



Finance and Administration Committee Agenda Item 10c

February 14, 2017

Item Name: Application of Responsible Contractor Policy to all CalPERS Contracts

Program: Operations Support Services Division

Item Type: Information

Executive Summary

At the December 2016 Investment Committee meeting, the Board requested CalPERS team members provide information on the background and application of the Statement of Investment Policy for the Responsible Contractor Program (RCP Policy or Policy) at the February 2017 Finance and Administration Committee meeting. Additional information was requested in an effort to ascertain whether the Policy is appropriate for application to all CalPERS contracts.

The RCP Policy does not apply to all CalPERS contracting activity. The RCP Policy applies to all contracts on RCP investments (Real Estate and Infrastructure investments in which CalPERS holds 50% ownership interest) except for contracts that are either for professional services or less than \$100,000.

CalPERS contracting activity is currently governed by CalPERS contracting policies and practices and ultimately California public contracting law. Changes to the standards and practices of CalPERS contracting activity similar to those embedded in the RCP Policy would likely require legislative changes to existing contracting law and procedures utilized by all California State agencies.

Strategic Plan

This item is provided at the direction of the Investment Committee and is not related to the CalPERS strategic plan.

Background

RCP Policy

CalPERS has a deep interest in the condition of workers employed by CalPERS investment managers at its Real Estate and Infrastructure investments. CalPERS, through the RCP Policy, supports and encourages fair wages and benefits, based on local market factors, for workers employed by its contractors and subcontractors, subject to fiduciary principles which require competitive returns on CalPERS Real Estate and Infrastructure investments.

The CalPERS RCP Policy was established in 1998. Since inception the Policy has been reviewed and revised several times, most recently, in a three-year process ending in 2012 and a

two-year process ending in 2015. On July 1, 2015, Real Estate and Infrastructure managers began operating under the revised and enhanced Policy approved by the Investment Committee in March 2015. The Policy applies to:

- Domestic Real Estate and Infrastructure investments in which CalPERS has more than a 50% ownership interest
- Contracts of \$100,000 and above that are not for professional services (e.g. legal, accounting, architectural)

The Policy defines terms; establishes roles; requires managers, delegates, and contractors certify their compliance with the Policy; and sets enforcement, monitoring, and administration requirements. The Policy is not applicable to contracts for professional services, such as actuarial, legal or consulting services.

The RCP Policy has specific provisions related to neutrality, including:

- CalPERS, Core managers, contractors and subcontractors are required to remain neutral in the event of an attempt to organize workers
- Selected non-core Real Estate and Infrastructure managers are subject to a Neutrality Trial Program, meaning the external investment manager must remain neutral in an attempt to organize workers
- Neutrality provisions apply to service contracts over \$100,000
- Professional services and construction contracts are exempt from the terms of the RCP
- Managers may grant themselves exemptions under certain circumstances outlined under the Policy
- All neutrality exemptions must be reported to CalPERS' staff within a specified period of time
- Contracting terms must be consistent with the Investment Committee's fiduciary responsibility to maximize the long term rate of return and diversify the risks of our investments.

The Policy is consistent with CalPERS' Statement of Investment Beliefs, as adopted October 14, 2013. CalPERS' Statement of Investment Beliefs provides context for CalPERS' actions, reflects CalPERS' values, and acknowledges CalPERS' responsibility to sustain its ability to pay benefits for generations.

CalPERS Contracts and Government Code

The RCP Policy's goal to support and encourage fair wages and benefits for workers is similar to that of Government Code 19134, which requires that workers providing janitorial and housekeeping services, custodians, food service, laundry, window cleaning, and security guard services be paid at least 85% of the State employer cost of wages and benefits paid to State employees performing similar work. Services of these types fall under our Property Manager contract in which we include specific compensation and benefit language to ensure compliance with State contracting law. CalPERS maintains contracting policies and processes that align with State contracting laws and regulations as prescribed in Public Contract Code, Government Code, Military and Veterans Code, the State Administrative Manual, and the State Contracting Manual.

State contracting law outlines specific terms and conditions required for all State contracts. As such, CalPERS' 33-page contract template contains 77 standard terms and conditions in addition to terms and conditions specific to Information Technology and Investments.

Of the 77 terms and conditions, eight (8) directly support fair employment practices and the ideals adopted by labor unions, as well as encourage development of small businesses and disabled veteran business enterprises. CalPERS is dedicated to promoting lawful behavior and decency with respect to workers employed by CalPERS' contractors and subcontractors, and believes that an adequately compensated and trained worker delivers a higher quality product and service, and therefore incorporates the following eight (8) terms (further described in Attachment 1) into every contract:

- Sweatfree Code of Conduct
- Benefits for Domestic Partners
- Child Support Compliance Act
- Nondiscrimination
- National Labor Relations Board Certification
- Americans with Disabilities Act
- Drug-Free Workplace
- Small Business and Disabled Veteran Business Enterprise Participation Goal

In addition to these provisions, CalPERS always remains neutral in regards to employees' right to organize at their place of employment.

Analysis

On average, CalPERS executes 375 agreements for professional services annually. Professional services agreements include, but are not limited to, contracts and purchase orders for the following: consulting, healthcare (Preferred Provider Organizations and Health Maintenance Organizations), outside legal counsel, investment manager, auditing, actuarial, and training. Application of the RCP Policy for real estate and infrastructure contracts has been successful thus far because CalPERS has greater than 50% ownership in the investment and therefore has the authority to require adherence to the Policy. CalPERS does not have ownership in our professional service providers, and therefore does not generally have the authority to impose these requirements.

Without this authority, CalPERS would face potential difficulty with Policy compliance and enforceability driven by a lack of participation, as we would not have the authority to enforce it. Additionally, enforcement of the Policy without legislative and/or regulatory changes could be considered as imposing an underground regulation. CalPERS could seek to sponsor changes in the requirements of California contracting code requiring similar elements to the RCP, such as neutrality, etc. should the Board direct such actions.

Implementation of elements of the RCP Policy for all CalPERS contracts would require collaboration with multiple Program areas, including Legal, Investments, Enterprise Compliance, Human Resources (Labor Relations), Operations Support Services, and the Board of Administration. Multiple considerations would need to be taken, including, but not limited to,

- What would the parameters of the Program be (i.e. Required for all contracts, or only some? Would there be a dollar threshold?)?
- Who would be responsible for monitoring Program compliance?
- Would the RCP continue to be reported to the Board on an annual basis? If so, who would be responsible for gathering and presenting the data?
- How would complaints and investigations be handled? Who would be responsible?
- Would the Policy be required as part of the solicitation process, or the contract process?
- Would enforcement of these new Policy elements and requirements have, in any way, an adverse effect on costs, investment returns, access to investment opportunities, or significant cost impacts?

The practicality and method of extending this Policy in the future beyond only majority-owned real estate and infrastructure investments depends on the factors and considerations described above, and the degree of control CalPERS can exercise.

Budget and Fiscal Impacts

If CalPERS were to implement the RCP Policy for all contracts, budget and fiscal impacts would require further research to identify the resources required for Program implementation, monitoring and reporting.

Benefits and Risks

Implementation of this Policy for all contracts would further prove CalPERS' continued interest in the condition of workers employed by its contractors. However, the risk remains that we would struggle with enforceability.

Attachments

Attachment 1 – CalPERS Contract Terms Supporting Fair Employment Practices

Kimberly A. Malm

Chief, Operations Support Services Division

Douglas Hoffner

Deputy Executive Officer, Operations and Technology

CalPERS Contract Terms Supporting Fair Employment Practices

Contract Term	Summary of Term
Sweatfree Code of Conduct	Contractor declares under penalty of perjury that no equipment, materials, or supplies furnished to CalPERS pursuant to the Agreement have been produced in whole or in part by sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor, or with the benefit of sweatshop labor, forced labor, convict labor, indentured labor under penal sanction, abusive forms of child labor or exploitation of children in sweatshop labor. Contractor further declares under penalty of perjury that it adheres to the Sweatfree Code of Conduct as set forth on the California Department of Industrial Relations website located at www.dir.ca.gov , and Public Contract Code section 6108.
Benefits for Domestic Partners	Contractor certifies, for contracts in excess of \$100,000, that it is in compliance with Public Contract Code section 10295.3 with regard to benefits for domestic partners.
Child Support Compliance Act	For any contract in excess of \$100,000, Contractor recognizes the importance of child and family support obligations and will fully comply with all applicable state and federal laws relating to child and family support enforcement, including, but not limited to, disclosure of information and compliance with earnings assignment orders, as provided in Chapter 8 commencing with section 5200 of Part 5 of Division 9 of the California Family Code.
Nondiscrimination	Contractor and its subcontractors, as well as their agents and employees, shall not unlawfully discriminate, harass or allow harassment, against any employee or applicant for employment because of sex, sexual orientation, race, color, ancestry, religious creed, national origin, disability (including HIV and AIDS), medical condition (including health impairments related to or associated with a diagnosis of cancer for which a person has been rehabilitated or cured), age (40 or over), marital status, use of family and medical care leave pursuant to federal law, and gender identity (in compliance with Public Contract Code section 10295.35). Contractor certifies under penalty of perjury under the laws of the State of California that Contractor has complied with the nondiscrimination program requirements of Government Code section 12990, subdivisions (a) through (f), and California Code of Regulations, Title 2, section 11100 et seq.
National Labor Relations Board Certification	Contractor, by signature hereto, does swear under penalty of perjury that no more than one final unappealable finding of contempt of court by a federal court has been issued against Contractor within the

	immediately preceding two-year period because of Contractor's failure to comply with an order of a federal court which orders Contractor to comply with an order of the National Labor Relations Board.
Americans with Disabilities Act	Contractor certifies that it complies with the Americans with Disabilities Act (ADA) of 1990 (42 U.S.C. § 12101 et seq.), which prohibits discrimination on the basis of disability, as well as all applicable regulations and guidelines issued pursuant to the ADA.
Drug-Free Workplace	Contractor certifies that it will comply with the requirements of the Drug-Free Workplace Act of 1990 (Government Code § 8350 et seq.) and will provide a drug-free workplace.
Small Business and Disabled Veteran Business Enterprise Participation Goal	<p>If for this Agreement Contractor made a commitment to achieve small business participation, then Contractor must within sixty (60) days of receiving final payment under this Agreement report to the awarding department the actual percentage of small business participation that was achieved.</p> <p>If for this Agreement Contractor made a commitment to achieve disabled veteran business enterprise (DVBE) participation, then Contractor must within sixty (60) days of receiving final payment under this Agreement certify in a report to the awarding department: (1) the total amount the prime Contractor received under the Agreement; (2) the name and address of the DVBE(s) that participated in the performance of the Agreement; (3) the amount each DVBE received from the prime Contractor; (4) that all payments under the Agreement have been made to the DVBE; and (5) the actual percentage of DVBE participation that was achieved.</p>