



EXECUTIVE MANAGEMENT AND AUDIT COMMITTEE
May 19, 2004

SUBJECT: CONTRACTOR PRE-QUALIFICATION

ACTION: RECEIVE AND FILE THE CONTRACTOR
PRE-QUALIFICATION ORDINANCE

RECOMMENDATION

Receive and file the attached ordinance regulating the MTA's contractor pre-qualification program at the May Board meeting and adopt it at the next meeting.

ISSUE

Public Utilities Code §130051.21 requires the MTA to have a program to pre-qualify contractors seeking to do business with the MTA. After the enactment of §130051.21 in 1996, the MTA operated its pre-qualification program pursuant to administrative regulations adopted by MTA staff. The MTA Administrative Code, adopted by the Board of Directors in August 2003, contains a Chapter 4-05, providing some basic rules regarding contractor pre-qualification. However, when the Administrative Code was presented for Board consideration, we indicated that Chapter 4-05 was proposed essentially as a place holder, and that a more comprehensive pre-qualification ordinance would be proposed at a later date. The attachment is the more comprehensive ordinance which was promised. It has been reviewed and approved by the Inspector General, Procurement, and the Pre-Qualification Manager within Internal Audit.

The law requires that an ordinance not be approved at the first meeting where it is presented to the Board for consideration. Therefore, this ordinance is being presented as a "receive and file" item this month and will be represented for final consideration at a subsequent meeting.

POLICY IMPLICATIONS

The proposed ordinance generally follows the existing procedures for the pre-qualification of contractors. However, a few elements have been added to help clarify and/or streamline the process. The ordinance allows the use of different forms of pre-qualification questionnaire, each tailored to the type of contract being sought by the potential contractor. It specifically calls for an abbreviated form of questionnaire for subcontractors. The ordinance exempts from pre-qualification contracts not reasonably expected to exceed \$100,000 in value. It also exempts specific categories of contracts for which pre-qualification provides no significant benefit to the MTA.

Examples are purchases of items at retail from department and home improvement stores, purchases from providers which do not provide a warranty other than the manufacturer's warranty and which have no continuing obligation for repair, real estate purchases, and purchases of sole source items where not procuring the item is not a viable alternative. In order to allow for budget curtailments related to pre-qualification, the ordinance exempts subcontractors at the second tier or below from pre-qualification unless the MTA determines that pre-qualification is needed for a particular subcontractor. The ordinance also details the mandatory and permissive bases for the denial of pre-qualification. Finally, the ordinance provides detail as to the appeal process available to potential contractors who have been denied pre-qualification.

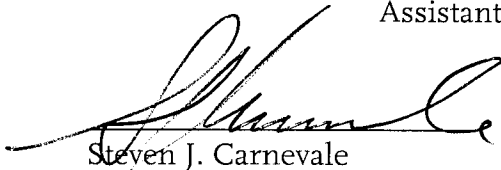
ALTERNATIVES CONSIDERED

The MTA could continue with a very basic pre-qualification ordinance, or no ordinance at all, and rely on administrative procedures to guide the pre-qualification program. However, we believe it is important that the rules guiding the program be Board adopted and contain a reasonable amount of detail so that MTA staff and potential contractors are made fully aware of the program requirements. In addition, a variety of procedures different from those in the proposal could be enacted. However, the proposal offers a reasonable program, which is consistent with the law, and which streamlines the program in a manner consistent with MTA budget reduction efforts. The proposal has been reviewed by the MTA Inspector General and by the various MTA departments with some responsibility for pre-qualification or procurement, and has been approved by each of them.

FINANCIAL IMPACT

The aspects of the ordinance which reduce the scope of the pre-qualification program will result in some modest budget savings. The remaining portions of the ordinance should have no significant direct financial impact.

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ATTACHMENT: Proposed Contractor Pre-Qualification Ordinance

ATTACHMENT

AN ORDINANCE AMENDING TITLE 4, CONTRACTING, OF THE MTA ADMINISTRATIVE CODE RELATING TO THE PRE-QUALIFICATION OF PROSPECTIVE CONTRACTORS.

Be it ordained by the Board of Directors of the Los Angeles County

Metropolitan Transportation Authority:

SECTION 1: Chapter 4-05 of the MTA Administrative Code is repealed and replaced to read as follows:

4-05-010 Purpose. The purpose of this chapter is to establish rules and procedures for the contractor pre-qualification program of the MTA authorized by Public Utilities Code §130051.21.

4-05-020 Objective and Scope of Pre-Qualification Program. The objective of the pre-qualification program is to make a preliminary assessment of the integrity and responsibility of business entities seeking to do business with the MTA. A determination of pre-qualification allows the business entity which has been pre-qualified to proceed with the procurement process in seeking a contract with the MTA. The pre-qualification of a business entity does not preclude the MTA from making a further responsibility determination as a part of the procurement process. During any period for which pre-qualification has been denied, the business entity may not compete for or otherwise seek a contract with the MTA.

4-05-030 Definitions. The following terms, whenever used in this chapter, shall be construed as defined in this section:

A. “Business Entity” means a construction company, engineering firm, consultant, legal firm, product vendor, and any other business entity seeking a contract with the MTA for the furnishing of goods or services.

B. “Certificate of Pre-Qualification” refers to the written notification granting pre-qualification to a business entity which has applied to the MTA for such status.

C. “Contract Value Threshold” means in excess of one hundred thousand dollars (\$100,000) in total expenditures by the MTA under one contract and any amendments thereto.

D. “Executive Review Committee” or “ERC” means a panel of at least three MTA employees serving in management positions appointed by the Chief Executive Officer as a committee to adjudicate an appeal of a denial of pre-qualification made by the Pre-Qualification Manager. Executive Review Committee or ERC also means any retired Superior Court Judge appointed by the Chief Executive Officer in lieu of a panel of MTA employees as authorized by paragraph D. of section 4-05-040.

E. “Notice of Denial of Pre-Qualification” refers to the written notification issued to a business entity which has applied to the MTA for pre-qualification that the business entity has been denied pre-qualification.

F. “Pre-Qualification” refers to a determination made by the MTA that a business entity has demonstrated sufficient integrity and responsibility to be permitted to be considered for a contract with the MTA. It also includes any validation process whereby a previously pre-qualified business entity updates its pre-qualification file for a

specific contracting opportunity.

G. “Pre-Qualification Manager” means the MTA employee who has been designated by the Chief Executive Officer as the administrative manager of the MTA contractor pre-qualification program.

4-05-040 Administrative Oversight of Pre-Qualification Program.

A. The Chief Executive Officer, in consultation with the Inspector General, is responsible for the administrative oversight of the pre-qualification program.

B. The Chief Executive Officer is authorized to prepare procedures consistent with this chapter as needed to implement the pre-qualification program.

C. The Chief Executive Officer shall assign responsibility for the day to day administrative management of the pre-qualification program to an MTA management employee who will serve as Pre-Qualification Manager.

D. The Chief Executive Officer shall appoint a panel of at least three management level employees of the MTA to serve as the Executive Review Committee to adjudicate appeals by business entities from denials of pre-qualification. The Chief Executive Officer may appoint a separate ERC for each appeal or may appoint one ERC to serve for a specified period of time to hear appeals filed during that period. If the Chief Executive Officer determines for any reason that it would not be efficient to have a panel of MTA employees serve as the Executive Review Committee for any particular appeal, the Chief Executive Officer may appoint a retired Superior Court Judge to serve in lieu of the panel of MTA employees. Any reference in this chapter to an Executive

Review Committee or to an ERC shall also be a reference to a Superior Court Judge appointed pursuant to this paragraph.

4-05-050 Pre-Qualification Questionnaire.

A. The MTA Inspector General, in consultation with the Pre-Qualification Manager, shall prepare pre-qualification questionnaires to be used in the MTA pre-qualification program. Different forms of the questionnaire, each tailored to the type of contract being sought, may be developed.

B. At a minimum, each pre-qualification questionnaire shall seek information from the business entity regarding the following:

1. The experience of the business entity;
2. The quality and timeliness of the past performance of the business entity when contracting with the MTA or other agencies for similar work;
3. The reliability and responsibility of the business entity;
4. The business entity's compliance with equal employment requirements;
5. The business entity's compliance with wage, hours, and other fair labor standards;
6. The subcontractors to be used by the business entity;
7. The integrity of the key personnel of the business entity; and
8. Any gifts given, or contributions made, by or on behalf of the business entity to members of the MTA Board of Directors or to MTA employees.

C. The questionnaire used in the pre-qualification program may seek information in addition to that described in paragraph B. However, in order to ensure that the pre-qualification program operates in as efficient a manner as possible consistent with the program objectives, information in addition to that required under paragraph B may be sought only if it is reasonably required to make a determination of integrity and responsibility relevant to the goods or services the business entity is likely to provide to the MTA if awarded a contract. The questionnaire used for the pre-qualification of a business entity whose services to the MTA will be as a subcontractor to another entity contracting directly with the MTA shall be in an abbreviated format which supports an expedited pre-qualification process, but which still provides the MTA with the information necessary to make a reasonable assessment regarding the integrity and responsibility of the business entity. Provided, however, any business entity may be required to complete any form of pre-qualification questionnaire if the MTA, in its sole discretion based upon the available information, determines that a more intensive than normal pre-qualification review is necessary for any particular business entity or any particular contract.

4-05-060 Completion of Pre-Qualification Questionnaire. Except as otherwise exempted by this chapter, each business entity seeking a contract with the MTA which, at the time of initial award, is reasonably expected to exceed the contract value threshold shall complete a pre-qualification questionnaire prepared as set forth in section 4-05-050.

4-05-070 Exceptions to Pre-Qualification Program. For certain solicitations, because of the nature of the goods or services to be obtained, the nature of the business relationship between the MTA and the business entity, or because of exigent circumstances, there is insufficient advantage to the MTA to justify the expenditure of the resources necessary to conduct a pre-qualification. The types of procurements or types of business entities described in paragraphs A through J of this section are found to be procurements of this nature and pre-qualification is not required:

A. Media or advertising contracts, including artists hired on a one-time basis to provide pictorial representation of MTA property;

B. The purchase of goods from a department store or a home improvement store where:

1. The store make the same goods available to the general public; and
2. The terms and prices for the MTA are no less favorable than the terms and prices available to the general public;

C. The purchase of goods from a business entity if that business entity will:

1. Have no legal obligation to warrant the goods sold, other than to pass on the manufacturer's warranty; and
2. Have no obligation after the sale to provide any maintenance or repairs for the goods sold;

D. Licensing and multiple-user agreements with software companies for existing software;

E. Purchases of off-the-shelf computer software provided the seller does not enter into a contract for continuing maintenance or enhancements of the software program;

F. Real estate purchase contracts, leases, licenses or other similar kinds of agreements;

G. Goods or services for which there is only one known source if not obtaining such goods or services is not a reasonable option for the MTA;

H. Emergency expenditures in case of public calamity pursuant to Public Utilities Code §130234; and

I. Expenditures for immediate remedial measures pursuant to Public Utilities Code §130235.

J. A business entity whose relationship with the MTA will be as a subcontractor at the second tier or below. Nothing herein prevents the MTA from requiring any subcontractor at any level to obtain pre-qualification if the MTA, in its sole discretion based upon the available information, determines that pre-qualification of that subcontractor is in the best interest of the MTA.

4-05-080 Mandatory Denial of Pre-Qualification. A business entity shall be denied pre-qualification if the evidence supports a finding as to any of the following:

A. The business entity, or any of its officers or principal owners, are currently debarred by a federal, state or local public authority;

B. The business entity has knowingly submitted false information on the pre-qualification questionnaire or in response to any follow-up inquiries from the MTA; or

C. The business entity has declined to submit to the MTA information requested by the Pre-Qualification Manager as part of the pre-qualification process.

4-05-090 Permissive Denial of Pre-Qualification. The MTA may, in its sole discretion, deny pre-qualification to a business entity or any of its planned subcontractors, if the evidence supports a finding as to the business entity or as to a subcontractor, or their principals or officers, of any of the following:

A. Commission of civil or criminal fraud in connection with obtaining, attempting to obtain, or performing a public contract, agreement or transaction;

B. Violation of federal or state antitrust statutes, including, but not limited to, those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

C. Commission of embezzlement, theft, forgery, bribery, making false statements, submitting false information, attempting to commit a fraud against the MTA or other public entity, receiving stolen property, making false claims to any public entity, obstructing justice or fraudulently obtaining public funds;

D. Violation of federal guidelines for disadvantaged business entity status including, but not limited to, a violation of 49 CFR part 26 *et seq.*, or misrepresenting minority or disadvantaged business entity status with regard to itself or one of its subcontractors;

E. Conviction for non-compliance with the prevailing wage requirements of the California labor law, or similar laws of any other state;

F. Violation of any law, regulation or agreement relating to a conflict of interest with respect to a government funded procurement;

G. Falsification, concealment, withholding and/or destruction of records relating to a public agreement or transaction;

H. Commission of any act or omission, or engaging in a pattern or practice, which tends to demonstrate that the business entity lacks the quality, fitness or capacity to perform a contract with the MTA, including, but not limited to, deficiencies in on-going contracts, false certifications or statements, fraud in performance or billing, or the lack of the financial resources necessary to perform contractual obligations;

I. Indictment or conviction for an offense which indicates a lack of business integrity or business honesty;

J. Willful failure to perform in accordance with the terms of one or more contracts;

K. Violation of a statutory or regulatory provision or requirement applicable to a public or private agreement or transaction;

L. Performance or conduct on one or more private or public agreements or transactions in a manner which negatively impacts or threatens the health or safety of the business entity's employees, the employees of any other entity involved with the transaction, the general public or any real property;

M. Knowingly has entered into a business relationship with a business entity while that entity was debarred by the MTA;

N. Violation of MTA policy regarding a drug-free workplace;

O. Violation of any non-discrimination laws or provisions included in any public agreement or transaction;

P. Violation of any labor laws, including, but not limited to, child labor violations, failure to pay wages, failure to pay into a trust account, failure to remit or pay withheld taxes to tax authorities or unemployment insurance tax delinquencies;

Q. Violation of a licensing, sub-letting or subcontractor-listing law;

R. Failure to comply with California corporate registration, federal, state and local licensing requirements;

S. Violation of a material provision of any settlement or a denial of pre-qualification or validation action;

T. A history of failure to perform, or of unsatisfactory performance of one or more contracts including, without limitation, default on contracts with the MTA or another public agency;

U. Has had its corporate status, business entity's license or any professional certification, suspended, revoked, or has otherwise been prohibited from doing business in the State of California in the past three years;

V. Has undisputed or finally adjudicated and unresolved tax liens with federal, state or local taxing authorities; or

W. Any other cause so serious or compelling in nature that it affects the present responsibility of the business entity, the quality of its work, and/or its fitness or capacity to perform on a contract with the MTA.

4-05-100 Investigations, Determinations and Referrals.

A. The Pre-Qualification Manager shall review the available information related to each business entity seeking pre-qualification and may conduct such further investigation as he or she deems necessary. MTA officials having information regarding a business entity they know to be seeking pre-qualification where such information is reasonably likely to bear on the pre-qualification determination shall promptly provide such information to the Pre-Qualification Manager for consideration.

B. Based upon all of the information obtained by the Pre-Qualification Manager, the Pre-Qualification Manager shall make a determination consistent with this chapter and any procedures adopted pursuant to section 4-05-040 as to whether a business entity seeking pre-qualification shall be granted pre-qualification.

C. If information obtained during the pre-qualification process is of a sufficiently serious nature to warrant further investigation and possible action beyond the denial of pre-qualification, the Pre-Qualification Manager shall refer the matter to the Inspector General, the General Counsel and/or other appropriate official for possible debarment or suspension under chapter 4-10.

D. The Office of the General Counsel shall advise and assist the Pre-Qualification Manager in reviewing for legal sufficiency any prospective denial of Pre-

qualification and the notice of denial, and for providing any necessary coordination with MTA staff regarding legal issues that may arise during the pre-qualification review process.

E. All actions of the Pre-Qualification Manager pursuant to this chapter shall be considered to be actions with the course and scope of the Pre-Qualifications Manager's employment with the MTA and shall be subject to the protections for public employees set forth in Division 3.6 of the Government Code.

4-05-110 Certificate of Pre-Qualification. Upon a finding that a business entity is approved for pre-qualification, the Pre-Qualification Manager shall promptly provide that business entity with a certificate of pre-qualification.

4-05-120 Notice of Denial of Pre-qualification.

A. If the Pre-Qualification Manager denies pre-qualification a notice shall be promptly given by letter to the business entity.

B. Such notice, or any other notice authorized or required by this chapter, shall be deemed sufficient notice if served personally or by mail by any of the means authorized by California Code of Civil Procedure §§ 1012 and 1013. Any attempt by a business entity to avoid service shall not prevent the denial of pre-qualification from becoming effective as of the date the MTA attempts notice as set forth in this paragraph.

4-05-130 Effect of Pre-Qualification Denial.

A. A denial of pre-qualification for a business entity shall constitute a denial of the right to obtain or compete for a contract with the MTA, including contracts below

the contract value threshold, until such time as the business entity is granted pre-qualification. Whether a denial of pre-qualification will extend to every division or other organizational element of the business entity will depend upon the structure of the business entity. However, if the application for pre-qualification is not limited to specific divisions or organizational elements of the business entity, a denial of pre-qualification shall apply to all affiliates, divisions, organizational elements.

B. A denial of pre-qualification to a particular business entity for a particular solicitation shall not necessarily result in the suspension or deferral of the solicitation schedule, regardless of whether an appeal from a denial of pre-qualification has been filed. Any suspension or deferral of the solicitation schedule will be within the sole discretion of the MTA's procurement management.

C. A denial of pre-qualification for a business entity then under contract with the MTA, where the denial of pre-qualification is based upon evidence which could support a cause for debarment under section 4-10-070, shall result in an immediate review of the status of that business entity's existing contracts with the MTA to determine whether action under chapter 4-10 is appropriate.

D. A denial of pre-qualification shall extend for an indefinite period of time unless the denial is overturned through an appeal under this chapter. A business entity subject to a denial of pre-qualification may again apply for pre-qualification after six months have elapsed from the date of notice of denial of pre-qualification, or at any time upon a showing of changed circumstances.

4-05-140 Appeal of Pre-Qualification Denial.

A. Any business entity that has been issued a notice of denial of pre-qualification may appeal that decision to the ERC. The appeal letter, together with all supporting documentation shall be submitted to the Pre-Qualification Manager within ten (10) working days of receipt of the notice of denial of pre-qualification.

B. If a business entity which has been served with a notice of denial of pre-qualification fails to file a timely written appeal as described in this section, the denial of pre-qualification shall become final.

4-05-150 Executive Review Committee. The ERC hears appeals of denials of pre-qualification. Each person serving as a member of the ERC pursuant to this chapter shall be considered to be acting within the course and scope of employment with the MTA for such service and shall be subject to the protections for public employees set forth in Division 3.6 of the Government Code.

4-05-160 Hearing Procedures.

A. The ERC shall have the power to review and/or hold a hearing on any appeal received from a business entity that has been denied pre-qualification. The ERC may only affirm or reverse the denial decision of the Pre-Qualification Manager.

B. For a denial of pre-qualification for a reason set forth in section 4-05-080, the decision of the ERC shall be limited to a determination as to whether there is factual support for the finding of at least one of the mandatory causes for denial of pre-qualification. For a denial of pre-qualification under section 4-05-090 the decision of the

ERC shall be based upon its independent judgment as to whether one or more of the permissive bases for denial of pre-qualification has been established and, if so, whether it constitutes sufficient reason for the MTA to decline to do business with the business entity.

C. The Business Entity may elect to waive its right to a hearing and rely solely on a written response. If the Business Entity elects in its appeal to waive a hearing, such a waiver must be clearly stated in its appeal. The ERC will set the dates for the submission of written materials and, if a hearing is requested, will set the time and date for the hearing.

D. In each appeal, the Pre-Qualification Manager shall present the reasons for denial of pre-qualification and the evidence supporting that determination. The business entity will then be provided an opportunity to submit relevant evidence challenging the determination of the Pre-Qualification Manager. If there is a hearing on the appeal, the hearing will be conducted in an informal manner, but may be recorded for the sole use of the ERC in preparation of its decision.

E. The ERC shall perform no independent collection of evidence and shall render a decision based solely on the evidence submitted by the Pre-Qualification Manager and the business entity. In conducting the hearing the ERC shall follow evidence rules similar to those described in section 4-10-170. The ERC may take judicial notice of common, uncontroverted facts.

F. The decision of the ERC is the final decision of the MTA. The business entity may seek judicial review of an ERC decision in Los Angeles County Superior Court. The appropriate party respondent in any such action shall be the MTA and not the individual members of the ERC, the Pre-Qualification Manager or any other MTA officer or employee.

G. If the ERC reverses the denial of pre-qualification, the Pre-Qualification Manager shall issue a pre-qualification certificate within fifteen (15) business days from the date of the reversal. If the ERC affirms the denial decision and has notified all interested parties, the Pre-Qualification Manager will take no further action.

H. An appeal from a decision of the ERC which upholds a denial of pre-qualification shall be filed with the time limits set forth in Code of Civil Procedure §§ 1094.5 and 1094.6.

I. Each notice of final denial of pre-qualification after an appeal to the ERC shall include the following statement:

THE MTA HAS REACHED A FINAL DECISION IN THE ADMINISTRATIVE MATTER PENDING BEFORE THE MTA. IF YOU CHOOSE TO SEEK JUDICIAL REVIEW OF MTA'S FINAL DECISION, SUCH ACTION MUST BE INITIATED IN ACCORDANCE WITH CODE OF CIVIL PROCEDURE §§1094.5 AND 1094.6. IT IS YOUR SOLE RESPONSIBILITY TO TAKE WHATEVER ACTION AND TO OBTAIN WHATEVER ADVICE YOU DEEM APPROPRIATE IN RESPONSE TO THIS NOTICE.

SECTION 2:

Publication of Ordinance. Upon adoption, this Ordinance shall be signed by the Chair of the Board of Directors of the Los Angeles County Metropolitan Transportation Authority. The Board Secretary shall cause the publication of this Ordinance once, within fifteen days of its adoption, in a newspaper of general circulation printed and published within the area served by the Los Angeles County Metropolitan Transportation Authority and the Board Secretary shall attest to such adoption and publication of this Ordinance.

Dated: _____

Chair, Board of Directors

Date Adopted by Board of Directors:

Date Published:

Attested to:

Dated: _____

Board Secretary

