

**MOORPARK CITY COUNCIL
AGENDA REPORT**

TO: Honorable City Council

FROM: Dave Klotzle, City Engineer/Public Works Director 
Prepared by: Shaun Kroes, Senior Management Analyst 

DATE: December 5, 2014 (CC meeting of 12/17/14)

SUBJECT: Consider Rejection of Bid for Two (2) 2014 or Newer 29-foot – 32-foot Compressed Natural Gas Low Floor Buses; Consider Waiver of City Purchasing Procedure Pursuant to Moorpark Municipal Code Section 3.04.120; and Consider Authorizing City Manager to Negotiate Final Bus Design and Cost, and Issue a Purchase Order to Creative Bus Sales and Execute Any Agreements Necessary to Effectuate the Purchase of Two (2) Compressed Natural Gas Buses in an Amount Not to Exceed \$864,000.00.

SUMMARY

On November 5, 2014, the City of Moorpark (City) received one bid from Gillig LLC (Gillig) in response to the City's Request for Bid (RFB) for two compressed natural gas (CNG) buses, which will replace the City's two remaining diesel buses. Gillig's bid met the City's requirements, including providing seating for 26 passengers. The City's two diesel buses seat 25 passengers each. Gillig's bid of \$1,051,369.10 is \$187,369.10 higher than the City's current budget of \$864,000.00 for the bus procurement which includes \$740,000 in Prop 1B funds and \$90,000 in Federal Transit Administration (FTA) funds. Staff has identified an alternative bus procurement option through the California Association for Coordinated Transportation (CalACT) that would enable the City to purchase two, 32-foot El Dorado EZ Rider II CNG buses that are similar to the City's existing CNG fleet of EZ Rider II buses, including providing seating for 27 passengers. The two EZ Rider II buses could be purchased within the City's existing budget of \$864,000.00 and meets the needs of the City's transit fleet. Staff is therefore requesting that the City Council consider rejecting Gillig's proposal; consider waiving the City's purchasing procedure pursuant to Moorpark Municipal Code (MMC) Section 3.04.120; and consider authorizing the City Manager to negotiate final bus design and cost, and issue a purchase order to Creative

Bus Sales for the purchase of two EZ Rider II CNG buses in an amount not to exceed the budgeted amount of \$864,000.00.

BACKGROUND/DISCUSSION

On September 17, 2014, City Council approved a RFB for two CNG buses, which will replace the City's two remaining diesel buses. The RFB was released on September 18, 2014, with an original bid submittal deadline of October 21, 2014. Based on comments from potential bidders, the City extended the deadline for bid submittals to November 5, 2014. On November 5, 2014, the City received a bid from Gillig and a "No Bid Letter" from Creative Bus Sales. The letter from Creative Bus Sales stated that although they appreciated the opportunity to bid on the project, their bus manufacturer, El Dorado National, was unable to meet the bid specifications. Although the proposal from Gillig met the City's specifications and requirements, the total bid amount was for \$1,051,369.10, or \$187,369.10 over the City's current budget of \$864,000.00. City staff contacted the Ventura County Transportation Commission about potential additional funding sources; however, additional funding was not available.

After conferring with the City Attorney, staff contacted Gillig to determine if there was a potential to reduce their proposed pricing to within the City's existing budget, without changing the specifications in the City's RFB. Gillig was unable to reduce its pricing to within budget. The City's RFB was modeled after the City of Thousand Oaks' (Thousand Oaks) RFB released last year, with some adjustments made with the intention of the City's bus to cost less than Thousand Oaks. As the City Council is aware, Thousand Oaks maintains the City's bus fleet and the goal was to increase maintenance efficiencies by both agencies having several of the same bus models, thereby reducing maintenance costs. Further analysis of recent cost comparisons between the City's existing CNG fleet and Thousand Oaks' fleet indicates that there would not be a significant maintenance savings that would justify the higher up front cost of procuring Gillig buses. Gillig's bid is not within the City's current budget of \$864,000.00; consequently, staff is requesting that the City Council reject the bid.

Although the City is unable to purchase replacement buses from Gillig, staff has identified an existing bus procurement option through CalACT and the Morongo Basin Transit Authority (MBTA), which the City can utilize to purchase El Dorado National EZ Rider II buses, the same model of bus as the City's existing CNG buses. The buses have a base price of \$365,872.00 each. Options for the buses, taxes and fees will not exceed the City's allowed budget of \$864,000.00, or \$432,000.00 per bus. The CalACT/MBTA agreement meets the Federal Transit Administration's (FTA) requirements that allow FTA grantees from within California to procure buses from its purchasing cooperative. The City, by being a member of CalACT, can use the CalACT/MBTA purchasing cooperative to purchase two

32-foot CNG buses that will be similar to the City's existing fleet. The buses would include:

- Two doors, which will allow passengers in wheelchairs to board the bus and secure seating without the need for turning around in tight quarters.
- Air conditioning/heating vents distributed throughout the bus instead of rear ventilation.
- Automated bus stop announcement system.
- Security camera system, including three inside cameras and one outdoor camera.
- Back up camera system that permits the driver to see what is behind the bus while going in reverse.
- Buses will be assembled in Riverside, CA, which helps to keep jobs in the state.

As recommended by the City Attorney's office, staff is addressing Section 3.04.120 of the MMC, which states, "In its discretion, the city council may at any time, by a majority vote and without amending this chapter, waive the purchasing procedures or alter these proceedings to fit a specific purchase, when such waiver is not in violation of state law." There are two factors that justify waiving the City's purchasing procedures (which would include going out to bid again with new specifications designed to match the EZ Rider II bus model) for this bus procurement. The first is that the City did go through a formal bid procedure for the procurement of two CNG buses and unfortunately the bids came in too high. The second is that the procurement of two CNG buses through the CalACT/MBTA purchasing cooperative did go through a competitive bid process.

The CalACT/MBTA purchasing cooperative also meets FTA requirements for other agencies in California to purchase buses using the same agreement. Staff has attached a letter from FTA, confirming that the CalACT/MBTA purchasing cooperative can be used by other grantees in California.

Once the City completes its final bus design with Creative Bus Sales, the design is submitted to CalACT for its review to confirm that the design and pricing meets the requirements of the purchasing cooperative. The City would then receive a "Letter of Assignment" from CalACT, confirming that it may purchase the specified buses. The Letter of Assignment will include an "Assignment to Purchase Agreement" from CalAct confirming the specific vehicle quantity and type with the original CalAct Agreement. The Assignment to Purchase Agreement also includes language indemnifying CalAct from the City's purchase of the buses. Upon receipt of the Letter of Assignment, the City would be able to issue a purchase order for the two buses. The City will use a combination of Proposition 1B (Prop 1B) funds (\$774,000) and FTA funds (\$90,000) to fund the purchase of the two CNG buses.

Table 1 (on the following page) provides a comparison of recent bus prices. Typically speaking, every bus is different when comparing one transit agency to another. Buses are

usually customized and have different features for each order. Consequently, the prices are different for each bus detailed in Table 1; however, the table does provide Moorpark with fair cost comparisons.

Table 1: Bus Cost (per-bus; all buses are low floor)

Moorpark 2010 32-foot CNG Bus El Dorado EZ Rider II 27 Seats	Moorpark 2014 32-foot CNG Bus El Dorado EZ Rider II 27 Seats	Simi Valley 2014 35-foot CNG Bus New Flyer 32 Seats	Thousand Oaks 2013 29-foot CNG Bus Gillig 26 Seats
\$410,116	\$432,000	\$520,233	\$503,072

As detailed above, bus prices can vary depending on the size of the bus as well as features included in the bus design. Moorpark specifically has \$432,000 per bus available for the procurement of two CNG buses using the budgeted Prop 1B and FTA funds.

FISCAL IMPACT

The FY 2014/15 Budget includes \$740,000.00 in SB 1266 – 06 Transportation Bond Fund (2611) and \$90,000.00 in FTA 5307 Federal Grant Fund (5000), for a total of \$864,000.00 for the procurement of two CNG buses.

STAFF RECOMMENDATIONS

1. Reject November 5, 2014, proposal by Gillig LLC for two (2) 2014 or newer 29-foot – 32-foot compressed natural gas low floor buses.
2. Waive City purchasing procedures for the procurement of two (2) 2014 or newer, 32-foot compressed natural gas low floor buses.
3. Authorize City Manager to negotiate final bus design and cost, and issue a Purchase Order to Creative Bus Sales and execute any agreements necessary to effectuate the purchase of two (2) compressed natural gas buses in an amount not to exceed \$864,000.00.

Attachment: FTA Letter Confirming Approval of CalACT/MBTA Purchasing Cooperative



U.S. Department
of Transportation
**Federal Transit
Administration**

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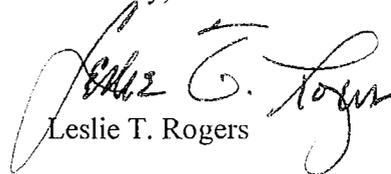
Re: California Association of Coordinated
Transportation (CalACT)-Morongo Basin
Transit Authority (MBTA) Purchasing
Cooperative

Dear Colleague:

As you may know, last year, the Federal Transit Administration (FTA) issued several determinations regarding large-quantity transit vehicle procurements and purchasing schedules to ensure that FTA requirements related to joint procurement and fair and open competition were followed. As a continuation of that effort, FTA initiated a review of the California Association of Coordinated Transportation (CalACT)-Morongo Basin Transit Authority (MBTA) Purchasing Cooperative. FTA has now concluded that review and the FTA Chief Counsel has issued the enclosed determination. In summary, FTA has determined that grantees located within the State of California may purchase vehicles through the current CalACT-MBTA Purchasing Cooperative. Please review the enclosed determination and circulate it to your project, procurement and legal staff.

If you have any questions about this matter, please contact Renee Marler, Regional Counsel, at (415) 744-2736 or Joonsik Maing, Assistant Regional Counsel, at (415) 744-2737.

Sincerely,


Leslie T. Rogers

Enclosure



U.S. Department
Of Transportation
**Federal Transit
Administration**

Chief Counsel

1200 New Jersey Avenue S.E.
Washington DC 20590

January 15, 2014

Joe Meer
General Manager
Morongo Basin Transit Authority
62405 Verbena Road
Joshua Tree, CA 92252

Dear Mr. Meer:

Last year the Federal Transit Administration (FTA) disallowed the use of several large-quantity bus contracts by entities that are not parties to those agreements. Following FTA's decision to disallow the use of these contracts, it asked the Morongo Basin Transit Authority (MBTA) to pause use of the Purchasing Cooperative it established with the California Association for Coordinated Transportation (CalACT) pending FTA review. I write to provide guidance on the ability of FTA grantees to use the MBTA-CalACT Purchasing Cooperative to purchase vehicles, as well as general guidance on FTA's procurement rules as they relate to State schedules, joint procurements and piggybacking. For the reasons outlined below, I find that FTA grantees located within the State of California may use your Purchasing Cooperative, as it is currently structured.

Background

Over the past several years, FTA has reviewed several large-quantity contracts to determine whether they comply with FTA's procurement rules. Upon review, FTA concluded that several of these contracts violate the requirement for full and open competition.

Most recently, on July 8, 2013, FTA informed the State of Minnesota that grantees outside the State of Minnesota do not enjoy the deference afforded the State by 49 C.F.R. § 18.36(a) and may not continue to use the Minnesota Cooperative Purchasing Venture to purchase buses or other goods and services with Federal funds.

In March of 2013, my office completed a review of several large-quantity contracts between a bus manufacturer and three transit agencies. Several dozen transit agencies, many of which were not parties to the contracts, used these contracts to purchase buses. After reviewing the contracts and the known purchases, FTA concluded that, to varying degrees, the contracts failed to comply with federal procurement rules. In all of the contracts, the parties contracted for quantities in excess of their current and reasonably expected needs, and with the apparent purpose of assigning contract rights to others at a

later date, as was evidenced by numerous “piggyback” purchases. Two of the three contracts were improperly styled as joint procurements, as many of the transit agencies that purchased vehicles were not, in fact, parties to the contract. Following the review, FTA disallowed the use of these contracts by all but the original and actual parties, and only for the amount specified by each party in the contract.

On March 8, 2013, FTA Administrator Peter Rogoff issued a “Dear Colleague” letter on the subject of large-quantity bus contracts. The Dear Colleague letter noted the widespread errors in how FTA recipients were conducting joint procurements and assigning options to others to purchase buses, and cautioned FTA grantees to “carefully review [FTA] requirements before purchasing buses through a joint procurement or an assignment of options.” It did not directly address state and local purchasing agreements.

In 2011, FTA concluded that its grantees could not purchase assets with FTA assistance from certain buying cooperatives like those developed and marketed by the National Joint Powers Alliance (NJPA) and the Houston-Galveston Area Council (HGAC). The decision was based on the absence of State participation, and the fact that neither agreement identified a finite number of vehicles that was based on the parties’ reasonably anticipated needs. Thus, FTA rejected the NJPA and HGAC cooperatives as lacking full and open competition.

FTA Procurement Rules

Recipients of FTA financial assistance are required by both 49 U.S.C. § 5325(a) and the common grant rule (49 C.F.R. § 18.36(c)) to use full and open competition when making purchases. Usually a grantee fulfills this requirement by one of three procurement methods: (1) conducting a stand-alone procurement for a finite number of vehicles; (2) jointly procuring a finite number of vehicles with one or more grantees; or (3) accepting the assignment of another grantee’s contractual right to purchase a finite number of vehicles (aka “piggybacking”). One common requirement in all methods is that the number of vehicles to be purchased is based on the grantee’s actual needs and is advertised with the solicitation. Thus, all respondents to the solicitation can provide a bid price based on the number of vehicles to be purchased as well as other salient factors contained in the solicitation. When the contract is formed, the grantee commits to purchasing vehicles at the agreed upon price and the vendor commits to furnishing the vehicles at that price. A fourth procurement method—(4) State purchasing schedules—is available to States only.

1. Stand-alone procurements

All stand-alone procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of 49 C.F.R. § 18.36. Grantees and subgrantees will use their own procurement procedures, which reflect applicable State and local laws and regulations provided that the procurements conform to applicable Federal law and the standards identified in the Common Grant Rule. FTA’s Third Party

Procurement Guidance, Circular 4220.1F, elaborates upon the Common Grant Rule's broad requirements.

2. Joint procurements

A joint procurement is “a method of contracting in which two or more purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor.”¹ The parties to a joint procurement may be from more than one state. FTA encourages the use of joint procurements when combining requirements into a larger order can result in a more advantageous contract for the participating recipients. FTA's current guidance does not require the needs of each joint procurement participant to be separately written into the contract. And, as with regular procurements, a joint procurement may take the form of an indefinite delivery/indefinite quantity contract (ID/IQ) if it contains “total minimum and total maximum” terms.²

Participation in a joint procurement does not relieve any recipient of the responsibilities it would have if it were procuring goods or services by itself.³ Recipients that participate in a joint procurement must adhere to all applicable federal requirements, including the prohibition against using federal money to procure unneeded items.

The Common Grant Rule requires that a recipient have procedures to “provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items,”⁴ including the acquisition of “quantities or options it does not intend to use or whose use is unlikely.”⁵ To prevent a recipient from purchasing unnecessary or duplicative items, a recipient may contract “only for its current and reasonably expected public transportation needs and may not add quantities or options to third-party contracts solely to permit assignment to another party at a later date.”⁶ “In monitoring whether a recipient has complied with its procedures to determine what property or services are unnecessary, FTA bases its determinations on what would have been a recipient's reasonable expectations at the time the recipient entered into the contract.”⁷

A joint procurement may not be used as an opportunity to improperly expand the scope of a federally assisted contract. “A contract has been improperly expanded when excess capacity has been added primarily to permit assignment of those contract rights to another entity.”⁸

¹ C. 4220.1F, ch. V § 3.

² C. 4220.1F, ch. V §§ 3, 7(a)(2)(b)(1).

³ C. 4220.1F, ch. IV § 1(c)(1).

⁴ 49 C.F.R. § 18.36(b)(4).

⁵ C. 4220.1F, ch. IV § 1(b).

⁶ C. 4220.1F ch. IV § 1(b)(2).

⁷ C. 4220.1F, ch. IV § 1(b).

⁸ C. 4220.1F, ch. V § 7(b)(1).

3. *Assignment of options (“Piggybacking”)*

For reasons of economy, FTA permits the assignment of unneeded contract rights, sometimes called “piggybacking.” FTA discourages the assignment of another recipient’s contract rights as a substitute for a stand-alone procurement.⁹ Assignments are intended to be used only when a recipient has “inadvertently acquired contract rights in excess of its needs”¹⁰ due to “changed circumstances or honest mistakes.”¹¹

Intentionally procuring excessive quantities using federal money is a violation of the Common Grant Rule described above. Furthermore, to the extent that an improper assignment of contract rights enables an assignee to avoid otherwise required procurement procedures, it also undermines the Common Grant Rule’s general purpose of full and open competition in federally assisted procurements.

4. *State schedules*

For reasons of federalism, States are accorded substantial deference under the Common Grant Rule at 49 C.F.R. § 18.36(a) in the policies and procedures used in state procurements. By this authority, a State may follow the same policies and procedures it uses for procurements from its non-Federal funds, so long as it ensures that every purchase order or similar contract includes any clauses required by Federal law. Many States use this authority to create purchasing schedules by which the State and its subsidiaries may acquire goods.

Principles of federalism limit State powers, too. FTA grantees located outside of a State’s borders are not permitted to purchase from that State’s schedule.¹² Joint procurements (and in limited circumstances piggybacking) are the only forms of FTA-funded contracts permitted among grantees from different states.

MBTA-CalACT Purchasing Cooperative

From 2006 to 2009, the California State Department of Transportation (Caltrans) and other FTA grantees in the State of California used several contracts awarded by the California Department of General Services (DGS) to purchase transit vehicles. After these contracts expired in 2009, DGS encountered problems that led it to discontinue the use of DGS-sponsored State contracts for transit vehicles.¹³

In 2010, DGS and Caltrans authorized MBTA and CalACT to establish a “Purchasing Cooperative” for use by Caltrans and other FTA grantees in the State of California.

⁹ C. 4220.1F, ch. V § 7(a)(2)(a).

¹⁰ C. 4220.1F, ch. V § 7(a)(2).

¹¹ C. 4220.1F, ch. IV § 1(b)(2)(b).

¹² C. 4220.1F, ch. V § 4.

¹³ August 13, 2013, letter from Mark Codey, Chief, Office of Federal Transit Grants, Division of Mass Transportation, California Department of Transportation, to Dorval R. Carter, Jr., Chief Counsel, Federal Transit Administration.

Letter to Joe Meer

Following a competitive procurement process, MBTA and CalACT awarded the most recent Purchasing Cooperative contracts to A-Z Bus Sales, Inc. (Contract No. 7-12-23-15-04) and Creative Bus Sales, Inc. (Contract No. 7-12-23-15-05). The parties to the contract memorialized State approval for the contracts by entering into separate California Participating Addenda in August 2012. These contracts are the only mechanism available to Caltrans and other FTA grantees to purchase certain types of accessible transit vehicles. The contracts are restricted to FTA grantees geographically located within the State of California.

Discussion

The purpose of this letter is to elaborate on FTA's March 8, 2013 Dear Colleague Letter by providing guidance on the use of State schedules like the MBTA-CalACT Cooperative Purchasing contracts.

The MBTA-CalACT Cooperative Purchasing contracts are not stand-alone or joint procurements within the meaning of Federal law as discussed above, nor have MBTA or CalACT assigned options to entities outside the State of California. The contracts are unique agreements to which the State of California participates via "Participating Addenda."

As explained above, FTA grants substantial deference to State procurement practices. Thus, unlike stand-alone or joint procurement methods that must be restricted to a defined minimum and maximum, State schedules may be open-ended if such a structure is permitted by State law. However, although FTA permits intrastate entities to purchase from a State contract, as FTA reiterated in its July 8, 2013 letter to New Flyer of America, Inc., State schedules may not be used nationally by out-of-state FTA grantees. The use of State schedules must be limited to entities located within the geographic boundaries of the State.

Inasmuch as the State of California continues to enter into Participating Addenda with MBTA and CalACT, the Purchasing Cooperative you have established appears to be a valid State schedule. In accordance with the deference afforded States by 49 C.F.R. § 18.36(a), FTA grantees located within the State of California may continue to use contracts established by the MBTA-CalACT Purchasing Cooperative.

If you would like to discuss this matter further, please contact Acting Assistant Chief Counsel Jayme Blakesley at (202) 366-0304.

Sincerely,



Dorval R. Carter, Jr.
Chief Counsel