

Memorandum



Date: November 15, 2005

To: Honorable Chairman Joe A. Martinez
and Members, Board of County Commissioners

From: George M. Burgess
County Manager 

Subject: Recommendation to Reject all Proposals for the Procurement of Small, Low Floor Transit Buses, RFP No. 407, and Authorize a Waiver of Competitive Bids and Negotiations with the Four Responsive Proposers

Agenda Item No. 8(J)(1)(A)

RECOMMENDATION

For the reasons set forth below, I recommend that the Board reject all proposals received in response to Request for Proposals (RFP) No. 407, Small, Low Floor Transit Buses, waive competitive bidding in order to authorize structured negotiations with the four responsive proposers. In addition, I recommend that the Board waive the bid protest process and the provisions of Sections 2-8.3 and 2-8.4 of the County Code with respect to this revised recommendation. I hereby rescind my recommendation to approve a contract between Optima Bus Corporation and Miami-Dade County, filed with the Clerk of the Board on August 9, 2005.

This procurement may be financed in part through grants from the Federal Transit Administration (FTA), the Florida Department of Transportation (FDOT), and proceeds from the Charter County Transit System Sales Surtax (Surtax).

BACKGROUND

On September 11, 2003, the Board approved the advertisement of RFP No. 407, Small, Low Floor Transit Buses (Resolution No. R-987-03). The selection of the RFP as the procurement method for this commodity was in accordance with the Federal Transit Administration (FTA) suggested procurement method for rolling stock.

A total of seven proposals were received in response to RFP No. 407 from the following five firms:

- Bluebird Coachworks (2 proposals – multiple proposals were allowed for differing bus styles)
- Daimler Chrysler Commercial Buses NC, LLC (2 proposals)
- EIDorado National
- Optare Group Limited
- Optima Bus Corporation

The proposal submitted by Optare Group Limited was found non-responsive due to its failure to comply with the Disadvantaged Business Enterprises (DBE) provisions of the RFP.

The designated Evaluation/Negotiation Committees included members from Miami-Dade Transit (MDT), Consumer Services, General Services Administration, and the Department of Business Development. The Evaluation Committee met on December 6 and 20, 2004, and on January 27, 2005 for oral presentations.

Evaluations were based on technical and price components as follows:

<u>Criteria</u>	<u>Points</u>
Technical Component	
Vehicle Design Quality	20
Delivery Schedule	15
After Market Support	15
Proposer's Experience	10
Quality Control Program	10
Price Component	<u>30</u>
	Maximum Score 100

On February 10, 2005, the Evaluation Committee requested authorization from the County Manager to conduct negotiations with the four proposers deemed to be within the competitive range. This was based on the scores for technical criteria for the 6 proposals in consideration being rated on average 55 points or above. This preliminary ranking eliminated one of the two proposals from Bluebird Coachworks (rated 52.8) and one of the two proposals from Daimler Chrysler (rated 52.6), leaving four remaining proposals for the Committee's consideration. The County Manager authorized negotiations to proceed, and the Evaluation Committee reconvened as the Negotiations Committee on March 17 and 23, 2005, and April 7 and 22, 2005.

At the March 23 meeting, pursuant to the terms of the RFP, the Negotiations Committee approved the submission of Best and Final Offers (BAFO), a process encouraged by federal procurement guidelines. Under the RFP, proposers invited to submit a BAFO could submit a new technical proposal and a new price. The RFP did not limit the scope of the technical changes and did not prohibit proposers from increasing the price submitted originally.

At the March 23 meeting, the Negotiations Committee requested that MDT internal audit staff review the financial statements included in the original proposals submitted by the four remaining proposers. The RFP required each proposer to submit information to determine their financial capability to perform the contract, as evidenced by two years of audited financial statements in accordance with the United States' Generally Accepted Accounting Principles (GAAP). In response, Optima Bus Corporation provided the audited financial statements of its parent company, American Capital Strategies (ACS), for a two year period and a one year audited balance sheet for Optima Bus Corporation. Bluebird Coachworks submitted two years audited financial statements for its parent company, Henleys Group, PLC. The audited statements for Henleys Group contained financial information with respect to its subsidiary, the proposer, but omitted material footnotes. Furthermore, the Henleys Group's statements had been audited in accordance with the United Kingdom's GAAP, not the U.S. GAAP. The submission of financial statements in accordance with the U.S. GAAP was a minimum qualification requirement of RFP No. 407.

The financial evaluation, conducted by the MDT internal auditor, found Bluebird Coachworks' financial statements to be incomplete. Since Bluebird Coachworks' auditor's notes were excluded from the financial statements that were submitted, there was no basis upon which to make an adequate or reasonable evaluation. As such, Bluebird Coachworks' financial statements lacked sufficient or "full" disclosure information to properly inform the judgment of the selection committee. The full disclosure principle requires the presentation of adequate information, such

as footnotes to allow for an informed decision. Footnotes are an integral part of the financial statements of a business enterprise and are a means of fully disclosing data relevant to the interpretation of the statements. Restrictions imposed by financial arrangements, basic contractual agreements, legal judgments, and pending litigation are explained in footnotes. MDT's internal auditor advised that without such data, a true financial analysis could not be performed. The Negotiations Committee unanimously determined that Bluebird Coachworks should not be allowed to provide the excluded portions of its financial statements at that point in the process: therefore, Bluebird Coachworks did not meet the minimum qualifications and was not entitled for further consideration.

BAFO's were evaluated for the three remaining proposers and the ranking was as follows:

<u>Proposer</u>	<u>Total Scores</u>
• Optima Bus Corporation	93.4
• ElDorado National	82.0
• Daimler Chrysler Commercial Buses NC, LLC	81.23

Optima Bus Corporation was subsequently recommended for award by the Negotiations Committee.

On August 23, 2005, Bluebird Coachworks filed a bid protest with the Clerk of the Board in response to my recommendation to award a contract to Optima Bus Corporation.

On September 21, 2005, the Hearing Examiner , after the conduct of a hearing, submitted his findings of fact to the Clerk of the Board. The Hearing Examiner found that Bluebird Coachworks is to be deemed responsible and responsive, that Optima Bus Corporation as not financially responsible, and that the BAFO of Bluebird Coachworks and the other two remaining proposers, El Dorado and Daimler Chrysler Commercial Buses NC, LLC, be reevaluated.

ANALYSIS

Accepting the Hearing Examiner's recommendation would require that the Selection/Negotiation committee be reconvened so that Bluebird Coachworks be given the opportunity to cure the flaws of its financial submissions and participate in the BAFO process in accordance with the RFP. It would also require rejecting Optima Bus Corporation's proposal as financially irresponsible.

Upon further review, I have concluded that neither Optima Bus Corporation nor Bluebird Coachworks submitted the financial information required by the RFP. Based on the information that was submitted, I do not concur with the Hearing Examiner's findings that Optima Bus Corporation should be disqualified. If Bluebird Coachworks is allowed to cure its flawed financial submission, then Optima Bus Corporation should be afforded the same opportunity to submit information as to the company's financial position. For this reason, I am not recommending acceptance of the Hearing Examiner's recommendations.

The RFP should not allow proposers to submit prices higher than the price offered initially unless the County materially changes the specifications of the original solicitation document. Optima Bus Corporation increased its BAFO price by approximately \$9.5 million over the price submitted in its original proposal. The BAFO process allowed all proposers who participated in negotiations to

amend their technical and price proposals as part of their BAFO submittals in order to respond to comments from members of the selection committee for the procurement of the bus that represented the best value for MDT. BAFO submittals were evaluated in accordance with the same criteria as the initial proposals -a maximum of seventy points (70) allocated to the technical proposal and a maximum of thirty (30) points allocated to the price proposal.

While this weighting structure was meant to produce proposals for premium technical products, the results of this process exposed an unintentional consequence. Too little emphasis was placed on price at a time when the process allowed proposers to change their price.

However, I am not convinced that the efforts behind this procurement should be thrown out entirely. After careful consideration, review of all pertinent documents, and several briefing meetings with staff from Miami-Dade Transit (MDT), and the County Attorney's Office (CAO) to review the options available to the County, I recommend the Board reject all proposals and authorize the waiver of competitive bids to allow structured negotiations with the four responsive proposers.

The four responsive proposers include Bluebird Coachworks, Daimler Chrysler Commercial Buses NC, LLC, EIDorado National, and Optima Bus Corporation. (The proposal submitted by Optare Group Limited was found non-responsive due to its failure to comply with the Disadvantaged Business Enterprises (DBE) provisions of the RFP.) I am recommending that a group of professionals be convened consisting of three County executives (Carlos Bonzon, P.E., Ph.D., Assistant County Manager, Roosevelt Bradley, MDT Director, and Mayra Bustamante, C.P.A., MDT Deputy Director) and two respected professionals outside of County government to evaluate a new set of proposals from the four responsive proposers.

Initially, this group will be charged with determining the responsibility of all responsive proposers. Following that, the group will evaluate new proposals submitted by all responsible and responsive proposers to determine which proposal offers the best value to Miami-Dade County. To make that determination, the group will be authorized to utilize any expedited methodology to secure a fair evaluation of the proposer's respective ability to satisfy current County needs. The determination of best value will be based on a combination of price with qualitative criteria to include:

- o Vehicle Design Quality, including design concepts related to aesthetics, performance, reliability, maintainability, ergonomics, structural integrity, warranties, quality, comfort, safety of passengers, and life cycle in terms of years and miles;
- o Delivery schedule and the ability to deliver each lot of buses to be furnished during 2006-2010;
- o "After Market" Support, including quality of training programs, technical publications, parts service, and warranty programs;
- o Proposers' experience, qualifications, quality assurance programs, financial capabilities, and past performance; and
- o Quality Control Programs.

Any resulting contract, which I deem to be in the best interests of the County, would be presented to the Board for its approval not later than 90 days following the Board's approval of this recommendation. This will avoid delays in the implementation of planned People's Transportation Plan (PTP) improvements and address the critical needs of the County. Because it is a recommendation for a bid waiver in the interest of time, it departs from the more traditional

evaluation and selection mechanisms available to the County. I am recommending this more expedited process to you in light of the extensive work and evaluation that has already occurred, the critical need for these buses which is being compromised by this protracted procurement, and the inherent trust that I have in the judgment and qualifications of the persons who will be entrusted with making the requisite decisions.

I continue to present to the Government Structures Task Force recommendations for procurement reform. I have directed the Department of Procurement Management (DPM) to identify additional administrative procurement reforms aimed at further reducing cycle times and streamlining the process to build on reform efforts to date. Staff, with the assistance of the CAO, are working to identify recommendations for legislative changes needed to achieve further time reductions and process streamlining. These reforms will include evaluation and selection procedures, committee composition, scoring options, and procurement methods.

I also intend to recommend procedural modifications for Selection/Evaluation Committee appointments for future procurements. This will include the appointment to these Committees of representatives outside of County government. Current County Administrative Procedures allow staff to include non-voting technical advisors to supplement the technical expertise of Selection Committees, and to use non-County staff as voting members on Selection Committees. I will direct staff to routinely include personnel from other jurisdictions and organizations that possess the requisite skills and experience to sit as voting members on the County's Selection Committees.

A waiver of competitive bids and negotiations with the four responsive proposers is the most expedient option available to the County at this time. In the event the Board chooses not to continue the negotiations with the four highest ranked responsive, responsible proposers, I recommend the Board reject all proposals and approve the advertisement of an Invitation to Bid (ITB). Any agreement reached as a result of the negotiations will be brought back to this Board for approval to award, and that new award will be subject to bid protest procedures in accordance with FTA guidelines. Waiver of bid protest procedures is being recommended only for this recommendation to reject all proposals associated with RFP No. 407 so that negotiations with the four responsive proposers can commence immediately.

FISCAL IMPACT

There will be no fiscal impact to MDT as a result of the rejection of bids on RFP No. 407 and authorization to negotiate with the four responsive proposers.


Assistant County Manager



MEMORANDUM

(Revised)

TO: Honorable Chairman Joe A. Martinez
and Members, Board of County Commissioners

DATE: November 15, 2005

FROM: Murray A. Greenberg
County Attorney

SUBJECT: Agenda Item No. 8(J)(1)(A)

Please note any items checked.

- "4-Day Rule" ("3-Day Rule" for committees) applicable if raised
- 6 weeks required between first reading and public hearing
- 4 weeks notification to municipal officials required prior to public hearing
- Decreases revenues or increases expenditures without balancing budget
- Budget required
- Statement of fiscal impact required
- Bid waiver requiring County Manager's written recommendation
- Ordinance creating a new board requires detailed County Manager's report for public hearing
- Housekeeping item (no policy decision required)
- No committee review

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 8(J)(1)(A)
11-15-05

RESOLUTION NO. _____

RESOLUTION REJECTING ALL PROPOSALS FOR THE PROCUREMENT OF SMALL, LOW FLOOR TRANSIT BUSES IN RESPONSE TO REQUEST FOR PROPOSALS (RFP) NO. 407, WAIVING THE REQUIREMENTS OF SECTIONS 2-8.3 AND 2-8.4 OF THE MIAMI-DADE COUNTY CODE PERTAINING TO BID PROTESTS, AND AUTHORIZING A WAIVER OF COMPETITIVE BIDS AND NEGOTIATIONS WITH THE FOUR RESPONSIVE PROPOSERS

WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board finds it in the best interest of Miami-Dade County to reject all proposals for the procurement of Small, Low Floor Transit Buses in response to Request for Proposals (RFP) No. 407, waive the provisions of Sections 2-8.3 and 2-8.4 of the Code of Miami-Dade County pertaining to bid protests, waive competitive bids and authorize negotiations with the four responsive proposers to procure the required goods and services.

The foregoing resolution was offered by Commissioner _____, who moved its adoption. The motion was seconded by Commissioner _____ and upon being put to a vote, the vote was as follows:

Joe A. Martinez, Chairman	
Dennis C. Moss, Vice-Chairman	
Bruno A. Barreiro	Dr. Barbara Carey-Shuler
Jose "Pepe" Diaz	Carlos A. Gimenez
Sally A. Heyman	Barbara J. Jordan
Dorrin D. Rolle	Natacha Seijas
Katy Sorenson	Rebeca Sosa
Sen. Javier D. Souto	

The Chairperson thereupon declared the resolution duly passed and adopted this 15th day of November, 2005. This resolution shall become effective ten (10) days after the date of its adoption unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF
COUNTY COMMISSIONERS

HARVEY RUVIN, CLERK

By: _____
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.

Hugo Benitez



HARVEY RUVIN, CLERK OF THE BOARD OF COUNTY COMMISSIONERS

IN RE: THE AUGUST 23, 2005 PROTEST
OF RECOMMENDATION OF AWARD
OF CONTRACT FOR RFP No. 407 FOR
SMALL, LOW FLOOR TRANSIT BUSES

BLUE BIRD COACHWORKS,
a Florida corporation,

Petitioner,

v.

MIAMI DADE-COUNTY,
a political subdivision of The State
of Florida,

and,

OPTIMA BUS COMPANY,
Intervenor/Respondent.

CLERK OF THE BOARD
2005 SEP 21 AM 10:45
CLERK OF THE BOARD OF COUNTY COMMISSIONERS
MIAMI COUNTY, FLA.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS
TO THE COUNTY COMMISSION**

I. Findings of Fact

A. Procedural Background

1. This hearing concerns a bid protest filed by Blue Bird Coachworks ("Blue Bird") with respect to Request for Proposal No. 407 ("RFP 407") issued by Miami-Dade Transit ("MDT").¹ Blue Bird's protest is in response to a memorandum by the County Manager to the

¹ RFP 407 was located at Tab 1 of Blue Bird's trial exhibit notebook. Addenda were located at Tab 2.

Board of County Commissioner recommending that RFP 407 be awarded to Optima Bus Company ("Optima").

2. The County Manager's Memorandum² is dated September 15, 2005, but was filed with the Clerk of the Board on August 9, 2005. The memorandum states that:

The financial evaluation, conducted by the MDT internal auditor, found Blue Bird Coachworks' financial statements to be incomplete. Since Blue Bird Coachworks' auditor's notes were excluded from the financial statements submitted, there was no reasonable basis upon which to make an adequate or reasonable evaluation. . . . The submission of financial statements in accordance with the Generally Accepted Accounting Principles (GAAP) was a minimum qualification requirement of RFP No. 407. Based on this lack of information provided by Blue Bird Coachworks and the statements made by MDT's professional auditing staff, the Negotiation Committee unanimously found Blue Bird Coachworks' proposal non-responsive.

3. The protest was filed August 23, 2005. In the protest, Blue Bird challenged the decision to find it non-responsive. Blue Bird also challenged the decision to find Optima responsive and award the contract to Optima. Blue Bird's price was approximately \$12 million less than Optima's price. Blue Bird, in addition to other grounds, essentially alleged that different standards were applied to it and Optima. Blue Bird subsequently made a supplemental filing of documents produced by the County after the protest was filed. The hearing on the bid protest was set for September 12, 2005.

4. On August 30, 2005, Optima filed a Motion to Intervene in the proceeding. The motion indicates that the County did not object to splitting its hearing time with Optima. On September 2, 2005, the Joint Motion in Limine by Miami-Dade County and by Intervenor Optima Bus Company was filed. The County and Optima sought to bar Blue Bird from using in the proceeding any records that were not filed on August 23, 2005. On September 7, 2005,

² Tab 15 in Blue Bird's protest Exhibit Notebook.

Optima filed a Motion to Strike and/or Dismiss Blue Bird Coachwork's Allegations in its Bid Protest Related to Optima Bus Company's Submission. On September, 9, 2005, Miami-Dade County and Optima Bus Company's Joint Motion to Strike and/or Dismiss Blue Bird Coachwork's Allegation of a Violation of the Sunshine Law was filed.

5. The bid protest hearing was held on September 12, 2005.

B. The Request for Proposal

6. In 2004, Miami Dade County issued RFP 407 for small, low-floor transit buses to be purchased over five years. This RFP, as amended by Addendum No. 1, is for an initial purchase of 300 buses, with the option to purchase an additional 300 buses. The County Manager is seeking \$215 million in funding for the acquisition.

7. RFP 407 was to proceed in two phases. As laid out in Section 3.0 of RFP 407, in the initial phase, Proposers would submit a technical proposal describing the bus and a separate price proposal. As set forth in Section 4.0, the proposals would then be evaluated by an Evaluation/Selection Committee. After ranking the proposals, the Committee was to "enter into negotiations with all the responsive and responsible Proposers within competitive range." RFP 407 § 4.4.

8. At the close of negotiations, all proposers were to submit their Best and Final Offer ("BAFO"). RFP 407 § 4.5. In lieu of submitting a BAFO, a proposer could simply stand on its previous proposal as its BAFO. "If Proposers do not submit a BAFO or a notice of withdrawal, their immediate previous proposal will be construed as their BAFO." *Id.* The contract would be awarded to the best proposer based on the evaluations of the BAFOs.

9. One of the requirements of RFP 407, to be a qualifying responsible proposer, is that the Proposer submit documents demonstrating:

Sufficient financial strength, resources and capability to finance the work to be performed and complete the Contract in a

satisfactory manner as measured by Proposer's financial statements for the two previous fiscal years prepared in accordance with United States Generally Accepted Accounting Principles (GAAP) and audited by an independent certified public accountant...

RFP 407 § 3.2(A)(4)(a). All parties agree that this section is central to this bid protest. This section was the basis for disqualifying Blue Bird, and Blue Bird contends that Optima did not meet this standard.

C. Financial Responsibility

10. The initial proposals for RFP 407 were submitted in November 2004.

11. "Blue Bird submitted its financial position as a part of its company's consolidated financial statements."³ Blue Bird's proposal included portions of the 2002 and 2003 "Annual Report & Financial Statements" of its parent company, Henlys, to demonstrate its financial responsibility.⁴ There is no dispute that Blue Bird's proposal included the auditor's report, the balance sheet and the cash flows, but did not include the auditor's footnotes. This final omission was the only basis referred to by the County Manager to disqualify Blue Bird. There is no dispute that the auditor's notes were not part of the proposal submission. There is also no dispute that the financials were fully audited and that the auditor's opinion as set forth in the auditor's report contained no reservations. Henlys 2003 Annual Report and Financial Statements, p. 29; Henlys 2003 Annual Report and Financial Statements, p. 27.⁵

12. According to the financial statements, Blue Bird was the principal subsidiary and a wholly owned subsidiary of Henlys Group PLC, a British Company. (Henlys also had

³ As set forth in the County's Financial Evaluation of Bids Submitted in Response to RFP No. 407. Tab 10 of Blue Bird's trial exhibit notebook.

⁴ Tabs 7 and 8 of Blue Bird's trial exhibit notebook.

⁵ Id.

relatively small investments in two other companies: Prevost Car and Nova Bus.) As reflected in the financial statements, Blue Bird's total sales in 2003 were \$504 million. It had \$711 million in fixed assets, \$215.5 million in current assets and \$243 million in assets net of liabilities. The consolidated financials were audited by Deloitte & Touche LLP. Because Henlys is a British company, United Kingdom generally accepted accounting principles were applied. The auditors certified that the statement of financial affairs, the profit and loss statements, the balance sheets and the cash flows, were all true. Henlys 2003 Annual Report and Financial Statements for 2003 p. 29.⁶ Blue Bird has been selling buses since 1927, and hundreds of Blue Bird school buses operate in Miami-Dade County.

13. Optima also submitted financials as part of its proposal. Optima's financial statements⁷ are preceded by an auditor's letter as well. The independent auditor was Allen, Gibbs & Houlik, LC from Kansas. These financial statements were not certified to be in accordance with generally accepted accounting principles. Rather, applying those principles, the auditors stated that they could not give an opinion on the financial position of Optima:

[W]e did not audit the balance sheet of Optima Bus Corp. as of September 30, 2002. Such balance sheet includes amounts which enter materially into the determination of the results of operations and cash flows for the year ended September 30, 2003. We have not audited or reviewed the September 30, 2002 financial statements and accordingly, do not express an opinion or any form of assurance on them.

Because of the matter discussed in the preceding paragraph, the scope of our work was not sufficient to enable us to express, and we do not express, an opinion on the results of operations and cash flows for the year ended September 30, 2003.

⁶ Id.

⁷ Tab 9 of Blue Bird's trial exhibit notebook.

14. The only thing that Optima's auditors certified was the 2003 balance sheet. They did not certify the 2002 balance sheet, the cash flows, the income statements, or the statements of stockholders' equity. Optima's financial statements for 2002 were specifically designated on their face as "unaudited," and, as agreed to by Mr. Ezekial Orji, the County's financial witness, Optima's financials were not in fact audited.

15. The one audited balance sheet for Optima lists total assets of only \$16 million. Liabilities are \$24.5 million. Liabilities thus exceed assets by \$8.5 million. The statement of operations, about which the auditors expressed no opinion, reflected total sales of \$26 million, with a net loss of \$7 million on those sales.

16. The owner of the majority of Optima's shareholders' equity⁸ is a publicly traded buyout and mezzanine fund: American Capital Strategies, Ltd. ("ACS"). Optima also submitted the financials of ACS. As agreed to by Mr. Orji, ACS's financials do not show balance sheets, cash flows, or other financial information of Optima.

17. ACS holds both debt and convertible preferred stock in Optima. ACS 2003 10-K, p.60.⁹ According to ACS's financials, it primarily is a lender and it only acquires equity in an investment company to increase the return on the loans.

We generally acquire equity interests in the companies from which we have purchased debt securities with the goal of enhancing our overall return. . . . In most cases, we receive rights to require the portfolio company to purchase the warrants and stock held by us, known as put rights, under various circumstances including, typically, the repayment of our loans or debt securities. We may use our put rights to dispose of our equity interest in a business . . .

⁸ ACS appears to own only 1% of Optima's common stock, according to its 10-K. It owns substantial preferred stock in Optima, which is said in Optima's financial statements to be "generally nonvoting." There was no testimony concerning ACS's voting and other rights.

⁹ ACS's financials are not in the trial exhibit notebook, but were filed by Blue Bird at Tab 13 of its Bid Protest.

ACS 2003 10-K, p.2. ACS does not invest forever, but instead reserves the right to exit its investments:

... We have exited 55 investments, or \$589 million of our originally invested capital, representing 22% of our total capital invested since our IPO earning a 19% compounded annual return on these investments from the interest, dividends, fees, gains and losses over the life of the investments.

ACS 2003 10-K, p.3

18. There was no evidence from any source that ACS provided any type of guarantee or assurance for the Optima proposal. According to ACS's financials and the testimony of both Blue Bird's and the County's financial witnesses, ACS only values its debt in Optima. It has completely written off its \$25 million equity investment in Optima. If Optima is awarded the contract, there is no requirement that ACS guarantee Optima's performance. ACS's financial statement, in fact, indicates that it liquidated some of its investments through bankruptcy.¹⁰ ACS did not itself attend the hearing.

D. Negotiations and BAFO

19. After the initial proposal, both Optima and Blue Bird were deemed responsive and responsible proposers and invited to negotiations. There are numerous emails and letters in the record from the County to that effect, none of which are controverted.¹¹

20. Blue Bird also established that throughout the negotiation period: it continued to ask the County if it needed any other documentation, and the County never asked for additional financial information.¹² Throughout the course of negotiation, the County continued to ask for

¹⁰ Tab 13, pp.26-27, of Blue Bird's trial exhibit notebook.

¹¹ Tab 11 of Blue Bird's trial exhibit notebook.

¹² Id.

additional information and presentations on a number of topics, but all parties agreed that it never asked for any additional financial information.¹³

21. The Negotiation Committee, the composition of which was identical to the Evaluation/Selection Committee, asked the County staff to perform a financial evaluation of the proposers in March. This evaluation was limited to calculating four financial ratios from certain information in the balance sheets and income statements. The evaluation is dated April 1, 2005.¹⁴ The staff did an evaluation of all four proposers. Mr. Orji admitted that, even without the auditor's notes, he was able to perform a financial analysis of Blue Bird. While that analysis makes note of the fact that Blue Bird's auditor's notes were missing, it does not state that that omission in any way affected the analysis.¹⁵ There is no mention of the fact that the auditors used United Kingdom rather than United States GAAP. There is no mention of the fact that Optima's financials were not audited.

22. According to the uncontroverted testimony of Blue Bird's expert accounting witness, Mr. Andrew Bernstein, the County did not need the footnotes for the financial calculations it was performing, and the County's analysis would not have been affected by anything in Blue Bird's notes.¹⁶ According to his uncontroverted testimony, it was apparent that the County did not use the notes when performing the financial evaluations.

23. The County's witnesses admitted that they never asked Blue Bird to supply the notes, and they never attempted to find the missing financial information.

¹³ Id.

¹⁴ Tab 10 of Blue Bird's trial exhibit notebook.

¹⁵ Id.

¹⁶ Transcript (Rough) of Hearing, pp. 57-59.

24. Blue Bird's Best and Final Offer quoted a price of \$85,769,525. Optima's price was \$97,726,077, approximately \$12 million more than Blue Bird.

25. Blue Bird was treated as a "responsible and responsive proposer" throughout the process of considering RFP 407 until the final meeting. At that meeting – for the first time – some members of the Committee raised the missing footnotes as a problem with Blue Bird's proposal. Without allowing Blue Bird even to speak to the issue, the Committee disqualified Blue Bird on the spot as nonresponsive and determined to recommend Optima.

26. As admitted by Ms. Gonzalez on cross-examination, when Blue Bird volunteered to supply the notes, the County decided not to allow Blue Bird to submit additional information even though the RFP did not prevent the County from accepting the information.¹⁷

27. Even though Blue Bird was not allowed to supplement its BAFO by providing notes, it was also uncontroverted that the proposal process was not completely closed with the BAFO, and the County continued to allow Optima to supplement its proposal as the parties continued to negotiate over Optima's performance bond and warranty.¹⁸

¹⁷ Transcript (Rough) of Hearing, p. 140:

Q Do you remember that Blue Bird offered to submit the notes?

A I recollect that.

Q So you agree with me, we offered to submit the notes?

A It was within the purview of the Selection Committee to accept those notes or not.

Q And they rejected them, correct?

A Correct.

¹⁸ Tab 11(J) of Blue Bird's trial exhibit notebook.

II. Conclusions of Law

A. Standard of Review

28. Ordinarily a Hearing Officer in a protest applies a *de novo* standard of review in these proceedings. Cf. Miami-Dade County v. Church & Tower, Inc., 715 So. 2d 1084, 1086-87 (Fla. 3d DCA 1998). Optima cited certain cases at the hearing that concerned judicial review of the County decision. Those cases held that a County's decision would only be overturned by a court if it is arbitrary and capricious. This is not a court proceeding.¹⁹ No decision has yet been made by the County in this case. The purpose of this hearing is to provide a report and recommendation to the County Commission to consider before it awards the contract. As such, this hearing officer will apply a *de novo* standard of review. Nevertheless, even if one were to apply an arbitrary and capricious standard, the outcome would be the same.

B. The Motions

29. Optima moved to intervene. Blue Bird did not oppose that motion, and that motion was granted. Optima was allowed to present evidence, examine witnesses, and make arguments.

30. Optima also brought two motions to strike. The first motion, which was joined by the County, concerned allegations of a Sunshine Act violation. Blue Bird alleged in the protest that two members of the Committee – Mr. Ron Barnes and Mr. Alberto Parjus - stepped out of the room with a finance officer at the beginning of the meeting where Blue Bird was disqualified, after which they proceeded to announce the disqualifying factor.²⁰ Blue Bird dismissed without prejudice in this proceeding the claim for a Sunshine Act violation.

¹⁹ Optima has also cited Administrative Procedure Act cases, but that act is inapplicable to this proceeding.

²⁰ Mr. Barnes and Mr. Parjus did not attend the hearing before this Hearing Officer.

31. The second motion, which the County did not join, concerned Optima's claim that Blue Bird lacked standing. Optima's standing arguments relate to court proceedings - not to internal administrative reviews, and the RFP and the County Code give Blue Bird the right to bring a protest. Blue Bird has standing, and that motion is denied.

C. The Merits.

32. There is no dispute that Blue Bird's best and final price was approximately \$12 million less than Optima's. Because Blue Bird's Best and Final Offer was rejected on the basis of responsiveness, Blue Bird's bus was not evaluated.

33. RFP 407 does not require any particular form of financial document be submitted to show that the proposer has the required sufficient financial strength to perform the contract. The RFP does require that companies be independently audited. There is no disagreement that Blue Bird was fully audited by Deloitte and Touche, albeit applying United Kingdom ("UK") accounting principles. There is no disagreement that Optima was not fully audited. The only question raised by the County Manager's Memorandum and by the Selection/Evaluation Committee (later named the Negotiation Committee and hereinafter referred to simply as "the Committee") during the RFP process was whether Blue Bird supplied sufficient documentation to demonstrate that it was audited and had sufficient financial strength. Because Blue Bird provided an unqualified auditor's report, because the County was able to perform its financial analysis of Blue Bird, because it was uncontroverted that the financial notes were not used as part of the financial analysis performed, this hearing officer concludes that Blue Bird provided sufficient documentation to prove it had "sufficient financial strength, resources and capability to finance the work to be performed and complete the Contract in a satisfactory manner as

measured by Proposer's financial statements for the two previous fiscal years" RFP 407 § 3.2(A)(4)(a).²¹

34. Additionally, the County admits that it chose not to evaluate the financial statements as part of the proposal process. Witnesses for the County testified that the Committee elected not to evaluate the financial statements as part of the initial proposal. While the Committee might have had, for the sake of argument, the right to change the criteria, it did not have the right to apply different criteria during the initial phase and the BAFO phase. As the County repeatedly emphasized during the hearing, RFP 407 clearly states that "BAFO's will be evaluated in accordance with the same requirements and criteria as the initial proposals" RFP 407 § 4.5.²² Having elected not to do a financial review and not to reject Blue Bird because its financials lacked auditor's notes or applied UK GAAP at the initial evaluation round, the Committee could not change the criteria for the BAFO and then reject Blue Bird. That requirement of consistency between the initial proposal and the BAFO was not a mere technicality. The requirement for internal consistency was included in the RFP to assure that the rules did not change in midstream. This Hearing Officer's opinion on this point is reinforced by the extensive correspondence issued by the County throughout the process referring to Blue Bird as responsible and responsive. According to RFP 407, responsiveness and responsibility is to be determined before negotiation. The Committee's decision to reject Blue Bird as non-responsive on a technicality at the very end of the process, when Blue Bird had no opportunity to correct the newly announced "deficiency," was erroneous, and the County Manager's Memorandum should be rejected.

²¹ Tab 1, p. 33, of Blue Bird's trial exhibit notebook.

²² Tab 1, p. 40, of Blue Bird's trial exhibit notebook.

35. As noted previously, the fact that Blue Bird's auditors applied UK GAAP had no material impact on the financials. There was testimony concerning the differences between US and UK GAAP, but the uncontroverted testimony of Blue Bird's financial expert was that these differences would not have impacted the analysis done by the County. Therefore this difference was immaterial.

36. The Committee also chose to apply different standards to Blue Bird and Optima. If the Committee were going to overlook the fact that Optima's financials were not audited at all for one year and only partially audited for another, it could not reject Blue Bird on the ground that Blue Bird did not supply enough proof of its audit or because of the standards its auditors applied. RFP 407 requires, as does every bid or proposal process, that all applicants be evaluated by the same criteria. For this reason, even if an arbitrary and capricious standard applied to this proceeding, the Committee's decision and the County Manager's Memorandum should still be rejected for not treating both proposers equally.

37. The County admitted that the Committee had the right to allow Blue Bird to submit its missing financial pages after the BAFO, but elected not to, deciding instead that the proposals were "closed." It was uncontroverted, however, that the proposals were not closed with the BAFO and that the County left several open issues that it continued to negotiate with Optima, including such important matters as the warranty and performance bond. The bond was surely a more central issue than the immaterial footnotes to Blue Bird's financial statements. Yet, the Committee gave Optima a chance to address that substantive issue of its financial viability while denying Blue Bird the chance to address the merely technical issue of the missing footnotes. This was another example of the Committee not treating the proposers equally.

38. “[T]he public authority may not arbitrarily or capriciously discriminate between bidders, or make the bid [sic²³] based upon personal preference.” City of Sweetwater v. Solo Constr. Corp., 823 So. 2d 798, 801 (Fla. 3d DCA 2002)(quoting Marriott Corp. v. Metro. Dade County, 383 So. 2d 662, 665 (Fla. 3d DCA 1980)(quoting Hotel China and Glassware Co. v. Board of Public Instruction, 130 So. 2d 78, 81 (Fla. 1st DCA 1961))). The Committee discriminated between Optima and Blue Bird.

39. The County’s discretion in awarding bids “must be exercised based upon clearly defined criteria, and may not be exercised arbitrarily or capriciously.” City of Sweetwater v. Solo Constr. Corp., 823 So. 2d 798, 802 (Fla. 3d DCA 2002)(citing Liberty County v. Baxter's Asphalt & Concrete, Inc.; 421 So. 2d 505 (Fla. 1982)); Miami-Dade County v. Church & Tower, Inc., 715 So. 2d 1084, 1088 (Fla. 3d DCA 1998); City of Miami Beach v. Klinger, 179 So. 2d 864 (Fla. 3d DCA 1965)). Decisions that are based on personal preference or that are made without reason or for reasons that are pre-textual are arbitrary and capricious. City of Sweetwater v. Solo Const. Corp., 823 So. 2d 798, 802 (Fla. 3d DCA 2002)(citing Decarion v. Monroe County, 853 F. Supp. 1415 (S.D.Fla.1994)). The basis for rejecting Blue Bird, having not been applied during the initial proposal process, could not be applied for the first time at the BAFO.

40. Even applying the arbitrary and capricious standard of review, the Committee’s decision and the County Manager’s Memorandum should be reversed.

41. This Hearing Officer also notes that RFP 407 required that the financials submitted be “audited by an independent certified public accountant.” By contrast to Blue Bird,

²³ This typographical error is a misquote by the Sweetwater Court of the Marriott opinion, wherein the court stated “make the award.” Marriott Corp., 383 So. 2d at 665 (emphasis added).

there was no way Optima could prove with unaudited financials that it had “sufficient financial strength, resources and capability to finance the work to be performed and complete the Contract in a satisfactory manner as measured by Proposer’s financial statements for the two previous fiscal years” Optima should have been rejected at the outset. Even its unaudited financials leave serious questions about Optima’s ability to perform a \$215 million contract. There is no way a rational evaluator could find Optima financially responsible and reject Blue Bird as financially irresponsible.

D. Other Arguments Raised by Optima and the County.

42. There were several arguments raised by the County and Optima for the first time at the hearing were not part of the County Manager’s Memorandum. Because such arguments were not the basis for the County Manager’s Memorandum, this hearing Officer rejects them.

43. The County raised an eleventh-hour claim that Blue Bird improperly mentioned in its BAFO cover letter that its price was unchanged. The County claims this violated the terms of the RFP. This Hearing Officer decides against that defense because it was also not part of the County Manager’s recommendation, and it was not ever mentioned by the Committee. Additionally, the County is incorrect in stating that, because the BAFO requires separate sealed price proposals, it was improper to state in the cover letter that there was no change in price. As quoted above in the Findings of Fact, RFP 407 § 4.5 allows proposers to stand on their previous proposal in lieu of submitting a new sealed price proposal. Blue Bird did nothing improper by stating that it was standing on its previous price proposal. The RFP specifically contemplated that a proposer could stand on its earlier price.

44. Optima also accused Blue Bird of violating the lobbyist ordinance. Blue Bird disputed the accusation. There is no dispute that Blue Bird is not debarred. Only the Ethics Commission has the authority to investigate violations of the lobbyist ordinances. Miami-Dade

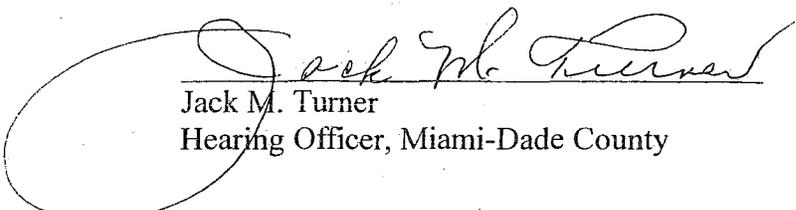
County Code § 2-11.1(s)(9). Only a Debarment Committee may debar companies. Miami-Dade County Code § 10-38. This Hearing Officer may not do either.

45. Blue Bird also raised in its protest certain issues related to the accessibility of the buses for persons with disabilities. Because these issues are not necessary to this ruling, this Hearing Officer will not address them.

D. Conclusion.

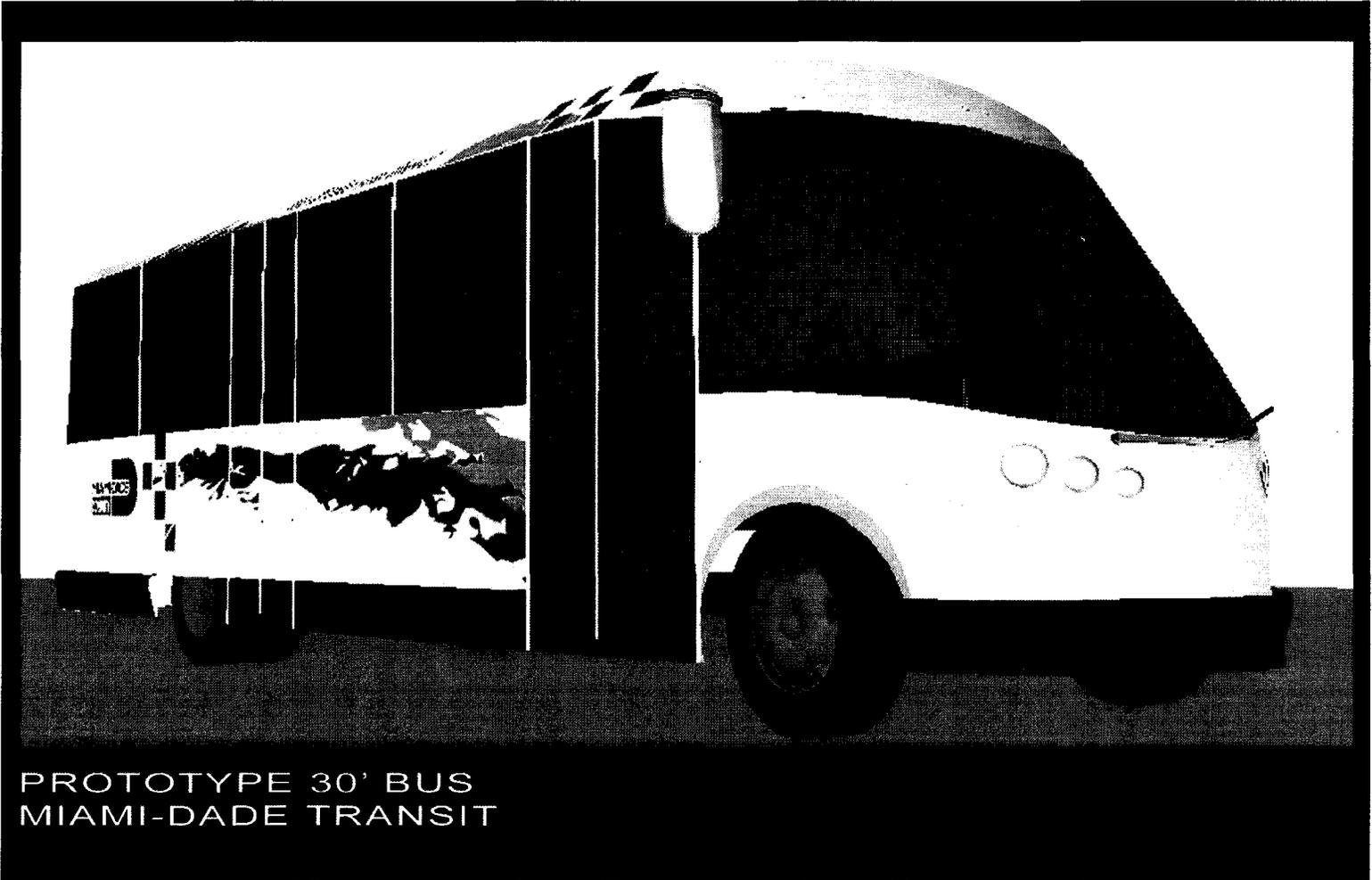
46. "There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission." Intercontinental Properties, Inc. v. State of Florida Dept. of Health & Rehabilitative Services, 606 So. 2d 380, 386 (Fla. 3d DCA 1992). Even though this proceeding concerned a proposal, rather than a bid, there was no basis for the Committee to completely reject Blue Bird's proposal for alleged financial irresponsibility based upon an immaterial technical irregularity and to award the contract to Optima for \$12 million more. This Hearing Officer recommends that the County Commissioners thus treat Blue Bird as responsive and responsible, that Optima be rejected as not financially responsible, and that the BAFOs of Blue Bird and the other two remaining bidders be reevaluated.

RESPECTFULLY SUBMITTED in Miami-Dade County, Florida this 19 day of September, 2005.

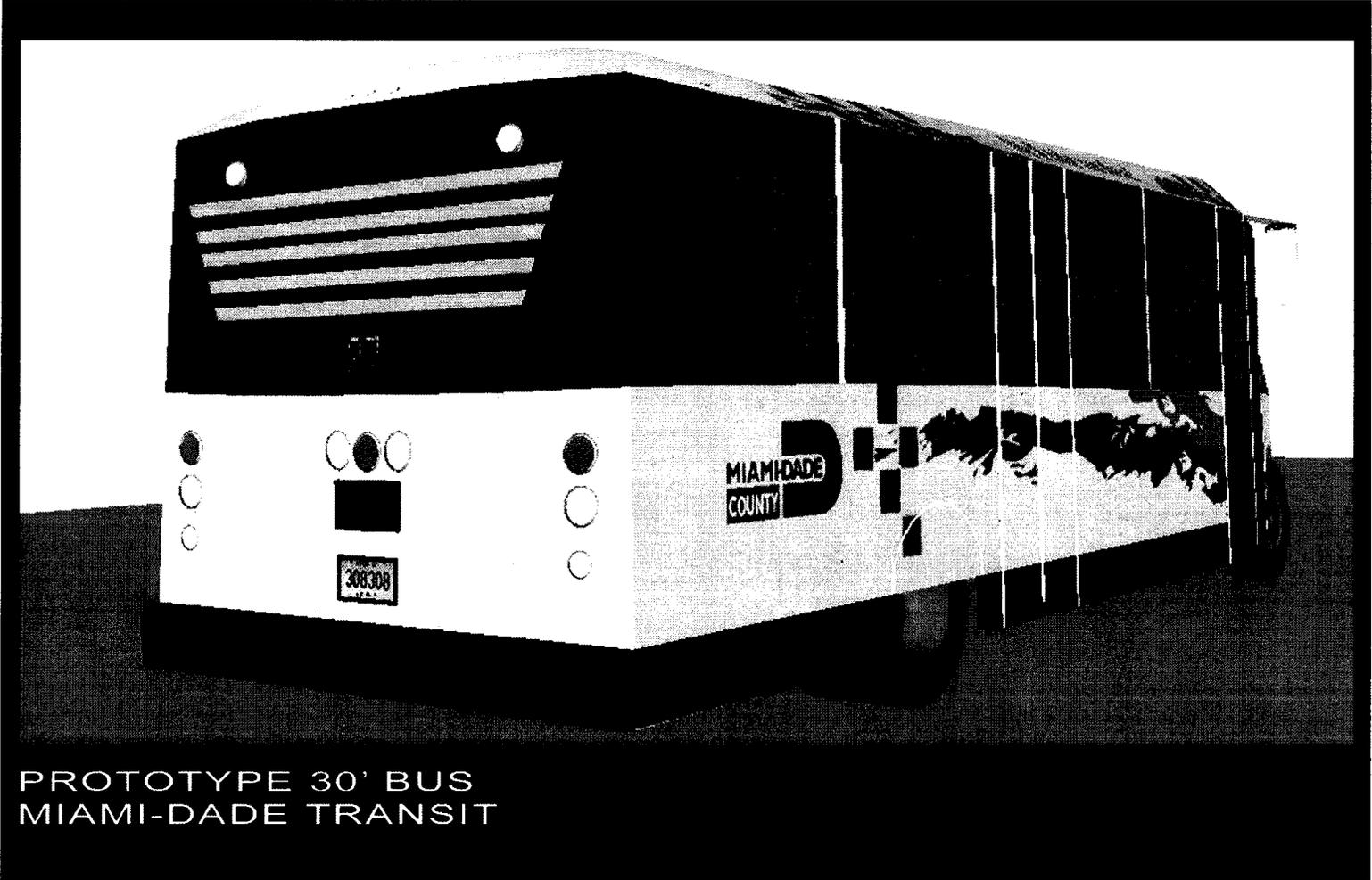

Jack M. Turner
Hearing Officer, Miami-Dade County

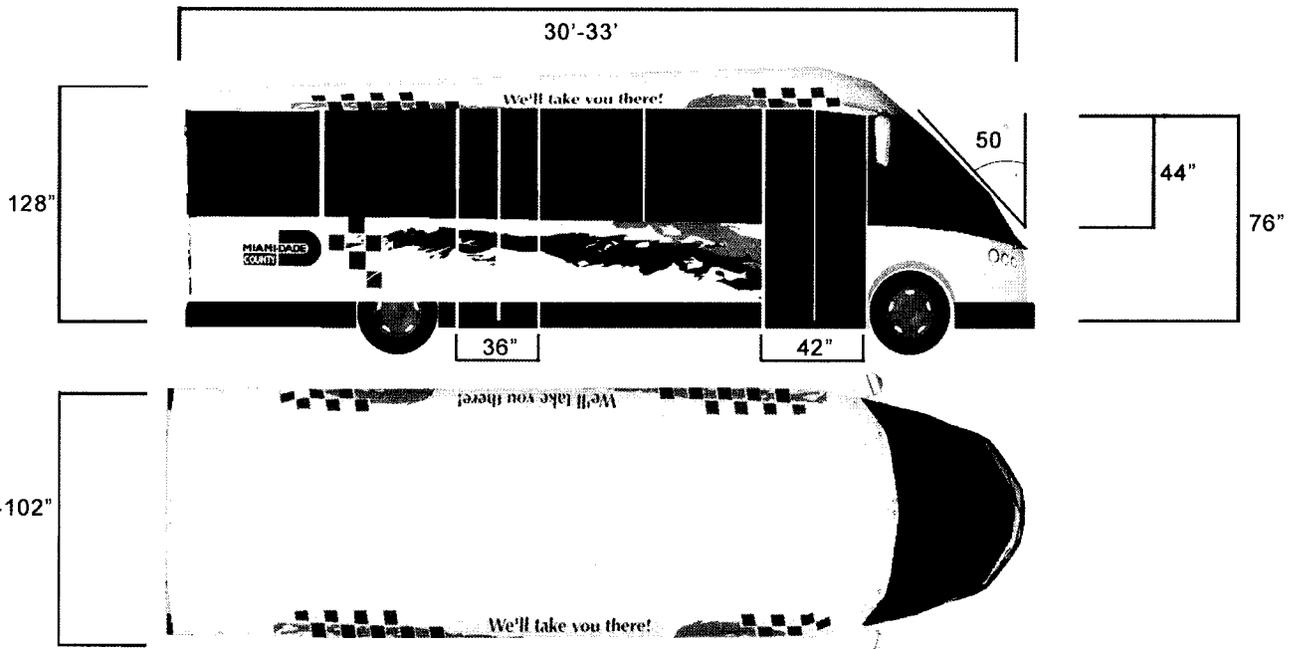
Copies furnished to:

Clerk of the Board
Bruce Libhaber, Esq., CAO
Miguel De Grandy, Esq.
Barry R. Davidson, Esq.



PROTOTYPE 30' BUS
MIAMI-DADE TRANSIT





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