

## **Board Policy No. 34 Unsolicited Proposal Policy**

### **Summary**

The North County Transit District (NCTD) normally develops its own requirements, solicits proposals or bids, and contracts with entities whose proposals or bids are deemed most advantageous to NCTD pursuant to its Procurement Manual, and state and federal law; however, NCTD recognizes the valuable, innovative ideas or sources of revenue that educational and nonprofit institutions, private sector entities, and individuals may bring to propose relevant projects or partnerships that they believe are within the purview of NCTD and will help meet NCTD goals. This policy outlines how NCTD staff will process unsolicited proposals to contract with NCTD as a consultant or contractor, and partnership requests seeking to work with NCTD in a public private partnership (P3) or other similar arrangement.

### **1.0 Scope of Policy**

- 1.1 This policy is intended to provide high-level policy considerations and procedures to guide NCTD decisions when responding to unsolicited proposals and partnership requests (unsolicited offers). In addition to this Policy, NCTD will comply with FTA Circular 4220.1F – Ch. VI (or any amendment thereto) in all instances where federal funding is to be considered.
- 1.2 An "unsolicited proposal" is defined as a written proposal to perform a proposed task or effort, initiated and submitted to NCTD by a prospective consultant, developer, or contractor (offeror) without a solicitation from NCTD, with the objective of obtaining a contract award from NCTD. The unsolicited proposal is the formal means by which business proposals are brought to the attention of NCTD, submitted in the hope that NCTD will contract with the offeror for goods, services, development, or partnership. Criteria for a valid unsolicited proposal:
  - a. Be innovative and unique, offering a development proposal with unique characteristics or benefits;
  - b. Be independently originated and developed by the offeror;
  - c. Be prepared without NCTD's supervision, endorsement, direction, or direct involvement;
  - d. Be sufficiently detailed such that its benefits/deliverables/outcomes are in support of NCTD's mission and responsibilities are apparent;
  - e. Not be an advance proposal for a contract, procurement or property development that NCTD could acquire through competitive methods;
  - f. Not be an offer responding to a previously published expression of need or request for a procurement or proposal.
- 1.3 An "unsolicited partnership request" is a written request that NCTD participate in a public private partnership (P3) or other partnership arrangement. Unlike a consultant or contractor arrangement, a partnership request calls for the requesting partner(s) to assume responsibility and financial liability for performing all or a significant number of functions in connection with a project. In transferring responsibility and risk for multiple project elements to the partner, NCTD would

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reduce its controls and risks regarding the project. Additionally, the partner would receive the opportunity to earn a financial return or other benefits commensurate with the risks it would assume. A valid unsolicited partnership request shall meet the same criteria as in (a)-(f) of Section 1.2 above.

- 1.4 An “offeror” is the term used in this policy to refer to entities or persons submitting an unsolicited offer, which may be in the form of an unsolicited proposal or partnership request.
- 1.5 The following types of correspondence will not be considered under this policy: (1) written inquiries regarding NCTD interest in research and/or development areas, (2) proposal explorations, (3) technical inquiries, (4) research descriptions, (5) offers to sell commercial off-the-shelf equipment or software, (6) a proposal that overlaps or conflicts with the scope of work in a pending competitive procurement, and (7) proposals or requests that would require NCTD to act outside NCTD authority, jurisdiction, inconsistently with applicable laws, or outside the purview of the agency.

### **2.0 Role of NCTD Staff**

- 2.1 Offerors may engage in preliminary discussions with NCTD staff to gauge NCTD interest in a potential unsolicited proposal or partnership request. Both NCTD and offeror staff, however, must exercise caution to ensure that these preliminary communications do not lead to inadvertent collaboration on the development of a statement of work that would subsequently be incorporated in an unsolicited offer. This would potentially invalidate the unsolicited nature of the offer or disqualify it from being considered due to concerns about unfair competition. Discussions between a potential offeror and NCTD staff other than NCTD Procurement and Contract Administration Division (PCA) staff should be limited to preliminary discussions of general concepts only. Discussions with non-PCA staff should be used solely to gauge NCTD potential interest and determine whether the unsolicited offer would be of interest to NCTD. If a potential offeror wishes to pursue the proposal or request after preliminary discussions, NCTD staff shall refer the offeror to this Policy and the PCA.
- 2.2 In cooperation with the Office of General Counsel, PCA will log the proposal/offer and within three business days, consult with the appropriate NCTD Department Director(s) for an initial analysis and for evaluation of technical and/or financial merit.

### **3.0 Preparation and Submission of Proposals**

- 3.1 All unsolicited offers submitted for NCTD consideration should be addressed to [SOW@nctd.org](mailto:SOW@nctd.org) and/or mailed to:

Procurement and Contract Administration Division  
Attention: Unsolicited Proposal  
NCTD  
810 Mission Ave  
Oceanside CA 92054

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An unsolicited offer submitted directly to anyone other than the PCA personnel cannot be acted upon officially until it is submitted to the PCA. If an offer is not sent by email, five copies of each offer must be delivered to NCTD, one of which must be a manually signed original. Unsolicited offers should be prepared in conformance with this policy and any written procedures developed under the authority of the Executive Director or its designee. Offerors may submit their proposals or requests in their own format as long as the required data are provided. Email submissions may be made to the email address above, provided a single, manually signed hard copy is mailed concurrently. All electronic submissions must be in PDF and OCR format.

- 3.2 An unsolicited offer must meet all of the requirements in Section 1.2 above in order to be eligible for formal evaluation.
- 3.3 The following information must be included in unsolicited offers:
  - 3.3.1 Name(s) and address(es) of entity(ies) or persons submitting the offer.
  - 3.3.2 Type(s) of organization(s) (for profit, nonprofit, educational, small business, other) submitting the offer.
  - 3.3.3 In the case of participation of other key entities or persons not participating as an offeror, provide identifying information for such entities or persons.
  - 3.3.4 Names and telephone numbers of the offeror's technical and business personnel whom NCTD may contact for evaluation and negotiation purposes.
  - 3.3.5 Identification of whether the offer is intended to be an unsolicited proposal or unsolicited partnership request.
  - 3.3.6 Identification of any proprietary data that the offeror intends to be used by the agency only for evaluation purposes. (See Section 3.4 for instructions).
  - 3.3.7 Names of any other Federal, State, local agencies, or other parties receiving the offer.
  - 3.3.8 Date of submission of the offer.
  - 3.3.9 A signature of a responsible official authorized to contractually obligate the offeror.
  - 3.3.10 Technical information, including a concise title and an abstract (approximately 200 words) of the proposed project or partnership.
  - 3.3.11 A reasonably complete discussion stating the objectives of the project or partnership, method of approach, the nature and extent of the anticipated results, and the manner in which the project or partnership will help support the NCTD mission.
  - 3.3.12 The names and brief background information of the offeror's key personnel who would be involved.

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- 3.3.13 The type of support, if any, the offeror requests of NCTD; e.g., financial, facilities, real property rights, equipment, materials, profit sharing, or personnel resources.
  - 3.3.14 A cost estimate for the proposed contract award, or estimated amount of investment from offeror and amount, if any, sought from NCTD including any grant funding or property allocation. The estimate must be sufficiently detailed, by element of cost, for meaningful evaluation by NCTD and include subcontractors, partners, or any potential private equity contribution the offeror would provide. Offeror also must provide its estimate of the projected total net value or cost of the proposal or partnership to NCTD and offeror over the life of the program, project, or service.
  - 3.3.15 Period of time for which the offer is valid (minimum of three months).
  - 3.3.16 Proposed schedule.
  - 3.3.17 A statement, if applicable, regarding proposed cost or revenue sharing.
  - 3.3.18 Identification of any organizational conflicts or financial conflicts of interest with NCTD, its member agencies, or the members of the Board of Directors.
  - 3.3.19 A brief description of the offeror's organization and previous relevant work or experience.
  - 3.3.20 A statement demonstrating the financial ability of the offeror to perform the project or venture.
- 3.4 Proprietary Data

Whenever possible, an offeror should submit a proposal without restrictions on the use of technical data provided. All offers shall be public records and subject to disclosure in compliance with state and federal law including, but not limited to, the California Public Records Act. The offeror must state whether or not the proposal contains proprietary information that constitutes a trade secret pursuant to California Civil Code section 3426.1. If an unsolicited offer includes trade secret data that the offeror does not want disclosed for any purpose other than evaluation of the offer, the title page shall be marked with the following legend:

### *USE AND DISCLOSURE OF DATA*

*The trade secret information in this offer shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the offer; provided, that if a contract or partnership agreement is executed with offeror as a result of or in connection with submission of this data, NCTD shall have the right to duplicate, use, or disclose the data to the extent provided in the contract. This restriction does not limit NCTD's right to use information contained in the data if it is obtainable from another source without restriction.*

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*Offeror agrees to indemnify and defend NCTD in the event NCTD withholds production of records which Offeror has marked "Confidential" "Trade Secret" "Proprietary", or similar designations, that are responsive to a Public Records Act request pursuant to California Government Code sections 6250, et. seq. or a Freedom of Information Act request.*

*The data subjected to this restriction are contained in page(s) [insert page numbers] of the offer.*

The offeror also shall mark each restricted page with the following legend:

*Use or disclosure of data in sections or paragraphs [insert section or paragraph numbers] on this page is trade secret and is therefore subject to the restriction on the title page of this offer.*

An unsolicited offer will be returned to the offeror if it is marked with a different legend than that provided in paragraph (a) above and/or if all pages are marked confidential and not just those pages/sections which actually contains proprietary information that constitutes a trade secret pursuant to California Civil Code section 3426.1. The offeror will be informed that the offer cannot be considered because it is impracticable for NCTD to comply with the offeror's requirements. The offeror shall also be informed, however, that the offer will be considered if it is resubmitted in compliance with the above.

### **4.0 Evaluation of Proposals**

4.1 Preliminary Review. Prior to making a Comprehensive Evaluation of a document submitted as an unsolicited offer, PCA will determine that the document contains sufficient information to enable meaningful evaluation. PCA will notify the potentially interested NCTD Departments and coordinate a preliminary review of the offer with the Executive Director providing the final determination. If the Department Director(s) in his/her/their sole discretion, deems the offer in NCTD's best interest to further evaluate, the PCA will notify the offeror. Such threshold evaluation includes but is not limited to the following:

- a. Satisfies and meets the elements of an Unsolicited Proposal as defined in Section 1.2 of this Policy;
- b. Contains sufficient technical and cost information to permit a meaningful evaluation;
- c. Has been approved by an authorized representative of the offeror or a person authorized to contractually obligate the offeror;
- d. Includes a general project concept that meets NCTD objectives or goals as may be provided by the Board of Directors by Ordinance, Policy, Resolution or other authorized writing; and
- e. Complies with the marking requirements for use and disclosure of data.

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If the document lacks information required by this policy or other procedures promulgated by NCTD the offeror will be notified and given the opportunity to submit the needed information. The Comprehensive Evaluation cannot begin until the needed information is received, and one or more Department Directors has authorized the expenditure of the funds within NCTD's approved budget to conduct a Comprehensive Evaluation. If it is determined that the submission does not meet the criteria for Comprehensive Evaluation as an unsolicited offer, or for any reason is determined to be undesirable to pursue, a reply will be sent to the offeror, indicating the reason(s) for not considering it. NCTD will endeavor to notify an offeror whether or not its offer will progress to a Comprehensive Evaluation within 60 days of receipt of the offer. Offerors shall have neither vested rights in this decision, nor ability to protest a decision by NCTD not to conduct a Comprehensive Evaluation.

- 4.2 Comprehensive Evaluation. Upon acceptance of an unsolicited offer for Comprehensive Evaluation, PCA will convene a panel of PCA staff and experts to perform an independent evaluation. The decision as to whether favorable action will be taken on the offer will be based upon an assessment by the panel of the potential contribution of the proposed project or partnership arrangement to the objectives of NCTD and whether the risk and cost to NCTD can be justified under the circumstances. NCTD staff or consultants will conduct cost, economic or market analyses to evaluate the current and future market conditions and determine whether the project or partnership arrangement is viable and in the best interest of NCTD. The offeror will need to be available to the evaluation team to answer questions and provide additional information without charge to NCTD. An offeror must establish it and/or its team or partners have sufficient technical experience and readiness to proceed.
- 4.3 Privacy Impacts. NCTD may determine that an offer involving exchange of data raises public privacy concerns that require further assessment. NCTD may require a privacy impact assessment to occur prior to fully evaluating an offer.
- 4.4 If it is determined to be in the best interest of NCTD, other local, state, or Federal agencies may be approached to share in the evaluation and consideration of the offer.
- 4.5 When the Comprehensive Evaluation has been completed, PCA will inform the offeror of the results of the evaluation. If NCTD determines the offer is viable and worthy of pursuit in its sole discretion, it will evaluate whether to utilize a Competitive Process or Sole Source procurement pursuant to Section 5 or 6 of this policy.
- 4.6 Normally, unsolicited offers are not returned after completion of the evaluation. They are retained in a secure location for a period of time and then destroyed pursuant to NCTD's Retention Schedule in Board Policy No. 15. If the offeror wishes the offer to be returned, a statement to that effect should be clearly made in the submission.

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### **5.0 Determinations Regarding Competitive Process**

- 5.1 NCTD will determine in its sole discretion whether competition exists from other potential offerors.
- 5.2 If NCTD determines competition may exist, PCA shall publicly notice the unsolicited offer on its website and in any other locations directed by NCTD management, and allow for other offerors to submit for consideration by NCTD pursuant to any applicable and authorized procurement method. The public notice shall include the evaluation criteria that NCTD will use to evaluate competing offers.

### **6.0 Determinations Regarding Whether a Sole Source Contract is Appropriate**

- 6.1 If the unsolicited proposal offers a proprietary concept that is essential to contract performance, it may be deemed a sole source contract award is possible. If not, NCTD will respond to the unsolicited proposal by following applicable state and or federal procurement guidelines for competitive procurement as provided in NCTD's Procurement Manual. In addition, NCTD is committed to engaging the appropriate stakeholders in the proposal process.
- 6.2 The offeror may claim, or it may appear from an offer, that no other entity or person could offer the same product, service, or partnership arrangement. In the case of software, technology or other intellectual property, it may appear that only the offeror can perform, however, these circumstances alone will not justify a sole source contract. The concept will be evaluated on its own merit, including analysis of revenue producing potential and opportunities for cost recovery for the applicable project or program. In many cases, the offeror will have competitors that could offer NCTD similar solutions, but with different options, functionality, costs or risks. A competitive process should be used to select the consultant, contractor or partner, unless NCTD staff determines that the proposed concept itself is proprietary, or the proposal concerns a specific piece of real property with unique attributes essential to NCTD's interests to which the offeror has exclusive ownership and/or negotiating authority.
- 6.3 The essential consideration in whether to accept an unsolicited offer without competition (i.e., to engage in contract negotiations on a sole source basis) is whether the offer is presenting a proprietary/trade secret concept or real property interest that is itself essential to contract performance. If an offeror is merely presenting a rationale for doing certain work that could be done by others if given the chance to compete, then there is no permissible basis to authorize a sole source. In the case of a proprietary software product that is being offered to achieve a certain goal, NCTD could not, for example, release proprietary programming codes in a competitive solicitation. Staff should, however, if it deems the proposal one it recommends pursuing, compete the contract award in terms of describing what the mission or goal is in order to see what other firms might offer in terms of software solutions. In other words, staff cannot assume that the product being offered in the unsolicited proposal is the only, or best, product available to meet the objectives of the agency. Any sole source determination must comply with the applicable sole source selection procedures and requirements of the funding source(s) being used.

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### **7.0 Partnership Requests that Include Joint Development Proposals**

Offers including proposed joint use and development on NCTD-developed and/or owned property will be evaluated using the following additional criteria:

- 7.1 Whether the project offers an added benefit, beyond the proposed development, that NCTD had either not planned for, or had considered but had not budgeted for, such as a transit improvement or an expansion of transit services.
- 7.2 Whether the project is consistent with regional and local community policies and plans.
- 7.3 Whether the project demonstrates a fiscal benefit to NCTD.
- 7.4 Whether the project provides economic development potential to NCTD or increased ridership potential (beyond what would be provided through a regular development process).
- 7.5 Whether the project increases accessibility to public transportation.
- 7.6 Whether the project provides public improvements that support active transportation (beyond what would be required in a regular development process).

### **8.0 Board of Directors Participation**

- 8.1 As set forth in Board Policy No. 19: Delegation of Authority, the Executive Director and his/her delegates may enter into agreements not currently incorporated in the budget and make other modifications to the budget in accordance with the authority provided therein. If, in order to act upon an offer, a modification of more than the authorized threshold would be necessary, such action shall be brought to the Board of Directors for consideration.
- 8.2 For all offers that progress to the Comprehensive Evaluation Stage, the Executive Director will report actions taken to the Board in summary written form at the next regular meeting of the Board.

### **9.0 NCTD Liability**

- 9.1 This policy and the procedures it describes do not commit NCTD to evaluate an offer within a certain period of time, execute a contract, or to expend any public funds. NCTD has no obligation to reimburse an offeror for any costs it incurs in preparing or submitting an offer or in providing information to NCTD as it evaluates an offer.
- 9.2 All unsolicited offers submitted to NCTD become the property of NCTD and public records and, as such, may be subject to public review and use by NCTD. Documents protected by law from public disclosure will not be disclosed by NCTD if clearly marked as described in Section 3.4 of this policy. Trade secrets may be marked as confidential only to the extent they meet the requirements of California Civil Code section 3426.1(d). Only information claimed to be a trade secret at the time of submittal to NCTD and marked as required in this policy will be treated as a trade secret. To the extent that an entire offer is marked as confidential or a trade secret, such designations will not be effective, and the offer will be rejected. To the

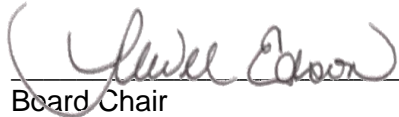



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extent that an offeror marks any information as either confidential or a trade secret, the offeror thereby agrees to defend and indemnify NCTD in the event that NCTD's non-disclosure is challenged in any legal action.

- 9.3 Offerors who wish to release information regarding evaluation, selection, or contract awards information in a press release or its promotional materials prior to the time a public announcement is made by NCTD must receive prior written approval from NCTD.

### Approvals

  
Board Chair 10/20/2022  
Date

  
Executive Director 10/20/2022  
Date

  
General Counsel 10/20/2022  
Date

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DATE	REVISION No.	RESOLUTION No.	COMMENTS
10/17/2019	ADOPTED	19-06	
10/20/2022	1	22-17	2022 REVISION