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EXECUTIVE MANAGEMENT AND AUDIT COMMITTEE

January 20, 2005

SUBJECT: STATE LEGISLATION

ACTION: APPROVE STAFF RECOMMENDATION ON STATE LEGISLATION

RECOMMENDATION


Approve in concept proposed legislative language pertaining to our procurement processes, contribution and financial interest limits, and post employment restrictions. --**SUPPORT**

ATTACHMENTS

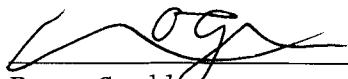
A1 Legislative Analysis

A2 Proposed Legislative Language

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for 

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Chief Executive Officer

BILL: TO BE DETERMINED

AUTHOR: TO BE DETERMINED

**SUBJECT: PROCUREMENT, CONTRIBUTION AND FINANCIAL INTEREST LIMITS,
AND POST EMPLOYMENT RESTRICTIONS**

STATUS: PENDING INTRODUCTION

ACTION: SUPPORT

RECOMMENDATION

Approve in concept proposed legislative language pertaining to our procurement processes, contribution and financial interest limits and post employment restrictions.

ISSUE

Procurement, Government Relations and County Counsel began a process of reviewing the various recommendations by Manatt, Phelps & Phillips, LLP consultant Steve Polan to improve our procurement processes. A number of potential improvements have been identified including administrative changes that can be made internally or through Board actions, and by making changes to state law. This report proposes the changes to state law.

Individual sections of the state laws pertaining to how we handle procurements do not create particular problems. However, when considered collectively they can become problematic. The enabling legislation that created the LACMTA states “any reference to this part, or in any other provision of law or regulation, to the Southern California Rapid Transit District (SCRTD) or to the Los Angeles County Transportation Commission (LACTC) and county transportation commissions in general shall be deemed to refer to the LACMTA.” As a result, the statutes that governed procurements from our predecessor agencies are still in effect and create confusion when determining applicability. Staff is recommending that the proposed set of statutes be used to govern our procurements.

An example of a conflict is that the LACTC and SCRTD statutes contain different requirements for engaging in emergency purchases. One statute requires the Board to approve emergency purchases while the other only requires the Board to be notified. Additionally, there are two statutes that authorize transit agencies to engage in different procurement processes for specialized technology. Although these two provisions are essentially optional, the interpretation and applicability create confusion amongst staff in which methodology should be applied.

Contribution and financial interest limits and the restrictions on post employment were included in this review. Staff is recommending changes to these sections in order to make them more consistent with provisions applicable to other governmental agencies and promote efficiency in government while still maintaining a high standard of integrity.

PROVISIONS

Staff is proposing a single set of statutes which would supersede all others to regulate our procurement process, and would make modifications to the contribution and financial interest limits, and post employment restrictions. The existing statutes relating to procurement would remain in effect but would no longer be available to us. The language below outlines a basic set of requirements and thresholds.

1. Competitive Procurements

A. General Provisions

- LACMTA would be authorized to utilize any competitive procurement process for the procurement of goods, equipment, materials, construction of public works and other services.
- The competitive procurement process could include one of the following methods: sealed bidding, competitive negotiation or other competitive methods.
- Notice to vendors would be provided via commercially reasonable methods.
- For competitive procurements not using sealed bids, LACMTA would be authorized to determine a method of evaluating proposals, shall have the authority to recommend award based on best value to the agency, and may use reverse auction procedures.

B. Two-Step Procurements

- Where circumstances indicate it is appropriate, LACMTA would be authorized to utilize a two-step process whereby vendors first submit a technical proposal. Upon review of the technical proposal, staff would select vendors who are then invited to submit a sealed price bid.
- This provision would also authorize staff to identify the requirements for submission of bids, and at the agency's discretion, would allow for negotiation with the lowest responsive and responsible bidder.

C. Online Auctions

- LACMTA would be authorized to purchase materials and equipment from public auctions including on-line public auctions.

2. Commercial Procurements

- For items defined as commercial, LACMTA would be authorized to utilize the procurement processes identified in this section.

3. Small Purchases

- Small purchases would be defined as the purchase of items not exceeding a total price of \$100,000. The small purchases threshold would be indexed for future years.
- LACMTA would be authorized to utilize a more streamlined process for small purchases by soliciting at least two quotes from an adequate number of qualified

sources and maintaining documentation that the price paid was fair and reasonable.

4. Micro Purchases
 - Micro purchases would be defined as the purchase of items not exceeding \$2,500. Staff would procure without formal solicitation of quotes so long as documentation is provided to ensure that the price paid was fair and reasonable.
5. Non-Competitive Procurements
 - LACMTA would be authorized to engage in non-competitive procurements if the procurement is required as a result of an emergency, is from a regulated public utility, the good, service or equipment can only be obtained from a government entity, may only be obtained from one source, is for follow-on work to an existing contract, would result in duplication of costs to the agency due to duplication of work, or would result in a material delay.
6. Reverse Auctions
 - Authorize LACMTA to utilize reverse auctions should it conduct an interactive bidding process.
7. CEO Award of Contracts.
 - The CEO or his/her designee would be authorized to approve all contracts, which are awarded based upon the lowest responsive and responsible sealed bid submitted.
8. Contribution and Financial Interest Limits
 - Increase contribution limit to \$100.
 - Allow for return of a contribution within 30 days.
 - Clarify rule of necessity to not require all non-conflicted members to be present.
 - Modify applicability of the contribution acceptance limits to more fairly apply to all persons seeking officary positions on the LACMTA Board.
 - Make the threshold for conflicts based on financial interests automatically adjust to be consistent with the Political Reform Act.
9. Post Employment Restrictions
 - Reduce post employment restrictions to three years from involvement in a contract decision or one-year from the date an employee or member leaves the LACMTA, whichever is later.

IMPACT ANALYSIS

Under current law, our procurements are governed by a variety of statutes. These include statutes created under the predecessor agencies, governing public agency procurements, and a variety of other enabling statutes.

Our Procurement staff have been concerned that the existence of a number of statutes creates confusion amongst our staff, results in lengthy administrative processes, and

increases costs to the agency, which ultimately impacts our vendors. To address these issues, staff developed a single set of statutes that would govern our procurement processes. These processes would grant flexibility to staff, reduce the amount of administrative time dedicated to a procurement process and avoid unnecessary cost to the agency.

Current law does not reflect the growing trends at the federal and state levels to simplify and streamline procurement requirements. In 1994, the federal government passed the Federal Acquisition Streamlining Act to simplify and streamline their procurement process. This was followed by the Federal Acquisition Reform Act of 1995 which increased contracting officials' authority to approve higher dollar thresholds, emphasized procuring commercial off-the-shelf items, and eliminated contractor certification requirements not required by law.

Several states, including Texas, Virginia, New York, Oklahoma, Tennessee, Arkansas and Washington, have been pursuing similar initiatives to simplify the way they procure goods and services. In addition, the American Bar Association (ABA) developed the ABA model Procurement Code in 2000. This code has been fully adopted by 16 states and sets forth basic procurement principles in clear, concise language, establishes common definitions and concepts and provides flexibility to the Contract Administrator to adapt procurement procedures to unusual circumstances.

PROPOSED LANGUAGE

An act to add Sections {suggest 20235} to the Public Contract Code, and to amend Sections XXXXX of the Public Utilities code relating to procurements by the Los Angeles County Metropolitan Transportation Authority.

SECTION XXXX. Section {20235} is added to the Public Contract Code, to read:

{20235}. Notwithstanding any other provision of law contained in this Article, in sections 20216 and 20217 of this Code, or in sections 130232, 130233, 130234, 130235, 130236, 130237, 130238 and 130242 of the Public Utilities Code, the Los Angeles County Metropolitan Transportation Authority will use the procedures described in this Article to procure goods, equipment, material, contracting for the construction of public works and other services.

SECTION XXXX. Section {20236} is added to the Public Contract Code, to read:

{20236} Competitive Procurements

a. Subject to the exceptions described in sections {20237}, {20238} and {20239} of this Article, the Los Angeles County Metropolitan Transportation Authority shall acquire goods, equipment and materials, and contract for the construction of public works and for other services by competitive procurement. Competitive procurement methods may include sealed bidding, competitive negotiations or other competitive methods to ensure fair and open competition.

b. In each competitive procurement the Los Angeles County Metropolitan Transportation Authority shall:

1. Use commercially reasonable methods of providing notice to potential offerors or bidders. Among other methods of providing public notice, the Los Angeles County Metropolitan Transportation Authority may provide notice through the Los Angeles County Metropolitan Transportation Authority's website, other appropriate websites, by or advertising or notice through other appropriate electronic media;

2. Provide a clear, accurate and complete description of the goods, equipment, material, or services to be procured, and specifications or requirements that do not unduly restrict competition.

3. Use a fair and reasonable method of price determination.

c. For competitive procurements not using sealed bids:

1. The Los Angeles County Metropolitan Transportation Authority shall include in its solicitation a fair and reasonable method of evaluating proposals and a description of all of the factors that will be used in the evaluation.
 2. If an award is made, it shall be made to the responsible offeror or offerors who submit proposals that are the best value to the Los Angeles County Metropolitan Transportation Authority on the basis of the factors identified in the solicitation.
 3. The Los Angeles County Metropolitan Transportation Authority may use reverse auctions in accordance with the procedures described in section 20240.
- d. For competitive procurements using a sealed bid process:
1. The Los Angeles County Metropolitan Transportation Authority may solicit bids using either a one-step or two-step bidding procedure.
 2. In a two-step procedure, the solicitation shall include as a first step a request for the submittal of a sealed technical proposal. As a condition to bidder's submission of a sealed priced bid in step two, the bidder shall have submitted a technical proposal, and the Los Angeles County Metropolitan Transportation Authority shall have (i) evaluated the proposal, (ii) determined that the proposal is responsive to the bid specifications and (iii) invited a sealed priced bid.
 3. Bidders shall submit sealed bids to the address, and not later than the date and time, stated in the solicitation.
 4. With the exception of step one in a two-step procedure, there shall be a public opening of all sealed bids.
 5. The Los Angeles County Metropolitan Transportation Authority may establish procedures for the submission of bids by electronic means as permitted by section 1601 of the Public Contract Code.
 6. Subject to the Los Angeles County Metropolitan Transportation Authority's power to reject all bids, the Los Angeles County Metropolitan Transportation Authority shall make the award to the lowest responsive and responsible bidder.
 7. If the bid from the lowest responsive and responsible bidder exceeds available funds, the Los Angeles County Metropolitan Transportation Authority may elect not to award the contract at the bid price and may negotiate with the lowest responsive and responsible bidder to obtain a contract price within available funds. If at the completion of the negotiation the Los Angeles County Metropolitan Transportation Authority elects to award the contract at the negotiated price, it shall award the contract pursuant to subsection d.6 of this section.

e. The Los Angeles County Metropolitan Transportation Authority may purchase goods, equipment and materials from a public auction sale, including online public auctions, using the procedures established for all other participants in the auction.

SECTION XXX. Section {20237} is added to the Public Contract Code, to read:

{20237}. Commercial Procurements

a. A “commercial item” is: (i) an item, other than real property, generally available in commercial quantities, that is customarily used by the public or non-governmental entities for other than governmental purposes and has been or is offered for sale, lease or license to the public, or (ii) services offered or provided competitively in substantial quantities in the commercial marketplace based on established catalog or market pricing for specific tasks or outcomes to be achieved and under standard commercial terms and conditions.

b. Notwithstanding any other provision of this Act, the Los Angeles County Metropolitan Transportation Authority may employ the simplified procedures authorized in this Section for the acquisition of commercial items estimated at the time of the solicitation to not exceed a total price of \$5,000,000.

c. The Los Angeles County Metropolitan Transportation Authority’s solicitation shall contain a clear, accurate and complete description of the commercial items to be procured. When evaluation factors are used in solicitation of commercial items, the Los Angeles County Metropolitan Transportation Authority shall evaluate offers in accordance with the criteria contained in the solicitation.

d. The Los Angeles County Metropolitan Transportation Authority shall request fixed prices in its acquisition of commercial items. Fixed prices requested may include fixed unit prices for one or more commercial items. Requirements, indefinite delivery, indefinite quantity and similar forms of contracting may be used. Where commercial items will be ordered and delivered in multiple deliveries over the term of the contract, the fixed prices may include provisions for economic price adjustments.

e. The Los Angeles County Metropolitan Transportation Authority shall use commercially reasonable methods of providing notice to potential bidders. Among other methods of providing public notice, the Los Angeles County Metropolitan Transportation Authority may advertise through its website, other appropriate websites, by or advertising or notice through other appropriate electronic media.

f. Provided that commercial items are sold in a competitive market in sufficient quantities, the Los Angeles County Metropolitan Transportation Authority may establish price reasonableness of bids for commercial items based on catalog pricing offered to other customers of the bidder or by other commercially reasonable methods of

establishing fair and reasonable prices. A separate cost and price analysis for items purchased using the procedures set forth in this sub-section shall not be required.

g. In any procurement pursuant to this section, proposers may propose more than one product that will meet the Los Angeles County Metropolitan Transportation Authority's specifications. The Los Angeles County Metropolitan Transportation Authority shall evaluate each proposed item as a separate offer.

h. In making its determination whether to procure a commercial item, the Los Angeles County Metropolitan Transportation Authority may evaluate and consider the past performance of each bidder and each competing commercial item being proposed.

SECTION XXXX. Section {20238} is added to the Public Contract Code, to read:

{20238} Simplified Procurements

a. Notwithstanding any other provision of this Act, the Los Angeles County Metropolitan Transportation Authority may employ the simplified procedures authorized in this Section for the acquisition of items constituting Small Purchases. Small Purchases are purchases estimated at the time of the solicitation to not exceed a total price of \$100,000. The initial maximum threshold of \$100,000 for Small Purchases shall be adjusted annually at the same rate of change as the **[DESIGNATE AN INDEX]**. The Los Angeles County Metropolitan Transportation Authority's Small Purchase procedures shall require at a minimum that:

1. The price or rate quotes be solicited from an adequate number of qualified sources;
2. At least two quotations shall be received; and
3. The solicitation be sufficiently documented to establish that the price paid was fair and reasonable.

b. Notwithstanding any other provision of this Act, the Los Angeles County Metropolitan Transportation Authority may employ the simplified procedures authorized in this Section for the acquisition of items constituting Micro Purchases. Micro Purchases are purchases estimated at the time of the solicitation to not exceed a total price of \$2,500. Micro Purchases may be made without obtaining a competitive quote. Documentation of Micro Purchases shall be sufficient to show that the price paid was fair and reasonable.

c. Small Purchases and Micro Purchases may be made using a Los Angeles County Metropolitan Transportation Authority authorized purchase card, other similar electronic commercial media or other commercially reasonable small purchase methods that meet the requirements of this section.

SECTION XXXX. Section {20239} is added to the Public Contract Code, to read:

{20239} Non-Competitive Procurements

Non-competitive procurements are procurements made through a solicitation of a proposal from only one source, either initially or after solicitation of a number of sources, and the Los Angeles County Metropolitan Transportation Authority determines competition to be inadequate. Non-competitive procurements shall not be required to observe provisions applicable to competitive procurements related to notice and advertising. The Los Angeles County Metropolitan Transportation Authority may use a non-competitive procurement when award of a contract under the procedures set forth in sections {20236}, {20237} and {20238} of this Article is determined in writing by the Chief Executive Officer or his or her delegate to not be in the best interest of the Los Angeles County Metropolitan Transportation Authority and that one of the following reasons for a non-competitive procurement exists:

- a. A public calamity, such as fire, earthquake, flood, storm, epidemic, terrorist activity or other disaster has caused a need for the immediate receipt of goods or services to avoid or alleviate damage to property, or to replace, repair or restore damaged or destroyed property, including equipment or facilities, necessary to provide essential public transportation services or to take other immediate remedial measures, and the immediate need for the goods or services will not permit a delay resulting from a competitive solicitation.
- b. The service is a regulated utility service and there is no competition.
- c. The goods, services, equipment or construction will be obtained from or performed by any other state, local or federal entity or agency.
- d. The item to be purchased is:
 1. Prototype equipment or a modification of existing equipment and the purpose of the procurement is to conduct an evaluation or operational testing;
 2. An existing used, unique and not generally available item of equipment, and the purchase of a similar new or untested item of equipment would not be cost effective.
- e. The item is available from only one responsible source and no other type of supplies, services or equipment will satisfy the Los Angeles County Metropolitan Transportation Authority's requirements.
- f. The contract is a follow-on contract for the continued development or production of a system or specialized equipment, or a major component, and it would not be cost

effective or in the best interest of the Los Angeles County Metropolitan Transportation Authority to award to any other source either because there would be:

1. Substantial duplication of cost to the Los Angeles County Metropolitan Transportation Authority due to duplication of work and other inefficiencies that could not be recovered through competition; or
 2. Material delays in fulfilling the Los Angeles County Metropolitan Transportation Authority's requirements.
- g. After a solicitation of a number of sources, there is inadequate or no competition.
- h. The item is a capital maintenance item that can be procured only from the original manufacturer or supplier of the item.
- i. In accordance with an existing written Los Angeles County Metropolitan Transportation Authority standardization program only specified makes and models of technical equipment and parts will meet the needs for additional units or replacement items, and only one source is available.

SECTION XXXX. Section {20240} is added to the Public Contract Code, to read:

{20240} Reverse Auctions

- a. For purposes of this section, "reverse auction" means a competitive solicitation process for fungible goods or services in which vendors compete against each other online over the Internet in real time in an open and interactive bidding environment.
- b. Notwithstanding any bidding provisions of this Article to the contrary, the Los Angeles County Metropolitan Transportation Authority may use reverse auctions in its acquisition of goods and services.
- c. The Los Angeles County Metropolitan Transportation Authority shall require vendors to register before the reverse auction opening date and time, and as part of the registration, agree to any terms and conditions and other requirements of the solicitation.
- d. The Los Angeles County Metropolitan Transportation Authority may require vendors to be pre-qualified by the Los Angeles County Metropolitan Transportation Authority prior to placing bids in a reverse auction.
- e. The Los Angeles County Metropolitan Transportation Authority shall include in the description of its reverse auction solicitation process an adequate specification of the goods or services being acquired, an opening date and time when real-time electronic bids may be accepted, and a designation of the closing date and time.

- f. The Los Angeles County Metropolitan Transportation Authority's bid process shall;
1. Allow bidders to post all bids made pursuant to this section electronically on the Internet;
 2. Cause bids to be updated on a real-time basis; and
 3. Allow registered bidders at any time during the time bids may be accepted to lower the amount of their bid below the lowest bid then posted.

Section XXXX) Section 130051.9 of the Public Utilities Code is amended to read:

130051.9

a) The Los Angeles County Metropolitan Transportation Authority shall appoint a full-time chief executive officer who shall act for the authority under its direction and perform those duties delegated by the authority.

(b) The chief executive officer shall be appointed to a term of four years and shall be removed from office only upon the occurrence of one or both of the following:

(1) A two-thirds majority of the members of the authority votes for removal.

(2) The chief executive officer violates a federal or state law, regulation, local ordinance, or policy or practice of the authority, relative to ethical practices, including, but not limited to, the acceptance of gifts or contributions.

(c) The chief executive officer shall approve and award all contracts ~~for construction~~, and that approval shall be are based upon the lowest responsible and responsive bid submitted.

(d) The Los Angeles County Metropolitan Transportation Authority shall appoint a general counsel and board secretary.

Public Utilities Code Section 130051.20.

(a)

(1) No construction company, engineering firm, consultant, legal firm, or any company, vendor, or business entity seeking a contract with the Los Angeles County Metropolitan Transportation Authority shall give to a member, alternate member, or employee of the authority, or to any member of their immediate families, a contribution of over ~~ten~~ *one hundred* dollars (\$100) in value or amount. A "contribution" includes contributions to candidates or their committees in any federal, state, or local election.

(2) Neither the owner, an employee, or any member of their immediate families, of any construction company, engineering firm, consultant, legal firm, or any company, vendor, or business entity seeking a contract with the authority shall make a contribution of over ~~ten~~ *one hundred* dollars (\$100) in value or amount to a member, alternate member, or employee of the authority, or to any member of their immediate families.

(3) No member, alternate member, or employee of the Los Angeles County Metropolitan Transportation Authority, or member of their immediate families, shall accept, solicit, or direct a contribution of over ~~ten~~ *one hundred* dollars (\$100) in value or amount from any construction company, engineering firm, consultant, legal firm, or any company, vendor, or business entity seeking a contract with the Los Angeles County Metropolitan Transportation Authority.

(4) No member, alternate member, or employee of the Los Angeles County Metropolitan Transportation Authority shall make or participate in, or use his or her official position to influence, a contract decision if the member, alternate member, or employee has knowingly accepted a contribution of over ~~ten~~ *one hundred* dollars (\$100) in value in the past four years from a party, participant, or its agent, involved in the contract decision.

(5) No member, alternate member, or employee of the authority, or member of their immediate families shall accept, solicit, or direct a contribution of over ~~ten~~ *one hundred* dollars (\$100) in value or amount from a construction company, engineering firm, consultant, legal firm, or any company, vendor, or business entity that has contracted with the authority in the preceding four years.

(6) If a member or employee who receives a contribution, which would otherwise require disqualification from participation in a contract decision under this Section, returns the contribution prior to voting and within 30 days after he/she knows or should have known about the contribution and the proceeding involving the contract decision, he/she shall be qualified to participate in the contract decision, license, permit or entitlement for use.

(7) Provided proper notice of a meeting has been provided to those board members who are not present at a board meeting, if a quorum of members qualified to vote is not present, then members who are otherwise disqualified may be randomly chosen from among those members present in sufficient quantity to achieve the minimum number of votes necessary for action to be taken and those chosen members may vote notwithstanding disqualification under Public Utilities Code Section 130051.20 or 130700, Government Code Section 84308, and any other laws which disqualify Los Angeles County Metropolitan Transportation Authority board members from participating in a contract decision.

(8) "Member" shall include all members of the Los Angeles County Metropolitan Transportation Authority board of directors and persons seeking election to an office that is required to serve as an officio member on the Los Angeles County Metropolitan Transportation Authority board of directors.

(b) A member, alternate member, or employee of the authority who has participated as a decision maker in the preparation, evaluation, award, or implementation of a contract and who leaves the authority shall not, within the later of three years after his or her last participation related to such contract or one year after leaving the authority, accept

employment with any company, vendor, or business entity that was awarded a contract as a result of his or her participation, evaluation, award, or implementation of that contract.

Section XXXX) Amend Section 130700 (c) of the Public Utilities Code as follows:

130700. (a) Board members or their staff shall not participate in a Los Angeles County Metropolitan Transportation Authority decision in which they know or have reason to know that they have a financial interest.

(b) Board members shall not be purchasers at any sale, or vendors at any purchase, that is made personally by that member.

(c) An individual is deemed to have a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on that individual or the individual's immediate family, distinguishable from its effect on the public generally, or on any of the following:

(1) Any business entity in which the board member or staff member has a direct or indirect investment worth one thousand dollars (\$1,000) or more. *This amount shall be adjusted consistent with the amount in Government Code Section 87103(a) as amended from time to time.*

(2) Any real property in which the board member or staff member has a direct or indirect interest worth one thousand dollars (\$1,000) or more. *This amount shall be adjusted consistent with the amount in Government Code Section 87103(b) as amended from time to time.*

(3) Any source of income, other than gifts and other than loans by a commercial lending institution made in the regular course of business in terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by, or promised to the board member or staff member within 12 months prior to the time when the decision is made. *This amount shall be adjusted consistent with the amount in Government Code Section 87103(c) as amended from time to time.*

(4) Any business entity in which the board member or a member of his or her staff is a director, officer, partner, trustee, or employee, or holds any position of management.

(5) Any donor or, or any intermediary of, agent for a donor of a gift or gifts aggregating two hundred eighty-nine dollars (\$289) or more in value provided to, received by, or promised to, the board member or staff member within 12 months prior to the time the decision is made. *This amount shall be adjusted consistent with the amount in Government Code Sections 87103(e) and 89503 as amended from time to time.*

(d) This section does not prohibit a board member from participating in a decision if that participation is legally required in order for the decision to be made. In that case the individual shall disclose the nature of his or her interest before he or she participates in the decision. For the purposes of this subdivision, the fact that a board member's vote is necessary to break a tie does not make his or her participation legally required.