendations that may be incorporated in subsequent legislation to provide additional oversight to infrastructure spending, or to the extent possible, considered when interpreting provisions of the Act. Recommendations fall in the following categories: increasing public transparency in infrastructure spending; recommendations relating to oversight and enforcement at both federal and state and local levels; and recommendations relating to contracts involving infrastructure bill funds.

A. Public Transparency

1. Creation of a Public Website to Track Infrastructure Spending

There should be a comprehensive public website to track projects that use federal infrastructure funds, similar to the Recovery Act.¹⁰¹ This is not an unfounded recommendation as federal agencies are already required by H.R. 3684 to publish, on a public website, reports for the implementation of certain grant programs, such as the Nationally Significant Freight, Highway Projects Program¹⁰² and the National Infrastructure Project Assistance Program.¹⁰³

In addition to providing the general public with information needed to hold officials accountable, a public website gives disappointed bidders and other competitors insight into bidding outcomes and affords informed parties who have an incentive to spot fraud, the necessary information to raise concerns. This website could also include other information to help combat potential corruption, fraud, and abuse, such as beneficial ownership of companies receiving federal contracts in excess of \$500,000, a requirement under the National Defense Authorization Act.¹⁰⁴ A very beneficial aspect of a website or portal is to increase the usefulness of data

101. American Recovery and Reinvestment Act, Pub. L. No. 111-5, § 1526 (2009).

102. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 11110(p)(1)(C) (2021).

103. Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 21201 (2022).

104. H.R. 3684; *See also* William M. (Mac) Thornberry, National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388; COAL. FOR INTEGRITY, *Anti-Corruption Recommendations for the Administration* (2021); <https://www.coalitionforintegrity.org/wp-content/uploads/2021/03/Anti-Corruption-Recommendations-for-the-Biden-Administration-Online-.pdf> [<https://perma.cc/2WLH-VVHH>] (describing additional information on the Coalition's prior recommendations related to beneficial ownership and the NDAA).

that is already in the public domain but fragmented and difficult to access.

2. Create Opportunities for Community Interaction

It is important to ensure opportunities for community engagement and input for infrastructure projects at the local level. As an example, public hearings relating to the design, cost, and timeline for infrastructure projects create space for informed discourse and debate. These types of hearings can help to ensure that the contemplated projects are responsive to the needs of the community and help to educate the community on the considerations for such projects. These and similar opportunities to engage the general public on forthcoming infrastructure projects bring the added benefits of instilling a culture of accountability for contractors and others responsible for the execution of the projects, as well as surfacing potential issues early in the process to avoid potential disruptions (such as protests and litigation) later in a project's life cycle.

B. Oversight Measures

1. Formalize Collaboration Amongst Inspectors General

While single-agency oversight of infrastructure spending is ordinarily sufficient for legislation focused on surface transportation, infrastructure legislation will fund a variety of projects under the jurisdiction of several departments and agencies. While each agency has its own inspector general, given that the proposed infrastructure projects may fall under the jurisdiction of multiple agencies, the government should set up a committee of the inspectors general of all the agencies responsible for administering infrastructure funds, so as to facilitate collaboration. A model or foundation for such a body is the Pandemic Response Accountability Committee (PRAC), which has overseen the disbursement of substantial federal spending, and already includes many of the inspectors general likely to oversee infrastructure funds.¹⁰⁵ Ideally, Congress would expand the PRAC's mandate to include oversight of future infrastructure spending. As that was not included in the bipartisan Infrastructure Act, it would be helpful if there is a distinct committee of IGs responsible for administering infrastructure funds.

105. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134. Stat 201 (2020).

2. Implement quarterly reporting requirements for infrastructure funding recipients.

H.R. 3684 appropriates infrastructure funding to responsible federal agencies, which in turn allocate the funds to eligible recipients, such as states, localities, Tribal governments, and public authorities.¹⁰⁶ Although the infrastructure bill requires the responsible federal agencies to provide Congress with reports on the implementation of certain grant program, more robust reporting obligations from the funding recipients should be considered. To that effect, agencies should require recipients of infrastructure funds from an agency to file quarterly reports with that agency, which shall in turn post information from these reports on a public-facing website such as the one described above

3. Provide Adequate Funding for Oversight and Enforcement Functions

Robust oversight and enforcement measures cannot succeed without adequate funding. Recognizing the importance of adequate funding, H.R. 3684 allocates a small percentage of the appropriations to the Office of Inspector General of each federal agency charged with overseeing the funds.¹⁰⁷ Additionally, any future infrastructure bill should include sufficient appropriations for a coordination committee of inspectors general as well as for law enforcement. The amount of funding will depend on various factors, including the scope and complexity of infrastructure spending provisions. As a benchmark, the Recovery Act, which allocated more than \$800 billion in stimulus funds, provided \$84 million to the Recovery Board.¹⁰⁸

4. Conduct Up-Front Risk Assessments

To guard against the heightened corruption risks that accompany what likely will be the accelerated disbursement of funds in response to the ongoing economic shock of the pandemic, each oversight agency should begin assessing risks immediately and continue to assess and reassess risks as programs are being carried out. Agencies should consider adopting an up-front risk assessment process that begins before any funds are distributed. As an example, the Department of Transportation (“DOT”) and

106. H.R. 3684, 117th Cong. § 21201 (2022).

107. *Id.*

108. Fraud Enforcement and Recovery Act of 2009 (“FERA”), Pub. L. No. 111-21, § 3 (2009).

Office of Inspector General (“OIG”) used a three-phase risk assessment process for both Recovery Act and Hurricane Sandy funds: first, identifying existing program risks based on past reports; second, assessing what DOT was doing to address those risks; and third, conducting audit work.¹⁰⁹

5. Provide “Real Time” Oversight of Federally Funded Programs

In addition to the “up front” risk assessment process described above, “real time” oversight is important to provide an ongoing assessment of infrastructure projects. Rather than adopt the “traditional” approach of reviewing a program after it has been implemented, agencies should review infrastructure programs as they are being carried out, consistent with the practice used in the Recovery Act context, in order to quickly address any problems that arise in the implementation of the program, including any potential cost overruns.

6. Require Conflict-of-Interest Disclosures from State Officials

Transparency into state officials’ potential economic or personal interests in infrastructure transactions can deter wrongdoing and improve detection when misconduct occurs. In states where it is not already a requirement, governors should consider requiring state and local government officials involved in infrastructure projects or in infrastructure spending initiatives to file annual conflict of interest disclosures with the state’s secretary of state or with the relevant state ethics agency. Such disclosure provisions should explicitly apply to members of government-owned independent entities, such as municipal authorities.

7. Require Conflict-of-Interest Disclosures from Fund Recipients and Others “Downstream”

In addition to requiring conflict-of-interest disclosures from state officials, state Governors should consider requiring infrastructure fund recipients, contractors, and subcontractors to disclose any potential conflicts of interests. As part of the CARES Act, for example, Congress required businesses that received emergency relief funds to first submit a certification—executed by the business’s CEO and CFO—confirming compliance with the Act’s conflict-of-interest prohibition, which barred

109. U.S. GOV’T ACCOUNTABILITY OFF., RECOVERY ACT: GRANT IMPLEMENTATION EXPERIENCES OFFER LESSONS FOR ACCOUNTABILITY AND TRANSPARENCY 22–23 (2014).

companies controlled by members of Congress, other senior government officials, and the family members of such individuals from receiving funds under the Act.¹¹⁰

8. Appoint State Infrastructure Czars

All governors should appoint their own infrastructure implementation coordinators to smooth the rollout of the \$1.2 trillion law.¹¹¹ Having a senior, single point of contact will help integrate all aspects of the implementation process. Several states such as Arkansas and New Mexico have already appointed such coordinators.¹¹²

9. Encourage state and local audit organizations to audit proactively

Similar to the recommendation above regarding up-front risk assessments at the federal level, state oversight entities should also take a proactive approach. In particular, state auditors should consider conducting earlier audits of state programs receiving infrastructure funds in order to identify risks and inform their work going forward. In addition to up-front auditing, it would be beneficial for state and local auditors to communicate their findings from the audits as early as possible to enable correction of risks relating to infrastructure spending.

The Denver City Auditor's Office successfully adopted this approach when auditing compliance with Recovery Act requirements by using a "tiered notification process."¹¹³ Under this process, the City auditor would first notify the appropriate city department informally by email (or similar means) of potential issues it found during an ongoing audit.¹¹⁴ The city auditor then would revisit these issues later, and if they were not addressed, would more formally communicate any substantive issue.¹¹⁵

110. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 4019 (2020).

111. Lobosco & Luhby, *supra* note 1.

112. Kate Sullivan, *Biden's Infrastructure Czar Urges Governors to Appoint Their Own Infrastructure Implementation Coordinators* (Jan. 4, 2022, 1:00 PM), **Error! Hyperlink reference not valid.**<https://www.cnn.com/2022/01/04/politics/mitch-landrieu-letter-to-governors-infrastructure/index.html> [<https://perma.cc/N64S-NV76>].

113. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 109, at 27.

114. *Id.*

115. *Id.*

10. Provide Adequate Funding to Support State Agency Oversight

State and local oversight bodies, no less than their federal counterparts, require adequate funding to function effectively. Although such funding can and should come in large part from state budgets (and ultimately state taxpayers), federal funding is also warranted in light of the additional strains brought on by an accelerated increase in infrastructure projects and reporting requirements, not to mention the economic strains of the pandemic itself.

11. Mandate the Maintenance of Effective Internal Controls

Federal agencies and state governments should be required to maintain effective internal controls. These agencies, in turn, should require recipients of infrastructure funds to maintain effective internal controls, and should consider the presence and demonstrated effectiveness of such controls in determining whether and how to award infrastructure funds.

12. Authorize Agencies to Terminate Infrastructure Funding and Seek Reimbursement in the Event of Fraud

Federal agencies should terminate infrastructure funding for, and seek reimbursement from, a funding recipient that makes a “false or fraudulent statement or related act in connection with”¹¹⁶ the relevant infrastructure program. This power, for example, could have benefited the federal agencies overseeing the Energy Savings Performance Contracts awarded to Schneider Electric after one of its project managers admitted to submitting false bidding information in an attempt to cover up bribery and kickbacks in the subcontractor bidding process.¹¹⁷ Likewise, the Department of Commerce, National Telecommunications and Information Administration, or IRS could have sought reimbursement from BVU OptiNet in connection with the false statements made by the company’s CEO and CFO.¹¹⁸ Ultimately, neither of the agencies or departments in these instances sought reimbursement.¹¹⁹

116. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. 109-159, Stat. 114 (2005).

117. *See infra* Sec. III.B.

118. *See infra* Sec. III.A.

119. COAL. FOR INTEGRITY, *supra* note 4.

13. Protect Whistleblowers

All agencies and state governments should protect whistleblowers who come forward with information relating to the misuse of federal funds or other noncompliance. These protections should, at a minimum, allow whistleblowers to come forward anonymously; prohibit the leaking of the whistleblower's identity; prohibit retaliation against the whistleblower; and set out investigative steps to be taken in the event of a retaliation allegation. In addition, inspectors general should ensure that federal employees with oversight responsibilities relevant to infrastructure are adequately trained on whistleblower provisions, and that protected funding recipients and state employees are notified of as well. To achieve these goals, inspectors general should adopt the best practices developed by the Council of Inspectors General on Integrity and Efficiency, Whistleblower Protection Coordinators ("WPCs"), and the Office of Special Counsel ("OSC") working groups.

14. Create Interagency Task Forces to Investigate Corruption and Enforce Laws Prohibiting Infrastructure-Related Fraud and other Misconduct

Federal and state governments should create interagency task forces to investigate and prosecute corruption in connection with infrastructure funds. The federal government has already recognized the importance of cross-agency coordination in the context of a pandemic relief funds by establishing the PRAC to spearhead oversight of pandemic response funds.¹²⁰ Interagency task forces should supplement any centralized inspectors general committee.

C. Bidding and Contract Provisions

1. Mandate a Competitive Acquisition Process to the Maximum Extent Possible

Although H.R. 3684 requires federal agencies to award grants on a "competitive basis," it typically does not specify what a "competitive" process should entail.¹²¹ To do so, Congress should look to Section 1554 of the Recovery Act as a model. The Recovery Act requires that a summary of any contract involving Recovery Act funds that is not awarded using competitive procedures and is not fixed price shall be posted in a

120. H.R. 748, 116th Cong. § 15010 (2022).

121. H.R. 3684, 117th Cong. § 21201 (2022).

special section of the public-facing Recovery.gov website.¹²² The specific “competitive procedures” referenced in the infrastructure statute should be applied in light of the Federal Acquisition Regulation (“FAR”). Pursuant to the FAR, competitive procedures typically must include full and open competition, the public announcement of bid invitations, and sealed bidding.¹²³ In addition, the FAR includes special pre-award and post-award publication requirements for certain Recovery Act contracts exceeding \$25,000 and \$500,000, respectively, providing added transparency.¹²⁴ Several countries have had success incorporating outside monitors into the bidding process to bring an additional level of oversight. For example, Australia has implemented “probity advisers” and “probity officers” empowered to both participate in the procurement discussion and investigate any concerns that arise.¹²⁵

2. Encourage Responsible Bidding and Contracting Through Value-for-Money Framework

To the extent possible, agencies should encourage an approach to contracting that values conservative bidding and places a premium on value-for-money solutions to infrastructure projects. Agencies should consider a general framework in which the cost, technical solution(s) and personnel are considered in connection with bids for infrastructure projects. A value-for-money approach ultimately encourages thoughtful and responsible bidding and discourages “low ball” bidding in which contractors seek to secure contracts by offering an unrealistically low bid, only to reveal the actual cost of the project after the contract has been awarded and the work has been undertaken.

V. CONCLUSION

State and local municipalities lose millions of dollars every year to various types of fraud emphasizing the crucial need for more stringent oversight mechanisms not only at the federal level but also at the state and local level. While federal agencies are responsible for how federal money is spent, proper oversight falls onto states and local jurisdictions where

122. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1554 (2009).

123. See FAR Pt. 6 (2019); see also Peter R. Orszag, *Memorandum Re: Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009* 39 (Feb. 18, 2009) (citing FAR Pt. 6).

124. *Id.*

125. THE INSTITUTE OF INTERNAL AUDITORS AUSTRALIA, *PROCUREMENT INTEGRITY (PROBITY)* (2020).

implementation of infrastructure projects occurs. Fraud, waste and abuse disproportionately burdens the poor, diverting resources that could otherwise lift communities out of poverty while undermining economic growth and reducing market opportunities for businesses. Therefore, to effectively combat fraud, states should implement policies that encourage transparency and improve oversight. In crafting this article, we have based recommendations off a report produced by Coalition for Integrity¹²⁶ that reviewed anti-corruption measures in prior legislation, infrastructure and stimulus bills, case studies and reports issued by GAO, the President's Council on Economic Advisors, Offices of Inspectors General, and Congressional Committees, as well as private organizations such as the World Economic Forum. Taking information learned, prevention mechanisms have been curated and recommended in this article in hopes that they will be implemented in future policy decisions.

126. COAL. FOR INTEGRITY, *supra* note 3.