

Date of Hearing: April 25, 2018

ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT

Cecilia Aguiar-Curry, Chair

AB 3177 (Chávez) – As Amended April 16, 2018

SUBJECT: North County Transit District: contracting.

SUMMARY: Repeals provisions of law requiring the North County Transit District (NCTD) to award contracts exceeding \$50,000 for supplies, equipment, and materials to the lowest responsible bidder and, instead, allows NCTD to establish and use a flexible process for these contracts and for service contracts. Specifically, **this bill:**

- 1) Repeals provisions of law requiring NCTD's contracts for the purchase of supplies, equipment, and materials in excess of \$50,000 to be awarded to the lowest responsible bidder after competitive bidding, except in an emergency declared by the vote of two-thirds of the membership of the board.
- 2) Finds and declares that a compelling interest exists in ensuring all federal, state, local, and private moneys available to the district are captured and used in a timely manner.
- 3) Allows the NCTD board, in order to maximize the use of federal, state, local, and private funds, and to maintain a competitive posture in seeking supplemental federal funds, to establish and use a flexible contracting process, consistent with the NCTD Act, to maximize its efficient use of public funds.
- 4) Requires all contracts for the acquisition or lease of materials, supplies, or equipment, except in cases where an item of a specified brand or trade name is the only item that will properly meet the needs of the district or in an emergency declared by the vote of two-thirds of all the members of the board, to be awarded as follows:
 - a) A contract with an expected cost that exceeds \$100,000, as authorized by the board, shall be made or entered into with the lowest responsible bidder that meets the specifications. For purposes of determining the lowest bid, the amount of sales tax shall be excluded from the total amount of the bid.
 - b) A contract with an expected cost that does not exceed \$100,000, shall be made or entered into using a district-approved competitive procurement process. When the expected cost of a contract exceeds \$5,000 and does not exceed \$100,000, the district shall seek a minimum of three quotations, either written or oral, to permit comparison of prices and other terms.
- 5) Requires all contracts for the acquisition of services that are not within a category of services described in existing law governing contracts with private architects, engineering, land surveying, and construction project management firms, except in cases of an emergency declared by a vote of two-thirds of the membership of the board, to be awarded as follows:
 - a) A contract with an expected cost that exceeds \$100,000 shall be made and entered into by soliciting bids in writing and awarding the contract using a district-approved competitive

procurement process, including, but not limited to, a negotiated procurement that may or may not evaluate price as a consideration.

- b) A contract with an expected cost that does not exceed \$100,000 shall be made or entered into using a district-approved competitive procurement process. When the expected cost of a contract exceeds \$5,000 and does not exceed \$100,000, the district shall seek a minimum of three quotations, either written or oral, to permit comparison of prices and other terms.
- 6) Requires the board to award contracts for architectural, landscape architectural, engineering, environmental, and land surveying services, and construction project management services that are expected to be in excess of \$100,000 in accordance with existing law governing contracts with private architects, engineering, land surveying, and construction project management firms.
- 7) Allows the board to use any approved competitive procurement process authorized for state or local agencies under state or federal law, including, but not limited to, a competitive negotiation process in accordance with existing law governing transportation agencies' use of a competitive negotiation procurement process. The board shall maintain acquisition and contracting guidelines and comply with those guidelines in the procurement of all goods and services.
- 8) Prohibits provisions that are in a federally funded contract concerning disadvantaged business enterprises and that are in accordance with the request for proposals from being subject to negotiation with the successful bidder.
- 9) Allows the board to purchase supplies, equipment, or materials in the open market without further observance of the provisions regarding contracts, bids, or advertisements if:
 - a) The board rejects bids received pursuant to the procedures outlined above and determines and declares by a two-thirds vote of all of its members that, in its opinion, the supplies, equipment, or materials may be purchased at a lower price in the open market; or,
 - b) After solicitation of bids pursuant to the procedures outlined above, the board determines and declares by a majority vote that it has not received a responsive bid.
- 10) Allows the district's executive director to authorize the expenditure of moneys previously appropriated by the board specifically for the direct purchase of goods and services without complying with the procedures outlined above, upon determining that an immediate remedial measure to avert or alleviate damage to, or to repair or restore the damaged or destroyed property of, the district is necessary to ensure that the district's facilities are available to serve the transportation needs of the general public, or to comply with any state or federal regulations with respect to the operation of public transportation services, and upon determining that available remedial measures, including procurement in compliance with the procedures outlined above, are inadequate. The executive director, after the expenditure has been made, shall submit to the board a full report explaining the necessity for that action.
- 11) Allows the board to direct the procurement of prototype equipment or modifications in an amount sufficient to conduct and evaluate operational testing without further compliance

with any contracting, bidding, or advertising requirements, upon a finding by two-thirds of all members of the board that a purchase in compliance with the procedures outlined above does not constitute a method of procurement adequate for the operation of the district's facilities or equipment.

- 12) Allows the board to direct the purchase of any supplies, equipment, or materials without complying with any contracting, bidding, or advertising requirements upon a finding by two-thirds of all members of the board that there is only a single source of procurement and that the purchase is for the sole purpose of duplicating, repairing, or replacing supplies, equipment, or materials that are in use, including upgrades or migrations of proprietary intellectual property.
- 13) Allows person who submits, or who plans to submit, a proposal in response to a procurement solicitation to protest any acquisition conducted pursuant to the provisions contained in 4) through 9), above, as follows:
 - a) Protests based on the content of the procurement solicitation shall be filed with the district within 10 calendar days after the procurement solicitation is first advertised. The executive director, or the designee of the executive director, shall issue a written decision on the protest prior to the opening of the procurement solicitation. A protest may be renewed by refileing the protest with the board within 15 calendar days after the posting of the notice of the intent to award;
 - b) Any bidder may protest the intent to award on any ground not based upon the content of the procurement solicitation by filing a protest with the district within 15 calendar days after the posting of the notice of the intent to award. The executive director, or the designee of the executive director, shall issue a written decision on the protest;
 - c) Any protest shall contain a full and complete written statement specifying in detail the grounds of the protest and the facts supporting the protest. Protestors shall have an opportunity to appear and be heard before the board prior to the opening of the procurement solicitation in the case of protests based on the content of the procurement solicitation or renewed protests based on the content of the procurement solicitation, or prior to final award in the case of protests based on other grounds; and,
 - d) The decision on the protest by the board shall be in writing and shall constitute a final administrative decision for purposes of judicial review pursuant to existing law governing judicial review of local agency decisions.
- 14) Authorizes NCTD to opt in to the Uniform Public Construction Cost Accounting Act (UPCCAA).
- 15) Clarifies that NCTD may contract with any department or agency of the federal government, any other public agency, or any person upon such terms and conditions as the district finds is in its best interest.
- 16) Repeals provisions of law requiring the NCTD Board, immediately upon holding its first meeting, to proceed to negotiate with the existing municipal transit operators within its area

of jurisdiction to acquire the capital transit equipment and facilities of the municipal transit operators.

- 17) Provides that, if the Commission on State Mandates determines that this bill contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to current law governing state mandated local costs.

EXISTING LAW:

- 1) Requires, pursuant to the Public Contract Code (PCC), public agencies to obtain competitively bid contracts for construction projects, and contracts for supplies, equipment, and materials above a specified cost threshold. This amount varies depending on the public agency and whether it is a city, county, special district, or school, and other variables.
- 2) Establishes the UPCCAA, which authorizes public agencies to voluntarily use their own employees on construction projects that cost up to \$45,000, and to use informal competitive bidding procedures for construction projects that cost up to \$175,000, if they agree to cost accounting procedures pursuant to the UPCCAA.
- 3) Creates the NCTD to acquire, construct, maintain, and operate, or let a contract to operate, public transit systems and related facilities within its jurisdiction.
- 4) Requires NCTD's contracts for construction in excess of \$10,000 to be awarded to the lowest responsible bidder after competitive bidding, except in an emergency declared by the vote of two-thirds of the membership of the board.
- 5) Requires NCTD's contracts for the purchase of supplies, equipment, and materials in excess of \$50,000 to be awarded to the lowest responsible bidder after competitive bidding, except in an emergency declared by the vote of two-thirds of the membership of the board.
- 6) Allows the governing board of a transit district (including NCTD), city, county, city and county, or transportation agency to direct the purchase of the following items by competitive negotiation upon a finding by two-thirds vote of all members of the board that the purchase of those products or materials in compliance with provisions of the PCC generally applicable to the purchase does not constitute a method of procurement adequate for the agency's needs:
 - a) Computers, telecommunications equipment, fare collection equipment, radio and microwave equipment, and other related electronic equipment and apparatus used in transit operations;
 - b) Specialized rail transit equipment, including, but not limited to, railcars;
 - c) Buses; and,
 - d) Passenger ferries.
- 7) Allows the governing boards of the Metropolitan Transit System (MTS) and the San Diego Association of Governments (SANDAG) to use flexible procurement procedures for the

acquisition of materials, supplies, equipment, or services that are nearly identical to the provisions of this bill.

FISCAL EFFECT: This bill is keyed fiscal and contains a state-mandated local program.

COMMENTS:

1) **Bill Summary.** This bill repeals existing law requiring the NCTD to bid contracts exceeding \$50,000 for supplies, equipment, and materials and, instead, allows NCTD to establish and use a flexible process for these contracts and for service contracts. The new process and bid thresholds are nearly identical to authorizations granted to SANDAG and MTS. The primary change for NCTD is a bid threshold increase to \$100,000, double its present bid threshold. The major provisions of the bill include the following:

- a) Contracts expected to cost less than \$100,000 may be awarded using a district-approved competitive procurement process, with contracts exceeding that amount subject to lowest-bidder requirements. The district must seek a minimum of three quotations for contracts between \$5,000 and \$100,000 to permit comparison of prices and other terms;
- b) Contracts for architectural, landscape architectural, engineering, environmental, and land surveying services, and construction project management services that are expected to exceed \$100,000 must be awarded in accordance with existing law governing these types of contracts;
- c) The NCTD board may use any approved competitive procurement process authorized for state or local agencies under state or federal law, as specified, and must maintain and comply with acquisition and contracting guidelines in the procurement of all goods and services;
- d) The board may purchase supplies, equipment, or materials in the open market without observing contracting, bidding, or advertising requirements if: the board rejects bids and declares by a two-thirds vote that the supplies, equipment, or materials may be purchased at a lower price in the open market; or, declares by a majority vote that it has not received a responsive bid;
- e) The district's executive director may authorize the expenditure of moneys previously appropriated by the board for the direct purchase of goods and services without complying with this bill's flexible procurement procedures upon specified determinations, and must submit a report to the board explaining the necessity for that action after the expenditure has been made;
- f) The board may direct the procurement of prototype equipment or modifications in an amount sufficient to conduct and evaluate operational testing without further compliance with any contracting, bidding, or advertising requirements, upon a finding by two-thirds of all members that a purchase in compliance with the procedures authorized by this bill are not adequate for the operation of the district's facilities or equipment; and,
- g) The board may direct the purchase of any supplies, equipment, or materials without complying with any contracting, bidding, or advertising requirements upon a finding by

two-thirds of all members that there is only a single source of procurement and that the purchase is for the sole purpose of duplicating, repairing, or replacing supplies, equipment, or materials that are in use, including upgrades or migrations of proprietary intellectual property.

This bill also provides a bid protest process, in keeping with requirements that apply to SANDAG and MTS under existing law. This bill also explicitly authorizes NCTD to opt in to the UPCCAA.

This bill is sponsored by NCTD.

- 2) **Author's Statement.** According to the author, "In order to keep the North County Transit District competitive and costs low for riders and taxpayers it is important to provide consistent procurement options that have been proven to be successful with other transit districts."
- 3) **Background.** The Legislature created the North San Diego County Transit Development Board in 1975 to plan, construct, and operate, directly, or through a contractor, public transit systems in its area of jurisdiction. The board was renamed NCTD in 2006.

SB 1703 (Peace), Chapter 743, Statutes of 2002, created a consolidated transportation agency in San Diego from specified existing agencies, including SANDAG, the San Diego Metropolitan Transit Development Board (MTDB), and NCDT, and authorized the consolidated agency to assume certain responsibilities.

SANDAG is responsible for many public transit and long-term transportation planning and programming responsibilities that formerly resided with MTDB and NCTD. SB 1703 established the general authority and powers of the revamped SANDAG in an attempt to create an agency with the power to develop a comprehensive regional public transportation system. In addition to the planning functions, SB 1703 transferred project development and construction activities to SANDAG, except on certain existing projects, and sought to refocus MTDB and NCTD primarily as agencies operating public transit services. The MTDB changed its name to the Metropolitan Transit System (MTS) in 2005.

- 4) **Contracting Practices.** NCTD contracts with private operators for the provision of all modes of public transit service. Through these contracts, NCTD provides the following transit services: commuter rail, hybrid rail, fixed-route bus, demand response fixed route and route deviation, and Americans with Disability Act of 1990 complementary paratransit.

NCTD has pointed to nearly identical contracting authority granted to its regional partners, MTS and SANDAG, stating that both have contracting authority up to \$50,000 for public works without the requirement for competitive bidding, and authorization for the procurement of goods and services without competitive bidding up to \$100,000. NCTD asserts that it "uses competition as its primary source selection vehicle. Due to federal funding, all procurements exceeding \$3,500 require competition and will continue to do so under the adoption of AB 3177. The main benefit of AB 3177 would be the provision authorizing NCTD to adopt the UPCCAA and thereby increase the informal bid threshold. NCTD posts informal bids online and distributes to bidders registered in its online bidding system. Informal bids are not advertised in newspapers of general circulation reducing the

cost to the District. When the economy is good, and the trades are busy, they can be selective on the jobs they bid. Utilizing a simplified bid process will position NCTD to be more competitive with the surrounding agencies and thereby drive down costs through healthy competition."

- 5) **NCTD Audits and Response.** In 2012, NCTD requested an independent auditor to perform an analysis of contract administration functions at the district. The SC&H Group performed an audit and documented 19 findings, including avoidance of competitive procurement, an inaccurate and outdated procurement manual, and other findings. Following the audit, NCTD released a Management Action Plan on June 20, 2013, stating that 11 of the 19 recommended improvements were completed. The Management Action Plan stated, "On-call contracts are competitively procured and rates are established as part of the final contract. In September 2012, the Executive Director restated FTA guidance and the District's position on competitive and sole source procurements. A sole source procurement review committee has been established. The sole source procurement request process and form were updated. Updated Procurements and Contracts Administration Manual will be completed by December 2013."

Despite the Management Action Plan of 2013, the addition of two staff positions for procurement, and a \$157,000 contract with an outside consulting group to help prepare the district for its triennial review by the FTA, an additional audit in 2014 by the Calyptus Consulting Group Inc. found multiple problems with the district's procurement process, particularly with its compliance with mandates for full and open competition. The FTA's 2015 review also found deficiencies with the District's performance in complying with federal requirements for contract administration. Nine of the 13 problems identified in the FTA's review were in procurement.

In response to questions about the District's progress on improving its procurement practices, the district notes, "Following NCTD's voluntary self-assessment of its procurement system in September 2012, NCTD has taken significant steps to address the deficiencies identified and to implement best procurement practices and make necessary modifications to its procurement system to ensure adequate oversight and technical capacity of staff to ensure compliance. To that end, NCTD has provided significant training to staff, implemented a Policies and Procedures Procurement Manual and standardized contract forms and templates to ensure each business transaction is conducted in compliance with all applicable state and federal laws and regulations.

"Additionally, since the 2012 self-assessment, NCTD has collaborated with the FTA on several audits, including a 2015 FTA Triennial Review, a 2015 Procurement Enhanced Review and a 2016 Procurement System Review. Following the implementation of the various elements noted above to ensure compliance, NCTD was determined to have no system-wide deficiencies in the 2016 Procurement System Review, which included extensive reviews of:

- Written Standards of Conduct
- Contract Administration System
- Written Protest Procedures
- Prequalification System
- System for Ensuring Most Efficient and Economic Purchase

- Procurement Policies and Procedures

"NCTD is committed to a standard of excellence in all its procurement activities."

- 6) **The UPCCAA.** The Public Contract Code specifies the procedures that public agencies must follow when they build public works projects, including limits on project costs. The UPCCAA was enacted in 1983 as an alternative to these general requirements by allowing increased bid limits as long as participating agencies follow uniform accounting standards and bidding procedures. A voluntary program that is available to all public entities in the State, the UPCCAA allows public projects costing \$45,000 or less to be performed by the public agency's force account, by negotiated contract, or by purchase order. Projects costing \$175,000 or less can use informal bidding procedures set forth in the UPCCAA. Projects that cost more than \$175,000 must be put out to bid under formal bidding procedures.
- 7) **Previous Legislation.** AB 1757 (Waldron), Chapter 325, Statutes of 2016, increased the compensation limits for NCTD's board of directors.

AB 1988 (Chavez) of 2014 would have authorized NCTD to use any procurement method authorized for state or local agencies under state or federal law and made several other changes to the NCTD Act, including increasing the compensation for board members and alternates from \$75 to \$150 for each day the member or alternate attends a meeting of the board and increasing the monthly cap from \$300 to \$600. AB 1988 was held in this Committee.

- 8) **Arguments in Support.** The North County Transit District, sponsor of this measure, states, "This is an important effort to ensure parity of the District's contracting services with neighboring agencies, while maintaining the integrity of a fair and competitive bidding process. This measure will put the District in line with other transit agencies in the region and will result in improved contracting due to more time efficiency and reduction of costs.

"Key among the bill's provisions is explicit authorization for the District to opt into the UPCCAA. By providing this authority, the District will be able to utilize the Act's streamlined contracting provisions, further ensuring cost-savings and efficiencies in its procurements and operations."

- 9) **Arguments in Opposition.** None on file.

REGISTERED SUPPORT / OPPOSITION:

Support

North County Transit District [SPONSOR]
International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART)

Opposition

None on file

Analysis Prepared by: Angela Mapp / L. GOV. / (916) 319-3958