Legal Memorandum
Sole Source Exception in Public Contract Code Section 3400 (c) (2)

To: Board of Trustees
Sunita Cooke, President/Superintendent
Tim Flood, Vice President for Administrative Services
Tom Macias, Director of Facilities

From: John P. Dacey, Esq., Cauvel & Dacey, P. C.

Date: July 30, 2020

Re: Board Adoption of Statutory Exceptions within Public Contract Code Section 3400 for Measure MM Construction Projects – August 20, 2020 Board Meeting

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I. INTRODUCTION & OVERVIEW

District Staff ("Staff") and the Program Management Office ("PMO") have identified an item that Staff and the PMO believe the District should not accept an "or equal" (e.g., substituted material, product, service and/or system) from bidders and/or proposers on projects as it is not in the District's and taxpayer's best interests to do so.

Public Contract Code ("PCC") 3400 permits the Board of Trustees to require such materials, products, services and/or systems to be used, without substitution, on its construction projects: (i) under certain circumstances; (ii) if certain requirements are met; and (iii) if the Board makes certain findings and gives certain directions to Staff.

This Memorandum addresses: (i) the item proposed; (ii) Staff and the PMO's Report "Sole Source Facility Justification Transmittal" attached as Exhibit A-1 to the Board Item, as well as the Contractor Information on the Epson Projectors referred to therein; (iii) Vantage Technology Consulting Group's (Technology Engineer) Letter and opinion thereon attached as Exhibit B-1 to the Board Item; and (iv) the requirements of PCC section 3400. This Memorandum also provides the Board with an overview of the item and my opinions thereon for the Board's consideration.

I have concluded that the proposed item meets the requirements for a recognized statutory exception found in PCC section 3400 (c) (2).

II. THE APPLICABLE LAW

A. Context

Before getting to the dispositive points raised in this Memorandum and options presented, two overriding points should be made first for context:

1. This Memorandum addresses permissible decisions that the Board can make as the Legislature has granted this Board (and other similar governing bodies) with discretion

Exhibit C-1

regarding their construction projects; and

2. nothing being asked of the Board affects the concepts of "competitive bidding" and/or receiving "competitive proposals" for the District's Measure MM construction projects or other District projects.

B. Legislative Rationale

As you will see from the statutory text and the opinions submitted for Board review, the Legislature has determined that Local Public Agencies (such as the District) are in the best position to determine what is best (within certain parameters) for each Local Public Agency's construction projects on certain matters (i.e., the Legislature has vested certain discretion in the Local Public Agencies). The issues presented here fall within that discretion.

C. The Applicable Law

1. PCC section 3400

PCC section 3400 reads in its pertinent part as follows:

"3400.

(a) *The Legislature finds and declares that it is the intent of this section to encourage contractors and manufacturers to develop and implement new and ingenious materials, products, and services that function as well, in all essential respects, as materials, products, and services that are required by a contract, but at a lower cost to taxpayers.*

(b) *No agency of the state, nor any political subdivision, municipal corporation, or district, nor any public officer or person charged with the letting of contracts for the construction, alteration, or repair of public works, shall draft or cause to be drafted specifications for bids, in connection with the construction, alteration, or repair of public works, (1) in a manner that limits the bidding, directly or indirectly, to any one specific concern, or (2) calling for a designated material, product, thing, or service by specific brand or trade name unless the specification is followed by the words "or equal" so that bidders may furnish any equal material, product, thing, or service. In applying this section, the specifying agency shall, if aware of an equal product manufactured in this state, name that product in the specification. Specifications shall provide a period of time prior to or after, or prior to and after, the award of the contract for submission of data substantiating a request for a substitution of "an equal" item. If no time period is specified, data may be submitted any time within 35 days after the award of the contract.*

(c) *Subdivision (b) is not applicable if the awarding authority, or its designee, makes a finding that is described in the invitation for bids or request for proposals that a particular material, product, thing, or service is designated by specific brand or trade name for any of the following purposes:*

***(2)** In order to match other products in use on a particular public improvement either completed or in the course of completion."*

(Amended by Stats. 2009, Ch. 132, Sec. 1. (AB 1086) Effective January 1, 2010.)"

(underlining and yellow highlighting added by me for ease of reference)

2. <u>The "Prohibitions" and "Exceptions"</u>

The "Prohibitions" are set forth in PCC section 3400 (b). A Local Public Agency cannot draft specifications: (i) so that only one company can get the job; or (ii) specify only one product, material, thing, or service without listing the words "or equal" in the specifications. The purpose behind these Prohibitions is to achieve the goals of the PCC, including avoiding "favoritism, fraud, and/or corruption" in public contracting as prohibited by PCC section 100 (d). The Prohibition language is underlined above by me in the quoted statutory text.

However, the Legislature has also recognized that certain exceptions to the language in PCC section 3400 (b) can be appropriate, because they are in the best interest of the District and the public (read: taxpayer dollars). There are the four statutory exceptions set forth in PCC section 3400 (c).

In the matters before this Board, one of the four recognized statutory exceptions is being considered. That is the statutory exception set forth in PCC section 3400 (c) (2) highlighted in yellow above in the quoted statutory text.

And as also highlighted above in yellow, the introductory text to subsection 3400 (c) states:

"***(c)** Subdivision (b) is not applicable if the awarding authority, or its designee, makes a finding that is described in the invitation for bids or request for proposals that a particular material, product, thing, or service is designated by specific brand or trade name for any of the following purposes:"*

Those purposes are:

***"(c) (2)** In order to match other products in use on a particular public improvement either completed or in the course of completion."*

III. <u>STAFF AND PMO (AND OTHERS) EFFORTS TO ASSESS AND EVALUATE CERTAIN PRODUCTS, SYSTEMS, MATERIALS AND THINGS UNDER PCC SECTION 3400 AND EXCEPTIONS THERETO</u>

Since passage of Measure MM, Staff, the PMO and others have been evaluating the impacts of the anticipated Measure MM projects on the District, including without limitation, existing products, systems, services, materials, things, etc., in use within the District as a whole. The effort began shortly after passage of Measure MM and has included numerous persons and entities regarding the future Measure MM projects, as well as other District projects.

In my capacity as outside legal counsel for the District, I have had numerous meetings, provided guidance on the requirements for PCC section 3400 exceptions, questioned Staff, the PMO and others, and consistently asked for justification on any proposed item being presented as an exception within the ambit of PCC section 3400.

As the underlying information and justifications were developed by Staff, the PMO and Vantage Technology Consulting Group (Technology Engineer), they were then presented to Vantage Technology Consulting Group (Technology Engineer) for their review and evaluation. The ultimate evaluation and findings resulted in the Board Item being presented on August 20, 2020.

IV. LEGAL COUNSEL'S EVALUATION OF STAFF, PMO'S AND TECHNOLOGY ENGINEER'S EVALUATIONS AND RECOMMEDATIONS ON PROPOSED EXCEPTION UNDER PCC SECTION 3400

The proposed item is set forth below. This is the same item that appear in the proposed Board Item and Resolution before the Board.

#	Proposed Item and Manufacturer	Exception under PCC section 3400
1.	Epson Projectors	PCC section 3400 (c) (2)

Staff and the PMO have each evaluated the potential item and prepared, with my assistance, the proposed Board Item pertaining to the proposed item and the requested findings to determine if the exception found in PCC section 3400 (c) (2) applies. Staff and the PMO have also prepared Exhibit A-1 ("Facility Justification Transmittals") setting forth the reasons and findings of Staff and the PMO and justifying why the exception to PCC 3400 (b) is being requested and recommended. I have reviewed the written Board Item and Exhibit A-1.

Vantage Technology Consulting Group (Technology Engineer) has reviewed the written Board Item and Exhibit A-1 and concurs in the Staff and PMO findings and recommendations. Vantage Technology Consulting Group issued a Letter for the item which is identified as Exhibit B-1. I have reviewed Exhibit B-1 as well from a legal basis.

As stated in PCC section 3400 (c) above, the restriction on specifying a single product, thing, service, system, or material is not applicable if the awarding authority, or its designee, makes a finding that is described in the Invitation For Bids or in a Request For Proposals that a particular material, product, thing, system, or service is designated by a specific brand or trade name for the following purpose: "In order to match other products in use on a particular public improvement either completed or in the course of completion."

Factors that should be looked at to come within this exception include: (i) what particular materials, products, things, systems, or services are currently in use or being placed in use throughout the District; (ii) where in the District the existing particular materials, products, things, systems, or services are currently in use or being placed in use throughout the District; (iii) how long they have been in use and the District's dependency/reliance on them; (iv) whether there have been any significant operational and/or maintenance issues; (v) the current life/longevity of the existing particular materials, products, things, systems, or services; (vi) the need to have a totally integrated/compatible particular material, product, thing, system, or service; (vii) security, safety and related reason concerns; (viii) where the new particular materials, products, things, systems, or services will be installed; and (ix) what negative resulting consequences (cost, maintenance, safety, security, or otherwise) are likely to occur if different materials, products, things, systems, or services are put in place.

For example, a product can be specified for a project when the owner wants the existing HVAC control system, lock system, irrigation system; fire alarm system, telecommunications system, etc., etc., to be compatible with the new system to be installed.

V. LEGAL COUNSEL'S CONCLUSIONS AND RECOMMENDATIONS

I have evaluated Exhibit A-1 and Exhibit B-1 and measured the contents thereof against the requirements for the exception found in PCC section 3400 (c) (2) and find that the proposed item meets the requirements of the statute. The Board, therefore, has the discretion, as provided by the Legislature, to make the requested findings and conclusions as set forth in the proposed Board Item and Resolution.

If the Board concurs, the Board should do the following:

1. Adopt the findings of Staff, the PMO and Vantage Technology Consulting Group as presented in the Board Item, Exhibit A-1, and Exhibit B-1 as the Board's own findings and conclusions; and

2. Direct Staff and the PMO to include a copy of the Resolution in all Notices Inviting Bids and/or in all Requests for Proposals for all Measure MM projects, and all projects District-wide, regardless of funding line(s).

[End of Memorandum]