

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
12.1	03/28/16	Open	Information	03/23/16

Subject: RT Legal Department Report: Advisability of Considering of a Proposer’s Human Rights Record as Part of a Determination of Whether the Proposer is a “Responsible Bidder”

ISSUE

Whether it is advisable to consider a bidder or proposer’s human rights record as part of a determination of whether the bidder or proposer is a “responsible bidder.”

RECOMMENDED ACTION

Information Only.

FISCAL IMPACT

None associated specifically with this information item.

DISCUSSION

RT must comply with a number of complex laws and regulations when contracting with third parties. The RT Legal Department is sought out, on a daily basis, to assist staff with the interpretation and application of these rules. The goal behind the rules is far simpler: ensure there is full and open competition so that work is performed and supplies are provided by qualified firms for the best possible price.

When RT engages in competitive solicitations for third party contracts for supplies or services, award is based either on “low bid” or “best value.” The source of the funding (local, state or federal), combined with the nature of the procurement (materials, supplies, services, construction), dictates the procurement method and the procurement rules that apply. Whether the procurement is “low bid” or “best value,” and regardless of the funding source, RT must make a determination that the bidder or proposer is “responsible” before a contract may be awarded. This required determination of responsibility, and specifically whether a bidder or proposer’s record on human rights is a required or permissible area of inquiry in making such a determination, is the focus of the analysis that Legal staff was asked to perform.

As set forth fully below, it is the opinion of the RT Legal Department that consideration of a bidder or proposer’s human rights record as a part of a “responsibility” determination, or as a criterion upon which to evaluate a proposal, would result in an impermissible burden on full and open competition and/or an indefensible evaluation that could result in potentially significant consequences to RT.

Approved:

Presented:

Final 03/23/16

General Manager/CEO

Chief Counsel

J:\Board Meeting Documents\2016\06 March 28, 2016\Info Item - Contractor Social Responsibility - MN Edits - for merge CB.doc

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
12.1	03/28/16	Open	Information	03/23/16

Subject: RT Legal Department Report: Advisability of Considering a Proposer’s Human Rights Record as Part of a Determination of Whether the Proposer is a “Responsible Bidder”

Background Information:

During the latter part of 2015, a group called SacRideHuman contacted RT staff and the RT Board with concerns about RT’s security services contractor, G4S. Specifically, the group alleged that G4S has a record of global human rights violations. Among the suggestions made by the group was that RT should consider a contractor’s record on human rights when making a pre-award responsibility determination. In December 2015, the group appeared at the RT Board meeting and gave public comment on the issue. At the January 11, 2016 Board Meeting, the Board was provided with an Issue Paper that discussed RT’s obligations regarding “responsibility” and set forth a number of preliminary concerns about adopting a policy that would require reviewing a contractor’s record on human rights as part of the bid/proposal evaluation process. The Board directed RT staff to continue to evaluate the issue, with the assistance of several Board members as needed, and report back to the Board at a subsequent meeting.

In the meantime, RT staff was provided with an analysis of the issue, along with a number of additional reference documents, by an attorney who has evaluated human rights as a responsibility factor on behalf of SacRideHuman. Additionally, RT staff was provided with a proposed set of human rights criteria to be used in evaluating whether a proposer is a responsible bidder. The authority cited for each criterion is a document called “*Guiding Principles on Business and Human Rights*” (“*Guiding Principles*”). The *Guiding Principles* has been adopted by the United Nations (several departments of which, incidentally, contract with G4S), but has not been adopted by the Federal Transit Administration (FTA) or the State of California, and is not referenced in any of the laws, regulations, rules, or guidance that RT is bound to follow in connection with making procurement determinations under state or federal law. In other words, the *Guiding Principles* is not an authoritative source for public agency procurement, regardless of the source of the funding for the procurement.

Consideration of a Bidder’s Human Rights Record in the Procurement Process Appears to be Inconsistent with Federal and State Procurement Rules and Could Result in Loss of Funding:

At the outset, the importance of complying with the procurement rules that apply based on the funding source used cannot be understated. As the Board is well aware, the funds that RT receives from State and Federal sources are critical to RT’s existence and come with significant strings attached. Fair competition in the procurement process designed to ensure the best use of public dollars is coupled with a host of requirements by which the provider of the funds seeks to influence the behavior of the grantee – ranging in significance from protection of civil rights guaranteed by the U.S. Constitution to the use of recycled paper. Adopting policies that stray from expectations of the grantor can result in what would be a catastrophic loss of funding for RT and cannot be taken lightly. RT Legal staff is appreciative of the Board’s cautious approach to this matter.

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
12.1	03/28/16	Open	Information	03/23/16

Subject: RT Legal Department Report: Advisability of Considering a Proposer’s Human Rights Record as Part of a Determination of Whether the Proposer is a “Responsible Bidder”

The SacRideHuman argument that a public agency must or, at a minimum, should consider a proposer’s human rights record stems from RT’s procurement process documents, including the *Procurement Ordinance* and the *Procurement Policy Manual*. The group’s position is based on the idea that a proposer’s human rights record has a bearing on character, integrity, reputation, and compliance with public policy. As will be evident from the discussion below, RT’s Procurement Ordinance and Policy Manual were created specifically to ensure that RT is in compliance with Federal and State procurement rules. For this reason, the RT-generated documents essentially mirror the requirements that RT is subject to from other sources and must be interpreted consistently with the source documents. The analysis here turns on how an agency is to interpret and apply responsibility factors such as integrity, business ethics, and compliance with public policy.

With respect to Federal procurement rules, the starting point is 49 United States Code section 5325. Section 5325 requires recipients of federal assistance to “conduct all procurement transactions in a manner that provides full and open competition...” (49 USC 5325(a).) Federal grants cannot be used to “support a procurement that uses an exclusionary or discriminatory specification.” (49 USC 5325(h).) A “responsible contractor” is one that possesses “the ability to successfully perform under the terms and conditions of a proposed procurement.” (49 USC 5325(j)(1).) Criteria to be considered are the integrity of the contractor, the contractor’s compliance with public policy, the contractor’s past performance, and the contractor’s financial and technical resources. (49 USC 5325(j)(2).)

Guidance in the interpretation and application of Section 5325 is found in FTA Circular 4220.1F – Third Party Contracting Guidance. To further the goal of full and open competition, the Circular prohibits solicitation requirements that “unduly restrict competition.” (Circular 4220.1F, p. VI-3.) Requiring a bidder or proposer to commit to compliance with *The Guiding Principles*, to have adopted procedures for assessing human rights impacts of its business operations; to have adopted a grievance mechanism, and so forth, would appear to place an undue restriction on competition. As noted above, *The Guiding Principles* is not a recognized authority in federally-funded procurements, so requiring a proposer to comply with the document would be improper. This issue is recognized in a paper provided to RT by SacRideHuman entitled *Turning a Blind Eye – Respecting Human Rights in Government Purchases*. The paper, prepared by the International Corporate Accountability Roundtable, acknowledges that “it is difficult for the Executive [referring to the President of the United States] to act in setting human rights standards through procurement absent an express or implied grant of authority by Congress.” (*Turning a Blind Eye*, p. 20.) Further, a proposer without a global scope of business would be unlikely to have adopted policies and procedures regarding human rights impacts and, as a result, such criteria would have the effect of unjustifiably excluding certain businesses.. Applying different standards for bidders or proposers of different sizes (as suggested in criteria provided on behalf of SacRideHuman) would clearly be exclusionary and an impingement on full and open competition. Again, the FTA Circular does not speak directly to human rights criteria, but by analogy, the circular expressly prohibits the imposition of “excessive bonding” requirements as restrictive of competition.

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
12.1	03/28/16	Open	Information	03/23/16

Subject: RT Legal Department Report: Advisability of Considering a Proposer’s Human Rights Record as Part of a Determination of Whether the Proposer is a “Responsible Bidder”

With respect to the determination as to whether a proposer is “responsible,” the FTA Circular ties the concept of “responsibility” to the proposer’s ability to perform. Specifically, the Circular identifies a responsible contractor as “possessing the ability, willingness, and integrity to perform successfully under the terms and conditions of the contract.” (*Circular 4220.1F, p. VI-22.*) Thus, an evaluation of a contractor’s “ethics” and “integrity” is a performance-based evaluation – not the general ethical evaluation that has been posited by those seeking the adoption of a human rights contracting policy. The unethical or dishonest conduct of concern to the FTA is the type of conduct that would result in debarment and suspension.

Additionally, the Circular sets forth a number of “flow down” socio-economic requirements that apply, based on adopted statutes or Executive Orders including protection of civil rights, such as Title VI of the Civil Rights Act, the ADA, and environmental justice. Protection of global human rights is not among the categories identified.

A second guidance document provided by the FTA, the Best Practices Procurement Manual (“BPPM”), is in accord with the foregoing. The BBPM defines a “responsible” contractor as one that possesses “the ability to perform successfully and a willingness to comply with the terms and conditions of a proposed contract.” (*BPPM, Sec. 5.1.*) The responsibility determination is, essentially, “grading a firm’s ‘ability’ to do a job.” (*BPPM, Sec. 5.1.*) In almost all instances, a proposer’s global human rights record will have no impact on its ability to perform under the terms of a contract with RT.

Confidence in this interpretation is bolstered by additional sources. Namely, RT contacted attorneys for the FTA in both Washington D.C. and Region IX in San Francisco, who expressed concern that evaluation of human rights as part of a determination of responsibility would place an excessive burden on full and open competition. Further, it is significant that RT has been unable to locate any transit agency (or any other public agency that receives Federal funding) that considers a proposer’s human rights record in a determination of responsibility.

As for California state public procurement law, the policy behind the rules matches the Federal rules – protecting public funds, a fair opportunity for contractors, stimulation of competition, and to eliminate favoritism, fraud and corruption. (*Public Contract Code §100.*) A “responsible bidder,” under California law, is defined as “a bidder who has demonstrated the attribute of trustworthiness, as well as quality, fitness, capacity, and experience to satisfactorily perform the public works contract.” (*Public Contract Code §1103.*)

Courts interpreting the “responsibility” determination under California law have rejected findings of “irresponsibility” by public agencies when the determination was based on “social responsibility” factors. For example, in *Associated General Contractors of California, Inc. v. City and County of San Francisco* (1987) 813 F.2d 922, the court found that San Francisco had improperly excluded a contractor who failed to meet certain “preferences” that the City and County had enacted by ordinance. The court held that the public agency could not utilize a responsibility determination to

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
12.1	03/28/16	Open	Information	03/23/16

Subject: RT Legal Department Report: Advisability of Considering a Proposer’s Human Rights Record as Part of a Determination of Whether the Proposer is a “Responsible Bidder”

further a municipal concern unrelated to whether the bidder can be expected to successfully complete the contract. (*Associated General Contractors, at 926.*)

State grants also may contain specific third party procurement requirements above and beyond those found in the Public Contract Code.

The discussion above applies regardless of whether the agency is making determinations during the “responsibility” phase of the procurement or during the evaluation of the individual proposals. During the evaluation phase, ability to perform, technical strength, and cost are the key factors to consider.

Based on the foregoing, it is the opinion of RT Legal that a contractor’s human rights record is certainly not *required* to be considered in making a “responsibility” determination under state or federal law and the use of such a criteria by RT procurement staff probably would be viewed as an excessive burden on competition and would violate both state and federal procurement rules. Given that compliance with federal procurement rules (and state rules with respect to some state grants) is mandatory in order to receive financial assistance, violations of the rules could result in RT losing the right to receive such assistance.

Consideration of a Bidder’s Human Rights Record in the Procurement Process is Likely to Result in Bidder Protests and Associated Delay and Increased Cost/Use of Resources:

Even if RT were to consider a proposer’s human rights record as part of the responsibility analysis, despite the interpretation above that only performance-based criteria should be considered, the application of such criteria would put RT in a nebulous and likely indefensible position. Namely, a significant problem arises when an agency attempts to make a determination as to whether a proposer has a responsible record on human rights. 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 considered reliable or required, how far back in time would the analysis go, etc.)

The concerns that SacRideHuman has with G4S provide an excellent illustration of the problem. On the one hand, an evaluator of G4S’ human rights record could look to a report prepared by the Jewish Voice for Peace called *The G4S Record: Human Rights Violations, Corruption and Management Failures*, in which the authors condemn G4S as complicit in routinely violating human rights. On the other hand, an evaluator could rely upon a report prepared by Dr. Hugo Slim and Professor Guglielmo Verdirame called *Human Rights Review of G4S Israel*, in which the authors conclude that claims that G4S is in breach of international human rights law are “manifestly unfounded.” It is important to draw a distinction between a disputed human rights record and, for example, apartheid in South Africa. No evaluation or determination was required by agencies seeking to divest from South Africa – there was undisputed legislatively-enacted

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
12.1	03/28/16	Open	Information	03/23/16

Subject: RT Legal Department Report: Advisability of Considering a Proposer’s Human Rights Record as Part of a Determination of Whether the Proposer is a “Responsible Bidder”

racial segregation. In the case of a company’s human rights record, as noted above, adverse allegations are hotly disputed.

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.

When a protest is properly filed prior to contract award, *the Board may not award the contract until issuance of a final decision on the protest.* When a protest is initially filed, RT staff must prepare a preliminary response within 10 days in which a meeting date and time is identified. Within 5 days after the meeting (or 10 days after the preliminary response if no meeting is held), the protestor provides notice that the protest is either withdrawn or continued. If protest is not withdrawn, it will be further investigated by RT, which would likely require the cost of third-party consulting services because RT does not have the internal expertise to sift through conflicting records and reports pertaining to alleged international human rights violations. There are no deadlines or timelines associated with this step.

Once the investigation is complete, the General Manager/CEO will issue either a recommendation (if the Board is the awarding authority) or a decision (if the General Manager/CEO is the awarding authority). Upon receipt of the recommendation, the protestor then has 5 working days to decide whether to continue the protest. If the protestor opts to continue, the Board or an impartial hearing officer will hear the protest and render a decision. As noted in the first issue paper on this topic, allegations regarding human rights violations are likely to be hotly contested and the RT Board or impartial hearing officer could end up sitting as a de facto human rights tribunal. Upon conclusion of the protest process, if the Board ultimately determines that the staff recommendation is correct, the Board may award the contract. However, litigation could delay execution of the contract or commencement of the work.

Proposers or bidders that are disappointed with the outcome of the protest proceedings could file suit challenging the decision to deem a bidder/proposer not responsible based on their human rights record, a decision regarding the scoring in an evaluation category of “compliance with human rights,” or the decision to award a contract to a contractor that the plaintiff believes is “not responsible” based on a human rights record. Such suits would usually take the form of a writ proceeding to compel the public agency to rescind the contract award and award to another bidder/proposer. Additionally, an unsuccessful bidder/proposer has the option of pursuing bid preparation costs as damages. Though writ proceedings receive expedited review by the court, because of the possibility of appeals, the process can be lengthened. As an example, in the leading case regarding the due process requirements for bidder deemed not “responsible,” the time between the initial writ filing and the decision on appeal was over a year and a half. Because the monetary remedies available to a bidder/proposer claiming to have been unlawfully denied a contract are very limited (only bid preparation costs, not lost profits) and because of the important

Agenda Item No.	Board Meeting Date	Open/Closed Session	Information/Action Item	Issue Date
12.1	03/28/16	Open	Information	03/23/16

Subject: RT Legal Department Report: Advisability of Considering a Proposer's Human Rights Record as Part of a Determination of Whether the Proposer is a "Responsible Bidder"
--

public policies involved, the balance of hardships may tip in favor of a petitioner that requests a stay, both at the trial court and appellate level, preventing RT from moving forward with the contract while the matter is resolved.

Based on the above, RT Legal would have serious reservations about taking human rights records into account as part of the procurement process even if such a practice were found to be allowable under state and federal law.

Of course, none of the foregoing indicates a lack of interest in global human rights on the part of RT. Rather, this analysis recognizes that global human rights is not a local transportation issue and RT is a local transportation agency with a limited and focused mission. This mission would be in serious jeopardy without state and federal financial assistance and would be ill-served by lengthy and costly protest hearings and litigation. If human rights records are to be considered as part of the procurement process, adding such a requirement should be undertaken at the state and federal level – it would be unwise for RT to initiate such a policy.