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MEMORANDUM

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To: Jill A. Sprague Esq.
Office of the General Counsel
Alameda-Contra Costa Transit District

From: Bruce M. Smith, Special Counsel



Re: AC Transit Auditor Rotation

Date: November 16, 2021

Facts: California Government Code Section 12410.6(b) requires the rotation of lead audit partners and coordinating audit partners if an audit firm continues to provide audit services to an agency such as AC Transit for greater than six fiscal years. AC Transit Board Policy No. 340 requires that AC Transit issue a Request For Proposals (RFP) for audit services every 5 years. A Board Director desires to prohibit using the same audit firm for more than one 5-year term.

Issue: Whether the Board excluding or prohibiting the incumbent audit firm the District had previously used for audit services for six consecutive years from submitting a proposal in response to a RFP would violate the requirement for “full and open competition” pursuant to the Federal Transit Act, 49 U.S.C. §5301, et. seq., regulations and guidance issued by the Federal Transit Administration (“FTA”) and other applicable obligations arising from the District’s receipt of federal financial assistance.

Conclusion: Yes. A blanket prohibition in excess of the requirements of California Government Code Section 12410.6(b) violates applicable federal requirements for “full and open competition”

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in AC Transit's third party contracting actions. Excluding an otherwise qualified accounting/audit firm from submitting a Proposal is contrary to fundamental principles of full and open competition embodied in the Federal Transit Act, the Federal Transit Administration Third Party Contracting Guidelines (FTA Circular 4220.1F) and other federal rules which are applicable to the District as a recipient of federal financial assistance. In addition, the District would potentially not be in compliance with its contractual obligations to the U.S. DOT Federal Transit Administration to conduct all its third party procurement using full and open competition.

Analysis: The District is a recipient of significant grants of federal financial assistance, including financial assistance provided by the United States Department of Transportation (U.S. DOT) Federal Transit Administration (FTA). The Federal Transit Act requires that "Recipients of assistance under this chapter shall conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary." 49 U.S.C. § 5325 (a).

In addition, the District executes a Master Agreement as to each FTA grant the District receives. The Master Agreement requires the District as a Recipient to comply with requirements of (a) federal laws, regulations, requirements, and guidance and (b) "conduct all its third party procurements using full and open competition as provided in 49 U.S.C. §5325(a), and as determined by FTA." The current Master Agreement is found at <https://www.transit.dot.gov/sites/fta.dot.gov/files/2021-02/FTA-Master-Agreement-v28-2021-02-09.pdf> (last visited November 9, 2021; see Section 16 "Procurement").

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FTA Circular 4220.1F “Third Party Contracting Guidance”, published in accordance with Title 49, United States Code, Chapter 53 elaborates on the requirement of a full and open competition in a Recipient’s procurements:

[T]he Common Grant Rules require a recipient of Federal assistance to use third party procurement procedures that provide full and open competition. The Federal Transit Administration's (FTA) enabling legislation at 49 U.S.C. Section 5325(a), also requires an FTA recipient to conduct all third-party procurements financed under 49 U.S.C. Chapter 53 in a manner that provides full and open competition as determined by FTA.

FTA Circular 4220.1F, Third Party Contracting Guidance, 2008 WL 4534439, at *60.

Compliance with the solicitation procedures described in this Chapter will fulfill FTA requirements for “full and open competition.” *Ibid.*

The Common Grant Rules prohibits solicitation requirements that contain features that unduly restrict competition. FTA recipients are also prohibited by 49 U.S.C. Section 5325(h) from using FTA assistance to support an exclusionary or discriminatory specification. FTA Circular 4220.1F, Third Party Contracting Guidance, 2008 WL 4534439, at *62.

The U.S. Department of Transportation adopted the Office of Management and Budget Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200) which replaced the “Common Grant Rules.” See 2 C.F.R. § 1201.1. The regulations state:

(b) In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

- (1) **Placing unreasonable requirements on firms in order for them to qualify to do business;**
- (2) Requiring unnecessary experience and excessive bonding;

- (3) Noncompetitive pricing practices between firms or between affiliated companies;
- (4) Noncompetitive contracts to consultants that are on retainer contracts;
- (5) Organizational conflicts of interest;
- (6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and
- (7) Any arbitrary action in the procurement process.**
2 C.F.R. § 200.319. (emphasis added).

California Government Code Section 12410.6(b) states:

Commencing with the 2013-14 fiscal year, a local agency shall not employ a public accounting firm to provide audit services to a local agency if the lead audit partner or coordinating audit partner having primary responsibility for the audit, or the audit partner responsible for reviewing the audit, has performed audit services for that local agency for six consecutive fiscal years.

Thus, the legislative policy of the state of California is that a public accounting firm is permitted “to provide audit services to a local agency if the lead audit partner or coordinating audit partner having primary responsibility for the audit, or the audit partner responsible for reviewing the audit” are excluded from the personnel/team providing audit services for the local agency (the District) after six years. The statute could have required public accounting firms to be rotated after performing audit services for a local agency for six years, but has not done so.

Excluding a firm from participating in the procurement process in excess of the requirements of the California Government Code would constitute an “arbitrary action” in the procurement process. Furthermore, there is no law that requires rotation of audit firms or the exclusion of a firm from submitting a proposal in contravention of Circular 4220.1F and 2 C.F.R.

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§ 200. So long as the lead audit partner or the coordinating audit partner and the audit partner responsible for reviewing the audit are excluded from the incumbent public accounting firm's proposal submitted in response to the District's RFP and the performance of services under an ensuing contract, a public accounting firm cannot be excluded from a local agency's consideration under a competitively bid Request For Proposals issued under AC Transit Board Policy No. 340. Accordingly, prohibiting an entire firm from competing for a contract to provide audit services to a local agency would violate the requirement to provide full and open competition.