

Sacramento Regional Transit Contractor Screening

RT has the authority and obligation under its existing procurement criteria to contract for services only with a contractor which is technically and financially capable of performing the services *and* which has a record of socially responsible business practices with respect to human rights, labor, the environment and anti-corruption conduct.

- **RT's current procurement ordinance and its implementing policy require RT to determine that a contractor is responsible.**

Under RT's current procurement ordinance and the policy implementing the ordinance, RT separately determines a contractor's responsibility and the responsiveness of the proposal submitted by the contractor to a Request for Proposals or RFP. "RT may reject any proposer that is not responsible *or* any proposal that is nonresponsive." (RT Administrative Code, Title 1, Procurement Ordinance, § 1.404 (*italics added*)). Similarly, RT "must award contracts *only to responsible contractors* possessing the ability to perform successfully under the terms and conditions of a proposed procurement." (RT Procurement Policy Manual, Chapter 16 - Contractor Responsibility and Debarment/Suspension, § 16.1 (*italics added*)).

In determining whether a contractor is responsible, RT must give consideration to "each" of four factors: RT must specifically consider the contractor's character, integrity, reputation, judgment, experience and efficiency in addition to the contractor's ability and skill to perform the contract within the time specified and the contractor's performance on previous contracts. (Procurement Ordinance, § 1.401.) In determining whether a contractor's proposal is responsive, in contrast, RT must consider with the contractor has submitted the information and documents in the form and the time required by the RFP and has offered to perform pursuant to the RFP. (Procurement Ordinance, § 1.402.)

Section 16.1 of the RT Procurement Policy Manual implements and details the responsibility factors or criteria that RT must consider in determining a contractor's responsibility. Section 16.1.A requires RT to give consideration "to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources." Section 16.1.F requires that a contractor meet "all" of nine requirements, including a "satisfactory record of integrity and business ethics."

Thus, under the RT Procurement Ordinance and Policy Manual, RT may determine that a contractor is responsible only if the contractor possesses the financial and technical resources to successfully perform the procurement and a record of integrity, ethical business practices and compliance with public policy.

- **RT's criteria for contractor responsibility tracks federal statute and administrative guidelines.**

When RT uses financial assistance received from the Federal Transit Administration (FTA) to finance its procurements, RT is required to comply with FTA's Third Party Contracting Guidance, FTA Circular 4220.1F (Rev. 4, March 18, 2013). Section 2.a(1) of chapter IV of the FTA Guidance provides:

"Responsibility" Requirements. In addition to the Common Grant Rules that require contract awards be made only to responsible contractors, Federal transit law at 49 U.S.C. Section 5325(j) limits third party contractor awards to those contractors capable of successfully performing under the terms and conditions of the proposed contract. Before selecting a contractor for award, the recipient must consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

In almost identical language, the federal statute cited in this provision of the FTA Guidance -- section 5325(j) of Title 49 of the United States Code -- provides:

(j) Awards to responsible contractors.

(1) In general. Federal financial assistance under this chapter [49 USC §§ 5301 et seq.] may be provided for contracts only if a recipient awards such contracts to responsible contractors possessing the ability to successfully perform under the terms and conditions of a proposed procurement.

(2) Criteria. Before making an award to a contractor under paragraph (1), a recipient shall consider--

(A) the integrity of the contractor;

(B) the contractor's compliance with public policy;

(C) the contractor's past performance; and

(D) the contractor's financial and technical resources.

Thus, section 5325(j) and the FTA Guidance following section 5325(j) serves as the basis of the language in section 16.1 of RT's Procurement Policy Manual regarding the factors that RT must consider in determining contractor responsibility. RT must consider, not only a contractor's financial and technical resources necessary to successfully perform a contract, but also the contractor's integrity and compliance with public policy.

- **The criteria for contractor responsibility under RT's procurement ordinance and policy, the FTA Guidance, and section 5325(j) reflect international principles and standards requiring commercially and socially responsible business practices.**

The requirement in section 16.1 of RT's Procurement Policy Manual, the FTA Guidance and section 5325(j), that RT's contractor responsibility determination include consideration of a contractor's record of integrity, business ethics and compliance with public policy in addition to consideration of the contractor's financial and technical ability to perform, reflects a growing consensus internationally that, to be responsible, the operations of business enterprises must support both commercial and societal goals. Concurrently, governmental agencies, must take steps to confirm such responsibility in the operations of the business enterprises with which the agencies contract in the course of carrying out their public charge and functions. By requiring such confirmation, the agencies fulfill their charge and functions within, and prevent damage to, the existing framework of social policies designed to promote the public welfare.

The substance of this international consensus is effectively distilled in the attached *United Nations Global Compact/Guide to Corporate Sustainability* and in the *United Nations Guiding Principles on Business and Human Rights*. The *Global Compact* requires its signatory businesses to operate responsibly in the areas of human rights, labor, environment and anti-corruption practices on the premise that long-term corporate

success and sustainability depends, not only upon operations that are financially profitable, but also upon operations that support societal values and goals. In the areas of human rights and labor, the *Global Compact* specifies that businesses should support and respect internationally recognized human rights, not act in complicity with human rights abuses, uphold freedom of association and the right to collective bargaining, and eliminate discrimination in employment.

The Guiding Principles on Business and Human Rights recognizes the duty of governmental agencies to promote respect for human rights by business enterprises with which they conduct commercial transactions, including procurement activities where contractor responsibility is tied to a record of respect for human rights. The *Guiding Principles* concurrently recognizes the concomitant responsibility of business enterprises to avoid or mitigate adverse impacts to human rights in their operations with appropriate policies, procedures and reports. These human rights are detailed in the International Bill of Human Rights consisting of the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic Social and Cultural Rights, and the International Labor Organization's Declaration on Fundamental Principles and Rights at Work.

In the context of RT's determination of a contractor's responsibility, the international consensus among governmental and business interests set forth in the *Global Compact* and the *Guiding Principles* provides focus and a substantive basis for RT's consideration of the contractor's record of integrity, business ethics and compliance with public policy pursuant to section 16.1 of the RT Procurement Manual. The *Global Compact* and *Guiding Principles* make clear that integrity and business ethics require business enterprises to respect and comply with public policy on human rights and labor. Without reference to this consensus, RT's evaluation of the contractor's integrity and ethics is easily limited to the commercial aspects of its operations without regard to the impact of the operations on human rights or labor; RT may easily ignore the contractor's compliance with public policy because "public policy" lacks any definition of its meaning and scope in either RT's Procurement Ordinance or its Procurement Policy Manual; and RT may, accordingly, fail to assure the contractor's responsibility with respect to societal goals for human rights and labor.

- **The criteria and procedures for determining contractor responsibility in the RT Procurement Ordinance and Policy Manual support RT's consideration of a contractor's record of socially responsible business practices with respect to human rights and labor.**

Responsibility criteria: The key terms of criteria relevant to a determination by RT about a contractor's responsibility regarding human rights and labor are set forth in RT's Procurement Ordinance and Policy Manual: "contractor integrity," "compliance with public policy," "satisfactory record of integrity and business ethics." (See Procurement Ordinance section 1.401.C; Procurement Policy Manual sections 16.1.A, 16.1.F.4) RT's amendment of these terms to clarify that they are to be construed in accordance with the meaning and usage ascribed to them by governmental agencies and business communities, as delineated in the *Global Compact* and *Guiding Principles*, will assure that these terms provide clear standards for RT to consider in determining whether a contractor's business operations respect human rights and labor.

In addition, RT may specify in an RFP or contract specific laws or regulations protective of human rights and labor with which a contractor's operations must comply. For example, sections 38 and 39 of the Sample Contract in the attached RFP for Security Guard Services require contractor compliance with laws prohibiting discrimination on the basis of disability and protecting the rights of employees and applicants for employment under various nondiscrimination laws.

Responsibility procedures: The procedures in the RT Procurement Policy Manual for RT's determination of contractor responsibility generally are suitable for RT's determination of whether a contractor's business operations avoid or mitigate adverse impacts to human rights and labor. Pursuant to section 16.5 of the Manual, RT obtains information regarding the responsibility of a prospective contractor from the contractor and must consult a broad range of information sources, including pre-bid survey reports, and information provided by suppliers, subcontractors, customers, financial institutions, government agencies and business and trade associations. Such sources of information can be supplemented by research firms specializing in business-specific information about business practices relevant to social responsibility criteria.

Notably, RT's consideration of whether a contractor's operations are responsible in avoiding adverse impacts to human rights and labor is facilitated in the case of a multi-national business like G4S which is a signatory to the *Global Compact* and has issued a global human rights policy pursuant to the *Guiding Principles* that seeks to safeguard the rights of employees and identify and mitigate against human rights risks in the operations of G4S businesses around the world. (See <http://www.adsadvance.co.uk/g4s-launches-landmark-human-rights-policy.html>.) Sources of information tracking G4S's compliance with its human rights policy are available, not only from G4S, but also from the governmental agencies with which it has contracted in various jurisdictions (e.g., various states within the U.S., U.K., Australia, South Africa and Israel) and from the reports of nonprofit organizations like UNICEF documenting the impacts of G4S operations on human rights. Because G4S global operations are centrally controlled, reliable documentation of G4S's impact on human rights and labor in jurisdictions outside the jurisdiction of RT is relevant to RT's determination of G4S's responsibility for purposes of its security services contract with RT.

Due process: Finally, the due process procedure in sections 1.601 through 1.615 of the RT Procurement Ordinance is appropriate for contesting a determination by RT that a contractor is not responsible in avoiding adverse impacts to human rights and labor in its operations would be subject to. This procedure is available to contest any written notice that a contractor has been deemed not responsible or non-responsive.

In sum, RT has the authority and capability to consider and determine whether a contractor's business operations responsibly avoid or mitigate adverse impacts to human rights and labor. RT is obligated to make such a responsibility determination to assure that it performs its function of operating the regional transit system within the framework of public policy designed to protect human rights and labor.