

REGIONAL TRANSIT ISSUE PAPER

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
9	01/11/16	Open	Information	1/05/16

Subject: RT's Responsibility Criteria

ISSUE

RT's "Responsibility" criteria for procurements

RECOMMENDED ACTION

Information Only

FISCAL IMPACT

None.

DISCUSSION

RT is subject to federal, state and local procurement codes governing contractor responsibility. Pursuant to these codes RT may make awards only to "responsible" contractors. The Federal Transit Administration defines a "responsible" contractor to be one that possesses the ability to perform successfully under the terms and conditions of a proposed procurement. Several months ago, RT was approached by a group, specifically concerned with RT's contract for security services, that requested information regarding RT's policies and procedures related to responsibility and further requested that RT include consideration of a company's human rights record in the responsibility analysis.

In determining whether a contractor is "responsible", RT may consider such matters as contractor integrity, compliance with public policy (e.g., EEO record, attainment of DBE goal, not debarred or suspended, etc.), record of past performance, and financial and technical resources.

Chapter 16 of RT's Procurement Policy Manual (Attached as Attachment A) identifies the step-by-step process RT uses to determine responsibility in accordance with governing laws and regulations, RT's Procurement Ordinance and related Board Resolutions.

In addition to the Procurement Ordinance, the RT Board has adopted several resolutions that address responsibility and set out procedures for establishing and documenting determinations that contractors are responsible and eligible for award of an RT contract, specifically through use of a pre-qualification questionnaire. In procurements where the pre-qualification questionnaire is required, it forms the primary basis for analyzing a bidder/proposer's responsibility.

When determining whether to amend or extend an existing contract, RT conducts a more limited responsibility review, verifying that the contractor has not been debarred and verifying that the contract performance to date has been satisfactory.

Approved:

Presented:

Final 01/16/16

General Manager/CEO

Manager, Contracts & DBE

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Under both state and federal law, because a finding that a bidder/proposer is not “responsible” impacts a property interest (both the bidder/proposer’s interest in the contract at issue and their reputation in the community, affecting future contracts with both RT and other entities), a bidder or proposer that is found not “responsible” has a right to request a due process hearing to challenge the determination.

Staff has conducted a preliminary evaluation of the proposal to incorporate an evaluation of a company’s human rights record into the responsibility determination and has some concerns.

(1) While the FTA requires RT to consider certain federally-adopted components of responsibility that address social policy (EEO requirements, for instance), RT’s responsibility criteria primarily address the ability of a contractor to satisfactorily perform the work for which they are engaged by RT, not the bidder/proposer’s activities that have no impact on contract performance.

RT was established as a limited purpose district "appointed by and responsive to the cities and counties in the Sacramento region served by the district so that there will be sufficient governmental authority to solve the existing and future transportation problems of the Sacramento region and provide the needed comprehensive public transportation system." The Board of Directors is empowered only to undertake the specific functions set out in the enabling act and, in addition, "do any and all things necessary to carry out" its statutory purpose. It is unclear at this juncture what authority and justification the Board would have to implement a policy that evaluates a bidder/proposer’s human rights record as an element of “responsibility.” At this time, Staff is unaware of any other limited purpose transit agency that has adopted such a policy.

(2) If the Board is interested in considering such a policy, the Board would have to consider how to evaluate a company’s human rights record and what actions would be disqualifying (what evidence or documentation would be required or considered, how far back in time would the analysis go, etc.).

(3) Because a determination of non-responsibility has a due process hearing component, and allegations regarding human rights violations are likely to be hotly contested, the RT Board could end up sitting as a de facto human rights tribunal.

At this time, Staff is requesting that the Board provide direction regarding its desire to further evaluate whether to add “satisfactory human rights record” as responsibility criteria for RT procurements.

ATTACHMENT A

RT PROCUREMENT POLICY MANUAL

CHAPTER 16 – CONTRACTOR RESPONSIBILITY AND DEBARMENT/SUSPENSION

16.0 Purpose And Scope

- A. This Chapter establishes RT's policy for award of contracts to responsible contractors, procedures for determining responsibility, and how information is obtained and used as a basis for a responsibility determination.
- B. Policy regarding the use of a pre-award survey and procedures for the conduct of a pre-award survey are described.
- C. RT's use of the List of Parties Excluded from Federal Procurement or Non-procurement Programs is prescribed.

16.1 Responsible Prospective Contractors

- A. The Contracting Officer must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration must be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.
- B. For public works contracts, California Public Contract Section 1103 defines a responsible bidder as one who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the work.
- C. A contractor whose bid is accepted on a public works contract may substitute a person as subcontractor in place of the subcontractor listed in the original bid if the Contracting Officer determines that a listed subcontractor is not a responsible contractor.
- D. The Contracting Officer must not make an award unless he/she has determined in writing that the prospective contractor is responsible, in accordance with the provisions of this Chapter.
- E. In the absence of information clearly indicating that the prospective contractor is responsible, the Contracting Officer, with the concurrence of the Office of the Chief Legal Counsel, must make a determination of non-responsibility.
- F. To be determined responsible, a prospective contractor must meet all of the following requirements:

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1. Financial resources adequate to perform the contract, or the ability to obtain them;
2. Ability to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
3. A satisfactory performance record based on acceptable reference verification;
4. A satisfactory record of integrity and business ethics;
5. The necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them;
6. Compliance with applicable licensing and tax laws and regulations;
7. The necessary production, construction, and technical equipment and facilities, or the ability to obtain them;
8. Compliance with Affirmative Action Program requirements, if any; and
9. Other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations.

16.2 Special Standards Of Responsibility

- A. The Contracting Officer must develop, with the assistance of appropriate specialists, special standards of responsibility when experience has demonstrated that unusual expertise or specialized facilities are needed for adequate contract performance.
- B. The Contracting Officer must set forth the special standards in the solicitation.
- C. The special standards set forth in the solicitation must apply to all bidders or proposers.

16.3 Application Of Requirements

- A. Unless the Contracting Officer determines through prequalification that a prospective contractor has sufficient resources, the Contracting Officer must require, and the prospective contractor must promptly provide, acceptable evidence of the prospective contractor's ability to obtain resources.
- B. Acceptable evidence of the prospective contractor's ability to obtain resources, as specified in the above section, must consist of a commitment or explicit arrangement that will be in existence prior to the time of contract award to rent, purchase, or otherwise acquire the needed facilities, equipment, personnel, or other resources.
- C. A prospective contractor that is or has been seriously deficient in contract performance may be presumed to be non-responsible. The Contracting Officer may determine the contractor to be responsible if the circumstances of the prior deficiency were properly beyond the contractor's control or if the contractor has taken appropriate corrective action.
- D. An affiliated business must be considered a separate entity in determining whether the business that is to perform the contract meets the applicable standards of responsibility. However, the Contracting Officer must consider an affiliate's past performance and integrity when they may adversely affect the prospective contractor's responsibility.

16.4 Subcontractor Responsibility

- A. Except as provided in the section below, a prospective contractor will be accountable for determining the responsibility of prospective subcontractors. The contractor must use the requirements and standards for responsibility set forth in this Chapter.
- B. Because the determination of a prospective subcontractor's responsibility may affect RT's determination of the prospective contractor's responsibility, a prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility.
- C. When it is in the best interests of RT, the Contracting Officer may independently determine a prospective subcontractor's responsibility, using the standards and requirements for responsibility set forth in this Chapter.

16.5 Obtaining Information For Determination Of Responsibility

- A. Before making a determination of responsibility, the Contracting Officer must possess or obtain information sufficient to support the determination that a prospective contractor does or does not meet the applicable standards and requirements for responsibility set forth in this Chapter.
- B. The Contracting Officer must obtain information regarding the responsibility of a prospective contractor who is the apparent low bidder or whose offer is in the competitive range. This information must be obtained promptly after bid opening or receipt of offers.
- C. The prospective contractor must promptly supply information requested by the Contracting Officer regarding the responsibility of the prospective contractor.
- D. If the prospective contractor fails to supply the information requested under the section above, the Contracting Officer must make the determination of responsibility or non-responsibility based upon available information. If the available information is insufficient to make a determination of responsibility, the Contracting Officer must determine the prospective contractor to be non-responsible.
- E. The Contracting Officer must use the following sources of information, as appropriate, to support determinations of responsibility or non-responsibility:
 - 1. General Services Administration publication titled “List of Parties Excluded from Federal Procurement or Non-procurement Programs” (<http://www.epls.gov>);
 - 2. Records and experience data, including verifiable knowledge of RT personnel;
 - 3. Information supplied by the prospective contractor, including bid or proposal information, questionnaire replies, financial data, information on production equipment, and personnel information;
 - 4. Pre-award survey reports; and

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5. Other sources, such as publications, suppliers, subcontractors, and customers of the prospective contractor, financial institutions, government agencies, and business and trade associations.
- F. RT personnel who become aware of circumstances casting doubt on a contractor's ability to perform a contract successfully must promptly inform the Contracting Officer and furnish the relevant information in writing.
- G. The Contracting Officer must consult the List of Parties Excluded from Federal Procurement or Non-procurement Programs before soliciting an offer from, awarding a contract to, or consenting to a subcontract with a debarred or suspended contractor.

16.6 Determinations And Documentation

- A. The Contracting Officer's execution of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract.
- B. When an offer on which an award would otherwise be made is rejected because the prospective contractor is found to be non-responsible, the Contracting Officer must make, sign, and place in the contract file a determination of non-responsibility, which must state the basis for the determination.
- C. Documents and reports supporting a determination of responsibility or non-responsibility, including any pre-award survey reports and any applicable information pertaining to DBEs from Equal Opportunity Programs must be included in the contract file.
- D. Except as provided in the section following, information, including the pre-award survey report, accumulated for purposes of determining the responsibility of a prospective contractor must not be released or disclosed outside RT except to the extent required to comply with a California Public Records Act request, which will be determined in consultation with the Office of the Chief Legal Counsel.
- E. The Contracting Officer may discuss pre-award survey information with the prospective contractor before determining responsibility. At any time, after award, the Contracting Officer may discuss the findings of the pre-award survey with the company surveyed.

16.7 Effect Of Listing

- A. Contractors debarred, suspended or proposed for debarment are excluded from receiving contracts, and RT must not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless the GM/CEO or his/her delegate, and with the concurrence of the Office of the Chief Legal Counsel, determines that there is a compelling reason for such action. Contractors debarred, suspended or proposed for debarment are also excluded from conducting business with RT as agents or representatives of other contractors.
- B. Contractors included on the List of Parties Excluded from Federal Procurement or Non-procurement Programs as having been declared ineligible on the basis of statutory or other regulatory procedures are excluded from receiving contracts, and if applicable, subcontracts, under the conditions and for the period set forth in the statute or regulation. RT must not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period.
- C. Contractors debarred, suspended, or proposed for debarment are excluded from acting as individual sureties.
- D. Bids received from any listed contractor in response to an Invitation for Bids must be entered on the abstract of bids, and rejected unless the Contracting officer, with the concurrence of the Office of the Chief Legal Counsel determines, in writing, that there is a compelling reason to consider the bid.
- E. Proposals, quotations, or offers received from any listed contractor must not be evaluated for award or included in the competitive range, nor may discussions be conducted with a listed bidder or proposer during a period of ineligibility, unless the Contracting officer, with the concurrence of the Office of the Chief Legal Counsel determines, in writing, that there is a compelling reason to do so. If the period of ineligibility expires or is terminated prior to award, the Contracting Officer may, but is not required to, consider such proposals, quotations or offers.
- F. Immediately prior to award, the Contracting Officer must again review the List of Parties Excluded from Federal Procurement or Non-procurement Programs to ensure that no award is made to a listed contractor.

16.8 Continuation Of Current Contracts

- A. Notwithstanding the debarment, suspension, or proposed debarment of a contractor, RT may continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment unless the GM/CEO or the Office of the Chief Legal Counsel directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by RT contracting and technical personnel and by counsel to ensure the propriety of the proposed action.
- B. RT must not review or otherwise extend the duration of current contracts, or consent to subcontracts, with contractors debarred, suspended, or proposed for debarment, unless the GM/CEO, with concurrence with the Office of the Chief Legal Counsel, determines in writing, that compelling reasons exist for renewal or extension.

16.9 Restrictions On Subcontracting

When a contractor debarred, suspended, or proposed for debarment is proposed as a subcontractor for any subcontract subject RT consent, Contracting Officers must not consent to subcontracts with such contractors unless the GM/CEO, with concurrence with the Office of the Chief Legal Counsel, states in writing the compelling reason for this approval action.

16.10 Certification Regarding Debarment Or Ineligibility

- A. The Contracting Officer will assure compliance with Federal guidelines by requiring contractor and subcontractor certificates regarding debarment or ineligibility.
- B. When a bidder or proposer, in compliance with the provision entitled "Debarred or Ineligible Parties" indicates an indictment, charge, civil judgment, conviction, suspension, debarment, proposed debarment, ineligibility, or default of a contract, the Contracting Officer must request such additional information from the bidder or proposer as may be deemed necessary in order to make a determination of the bidder or proposer's responsibility.
- C. Bidder's or proposer's who do not furnish such information as may be requested by the Contracting Officer must be given an opportunity to remedy the deficiency. Failure to furnish the certification or such information may render the bidder or proposer non-responsible.

16.11 California Department Of Labor Standards Enforcement Debarments

- A. Under California law, whenever a contractor or subcontractor performing a public works project is found by the Labor Commissioner to be either in violation of certain provisions of law, with intent to defraud, or in willful violation of those provisions of law, the contractor or subcontractor or a firm, corporation, partnership, or association in which the contractor or subcontractor has a substantial interest is ineligible to bid on or to receive a public works contract for specified periods of time.
- B. RT may not permit a contractor or subcontractor who is ineligible to bid or work on, or be awarded, a public works project, as specified, to bid on, be awarded, or perform work as a subcontractor on, a public works project. Every RT public works contract must contain a provision regarding this prohibition.
- C. The list of debarred contractors may be found at <http://www.dir.ca.gov/DLSE/Debar.html>.

16.12 RT Debarment and Suspension Ordinance

The RT Board has adopted a Debarment Ordinance, see Title I – Procurement Ordinance, Chapter 1, Article VII - Debarment. The ordinance adopts a detailed process for debarment, which fully meets the procedural due process requirements for such a sanction. The ordinance also provides for the suspension of a contractor, as a temporary measure, when the contractor has committed an act that would support debarment.