



Staff Report Item 13

TO: East Bay Community Energy Board of Directors
FROM: Leah Goldberg
SUBJECT: Change to Administrative Procurement Policy
DATE: January 16, 2019

Recommendation

Adopt a Resolution to amend the Administrative Procurement Policy to remove section 5.iv, relating to race and gender conscious preferences.

Background and Discussion

On February 7, 2018, the Board approved a resolution adopting an Administrative Procurement Policy. The policy was amended and restated on July 18, 2018. Both versions of the policy sought to support diversity among EBCE contractors by allowing for bonus points to be awarded during the RFP and RFQ process to contractors who are “women, minority, disabled veteran, and lesbian, gay, bisexual, and transgender owned”.

The current Administrative Procurement Policy states:

“5.i. EBCE seeks to support companies and contractors that reflect its values, and has identified three vendor/contractor categories that shall be given special consideration during bid evaluation and selection. In competitive solicitations, these categories shall receive bonus percentages/points ranging from 2.5% - 5% for a maximum bonus total of 10% in a bid scoring process...

5.iv. EBCE desires to support diversity among its contractors and vendors by working with women, minority, disabled veteran, and lesbian, gay, bisexual, and transgender-owned businesses. Businesses owned and

operated by a person representing one or more of these categories shall receive a bonus equal to 2.5% or 2.5 points out of a 100-point scoring system in competitive solicitations.”

Analysis

There are two problems with providing scoring credit for diversity. The first problem is that it is difficult to establish that a vendor/consultant/contractor qualifies. Because employers are not allowed to ask employees about such things as their sexual/gender preferences, few if any bidders have sought to take advantage of the bonus points. More importantly, however, Proposition 209, adopted in California in 1996 prohibits public entities from giving any preferences based on gender or race, unless required to secure Federal funds. Public agencies can of course encourage a wide range of applicants to apply and that is what EBCE will continue to do.

It is in the interest of EBCE to maintain administrative procurement practices that facilitate efficient business operations and provide fair compensation and local workforce opportunities whenever possible, within a framework of high quality, competitive service offerings, while also complying with the laws and regulations. While we will continue to evaluate the ability, potential criteria, and circumstances upon which EBCE can solicit and encourage diversity in the pool of bidders, the Administrative Procurement Policy should be revised so that no race or gender scoring preference will be given during the RFP or RFQ process. EBCE will continue to publicly notice all its solicitations and will continue to encourage companies with diversity hiring practices to apply.

Fiscal Impact

None.

Attachment

- A. Resolution to make changes to the Amended and Restated Administrative Procurement Policy; and
- B. Amended and Restated Administrative Procurement Policy

RESOLUTION NO. __

A RESOLUTION OF THE BOARD OF DIRECTORS
OF THE EAST BAY COMMUNITY ENERGY AUTHORITY
AMENDING THE ADMINISTRATIVE PROCUREMENT POLICY

THE BOARD OF DIRECTORS OF THE EAST BAY COMMUNITY ENERGY AUTHORITY
DOES HEREBY FIND, RESOLVE AND ORDER AS FOLLOWS:

Section 1. EBCE was formed on December 1, 2016, under the Joint Exercise of Power Act, California Government Code sections 6500 *et seq.*, among the County of Alameda, and the Cities of Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Piedmont, Oakland, San Leandro, and Union City to study, promote, develop, conduct, operate, and manage energy and energy-related climate change programs in all of the member jurisdictions.

Section 2. It is in the interest of East Bay Community Energy Authority (“EBCE”) to establish administrative procurement practices that facilitate efficient business operations and provide fair compensation and local workforce opportunities whenever possible within a framework of high quality, competitive service offerings.

Section 3. On February 7, 2018, the Board approved an Administrative Procurement Policy. On July 18, 2018, EBCE adopted an amended and restated Administrative Procurement Policy. Both the original and the amended and restated policies included awarding bonus points to vendor/contractors that were Alameda County based, employed union labor and were owned and operated by women, minorities, disabled veterans, lesbian, gay, bisexual and transgender businesses.

Section 4. Establishing that a vendor/contractor should be awarded the bonus points for diversity has proven difficult and no bidder sought to qualify for the bonus points.

Section 5. The EBCE Administrative Procurement Policy must comply with Federal and State laws and regulations. Proposition 209 in California prohibits race and gender conscious preferences.

Section 6. The Board hereby amends the Administrative Procurement Policy to remove section 5.iv., so that no scoring preference will be given for diversity factors in the RFP or RFQ process. The Board further directs that all EBCE solicitations over \$100,000 be noticed publicly to encourage a diverse and wide range of bidders.

ADOPTED AND APPROVED this _____ day of _____, 2019.

Scott Haggerty, Chair

ATTEST:

Stephanie Cabrera, Secretary

AMENDED AND RESTATED Administrative Procurement Policy**Policy No. 2018-9****July 18, 2018**Purpose:

It is in the interest of East Bay Community Energy (“EBCE”) to establish administrative procurement practices that facilitate efficient business operations and provide fair compensation and local workforce opportunities whenever possible within a framework of high quality, competitive service offerings.

Policy:**1. Public Bidding Requirements:**

- a. EBCE shall issue a Request for Proposals or a Request for Qualifications for the purchase of goods or services in excess of \$100,000 in any given contract year or term. EBCE will run competitive solicitations through the issuance of requests for proposals (“RFPs”) or similar instruments for all non-professional service contracts with a contract value in excess of \$100,000 in any given contract year. These contracts are subject to Board approval before final execution.
- b. For contracts valued between \$50,000 and \$99,999.99, staff shall solicit informal written proposals from at least three providers, if feasible. An informal written proposal consists of a written proposal that includes the provider’s name, address, phone number, professional license number, if applicable, the work to be performed and the amount of the bid. A written proposal may be in an electronic mail format.
- c. For contracts valued between \$10,000 and \$49,999.99, staff shall solicit informal verbal proposals from at least three providers. Staff shall note the three verbal bids by including the providers’ name, address, phone number and amount of the verbal proposal in EBCE’s records.
- d. For contracts valued at less than \$10,000, no formal or informal bids shall be required, but EBCE staff is directed to seek the lowest cost supplies and the highest quality services available.
- e. When procuring goods and services utilizing federal funds (e.g., grant funds), EBCE shall comply with all federal project requirements in securing any goods or services necessary.
- f. The Chief Executive Officer (“CEO”), at his/her discretion, may direct that EBCE solicit competitive solicitations through the RFP process for contracts under \$100,000.
- g. EBCE shall not be required to award a contract to purchase goods or services from the lowest responsible bidder, unless required by California law.

- h. No EBCE employee, official, or director shall split purchases into more than one purchase in order to avoid the competitive solicitation requirements in this policy. Splitting purchases does not allow for a competitive marketplace, increases administrative workflow, and may create ethical issues.
- i. Exceptions to competitive solicitation requirements:
 - i. Sole source purchasing is authorized when the goods or services contemplated are capable of being performed by a sole provider, such as the holder of an exclusive patent or franchise, for purchase of unique or innovative goods or services including but not limited to computer software and technology, or for purchases of goods or services when there is a demonstrated need for compatibility with an existing item or service. A sole source may be designated when it is apparent that a needed product or service is uniquely available from the source, or for all practical purposes, it is justifiably in the best interest of EBCE. Under some circumstances, EBCE competitive solicitation requirements may be dispensed with when the goods or services are only available from one source either because the brand or trade name article, goods, or product or proprietary service is the only one which will properly meet the needs of the EBCE or the item or service is unique and available only from a sole source.

Sole source purchasing shall be an exception to the normal solicitation process and requires a detailed explanation. The following factors shall not apply to sole source requests and shall not be included in the sole source justification: personal preference for product or vendor; cost, vendor performance, and local service (this may be considered an award factor in competitive bidding); features that exceed the minimum requirements for the goods or services; explanation for the actual need and basic use for the equipment, unless the information relates to a request for unique factors.
 - ii. No competitive solicitation, formal or informal bids shall be required for goods or services valued at less than \$10,000 in any one contract term or contract year.
 - iii. No competitive solicitation shall be required to rent or lease equipment.
 - iv. Competitive or informal solicitations shall not be required when the contract, the goods or the services will be provided by another governmental agency. EBCE can rely on the competitive solicitation process provided by another governmental agency providing that that agency's procurement is in compliance with California law.
 - v. In the event of an emergency, the CEO may suspend the normal purchasing and procurement requirements for goods and services related to abatement of the impacts or effects of the emergency.
- j. No EBCE employee, officer, or Director shall accept, directly or indirectly, any gift, rebate, money or anything else of value from any person or entity if such gift, rebate, money or anything of value is intended to reward or be an inducement for

conducting business, placing orders with, or otherwise using the employee's position to secure an agreement with EBCE.

2. Procurement of Supplies:

EBCE shall procure supplies in compliance with the Competitive Solicitation Requirements in Section 1, above. While, EBCE shall not be required to award to lowest responsible bidder, EBCE staff shall seek to purchase supplies at the lowest costs. EBCE is encouraged to jointly procure supplies with other governmental agencies to obtain the lowest cost when possible. In the event one or more EBCE employees are designated as purchasing agents, those individuals shall be included in EBCE's conflict of interest code as persons who must file an annual statement of economic interest.

3. Procurement of Professional Services:

EBCE may contract for professional services, including but not limited to consultant, legal, or design services, in its sole discretion. EBCE shall endeavor to secure the highest quality professional services available. While EBCE shall secure such services in compliance with the Competitive Solicitation Requirements in Section 1, above, awarding a contract for services need not be awarded to the lowest responsible bidder.

4. Executive Management Signing Authority:

- a. The CEO is authorized to enter into contracts of \$100,000 or less without prior Board approval with the stipulation that all new contracts must be reported at the next scheduled Board meeting. This contract limit does not include power supply or wholesale energy services and shall remain in place unless and until amended by the EBCE Board of Directors.
- b. Notwithstanding other express authority in this Administrative Procurement Policy, a member of the EBCE executive level staff consisting of the Chief Operating Officer ("COO"), the General Counsel or a Vice President, at the discretion and approval of the CEO, is authorized to sign professional service agreements and vendor contracts up to \$100,000 as an authorized designee of the CEO, subject to Board reporting requirements outlined above.
- c. The COO is authorized to sign professional service agreements or vendor contracts whose object or purpose is related to the activities or functions of the Office of the COO, up to \$25,000 in total compensation, subject to Board reporting requirements outlined in Subsection a, above.
- d. Any staff Senior Director or Vice President is authorized to sign professional service agreements or vendor contracts whose object or purpose is related to the activities or functions of that Senior Director or Vice President up to \$10,000 in total compensation, subject to Board reporting requirements outlined in Subsection a, above.
- e. Any staff level Director is authorized to sign professional service agreements or vendor contracts whose object or purpose is related to the activities or functions

of that Director up to \$5,000 in total compensation, subject to Board reporting requirements outlined in Subsection a, above.

- f. The General Counsel, or his/her designee, is authorized to sign professional service agreements or vendor contracts whose object or purpose is related to the activities or functions of the Office of the General Counsel up to \$50,000 in total compensation, subject to Board reporting requirements outlined in Subsection a, above. All Legal Services Agreements must be issued through the General Counsel's Office.
 - g. Prior to signing any professional services agreement or vendor contract, the individual signing shall ensure 1) that the contract compensation has been budgeted for in the current EBCE budget 2) that adequate funds have been appropriated by the Board 3) that such funds are unexpended and unencumbered sufficient to pay the expense of the contract, and 4) that the Contract or Professional Services Agreement has been approved as to form and content by the General Counsel or his/her designee.
 - h. In addition, the following authorities shall apply, after review and approval of such Agreements by the General Counsel, or his/her designee and except where in conflict with the Joint Powers Agreement, state or federal law:
 - i. Non-Disclosure Agreements - Director level and above;
 - ii. Banking and Treasury Administration - COO level and above.
 - i. Invoices and vendor payments shall be approved by the contract signee, his/her executive level manager or the COO prior to payment.
 - j. Contract amendments including changes in timeframe, scope, and value shall be subject to Board approval and signing authorities outlined in this Section 4.
 - k. EBCE shall report on all new contracts, regardless of scope or contract value, at each Board meeting. Unless subject to the attorney client privilege or some other legal protection, as a public agency, EBCE shall release all public records, including contracts as applicable, as required by the Public Records Act.
5. Bid Evaluation:
- a. Bids and proposals received through a competitive solicitation shall be subject to a set of criteria and a scoring system, reviewed and evaluated by relevant EBCE staff and an evaluation committee selected by the CEO, COO or General Counsel, or at the discretion of the Board, members of a designated Board subcommittee or the Community Advisory Committee. Bids for contracts received through formal or informal solicitation shall be evaluated based on competency to perform the scope of work, best fit, price competitiveness and compliance with subsections i (Special Procurement Preferences), ii (Alameda County Preference), iii (Union Labor Preference), and iv (Other Preferences) below.
 - i. EBCE seeks to support companies and contractors that reflect its values, and has identified three vendor/contractor categories that shall be given special consideration during bid evaluation and selection. In competitive

solicitations, these categories shall receive bonus percentages/points ranging from 2.5% - 5% for a maximum bonus total of 10% in a bid scoring process.

- ii. EBCE desires to support Alameda County businesses where possible. Businesses with office(s) located in Alameda County and include at least 25% Alameda County residents under their employment shall receive a bonus equal to 5% or 5 points out of a 100-point scoring system in competitive solicitations.
 - iii. EBCE desires to support the use of union labor where possible. EBCE shall make its best effort to work with unionized contractors and subcontractors in the provision of goods and services to EBCE. Businesses who use union labor and/or unionized contractors shall receive a bonus equal to 2.5% or 2.5 points out of a 100-point scoring system in competitive solicitations.
 - iv. EBCE desires to support diversity among its contractors and vendors by working with women, minority, disabled veteran, and lesbian, gay, bisexual, and transgender-owned businesses. Businesses owned and operated by a person representing one or more of these categories shall receive a bonus equal to 2.5% or 2.5 points out of a 100-point scoring system in competitive solicitations.
- b. EBCE is committed to the highest standards of responsible behavior and integrity in all of its business relationships. EBCE will consider a company's business practices, environmental track record, and commitment to fair employment practices and compensation in its procurement decisions.

6. Procurement of Power and Energy Attributes:

EBCE must secure sufficient power resources and energy attributes to serve its customers, comply with State law and meet EBCE's and its member agencies' goals. The Board shall approve the form of all master power purchase agreements. The signing authority in Section 4 shall not apply to power and energy attribute procurement. The following EBCE staff shall be authorized to enter into power purchase agreements and other agreements to secure power and energy attributes providing such agreements are in substantially the same form as the Board-approved master power purchase agreements, and that all transactions and agreements are in strict compliance with EBCE's Risk Management Policy:

- a. The CEO is authorized to enter into agreements in accordance to the approved Risk Management Policy.
- b. The COO is authorized to enter into agreements in accordance to the approved Risk Management Policy provided that transactions shall not be over two years in duration and \$10,000,000 in total compensation.
- c. The Director of Power Resources is authorized to enter into agreements in accordance to the approved Risk Management Policy provided that transactions shall not be over one year in duration and not be over \$2,000,000 in compensation.

- d. With dual signatures, the COO and Director of Power Resources are authorized to enter into agreements with equivalent authority as the CEO in accordance with the approved Risk Management Policy.
7. All Professional Service Agreements, vendor contracts and power procurement agreements must be approved as to the form and content by the General Counsel or his/her designee prior to signature by any authorized individual.