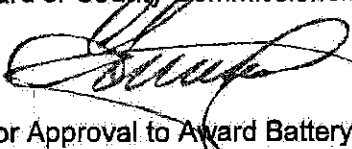


# Memorandum



**Date:** October 3, 2019

**To:** Honorable Chairwoman Audrey M. Edmonson  
and Members, Board of County Commissioners

**From:** Carlos A. Gimenez  
Mayor 

**Subject:** Recommendation for Approval to Award Battery-Electric Buses and Charging System;  
and Authorizing the Use of Charter County Transportation Surtax Funds for Such  
Purpose

Agenda Item No. 8(F)(24)

Resolution No. R-1041-19

## Recommendation

It is recommended that the Board of County Commissioners (Board) approve a competitive contract award, *Contract No. RFP-00456, Battery-Electric Buses and Charging System*, for the Department of Transportation and Public Works (Transportation and Public Works).

The contract provides for the purchase of a minimum of 33, and up to a maximum of 75, 40-foot, Battery-Electric buses and installation of depot chargers (charging system) at each of the three maintenance garages. Battery-Electric buses produce zero emissions, have a 12-year lifespan, include a 12-year warranty that covers the batteries and charging system, and include training, spare parts, and diagnostic tools. Each charging system will fully charge a minimum of 11 Battery-Electric buses simultaneously within four hours to provide an operating range with full state of charge and under full GVWR and auxiliary loads to be at least 175 miles. The Battery-Electric buses will replace diesel-powered buses that have surpassed their useful lives.

This item is placed for Board review pursuant to Miami-Dade County Code Section 29-124(f). The Board may only consider this item if the Citizens' Independent Transportation Trust (CITT) has forwarded a recommendation to the Board prior to the date scheduled for Board consideration or 45 days have elapsed since the issuance of this recommendation. If CITT has not forwarded a recommendation and 45 days have not elapsed since the issuance of this recommendation, a withdrawal of this item will be requested.

## Background

Battery-Electric or zero emission buses offer low noise operations, and support the shift of the transportation sector away from petroleum dependence to alternative fuel technologies and changes in environmental regulations. Zero emission buses are generally best suited for lower speed, stop-and-go driving, as is typified by the majority of transit bus operations. In the United States, the transportation sector represents 27 percent of total greenhouse gas emissions nationally. Diesel buses are one of the major emitters of greenhouse gases within the sector. Every zero emission bus is able to eliminate 1,690 tons of carbon dioxide over its 12-year lifespan. This is equivalent to taking 27 cars off the road.

Zero emission buses are more fuel-efficient than diesel and Compressed Natural Gas (CNG) buses. Depending on driving conditions, these buses can use the same amount of fuel as a diesel bus and travel further. Battery-electric buses travel about 17.48 miles per diesel gallon equivalent while CNG buses travel 4.51 miles per diesel gallon equivalent. By using less fuel while traveling the same distance or even greater distances than diesel-fueled or CNG buses, fleets using zero emission buses have the opportunity to reduce their overall fuel costs annually. A zero emission bus does not require oil changes or emissions after-treatments. There is no maintenance needed for the engine, fuel, cooling, or exhaust systems. As a result, maintenance savings can add up to \$237,000 over the lifetime of a zero emission bus as compared to a diesel-hybrid bus, up to \$151,000 compared to a diesel and \$250,000 as compared to a CNG bus.

On October 21, 2016, a Request for Proposal was advertised. Three proposers responded to the solicitation. One proposer, BYD Motors, Inc., was deemed non-responsive by the County Attorney's Office for failure to submit a bid bond or other form of acceptable bid security with their proposal. The remaining proposers were New Flyer of America, Inc. (New Flyer), and Proterra, Inc. (Proterra).

Staff conducted a responsibility review meeting with Proterra on February 16, 2018. Proterra addressed each concern raised during the evaluation. On February 28, 2018, the Negotiation team determined Proterra's bus met, or would be able to meet, the 175-mile range and other requirements and regulations.

Negotiations began on March 8, 2018. Proterra's original price proposal was \$74,900,221.90 for all 75 buses, charging system, training, spare parts, and diagnostic tools. Negotiations resulted in a price reduction of \$2,723,900 and customization of various systems, and additional on-site training for a negotiated price proposal of \$72,176,322. In comparison, New Flyer's proposal price is \$75,850,903, and Transportation and Public Works' Independent Cost Estimate is \$78,750,000. Based on the price analysis and negotiations, the overall negotiated price of \$72,176,322 for this proposed contract is considered fair and reasonable.

Federal Transit Administration (FTA) regulations require Transportation and Public Works to complete a Buy America, pre-award audit of the bus manufacturer to determine if Proterra complies with the Buy America requirements outlined in 49 CFR Part 661 and Part 663. To complete this pre-award audit, Transportation and Public Works contracted with Transit Resource Center, Inc. to act as its agent concerning the Buy America requirements.

On December 31, 2018, Transit Resource Center, Inc. concluded that Proterra met FTA Pre-Award Buy America Audit requirements for the production of the vehicles covered in this purchase. Transit Resource Center also concluded that Proterra's plans comply with the technical specifications in the solicitation. The County continued its due diligence after receipt of Pre-Award Buy America Audit. This due diligence included additional reference checks, and review of concerns raised by one of the competitors in February and March 2019 letters. Based on additional review and due diligence conducted, no adverse information was found.

**Scope**

The scope of this item is countywide in nature.

**Fiscal Impact/Funding Source**

The fiscal impact for the five-year term is up to \$72,176,322, should the County purchase all seventy-five buses. The contract is funded by the Charter County Transportation Surtax funds.

Department	Allocation	Funding Source	Contract Manager
Transportation and Public Works	\$72,176,322	Federal Transit Administration/PTP Surtax	Ana Rioseco
<b>Total:</b>	<b>\$72,176,322</b>		

**Track Record/Monitor**

Vanessa Stroman of the Internal Services Department is the Procurement Contracting Manager.

**Delegated Authority**

If this item is approved, the County Mayor or County Mayor's designee will have the authority to exercise all provisions of the contract, including any cancellation, renewal and extension provisions, pursuant to Section 2-8.1 of the County Code and Implementing Order 3-38.

**Vendor Recommended for Award**

A Request for Proposals was issued under full and open competition. Three proposals were received in response to the solicitation.

Pursuant to disclosure requirements in Resolution No. R-477-18, the highest-ranked proposer is recommended in accordance with the method of award per the solicitation and is a non-local vendor. None of the proposers were local vendors, as there are no bus manufacturers located in Miami-Dade County.

Vendor	Principal Address	Local Address*	Number of Employee Residents	Principal
			1) Miami-Dade 2) Percentage*	
Protterra, Inc.	1815 Rollins Road Burlingame, CA	None	0 0%	Ryan Popple

\*Provided pursuant to Resolution No. R-1011-15. Percentage of employee residents is the percentage of vendors' employees who reside in Miami-Dade County as compared to the vendor's total workforce.

**Vendors Not Recommended for Award**

Vendor	Local Address	Reason for Not Recommending
New Flyer of America, Inc.	None	Evaluation Scores/Ranking
BYD Motors, Inc.	None	Deemed non-responsive by the County Attorney's Office for late submittal of Bid security (opinion attached)


**Due Diligence**

Pursuant to Resolution No. R-187-12, due diligence was conducted in accordance with the Internal Services Department's Procurement Guidelines to determine vendor responsibility, including verifying corporate status and that there are no performance and compliance issues. The lists that were referenced included convicted vendors, debarred vendors, delinquent contractors, suspended vendors, and federal excluded parties. There were no adverse findings relating to vendor responsibility.

**Applicable Ordinances and Contract Measures**

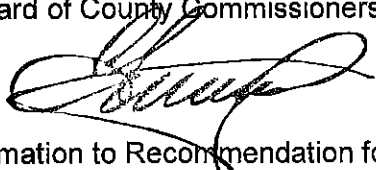
- The two percent User Access Program provision does not apply.
- The Small Business Enterprise Selection Factor and Local Preference do not apply.
- The Living Wage does not apply.

Attachment

  
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 Alina T. Hudak  
 Deputy Mayor

# Memorandum



**Date:** October 3, 2019  
**To:** Honorable Chairwoman Audrey M. Edmonson  
and Members, Board of County Commissioners  
**From:** Carlos A. Gimenez   
Mayor  
**Subject:** Supplemental Information to Recommendation for Approval to Award Contract Number  
RFP-00456, Battery-Electric Buses and Charging System

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## Bid Protest

Bid award recommendation to award a contract to Proterra for Battery-Electric buses was filed with the Clerk of the Board on June 28, 2019, and notice was sent to all proposers thereafter. New Flyer of America, Inc. (New Flyer) filed a Bid Protest (attached) on July 9, 2019 stating that the County should have rejected Proterra's proposal as non-responsive.

The Findings and Recommendation of the Hearing Examiner (attached) determined that the County did not act in any way that would qualify as arbitrary, capricious, fraudulent or illegal. On the contrary, the Hearing Examiner's recommendation states:

***"Proterra's proposal was responsive to the RFP and New Flyer failed to establish that Proterra made any material misrepresentations in its proposal or at any point in this procurement process. New Flyer also failed to establish that the County acted arbitrarily or capriciously. On the contrary, the County acted reasonably and conducted additional due diligence in response to New Flyer's concerns. The County did not deviate from the terms or scope of the RFP when it entered post-evaluation with Proterra after the Section Committee gave Proterra a higher score than New Flyer. The post-evaluation negotiations were consistent with the terms of the RFP and did not provide a competitive advantage."***

***"The Selection Committee's recommendation to award Proterra was based upon an honest exercise of the Committee's discretion following a procurement process that was clean, fair, competitive, reasonable, and transparent."***

Accordingly, the Hearing Examiner recommends that New Flyer's Bid Protest should be denied and the recommendation of award to Proterra should be affirmed.

## Price Comparison

Proterra's negotiated pricing was compared to recent awards by other agencies. In the last 12-15 months, Proterra was awarded two competitive FTA-compliant state schedules: State of Georgia Department of Administrative Services (DOAS) contract for Transit Buses, and the Commonwealth of Virginia's Department of General Services Optional Contract No. E194-81688.

	Miami-Dade County Proposed Contract	State of Georgia Contract	State of Virginia Contract
Battery-Electric Bus with County Specifications	\$898,000	\$1,056,947	\$1,097,684

Honorable Chairwoman Audrey M. Edmonson  
and Members, Board of County Commissioners  
Page 2

The maintenance cost savings for a Battery-Electric bus compared to the buses powered by Compressed Natural Gas (CNG) are \$250,000.

Therefore, the Hearing Examiner's recommendation to deny New Flyer's bid protest, and award the contract to Proterra should be affirmed.



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Jennifer Moon  
Deputy Mayor

Attachments

**MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS**

**NEW FLYER OF AMERICA, INC.,**

**Petitioner,**

**v.**

**RFP No. 00456 Battery-Electric Transit Buses  
and Charging System**

**MIAMI-DADE COUNTY,**

**Respondent**

**and**

**PROTERRA, INC.,**

**Intervenor**

CLERK OF THE BOARD

2019 AUG -2 PM 1:31

CLERK OF THE BOARD  
MIAMI-DADE COUNTY, FLOR.  
#1

**HEARING EXAMINER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

On July 26, 2019, the undersigned Hearing Examiner presided over the above-styled duly noticed Bid Protest Hearing (hereinafter the "Hearing") at the Stephen P. Clark Government Center, 22<sup>nd</sup> Floor Main Conference Room. Michael Llorente, Esq. and Diana C. Mendez, Esq. appeared on behalf of Petitioner, New Flyer of America, Inc. ("New Flyer" or "NFI"); Bruce Libhaber, Esq. and Dale P. Clarke, Esq. appeared on behalf of Respondent, Miami-Dade County (the "County"); and Joseph M. Goldstein, Esq. and Andrew E Schwartz, Esq. appeared on behalf of Intervenor, Protterra, Inc. ("Protterra").

As an initial matter, the undersigned notes that at the outset of the Hearing the undersigned advised that the parties were free to elicit live testimony from their contemplated witnesses, but also that the undersigned felt that the written record, which includes the parties' written briefs and accompanying exhibits, was sufficiently developed to decide the matter

without live witness testimony. As a result, the parties declined to call live witnesses and instead proceeded with oral presentations by counsel.

## **FINDINGS OF FACT**

### **I. The RFP**

On October 21, 2016, the County issued Request for Proposals No. 00456 for Battery-Electric Transit Buses and Charging System (the "RFP"). The County issued the RFP for the award of a minimum quantity of 33 and a maximum of 75 forty-foot (40') heavy duty battery electric buses with a 175-mile minimum range and a minimum lifecycle of 12 years or 500,000 miles, whichever comes first. The RFP also calls for the construction and installation of three charging stations for the buses, but the charging stations are not implicated by New Flyer's protests. New Flyer Protest Exhibit 1, RFP, at p. 5, 51 (pagination as per bottom right corner). At this point, the undersigned notes that at the Bid Protest Hearing all the parties agreed that this was a very ambitious procurement that required proposers to be innovative, because at the time the solicitation was issued and proposals were submitted, no one had an electric bus that met or exceeded all the technical specifications contained in the RFP.

### **II. Evaluation Criteria**

The RFP spelled out provisions for the County's evaluation of proposals for responsiveness and reservation of the right to request and evaluate additional information as follows:

#### **1.3 General Proposal Information**

... The County reserves the right to request and evaluate additional information from any respondent regarding respondent's responsibility after the submission deadline as the County deems necessary.

The submittal of a proposal by a Proposer will be considered a good faith commitment by the Proposer to negotiate a contract with the County in substantially similar terms to the proposal offered and, if successful in the process set forth in this Solicitation and subject

to its conditions, to enter into a contract substantially in the terms herein.

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#### **4.1 Review of Proposals for Responsiveness**

Each proposal will be reviewed to determine if the proposal is responsive to the submission requirements outlined in this Solicitation. A responsive proposal is one which follows the requirements of this Solicitation, includes all documentation, is submitted in the format outlined in this Solicitation, is of timely submission, and has the appropriate signatures as required on each document. Failure to comply with these requirements may result in the proposal being deemed non-responsive.

And in order to ensure a fair, transparent, and competitive selection process, the County included the following criteria in the RFP, providing for a maximum of one hundred (100) points per Competitive Selection Committee ("Selection Committee") member:

#### **4.2 Evaluation Criteria**

Proposals will be evaluated by a Competitive Selection Committee which will evaluate and rank proposals on criteria listed below. The Competitive Selection Committee will be comprised of appropriate County personnel and members of the community, as deemed necessary, with the appropriate experience and/or knowledge, striving to ensure that the Competitive Selection Committee is balanced with regard to both ethnicity and gender. The criteria are itemized with their respective weights for a maximum total of one hundred (100) points per Competitive Selection Committee member.

Criteria	Points
<p><b>1. Approach to Design, Construction, and Performance</b></p> <p>Proposer's approach toward the design and construction of the buses including chargers and charging system, and how the technical design and construction approach meets the requirements of the Technical Specifications (Attachment A) and Construction Documents (Attachment B).</p>	20
<p><b>2. Program Management/Manufacturing Capacity</b></p> <p>Manufacturing capacity for the production of the proposed buses and charging systems as outlined in this solicitation, to include the available plant capacity, personnel, and other resources to perform the work.</p>	20
<p><b>3. Warranties, Product Support, and Life Cycle Costs</b></p> <p>The Proposer's warranty system terms, life cycle costs, and on-site and technical support.</p>	15
<p><b>4. Proposer's Experience and Past Performance</b></p> <p>Proposer's and major subcontractor's performance in previous Electric Bus procurement contracts. To address contractual issues, technical capability, quality of work, contractual delivery schedules, actual delivery schedules, Bus performance, reliability, and maintenance.</p>	5
<p><b>5. Electric Bus Deliveries</b></p> <p>Proposer's proposed production and delivery schedule, as outlined in the Technical Specifications (Attachment A).</p>	10
<p><b>6. Price</b></p>	30

RFP § 4.2.

In Section 4.5 of the RFP, the County was unambiguous when it reserved the right to conduct post-evaluation negotiations as follows:

**4.5 Negotiations**

The Competitive Selection Committee will evaluate, score, and rank proposals, and submit the results of the evaluation to the County Mayor or designee with its recommendation. The County Mayor or designee will determine with which Proposer(s) the County shall negotiate, if any. *The County Mayor or designee, at their sole discretion, may direct negotiations with the highest ranked Proposer, negotiations with*

*multiple Proposers, and/or may request best and final offers.* In any event the County engages in negotiations with a single or multiple Proposers and/or requests best and final offers, *the discussions may include price and conditions attendant to price.*

RFP § 4.5 (emphasis added).

### **III. Proposals Received by the County**

On February 13, 2017, Proterra and New Flyer timely submitted proposals in response to the RFP.<sup>1</sup> The undersigned finds that neither New Flyer nor Proterra submitted an error-free proposal. Rather, both proposals contained de minimis errors. Even so, the County reasonably determined that both proposals met the RFP's limited responsiveness requirements and included sufficient information for the Competitive Selection Committee to evaluate them. Thus, rather than elevate form over substance, the County reasonably chose to evaluate and score both proposals.

### **IV. The Evaluation of Proposals, New Flyer's Letter of Concern, the County's Special Responsibility Review, and Negotiations with Proterra**

Having found Proterra and New Flyer responsive, the County invited both parties to give an oral presentation of each of their proposals, which occurred on May 3, 2017. After the receipt of the parties' proposals and the oral presentations, during which Proposers clarified (but did not modify or amend) their proposals, the County's Selection Committee evaluated and scored the proposals. Ultimately, the Selection Committee ranked Proterra higher than New Flyer, and recommended entering into negotiations with Proterra. County/Proterra Response Exhibit 6, May 16, 2017 Memorandum.

On May 26, 2017, New Flyer (through counsel), wrote to the County and alleged Proterra's proposal was flawed. New Flyer contended that the County should have rejected

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<sup>1</sup> A third company, BYD Motors, Inc., also submitted a proposal, which the County rejected as non-responsive for failing to provide the required bid bond.

Proterra's proposal as "non-responsive" or eliminated Proterra from the competition as "non-responsive" because:

1. Based on New Flyer's calculations, which purportedly relied on "industry standards," Proterra's proposed vehicle, the Catalyst E2, could not meet the 175-mile range requirement;
2. Proterra's proffered vehicle exceeded the Gross Vehicle Weight Rating ("GVWR") and Gross Axle Weight Rating ("GAWR"); and
3. Proterra made material misrepresentations in its proposal because it provided an FTA Altoona report for the BE-40 to demonstrate that the Catalyst E2 could meet or exceed all the RFP's performance requirements.

Based on these allegations, New Flyer asked the County to conduct additional due diligence by conducting a responsiveness review or responsibility review. Protest Exhibit 8, at pp. 1-7. On November 7, 2017, Proterra (through counsel) responded to New Flyer's letter and explained why each of New Flyer's allegations were meritless and constituted mere disagreement with the County. Protest Exhibit 4, *throughout*. Proterra also pointed out that the County could not have been misled by Proterra's inclusion of an Altoona report for the BE40, an entirely different bus than the one proposed, because Proterra's proposal clearly stated it was proposing to provide the County with a Catalyst E2. As Proterra explained in its November 7, 2017 letter, the BE40 report was included because it was the best Altoona information it had at the time of bid submittal, which was industry practice. Protest Exhibit 4, at pp. 6-8 (pagination as per upper left corner).

Proterra included the Altoona report for the earlier BE40 electric bus to provide a base line for Proterra's development of the Catalyst E2 in its Proposal to the County. This was not dissimilar to New Flyer's inclusion of an Altoona report relating to an earlier New Flyer electric bus than the one New Flyer proposed in response to this RFP.

On November 21, 2017, New Flyer (through counsel) wrote a second letter to the County, attached to which was the September 2017 FTA Altoona partial test report of the Catalyst E2. Protest Exhibit 8, at pp. 8-12 (pagination as per pdf). The report shows that the FTA ran the Catalyst E2 through three test cycles for the tested: a "Manhattan" cycle in which the bus demonstrated a 156 mile range; an "Orange County" cycle in which the bus demonstrated a 159 mile range; and a Heavy Duty Urban Dynamometer Driving cycle in which the bus demonstrated a 204 mile range. Protest Exhibit 3, at p. 4 (pagination as per lower right corner). According to New Flyer, the September 2017 Altoona report also shows that the Catalyst E2 exceeded the GVWR<sup>2</sup> and GAWR<sup>3</sup>. Thus, New Flyer argues the September 2017 Altoona report evidences Proterra's misrepresentations and confirms that the Catalyst E2 did not meet the RFP's specifications. New Flyer overstates the September 2017 Altoona report in relation to this RFP.

In the first instance, I find the September 2017 Altoona test was not required as a part of this solicitation. Nevertheless, I also note that after reviewing New Flyer's allegations, the County conducted an additional level of due diligence, and on February 16, 2018, the County's technical experts convened a responsibility review with Proterra to address the items raised by New Flyer. County/Proterra Response Exhibit 2. After the meeting the County's technical personnel convened separately to assess whether to evaluate Proterra's responsibility. See County/Proterra Exhibit 4, Recording of February 16, 2018 Responsibility Review Meeting; County/Proterra Exhibit 4, Recording of February 16, 2018 Strategy Meeting. At the end of the meeting, the County's technical team requested additional information, which Proterra provided. County/Proterra Exhibit 2, Proterra's Responsibility Review Materials.

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<sup>2</sup> GVWR (Gross Vehicle Weight Rating), determined by the manufacturer, is the maximum weight at which the vehicle can be safely and reliably operated for its intended purpose.

<sup>3</sup> GAWR (Gross Axle Weight Rating), determined by the axle manufacturer, is the maximum total weight at which the axle can be safely and reliability operated for its intended purpose.

During the responsibility review, Proterra explained that at the time of proposal submittal it had been developing its new, proprietary Duopower Drivetrain, which Proterra anticipated would result in a 20% increase in efficiency. Proterra explained that although the anticipated 20% efficiency improvement was incorporated in and factored into Proterra's proposal, Proterra could not, at that time, explicitly identify its yet unreleased, proprietary Duopower Drivetrain, because at that time the development of this new drivetrain was a closely guarded trade secret.

As it relates to the findings in the September 2017 Catalyst E2 partial Altoona test report, Proterra explained that the report does not provide a full assessment of the bus described in its proposal because the buses discussed in that report did not have the as of then unreleased, closely guarded Duopower Drivetrain. Indeed, Proterra did not announce its development of its more efficient Duopower Drivetrain to the world until October 2017, which was after the September 2017 Altoona partial test of the Catalyst E2. Furthermore, Proterra explained issues New Flyer raised regarding the GVWR and GAWR were all moot by subsequent developments beyond Proterra's control. In its proposal, Proterra identified the ZF, Model Number 75 EC, as its front axle. But, as Proterra learned that ZF would no longer be producing the 75 EC at the time of vehicle production, it advised that it would have to replace the ZF 75 EC with the next generation axle, the ZF RL 82 EC, which was stronger, at no additional cost to the County.

After reviewing this additional information from Proterra, the County's technical experts found Proterra responsible and entered into negotiations with it. The County then negotiated a better deal with Proterra. This was in the best interest of the County for two reasons. First, Proterra substituted its new, upgraded axle, including other associated items that are part and parcel with the axle itself. Second, Proterra reduced its price by \$2,723,900 without any reductions in capability.

Based on the foregoing, I find that the County's actions were both consistent with the terms of the RFP and reasonable. The County was reasonable in finding Proterra responsive, and when the second highest bidder raised concerns, the County acted with due diligence by conducting a responsibility review with Proterra. Having found Proterra responsive and responsible, the County exercised the option, unambiguously contemplated by the RFP, to enter into post-evaluation negotiations with Proterra, which was then the highest scored responsive and responsible bidder. I further find the upgrades the County negotiated were not required to make Proterra responsive or responsible, and provided Proterra no competitive advantage.

### CONCLUSIONS OF LAW

#### **I. Under the Applicable Standard of Review the County's Contract Award Decision is Subject to Great Deference**

The Hearing Examiner may set the County's procurement decision aside only if it is arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law. *City of Pensacola v. Kirby*, 47 So. 2d 533, 535-36 (Fla. 1950); *Wester v. Belote*, 138 So. 721, 724 (Fla. 1931). In other words, a procurement decision may only be set aside if it lacks a rational basis or is otherwise unlawful. Under this standard it is the Hearing Examiner's role to determine whether the County's actions were arbitrary, not whether the County "got it perfect" on technical matters requiring agency expertise. *Biscayne Marine Partners, LLC v. City of Miami*, No. 3D18-2061, 2019 WL 575327 (Fla. 3d DCA Feb. 13, 2019).

This is a highly deferential standard of review. The hearing examiner may not substitute its judgment for the agency's. *Preston Carroll Co. v. Fla. Key's Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d DCA 1981). A procurement decision lacks a rational basis only if no reasonable person could agree with it. *Culpepper v. Moore*, 40 So. 2d 366, 369-70 (Fla. 1949). *Cf. Booker v. State*, 514 So. 2d 1079, 1085 (Fla. 1987) ("abuse of discretion implies arbitrary and capricious")

and “discretion is abused only where no reasonable man would take the view adopted by the [government]. If reasonable men could differ as to the propriety of the action taken by the [government], then it cannot be said that the [government] abused its discretion.”); *Sunshine Towing @ Broward, Inc. v. Dep’t of Transp.*, DOAH No. 10-0134BID, ¶¶ 43-45, 2010 WL 1417770, at \*10-11 (Fla. Div. Admin. Hrgs. Apr. 6, 2010) (RO) (same).

Under the rational basis standard the “question is not whether the court [or hearing examiner] would reach the same conclusions as the agency. . . , but rather, whether the conclusions reached by the agency lacked a reasonable basis and were, therefore, arbitrary or capricious.” *Barton Protective Servs. v. Dep’t of Transp.*, DOAH No. 06-1541BID, ¶ 215, 2006 WL 2056535, at \*57 (Fla. Div. Admin. Hrgs. July 20, 2006) (RO) (citation omitted). *Scientific Games, Inc. v. Dittler Bros.*, 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991) (a court or hearing officer may not “second guess the members of evaluation committee to determine whether he and/or other reasonable and well-informed persons might have reached a contrary result”).

A protester’s mere disagreement with the government decision, no matter how vigorous, falls far short of meeting the heavy burden of showing the decision is irrational. *Miami-Dade Cnty. v. Church & Tower, Inc.*, 715 So. 2d 1084, 1089-90 (Fla. 3d DCA 1998). This “burden is particularly great in negotiated procurements” because the government “is entrusted with a relatively high degree of discretion, and greater still where, as here, the procurement is a best-value procurement.” *Barton Protective Servs.*, DOAH No. 06-1541BID, ¶ 215, 2006 WL 2056535, at \*57 (citation omitted); *Hillsborough Cnty. Aviation Auth. v. Taller*, 245 So. 2d 100, 102-03 (Fla. 2d DCA 1971) (reversing order setting award because “[i]n Florida there is a presumption that public officials properly perform their duties in accordance with the law and it is incumbent upon those challenging such performance to overcome the presumption.”).

## II. Proterra Did Not Misrepresent the Testing of its Catalyst E2.

As stated, the RFP required Proposers to be innovative. That Proposers would lean on cutting edge technologies in order to deliver a compliant bus would come as no surprise to the County. In that regard, I find that Proterra's proposal did not contain any material misrepresentations. At the hearing, New Flyer contended that Proterra knew or should have known at the time of proposal submittal in February 2017 that the Catalyst E2 could not meet the technical specifications of the RFP. In support, New Flyer offered the FTA's September 2017 Altoona report for the Catalyst E2. New Flyer's reliance on the September 2017 Altoona report is misplaced for numerous reasons found in the record, and as such, New Flyer's contention fails.

First, as previously stated the 2017 Altoona report was not required as a part of this procurement process and cannot be weighed as a part of the responsiveness determination. Indeed, the RFP requires the selected Proposer to provide an applicable Altoona report to the County as a condition of acceptance, not as a condition of responsiveness:

Prior to acceptance of first bus, the structure of the bus shall have undergone appropriate structural testing and/or analysis, including FTA required Altoona testing, to ensure adequacy of design for the urban transit service. Any items that required repeated repairs or replacement must undergo the corrective action with supporting test and analysis. A report clearly describing and explaining the failure and corrective actions taken to ensure any and all such failures will not occur shall be submitted to DTPW with the proposal technical submittals. **If not available, then the report shall be provided prior to first acceptance of bus.**

Exhibit 1, at p. 62 (emphasis added).

Second, the Catalyst E2 addressed in the September 2017 report did not have the Duopower drivetrain that Proterra contemplated using at the time it submitted its proposal (and indeed, incorporated into calculations included in the Proposal). Third, and equally important, New Flyer proffered nothing more than the passionate argument of counsel that in February

2017, Proterra knew or should have known what the results of the September 2017 Altoona report would be.

Proterra explained in its proposal and throughout the procurement that the Altoona report included in its proposal was for the BE40, and that it was proposing the Catalyst E2:

- **Battery-Electric Bus:** Proterra is proposing our 40-foot Catalyst E2 battery-electric bus. The proposed Catalyst E2 bus has a total of 440kWh of on-board energy storage; more than 25% more capacity than other 40' battery electric buses on the market. Based on our experience with nearly 3 million miles of customer revenue service in the USA, we're confident that the Proterra Catalyst E2 is the only 40-foot battery electric bus that can meet DTPW's 175 mile operating range requirement in real-world usage. Proterra's bus design is also very unique from a styling and design perspective, delivering a modern, differentiated look that will set DTPW's electric buses apart from the standard, boxy look of traditional buses. Importantly, with an all-composite body, the Proterra Catalyst has the highest corrosion resistance of any bus available.

Protest Exhibit 2(b), Proterra Proposal, at p. 1408.

The Catalyst E2 is an upgraded version of the Catalyst BE40, a 40-foot battery-electric bus that was federally tested in 2015, yielding an industry leading 1.7kWh/mile efficiency. In its proposal, Proterra outlined, and the included report demonstrated, that the Altoona testing was for the Catalyst BE40, not the Catalyst E2: "Federal Transit Bus Test report number LTI-BT-R1406 documents the performance of the 40-foot Proterra Catalyst BE40. . . ." Proposal, at 1458.

# FEDERAL TRANSIT BUS TEST

Performed for the Federal Transit Administration U.S. DOT  
in accordance with CFR 49, Volume 7, Part 655

Manufacturer: Proterra Inc.

Model: BE40

Submitted for Testing in Service-Life Category  
12 Year /500,000 Miles

May 2015

Report Number: LTI-BT-R1406

Miami-Dade County

RFP-00456

## EXECUTIVE SUMMARY

Proterra Inc., submitted a model BE40, electric-powered 41 seat (including the driver) 42-foot bus, for a 12 yr/500,000 mile STURAA test. The odometer reading at the time of delivery was 2,851 miles. Testing started on June 19, 2014 and was completed on April 10, 2015. The Check-in section of the report provides a description of the bus and specifies its major components.

## III. DISCUSSION

The check-in procedure is used to identify in detail the major components and configuration of the bus.

The test bus consists of a Proterra Inc., model BE40. The bus has a front door equipped with a Ricon, model RIFR25517-10800000 electric fold-out handicap ramp located forward of the front axle. The rear passenger door is located forward of the rear axle. Power is provided by 8 Proterra model TerraVolt100a Lithium Titanate fast-charge battery packs, energizing, a UQM High Voltage Drive Motor, model PP220 coupled to an Eaton model EEV-7202 transmission.

Protest Exhibit 2(b), Proterra Proposal, at p. 1221, 1224, 1227.

Proterra explained in its proposal that “[s]ince the testing at Altoona, Proterra has used the test results as they are intended, to improve the design and reliability of our 40-foot Catalyst

vehicle.” Proterra also explained to the County that this is standard in the industry. I find that Proterra’s explanations and the County’s acceptance of those explanations are reasonable.

Moreover, during the oral presentations, Proterra made clear that the Catalyst E2 was an upgraded version of the BE40 that was the subject of the 2015 Altoona test report. Proterra included the 2015 BE40 Altoona Report in its Proposal because that report contains the structural durability tests for the Catalyst E2 buses that will be delivered to the County. In the 2017 Altoona test, the Federal Transit Agency (FTA) only required partial testing of the Catalyst E2, indicating that the FTA agrees that the E2 is based on the same vehicle platform of the BE40. *See* Protest Exhibit 3, at Cover and Executive Summary (indicating partial test based on previously test for BE40).

As stated by the County and Proterra, I find that the purpose of the 2015 BE 40 Altoona test was not to demonstrate the projected range of the buses to be delivered to the County, and Proterra accurately described the status of its then-federal testing consistent with the RFP requirement. Protest Exhibit 1, RFP, at 62, TS 18 (Altoona Testing).

**III. The County Acted Reasonably in finding that Proterra’s Proposal met the RFP’s Requirements.**

**A. The County reasonably found Proterra’s Proposal Compliant with the RFP’s Technical Specifications Relating to Vehicle and Axle Weights.**

**1. The County reasonably found the Catalyst E2 gross vehicle weight rating (42,094 pounds) exceeded the gross vehicle weight (41,399 pounds).**

As to New Flyer’s challenge to the “responsiveness” of Proterra’s initial proposal, the undersigned notes as an initial matter that in the very recent decision *Biscayne Marine Partners, LLC v. City of Miami*, No. 3D18-2061, 2019 WL 575327 (Fla. 3d DCA Feb. 13, 2019), the Third District reaffirmed the principle that the highly deferential rational basis standard applies to a challenge to an agency’s finding that an awardee’s offer meets or exceeds the requirements of a

solicitation. There, the protester argued that hearing officers and courts “are required to undertake an independent review” of the awardee’s offer to see if it materially deviated from the solicitation. *Id.* at \*3. The Third District denied the protest because “In Florida ... a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.” *Id.* at \*4 (quoting *Liberty Cnty. v. Baxter’s Asphalt & Concrete, Inc.*, 421 So. 505, 507 (Fla. 1982)). Accordingly, it is not this Hearing Examiner’s role to conduct a *de novo* review and substitute her own judgment for that of the County’s. Rather, the undersigned’s only role to determine whether the County’s decisions were the result of a good faith, rational process. *Id.*

Additionally, the undersigned notes that whether or not Proterra’s proposal met or exceeded the RFP’s technical specifications is a highly technical matter requiring significant levels of agency expertise. The undersigned finds that New Flyer has not met its heavy burden of showing that “no reasonable person” could agree with the County evaluation of Proterra’s proposal. *Id.* To the contrary, the undersigned finds that the County acted reasonably when it found Proterra’s proposed bus complies with Technical Specification 5.2, which requires that “The vehicle shall be designed to carry the gross vehicle weight, which shall not exceed the bus GVWR [gross vehicle weight rating].” RFP, at 35 (Protest Exhibit 1). The GVWR is “The maximum weight as determined by the vehicle manufacturer, at which the vehicle can be safely and reliably operated for its intended purpose.” The GVWR may be calculated by summing the front gross axle weight rating (GAWR) with the rear GAWR. Proterra’s proposal indicates that the GVWR is 42,094 pounds. Proposal, at 922 (Protest Exhibit 2(b)):

GAWR				16094						26000	42094
------	--	--	--	-------	--	--	--	--	--	-------	-------



As noted above, Proterra identified its front GAWR as 16,094, which was based on the proposed use of the axle produced by ZF, Model Number 75 EC (7,500 kg).<sup>5</sup> Proterra indicated that the designed weight of its front axle was 15,774 pounds, which is less than the GAWR of 16,094 pounds in Proterra's proposal:

	No. of People	Front Axle		Center Axle			Rear Axle		Total Bus
		Left Total	Right	Left Total	Right	Left Total	Right		
Empty Bus Full Fuel and Farebox	0		13134					16715	29849
Fully			15774					20075	35849

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New Flyer argues that the Catalyst E2's front axle weight exceeds the GAWR because the 15,774 pounds did not include standees. However, this argument relies on the assumption that all or a significant proportion of the standees would be positioned above the front axle. But, because New Flyer's assumption is not based on any language in the RFP, the undersigned cannot accept it without substituting New Flyer's judgment for the County's. *Preston Carroll Co.*, 400 So. 2d at 525.

The RFP did not require Proposers to specify a standee capacity or where on the bus such potential standees would be located. As such Proterra did not include any assumptions in its Proposal. Proterra's proposal provided the County enough information for the County's technical experts to reasonably conclude that the bus could be configured in such a manner that the weight

<sup>5</sup> The front axle GAWR is calculated based on the lower weight limit of the following 3 components: 1- Axle; 2- Wheels; and 3- Tires. The number listed in Proterra's proposal assumed the use of Michelin Tires 305/70, which are rated at 8,047 pounds or for two tires 16,094. Since the County intends to select the tires, it would have been more appropriate for Proterra to identify a GAWR of 16,535 pounds, which is the rating for the ZF RL 75 EC front axle.

of the standees could be disproportionately distributed over the rear axle, thus keeping the front axle weight below the GAWR. As such, the County acted reasonably in finding the Catalyst E2's gross axle weight was less than the GAWR.

During the responsibility review meeting where this issue was properly discussed, the County's technical team asked Proterra to address the GAWR based on a factual assumption regarding the distribution of standing passengers. Proterra explained that under the newly provided factual assumption, the front axle weight would still be less than the front GAWR using the next generation of the same model front axle proposed at submittal, ZF RL 82 EC, which has a GAWR of 18,078 pounds. ZF will not be offering the ZF axle offered in Proterra's proposal by the time it produces the County's buses. *See* County/Proterra Exhibit 2, Proterra's Responsibility Review Materials, February 16, 2018, Presentation, at pp. 23-25. *See also* County/Proterra Exhibit 3, Recording of February 16, 2018 Responsibility Review Meeting<sup>6</sup>; County/Proterra Exhibit 4, Recording of February 16, 2018 Strategy Meeting.<sup>7</sup> The Catalyst E2 bus with the upgraded ZF RL 82 EC is currently used in revenue service by multiple transit agencies.

Moreover, during the responsibility review meeting Proterra detailed on-going efforts to reduce the overall curb weight of the bus, such as removal of the Grayson battery conditioning unit, the body fairing redesign, and removal of the overhead charge blade, which would further reduce the weight over the front axle to ensure that it was less than the GAWR of 18,078 pounds. Importantly, I find Proterra did not make these changes to make a non-compliant bus compliant, but rather, as stated I find Proterra's bus was compliant at the time of bid submission and these changes resulted from post-evaluation negotiations contemplated by the RFP.

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<sup>6</sup> Proterra's counsel provided copies of this item to the Hearing Officer and counsel for New Flyer at the conclusion of the Hearing.

<sup>7</sup> Proterra's counsel provided copies of this item to the Hearing Officer and counsel for New Flyer at the conclusion of the Hearing.

**B. The County reasonably concluded that the Catalyst E2 meets the 175 mile range requirement.**

I find the County reasonably found that Proterra's Catalyst E2 exceeds the 175-mile range requirement:

Operating Range and the Catalyst E2 Product

The 40-foot Proterra Catalyst is the most efficient 40-foot transit bus ever tested at Altoona, achieving an impressive 1.7kWh/mi efficiency. Other OEMs have tested their electric buses at Altoona and have received solid efficiency figures (1.84 kWh/mi & 1.98 kWh/mi), although none were as efficient as the 40-foot Proterra Catalyst. Combining the industry's most efficient vehicle with the industry's highest amount of on-board energy storage provides DTPW with the most operating range available.



Efficiency plays a vital role in determining operating range. Proterra, much like the other battery-electric bus OEMs, utilizes ~80% of the total energy stored on the vehicle as "usable" energy required to power the vehicle. This is done for a variety of reasons, but namely to extend the battery life cycle and protect against performance degradation over time.

The Catalyst E2 has 440kWh of on-board energy, providing ~352 kWh of "usable" energy. Under full GVWR with auxiliary loads, the Proterra Catalyst vehicle efficiency will be impacted by the additional mass of the passengers and the auxiliary load draw. Based on the Altoona drive profile, we would expect efficiency to decrease by ~13% from 1.7kWh/mi to 1.92kWh/mi. Based on the usable energy, at the impacted efficiency the Catalyst E2 can drive for 189 miles. And, that assumes a full day operating at GVWR with auxiliary loads.

Proterra Proposal, at p. 1413 (highlighting added) (Protest Exhibit 2 (b), at 613 of 792 PDF).<sup>8</sup>

Although New Flyer takes issue with the County's acceptance of Proterra's range calculations, instead of its own, New Flyer has not shown "no reasonable person" would accept Proterra's calculations over New Flyer's. New Flyer merely disagrees with the County, which is not a sufficient basis for the Hearing Examiner to question the reasonableness of the County's actions or to sustain New Flyer's Bid Protest. *Church & Tower*, 715 So. 2d at 1089-90.

**C. The Technical Specifications of the Solicitation are Scored Evaluation Factors Not "Responsiveness" Requirements.**

**1. The RFP included a narrow responsiveness review.**

Where the County wanted an RFP requirement to be a "pass/fail" responsiveness requirement, unlike the technical specifications, it was clear. For example, the RFP states "[i]f a

<sup>8</sup> Pagination as per page numbers added to lower right corner by BidSync. Proterra also included a slightly different estimate of range at page 1445 of its response. For purposes of this letter, we use Proterra's most conservative figures.

Proposer fails to submit the required Collusion Affidavit, said Proposer **shall be ineligible for award[.]**” and “offers that are not accompanied by a completed Buy America certification **must be rejected as nonresponsive[.]**” Protest Exhibit 1, RFP, at pp. 10, 572 (emphases added). There is no such language in the RFP regarding responses to the technical specifications. “[T]he presence of [ . . . ] mandatory minimum language in one section of a solicitation and its omission in another must be presumed to have been purposeful and provides a strong indication that the latter provision is not a mandatory minimum requirement[.]” *ManTech Telecomm. & Info. Sys. v. U.S.*, 49 Fed. Cl. 57, 69 n.18 (2001); *see also Leisure Resorts, Inc. v. City of West Palm Beach*, 864 So. 2d 1163, 1166 (Fla. 4th DCA 2003) (applying the “drafter knows how to say something when it wants to” doctrine to written instrument); *Horne v. Horne*, 289 So. 2d 39, 40 (Fla. 2d DCA 1974) (same).

**2. The Technical Specifications were to be considered in scoring proposals not as responsive requirements.**

The undersigned finds that New Flyer’s responsiveness protests, as well as its challenge to the County negotiation of “material terms” with Proterra, is the result of a misreading of the plain language of the instant RFP and a general misunderstanding of negotiated procurement procedures. In a negotiated procurement such as this one a “numerical scoring system, which evaluates the degree to which the proposals meet requirements, is the antithesis of a pass/fail evaluation system of mandatory requirements requiring the summary rejection of proposals.” STEVEN W. FELDMAN, 1 GOV’T CONTRACT AWARDS: NEGOTIATION & SEALED BIDDING § 10:20 (2018). For example, in *AT&T Corp. v. State, Dep’t of Mgmt. Servs.*, 201 So. 3d 852, 856 (Fla. 1st DCA 2016), AT&T contended that the award was improper, in part, because the awardee failed to comply with some of the technical specifications. The Hearing Officer denied the bid protest, and the decision was affirmed by the appellate court, stating that “The majority of

AT&T's arguments involve the ITN's 'Statement of Work' and AT&T's belief that the Department should have performed a responsiveness assessment of the vendors' initial replies to the Statement of Work." \* \* \* "The Statement of Work was a 192-page attachment to the ITN that contained the ITN's technical requirements" and "the ALJ properly found that any deficiencies in a vendor's reply to the Statement of Work requirements would be reflected in a poor scoring of the reply during the evaluation phase and was not a responsiveness issue."

Like the failed protester in the *AT&T* case, New Flyer incorrectly claims here that the RFP's technical specifications are "pass/fail" responsiveness requirements that Proposers' proposals must satisfy to be eligible for evaluation and scoring. But as noted above, here, the RFP states a Proposer's "approach toward the design and construction of the buses including chargers and charging system, and how the technical design and construction approach meets the requirements of the Technical Specifications (Attachment A)" is a matter for the Competitive Selection Committee to consider and score under the "Approach" factor. Nothing in the RFP put Proposers on notice that each and every technical specification is a "pass/fail" requirement by saying that proposals must meet each and every technical specification to be eligible for evaluation or, conversely, that failing to meet each and every specification will result in rejection of the proposal. A reasonable person reading the RFP would therefore conclude the technical specifications are standards for evaluating and scoring proposals, not "pass/fail" "responsiveness" requirements. *AT&T Corp.*, 201 So. 3d at 856. *See also ManTech Telecomm. & Info. Sys. v. U.S.*, 49 Fed. Cl. 57, 67-69 (2001), *aff'd*, 30 Fed. App'x 995 (Fed. Cir. 2002).

**IV. New Flyer's Protest Challenging Proterra's "Modifications" Fails Because Any Modifications Proterra Made Related to its Responsibility to Perform, were In-Scope, and Provided it with no Competitive Advantage.**

New Flyer alleges the County improperly allowed Proterra to “materially modify” its proposal by agreeing to provide the County upgraded bus parts at no additional cost. For several reasons I find this aspect of New Flyer’s protest is without merit.

First, the RFP made clear the County could negotiate with the highest-ranked Proposer. See RFP § 4.5. As such, the County acted reasonably and within the terms of the RFP when it negotiated with Proterra. The negotiations occurred post-evaluation, after the County’s Selection Committee scored Proterra’s bid higher than New Flyer’s. The upgrades the County negotiated with Proterra were not necessary to make Proterra responsive, and the Selection Committee did not consider them when scoring Proterra’s proposal. As such, the post-evaluation negotiations did not provide Proterra a competitive advantage.

Further, I find these no-cost upgrades were all within the scope of the RFP. The solicited requirement is a minimum of 33 and a maximum of 75 forty-foot (40’) heavy duty battery electric buses with a 175-mile minimum range and a minimum lifecycle of 12 years or 500,000 miles, whichever comes first. Protest Exhibit 1, RFP, at p. 28, 51. New Flyer alleges the County unlawfully allowed Proterra to make the “twelve” material improvements to its bus design during negotiations, but many of these were the result of the same upgrade, and the changes negotiated resulted in Proterra reducing its price by \$2,723,900 without any reductions in capability. Exhibit 7, June 28, 2019 Award Recommendation.

In any case, and assuming Proterra made all the technical improvements New Flyer alleges it made while lowering its price, under the RFP these items were all open to negotiation. New Flyer alleges County unlawfully “treat[ed] the RFP ranking process as little more than a ranking tool” by negotiating “material terms” with Proterra. Protest, at pp. 23-26. New Flyer relies on *State, Dep’t of Lottery v. Gtech Corp.*, 816 So. 2d 648 (Fla. 1st DCA 2001).

*Gtech* is unavailing to New Flyer. Here, the RFP contemplated post-evaluation negotiations, which resulted in Proterra agreeing to provide upgrades at a reduced price to the County. In contrast, in the *Gtech* the agency's actions were "contrary to the plain language" of a solicitation that merely "envision[ed] finalizing an agreement by turning the winning [initial] proposal into a contract" without substantive negotiations. 816 So. 2d at 650-52. The First District's decision in *AT&T Corp. v. State, Dep't of Mgmt. Servs.*, 201 So. 3d 852 (Fla. 1st DCA 2016) is more relevant. There, the First District upheld the agency's extensive negotiations because the solicitation "alerted the parties that the Department reserved the right to negotiate and to request revised replies" and Proposers "should have been well aware that negotiations would be a part of the process." 201 So. 3d at 857-58.

At the Hearing, New Flyer argued *AT&T Corp.* is not relevant because the agency in that case used an invitation to negotiate ("ITN") but here the County used a request for proposals. New Flyer's argument is not well-taken because the meaning of a solicitation is determined by its content, not its label. In both *AT&T Corp.* and *Gtech* the First District reached its decision based on its reading of the plain language in the solicitation. As applied here, the undersigned finds that the negotiation provision in this RFP can be analogized to the negotiation provisions included in ITNs issued by Florida state agencies.

As in *AT&T Corp.*, the instant solicitation anticipates more than simply "finalizing" an initial proposal, and informs everyone that real negotiations will be a part of the process. The RFP states "[t]he submittal of a proposal" "will be considered a good faith commitment" "to negotiate contract with the County in substantially similar terms to the proposal offered[.]"

Protest Exhibit

1, RFP, at p. 6. The RFP also states if the "County engages in negotiations" "the discussions may include price and conditions attendant to price." Finally, the RFP gives the County "sole discretion" to "negotiate with the highest ranked" Proposer. Protest Exhibit 1, RFP, at p. 10. In sum, the RFP clearly provided for meaningful negotiations, and not just the "finalization" of an initial proposal into a contract. Thus, New Flyer's current arguments are untimely and without merit.

#### V. Recommendations

Based on the foregoing, the undersigned hearing officer recommends that New Flyer's bid protest be denied. Proterra's proposal was responsive to the RFP and New Flyer failed to establish that Proterra made any material misrepresentations in its proposal or at any point in this procurement process. New Flyer also failed to establish that the County acted arbitrarily or capriciously. On the contrary, the County acted reasonably and conducted additional due diligence in response to New Flyer's concerns. The County did not deviate from the terms or scope of the RFP when it entered post-evaluation negotiations with Proterra after the Selection Committee gave Proterra a higher score than New Flyer. These post-evaluation negotiations were consistent with the terms of the RFP and did not provide Proterra a competitive advantage.

The Selection Committee's recommendation to award Proterra was based upon an honest exercise of the Committee's discretion following a procurement process that was clean, fair, competitive, reasonable, and transparent. Accordingly, this Hearing Examiner recommends that New Flyer's bid protest should be denied and that the recommendation of award to Proterra should be affirmed.



Loree Rene Schwartz, Hearing Examiner



## MEMORANDUM

**TO:** LISTED DISTRIBUTION

**DATE:** July 11, 2019

**FROM:** Honorable Harvey Ruvin, Clerk  
Circuit and County Courts

**SUBJECT:** Bid Protest – Contract No. RFP-  
00456 – Battery-Electric Buses  
and Charging System

Linda L. Cave, Director  
Clerk of the Board Division

Pursuant to Section 2-8.4 of the Code of Miami-Dade County, and Implementing Order 3-21, Bid Protest Procedures, a Formal Bid Protest was filed with the Clerk of the Board Division on July 9, 2019, by Diane Mendez, LLORENTE & HECKLER, PA on behalf of New Flyer of America, Inc.

A filing fee in the amount of \$ 5,000.00 was submitted by the protestor.

If you have any questions, pertaining to this protest, please contact Daysha McBride at 305-375-1293.

CA/dmcb

Attachment:

**Distribution:**

Honorable Chairwoman Audrey M. Edmouson and Members, Board of County Commissioner (via email)  
Honorable Carlos A. Gimenez, Mayor, Miami-Dade County (via email)  
Alina T. Hudak, Deputy Mayor (via email)  
Jennifer Moon, Deputy Mayor (via email)  
Abigail Price-Williams, County Attorney (via email)  
Geri Bonzon-Keenan, First Assistant County Attorney (via email)  
Hugo Benitez, Assistant County Attorney (via email)  
Bruce Libhaber, Assistant County Attorney (via email)  
Jenelle Snyder, County Attorney's Office (via email)  
Yolanda Negrin, County Attorney's Office (via email)  
Elizabeth Alfonso Ruiz, County Attorney's Office (via email)  
Adeyinka Majekodunmi, Commission Auditor (via email)  
Tara C. Smith, Director, Internal Services Department (via email)  
Namita Uppal, Chief Procurement Officer, Internal Services Department (via email)  
Rita A. Silva, Division Director 2, Internal Services Department (via email)  
Jeanise Cummings-Labossiere, Vendor Services Manager, Internal Services Department (via email)  
Vanessa Stroman, Procurement Contracting Manager, Internal Services Department (via email)  
René Guerrero, Procurement Vendor Service Specialist, Internal Services Department (via email)  
Reginald L. Hires, Procurement Quality Control Specialist, Internal Services Department (via email)  
Jesus Lee, Procurement Contracting Officer 3 (via email)

MIAMI-DADE COUNTY BOARD OF COUNTY COMMISSIONERS

NEW FLYER OF AMERICA INC.,

Petitioner,

v.

MIAMI-DADE COUNTY

Respondent,

RFP No. 00456 Battery-Electric Transit  
Buses and Charging System

MIAMI-DADE COUNTY, FLA.  
2019 JUL -9 PM 3:47  
CLEAN OF THE BOARD

**NEW FLYER OF AMERICA INC. FORMAL PROTEST OF THE AWARD  
RECOMMENDATION PURSUANT TO REQUEST FOR PROPOSAL NO. NO. 00456  
BATTERY-ELECTRIC TRANSIT BUSES AND CHARGING SYSTEM**

New Flyer of America Inc. ("New Flyer"), a North Dakota Corporation, by and through undersigned counsel, hereby protests the recommendation to award a contract to Proterra, Inc. ("Proterra") pursuant to Request for Proposal No. No. 00456 Battery-Electric Transit Buses and Charging System ("RFP"). For the reasons stated below, the County's decision to award Proterra the RFP is clearly erroneous, arbitrary and capricious, illegal, and contrary to competition. Accordingly, New Flyer respectfully requests that the County either: (i) disqualify Proterra's proposal for being non-responsive and recommend awarding the contract to New Flyer; or (ii) reject all proposals and issue a new solicitation on an expedited basis. Furthermore, New Flyer requests that the County stay any award during the pendency of this protest.

**I. Standing and Timeliness**

New Flyer has standing to challenge the County's Recommendation to Award because it was the second-ranked proposer in this procurement and was materially prejudiced as a result of

the County's arbitrary and capricious acts. *See, e.g., Preston Carroll Co., Inc. v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d DCA 1981) (holding that a second-lowest proposer has a substantial interest to contest the award of a public contract). Moreover, this Protest is being timely filed within three (3) days after filing the Notice of Intent to Protest on July 3, 2019, in compliance with Section 2-8.4, Protest Procedures, of the Code of Miami-Dade County ("County"), Florida, and County Implementing Order ("IO") 3-21, Bid Protest Procedures. This Protest amends and supplements New Flyer's Notice of Intent to Protest as permitted under IO 3-21.

## **II. Introduction**

This protest involves both a fatally defective and deceptive proposal *as well as* a fatally defective process. The recommended proposer should be deemed non-responsive because the Catalyst E2 bus model offered in its proposal materially deviates from the technical specifications in the RFP by: (1) exceeding the Gross Vehicle Weight Rating ("GVWR") and front axle Gross Axle Weight Rating ("GAWR") of the vehicle; (2) failing to comply with state and federal regulations; and (3) failing to meet County's minimum range requirements set forth in the RFP.

In addition, Proterra misleadingly suggested that the Catalyst E2 had undergone FTA Altoona Testing when the Catalyst E2 had not been manufactured or tested prior to the RFP submittal deadline. The deceptive statements in Proterra's proposal and during its oral presentation substantially influenced the outcome of the scoring of the County's Evaluation Committee. New Flyer properly submitted multiple letters to the County highlighting the fatal bus design flaws and misrepresentations in Proterra's proposal and at the oral presentation. However, instead of finding Proterra's proposal non-responsive, the County afforded Proterra yet another unfair competitive advantage by allowing Proterra to make *twelve material modifications* to the design of its buses.

In short, Proterra proposed an illusory bus that failed to comply with the mandatory design requirements of the RFP. The deviations in Proterra's proposal deprived the County from receiving necessary assurances that Proterra will perform the contract according to the RFP specifications and granted Proterra an unfair competitive advantage. Allowing Proterra to materially deviate from the RFP requirements and later permitting Proterra to make modifications to its proposal to address its non-conformance with the RFP specifications is against the basic principles of Florida procurement law.

### **III. Factual Background**

#### **A. The RFP**

On October 21, 2016, the County issued Request for Proposal No. No. 00456 Battery-Electric Transit Buses and Charging System ("RFP"). The RFP sought proposals for the purchase of forty foot (40') heavy duty battery-electric low floor transit buses, spare parts, installation/construction of charging systems, and training. The RFP included a minimum quantity of thirty-three (33) buses, and a maximum quantity of seventy-five (75) buses, and installation/construction charging systems at three (3) County locations. The County is planning to fund the contract in part or in whole by the Federal Transit Administration (FTA). Therefore, all FTA regulations and provisions apply. *See* RFP No. 00456 § 1.1 (Oct. 21, 2016) (**Exhibit 1.**)

The RFP provides that the purchase of the buses must be "in accordance with [...] the terms and conditions of [the] Solicitation, Technical Specifications (Attachment A), and Construction Documents (Attachment B)." *See* RFP § 2.1. The RFP includes the following technical specifications, among others:

- a. **Vehicle Weight Rating:** the RFP provides that "*the proposed vehicle shall be designed to carry a gross vehicle weight ("GVW") (actual weight of the fully loaded vehicle, including all cargo, fluids, passengers and optional equipment)*

*which shall not exceed the vehicle's Gross Vehicle Weight Rating ("GVWR")."*

See Attachment A, Technical Specification ("T.S.") 5.2. The GVWR is the maximum total weight, as determined by the vehicle manufacturer, at which the vehicle can be safely and reliably operated for its intended purpose.

- b. **Axle Weight Rating:** the RFP provides that the Gross Axle Weight ("GAW") of the vehicle cannot exceed the Gross Axle Weight Rating ("GAWR"), which is defined as the maximum total weight as determined by the axle manufacturer at which the axle can be safely and reliably operated for its intended purpose. See Attachment A, T.S. 2.
- c. **State and Federal Regulations:** the RFP requires the proposer to comply with all applicable federal, state and local regulations. See Attachment A, T.S. 4. Section 393.75 of the Code of Federal Regulations provides "*that no motor vehicle shall be operated with tires that carry a weight greater than that marked on the sidewall of the tire, or in the absence of such a marking.*" In addition, Rule 14-90.007 of the Florida Administrative Code, expressly requires the County to ensure that the buses being procured meet the GVWR and GAWR. Therefore, based on these technical specifications, the RFP expressly prohibits the proposed buses to exceed the GVWR, GAWR, and tire ratings.
- d. **Minimum Operating Range:** the RFP specifies the minimum operating range of the vehicles. Specifically, the RFP provides that "*the operating range of the coach with full state of charge and under full GVWR and auxiliary loads shall be at least 175 miles.*" See Attachment A, T.S. 7.4.1. The RFP further provides that: "*each Charging system shall be designed to fully charge a minimum of ten (10)*

*electric transit buses simultaneously in no more than four (4) hours and provide an operating range of at least 175 miles for each bus under its full Gross Vehicle Weight Rating (GVWR) and auxiliary loads." See Attachment B, Section 1.02.*

The technical specifications in the RFP addressing the bus weight specifications and operating range are material as they ensure the safe operation of the buses and are significant elements of the bus design and construction. The bus design and construction approach were a key evaluation criterion. Under Section 4.2 of the RFP, Evaluation Criteria, as many as 20 points out of 100 points of the evaluation criteria were assigned to the proposers' approach to design, construction, and performance. In reviewing the proposals under this criterion, the Evaluation Committee members were directed to address *"how the technical design and construction approach meets the requirements of the Technical Specifications."*

**4.2 Evaluation Criteria**

Proposals will be evaluated by a Competitive Selection Committee which will evaluate and rank proposals on criteria listed below. The Competitive Selection Committee will be comprised of appropriate County personnel and members of the community, as deemed necessary, with the appropriate experience and/or knowledge, striving to ensure that the Competitive Selection Committee is balanced with regard to both ethnicity and gender. The criteria are itemized with their respective weights for a maximum total of one hundred (100) points per Competitive Selection Committee member.

<u>Technical Criteria</u>	<u>Points</u>
1. Approach to Design, Construction, and Performance Proposer's approach toward the design and construction of the buses including chargers and charging system, and how the technical design and construction approach meets the requirements of the Technical Specifications (Attachment A) and Construction Documents (Attachment B).	20
2. Program Management/Manufacturing Capacity Manufacturing capacity for the production of the proposed buses and charging systems as outlined in this solicitation, to include the available plant capacity, personnel, and other resources to perform the work.	20
3. Warranties, Product Support, and Life Cycle Costs The Proposer's warranty system terms, life cycle costs, and on-site and technical support.	15
4. Proposer's Experience and Past Performance Proposer's and major subcontractor's performance in previous Electric Bus procurement contracts. To address contractual issues, technical capability, quality of work, contractual delivery schedules, actual delivery schedules, bus performance, reliability, and maintenance.	5
5. Electric Bus Deliveries Proposer's proposed production and delivery schedule, as outlined in the Technical Specifications (Attachment A).	10
 <u>Price Criteria</u>	 <u>Points</u>
1. Proposer's proposed price	30

Therefore, the County's Evaluation Committee had to consider the proposers' compliance with T.S 4, 5.2 (vehicle weight rating) and 7.4.1 (minimum operating range) in evaluating the proposals.

## B. Proterra's Proposal

At the time of bid submittal – and, in fact, to this day – Proterra had never manufactured, tested, or delivered a vehicle that could satisfy the County's technical requirements. As a result, Proterra offered the County a newly designed, never-tested bus that Proterra claimed met the County's rigorous requirements. It did not. Specifically, Proterra's proposed Catalyst E2 model deviated from the technical specifications in the RFP by: (a) exceeding the Gross Vehicle Weight Rating ("GVWR") and front axle Gross Axle Weight Rating ("GAWR") of the vehicle; (b) failing to comply with state and federal regulations; and (c) failing to meet the County's minimum range requirements.

In addition, Proterra materially misrepresented the testing that the Catalyst E2 model had undergone and its ability to meet the County's range requirements by including in its proposal an FTA Bus Test Report (called an Altoona Test Report) for the BE-40 bus model, a significantly different bus model from the Catalyst E2. See Solicitation Tabulation Packet for RFP No. 00456, Proterra Proposal, p. 1222 (Feb. 10, 2017) (**Exhibit 2**) [hereinafter Solicitation Tabulation Packet].<sup>1</sup> Citing the Altoona Test Report for the BE-40 model, Proterra misleadingly claimed that the Catalyst E2 model had been tested for efficiency and was capable of meeting the County's 175-mile range requirement when it stated that "*the 40-foot Proterra Catalyst is the most efficient 40-foot transit bus ever tested at Altoona; achieving an impressive 1.7kWh/mi efficiency.*" Solicitation Tabulation Packet, p. 1413 (emphasis added).

Proterra's claim was false. The FTA did not issue its Altoona Test Report for the Catalyst E2 bus until September 21, 2017 – approximately eight (8) months after the bid submittal

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<sup>1</sup> The BE-40 model tested was a Fast Charge series bus with a curb weight of 27,370 lb., Lithium Titanate Oxide (LTO) batteries, and an Altoona tested range of less than 40 miles. The proposed Catalyst E2 model, on the other hand, has a new battery system and a curb weight which is 2,479 lb. heavier than the BE-40 model. Therefore, the Catalyst E2 vehicle that Proterra offered in its proposal is not the same model as the one that was tested at Altoona.

deadline. See FTA Report PTI-BT-R1706-P involving Proterra Inc. Model Catalyst E2 (September 2017) (Exhibit 3) [hereinafter September 2017 FTA Test Report]. The Altoona Test Report confirmed that the Catalyst E2 model was not “the most efficient 40-foot transit bus ever tested” and did not meet the County’s 175-mile range requirement.

**a. The design and capacity of Proterra’s Catalyst E2 model exceeds the Gross Vehicle Weight Rating (“GVWR”) and Front Axle Gross Axle Weight Rating (“GAWR”).**

One of the most basic requirements of the RFP is that the actual weight of a fully-loaded vehicle (i.e., the Gross Vehicle Weight, or GVW) cannot exceed the maximum total weight, as determined by the manufacturer, at which the vehicle could be operated (i.e., the Gross Vehicle Weight Rating, or GVWR) or the maximum total weight, as determined by the axle manufacturer, at which the axle could be operated (i.e., the Gross Axle Weight Rating, or GAWR). Proterra indicated in its proposal that its Catalyst E2 model was designed to accommodate 77 passengers, with 37 standing passengers and 40 seated passengers. However, the GVW of a fully loaded Catalyst E2, with 77 passengers, exceeds both the GVWR and the GAWR.

The GVWR of Proterra’s Catalyst E2 Model is 39,050 lb. See Solicitation Tabulation Packet, p. 922. Nevertheless, the GVW of a fully loaded Catalyst E2 bus, including 77 seating and standing passengers, fuel, and the farebox system, is 41,399 lb. See *id.* As a result, Proterra’s Catalyst E2 Model failed to comply with T.S. 5.2 of the RFP by proposing a bus with a GVW that exceeds the GVWR by as much as 2,349 lb.

The GAWR of the Catalyst E2, as defined in Proterra’s proposal, is 15,660 lb. for the front axle. *Id.*, p. 923 (Section I-4). However, when the vehicle is fully seated, with 40 passengers, the Catalyst E2 Model has a GVW of 15,774 lb. on the front axle. *Id.* p. 923 (Section

H). Thus, even without including any standing passengers, the GVW proposed by Proterra exceeds the GAWR of its front axle by 114 lb. This failure is a clear violation of T.S. 2 of the RFP.

Proterra submitted a letter to the County on November 7, 2017, stating that the Catalyst E2 Model has a GAWR of 16,094 lb. instead of the 15,660 lb. that Proterra had originally included in its proposal. *See* Letter from Joseph M. Goldstein and Andrew E. Shwartz, (Nov. 7, 2017) (Exhibit 4.) However, as confirmed in the September 2017 FTA Test Report for the Catalyst E2, the GVW for the front axle of a fully loaded vehicle, with 81 passengers, is 19,140 lb, which exceeds the GAWR of 16,094 lb. by 3,046 lb. Thus, the bus design proposed by Proterra in its proposal failed to meet the requirements of T.S. 2.

**Table from September 2017 FTA Report, at Page 7 of 30**

Total Weight Details:

Weight (lb)	CW	SLW	GVW	GAWR
Front Axle	14,000	15,860	19,140	16,094
Middle Axle	N/A	N/A	N/A	N/A
Rear Axle	17,360	21,370	24,400	25,906
Total	31,360	37,230	43,540	42,000 (GVWR)

In sum, Proterra’s Catalyst E2 model cannot safely accommodate the 77 passengers as provided in its Proposal. The design flaws in Proterra’s proposed vehicle materially deviate from the technical specifications of the RFP and jeopardize the safety and reliability of the vehicle.

- b. Proterra did not provide information to assess whether the Catalyst E2 model complies with Section 393.75 of the Code of Federal Regulations regarding the tire load ratings requirement.**

The Vehicle Technical Information Questionnaire in Attachment A of the RFP required proposers to provide tire data to ensure the proposers met Federal requirements. *See* RFP

Attachment A p. 181 (Section K-2). Based on Proterra's proposal, the Catalyst E2 model has a front axle curb weight of 15,774 lb., or 7,887 lb. per tire. Proterra, however, failed to provide the tire information. *See* Solicitation Tabulation Packet, p. 923 (Section K-2). Absent this information, based on Proterra's proposal, the County could not get any assurance that Proterra's design met the tire load ratings of the tire manufacturer and complied with federal regulations.

However, the information provided in the September 2017 FTA Test Report regarding Proterra's Catalyst E2 model supports a finding that the vehicle does not meet the Federal regulations involving tire load ratings. According to published data and information New Flyer received from Michelin North America, Inc. ("Michelin"), the manufacturer of the tires used during the testing of the Catalyst E2 model, the tires used on the vehicle are rated at 7,830 lb. for 120 psi in transit application. *See* Michelin Xzu 2 Tire Data (**Exhibit 5**.) This equates to 15,660 lb. for combined curb and street side front tires. As a result, the GAWR of 16,094 lb. provided by Proterra exceeds the tire manufacturer's rating by 434 lb. (combined curb and street side tires). Furthermore, the Catalyst E2 was tested with a seated GVW of 15,860 lb. for 39 passengers. Therefore, with seated passengers, the Catalyst E2 exceeds the manufacturer's tire rating contrary to the requirements in Section 393.75(g) of the Code of Federal Regulations.

New Flyer's assessment of the published information in the September 2017 FTA Test Report suggests this overloaded condition equates to a minimum of two seated passengers over the allowable tire capacity (each removed passenger equivalent represented by 150 lb.) In addition, the test vehicle has no capacity to operate with standees. As stated above, the Catalyst E2 model has a GVW on the front axle of 19,140 lb. with 42 standing passengers. This GVW also greatly exceeds the tire manufacturer's rated capacity for combined curb and street side tires by 3,480 lb.

**c. The Catalyst E2 model does not meet the 175-mile range required in the RFP**

Because Proterra's Catalyst E2 bus had not been manufactured, tested, or delivered at the time of bid submittal, Proterra had a difficult time establishing that its proposed design could achieve the County's aggressive 175-mile range requirement. In order to claim compliance with the 175-mile range requirement, Proterra offered the County a mathematical calculation that, according to Proterra, demonstrated that the Catalyst E2 bus *could theoretically* achieve 175 miles on a single charge. This calculation included two erroneous assumptions that Proterra knew to be factually inaccurate at the time of bid submittal.

First, Proterra stated in its proposal that its Catalyst E2 model has 440 kilowatt hours (kWh) of on-board energy providing approximately 352 kWh of "usable energy." See Solicitation Tabulation Packet, p. 1413. Proterra further calculated that when operating at full capacity (including the HVAC system) the vehicle efficiency decreases by approximately 13%, or 0.22kWh/mi. *Id.* However, under the industry normal the HVAC load decreases the vehicle efficiency of any bus by at least 0.4kWh/mile under typical summer temperatures of 85 degrees to 95 degrees.<sup>2</sup> Thus, Proterra's range calculations assumed that the vehicle efficiency of its Catalyst E2 bus would decrease by only 0.22 kWh/mile due to the HVAC load, compared to the decrease of 0.44 kWh/mile experienced by most other electric buses.

Proterra had no factual basis for its assumption that its Catalyst E2 bus would operate twice as efficiently as any other electric bus in Miami's extreme weather conditions. At the time of proposal submittal, Proterra was certainly aware of the United States Department of Energy's real-world data reporting, which indicated that vehicle efficiency for Proterra buses under typical summer temperatures decreases by approximately 0.4kWh/mi (consistent with industry norms)

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<sup>2</sup> Electric vehicles have a limited energy storage capacity, and the heating and air-conditioning (HVAC) system may consume a substantial amount of the total energy stored. This considerably reduces the vehicle range.

rather than the 0.22kWh/mi cited in Proterra's proposal. See LESLIE EUDY, AT. AL., NATIONAL RENEWABLE ENERGY LABORATORY, FOOTHILL TRANSIT BATTERY ELECTRIC BUS DEMONSTRATION RESULTS vii (Jan. 2016) (Exhibit 6) also available at <https://www.nrel.gov/docs/fy17osti/68412.pdf>; See also FEDERAL TRANSIT ADMINISTRATION, KING COUNTY METRO BATTERY ELECTRIC BUS DEMONSTRATION 4 (May 2017) (Exhibit 7) also available at <http://www.nrel.gov/docs/fy17osti/68412.pdf>. Had Proterra's range calculation included accurate HVAC load estimates, the projected range of Proterra's Catalyst E2 Model would equal approximately 164 miles – 11 miles short of the County's minimum 175-mile range requirement.

Second, Proterra based its range calculations on a bus that is significantly lighter and more efficient than the Catalyst E2 model included in Proterra's proposal. Specifically, Proterra's 175-range estimate is based on the energy consumption patterns of its BE-40 model, which has an overall average energy consumption of 1.7 kWh/mile. See Solicitation Tabulation Packet p. 1353.<sup>3</sup> However, as confirmed in the September 2017 FTA Report, the Catalyst E2 model has an overall energy consumption of 2.2 kWh/mile – not 1.7 kWh/mile, as suggested by Proterra. See September 2017 FTA Test Report.<sup>4</sup> Again, had Proterra used accurate energy consumption estimates for its Catalyst E2 bus, the range would have fallen well short of the County's 175-mile range requirement.

To the extent there is any doubt that Proterra manipulated key variables to claim compliance with the County's range requirement, September 2017 FTA Report states

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<sup>3</sup> Proterra's proposal provided the Altoona Test Report for Bus Model BE-40. See Solicitation Tabulation Package, p. 1222. The report states that the BE-40 has an overall average energy consumption of 1.7 kWh/mile. *Id.* 1353. Proterra inappropriately used this figure for its calculations on energy performance. *Id.* p. 922, 1413.

<sup>4</sup> The September 2017 FTA Test Report indicates the Proterra Catalyst E2 model has an energy consumption of 2.41 kWh/mile under the Manhattan Duty Cycle, 2.36 kWh/mile for the Orange County Duty Cycle, and 1.84 kWh/mile under the HD-USS Duty Cycle; resulting in an overall average energy consumption of 2.2 kWh/mile. P. 24.

conclusively that the Catalyst E2 bus does not meet the County's range requirement. The Altoona Test Report includes range estimates for the Catalyst E2 bus under three (3) different roadway conditions. The first test, called the Manhattan Duty Cycle, estimated that the Catalyst E2 has a range of approximately 156 miles. The second test, called the Orange County Duty Cycle, also estimated that the Catalyst E2 has a range of approximately 156 miles. The third test, called the HD-USS Cycle was inconclusive because the Catalyst E2 failed to perform to the required test standards.

#### **C. Evaluation Committee Meeting**

On May 5, 2017, the Committee, as appointed by the County Mayor, met to evaluate and score/rank the proposals submitted by Proterra and New Flyer in response to the RFP. In the RFP, as many as 20 points out of 100 points of the evaluation criteria were assigned to the proposers' approach to design, construction, and performance. In reviewing the proposals under this criterion, the Committee members were directed to address "*how the technical design and construction approach meets the requirements of the Technical Specifications.*" Therefore, the County's Committee had to consider the proposers' compliance with T.S. 4, 5.2 and 7.4.1 in its assessment. Even though Proterra did not comply with T.S. 4, 5.2 and 7.4.1, Proterra obtained a 7-point advantage over New Flyer under this category and ultimately received a higher overall score than New Flyer.

#### **D. Responsibility Review**

As permitted under the County's Code of Silence Ordinance in Section 2-11.1(t), Miami-Dade County Code of Ordinances, counsel for New Flyer submitted various letters to the County informing the County of the fatal design flaws in Proterra's proposed bus. True and correct copies of the letters from Llorente & Heckler, P.A. to the County are attached as **Exhibit 8**.

In response, the County conducted a Responsibility Review of Proterra's proposal on February 16, 2018. Following the meeting, Proterra submitted a letter to the County dated February 23, 2018, supplementing its response to the County's Responsibility Review. Letter from Ryan Poppel, President and CEO, Proterra, Inc. (Feb. 23, 2018) (**Exhibit 9**)[hereinafter Proterra Responsibility Review Letter.]

Proterra's testimony during the Responsibility Review was inaccurate, misleading and did not provide the County with satisfactory assurances that its original Proposal met the specification requirements of the RFP. During the Review, Proterra was asked by the County whether the Catalyst E2 model could meet the 175-mile range requirement in Technical Specification 7.4.1. Transcript: Responsibility Review Meeting p. 5 (Feb. 16, 2018) (**Exhibit 10**.)<sup>5</sup> Ignoring the September 2017 FTA Report, which showed that the Catalyst E2 model did not meet the 175-mile range requirement, Proterra answered in the affirmative and cited its mathematical calculations which were based on flawed and arbitrary assumptions corresponding to its lighter BE 40 model. *Id.* at pp. 6-9.<sup>6</sup> Proterra also claimed it would achieve a 20% vehicle efficiency improvement prior bus delivery. *Id.*, at p. 10.<sup>7</sup> However, Proterra did not provide any technical details on how this dramatic efficiency improvement would be achieved. When pushed by the County to address the September 2017 FTA Test Report, Proterra responded evasively contending that the County should not focus on the FTA test results. *Id.*, at pp. 14-15.<sup>8</sup> Instead, they argued, the County should rely on Proterra's internal unverified range demonstration that

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<sup>5</sup> See also Audio Recording: Responsibility Review Meeting 00:03:43 (Feb. 16, 2018) (on file with the procurement manager).

<sup>6</sup> See also Proterra Responsibility Review Letter, Exhibit D, p. 2 (Line 2 of Table)

<sup>7</sup> See also Proterra Responsibility Review Letter, Exhibit D, p. 2 (Line 4 of Table)

<sup>8</sup> See also Audio recording: Responsibility Review Meeting 00:13:00

departs from the third-party verified findings of the September 2017 FTA Test Report. *See id.*, at pp. 12-14.<sup>9</sup>

In short, the information Proterra shared during the Responsibility Review was misleading as it was based on the test results from another model bus (the BE40 instead of the Catalyst E2) combined with a future 20% fuel efficiency promise that would occur before delivery. Unlike the unverified assertions made by Proterra during the meeting, the test results from the September 2017 FTA Test Report for the Catalyst E2 model are indisputable – as proposed the Catalyst E2 model does not meet the minimum 175-range requirement of the RFP.

Moreover, during the Responsibility Review, Proterra introduced significant material modifications to the design and specifications of the bus it offered in its Proposal – an implicit acknowledgement that the original design did not meet the mandatory requirements of the RFP.

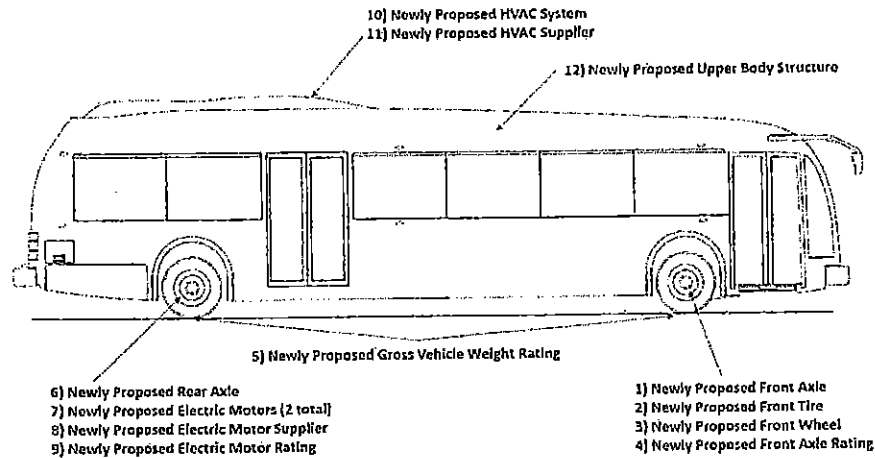
These modifications included:

- 1) A new **front axle and independent suspension** that was not defined in the Proposal. *Compare* Proterra Responsibility Review Letter, Exhibit D, p. 5 *with* Solicitation Tabulation Packet, pp. 919-21.
- 2) A new **front tire** that was not defined in the Proposal. *Id.*
- 3) A new **front wheel** that was not defined in the Proposal. *Id.*
- 4) A new **front axle gross weight rating** that was not defined in the Proposal. *Id.*
- 5) A new **Gross Vehicle Weight Rating (“GVWR”)** that was not included in the Proposal. *See* Proterra Responsibility Review Letter, Exhibit D, p. 5.
- 6) A **completely new rear axle and suspension linkage system** that has never been tested at the Federal Transit Administration (“FTA”) Altoona Test Facility for reliability or any other type of performance testing. *See* Proterra Responsibility Review Letter, Exhibit D p. 5.
- 7) The introduction of the DuoPower system, a **completely new electric motor drive system** that is different from the ProDrive electric system that was included in the original proposal. *Compare* Proterra Responsibility Review Letter, Exhibit B *with* Solicitation Tabulation Packet, p. 922. The DuoPower system has never been tested at the FTA Altoona Test Facility for reliability or any other type of performance testing.
- 8) A new **electric motor supplier** that was not included in the Proposal. *Compare* Proterra Responsibility Review Letter, Exhibit B and H *with* Solicitation Tabulation Packet, p. 922.

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<sup>9</sup> *See also* Audio recording: Responsibility Review Meeting 00:13:15

- 9) A new **power rating** for the electric motor drive system that was not included in the Proposal. *Compare* Proterra Responsibility Review Letter, Exhibit E with Solicitation Tabulation Packet, p. 922.
- 10) A newly proposed **HVAC system** that was not included in the Proposal. *See* E-Mail from Ethan Carbaugh, Director, Business Engagement, Proterra, Inc. (Feb. 12, 2018) (Exhibit 11.)
- 11) A newly proposed **HVAC supplier** that was not included in the Proposal. *See id.*
- 12) A newly proposed **Upper Body Structure** with other configuration changes that were not included in the Proposal. *See* Proterra Responsibility Review Letter, p. 7.



With these modifications, the Proterra Catalyst E2 model has no relationship to the BE40 bust test report submitted by Proterra in its Proposal, which is contrary to Proterra’s affirmation when it signed the Bus Testing Program Certification and Certification of Compliance with FTA’s Bus Testing Requirements in Attachment D of the RFP. The modifications are as material as to require additional testing to ensure the newly proposed bus configuration conforms to FTA test requirements and policies.

**E. County’s Strategy Meeting Following the Responsibility Review**

After the Responsibility Review with Proterra, the negotiation committee members discussed their assessment of the review session during a negotiation strategy meeting. *See* Audio recording: Negotiation Strategy Meeting (Feb. 16, 2018) (on file with the procurement manager) [hereinafter Recording of Negotiation Strategy Meeting]. During the discussion it became clear that the committee members agreed with New Flyer’s claims that: (1) the 175-mile range requirement was a mandatory minimum requirement of the RFP; (2) Proterra’s original proposal offered a bus that did not exist; (3)

Proterra's original proposed bus did not meet the minimum range requirement of the RFP; and (3) after the Responsibility Review (and after New Flyer noted Proterra's design deficiencies) Proterra had re-designed its proposed bus and modified its original proposal.

In her analysis, committee member Mercedes Sosa stated that Proterra was "banking on" being able to comply with the RFP range requirement through updates in their technology. However, she found that "that is not where they are at today." Recording of Negotiation Strategy Meeting, at 48:40:00. Referring to the bus tires, Ms. Sosa found that Proterra did not have the specification of the tires yet even though they were supposed to provide them in their proposal. *Id.* at, 50:50:00. Moreover, referring to the tire specifications that Proterra provided during the Responsibility Review, Ms. Sosa stated that "the one they gave us doesn't exist and won't exist for another year." Recording of Negotiation Strategy Meeting, *Id.* at 52:57:00.

Committee member Carlos Delgado also noted Proterra was changing their battery capacity from 440 kWh to 660 kWh and asked whether the committee could accept those changes since they constituted a change in the bus configuration. *Id.* at 54:18:00. Jesus Lee, the procurement officer, disapprovingly stated that Proterra was "changing their proposal," *Id.* at 54:20:00. Ms. Sosa considered that Proterra should have been disqualified from the beginning because they did not meet the minimum 175-mile range requirement provided in the RFP:

Ms. Sosa: "but the problem [...] is that what [Proterra] submitted did not meet the specs to begin with and that's a problem and when your submittal does not meet the minimum specs from the beginning...."

County Attorney Bruce Libhaber: "you didn't have to have an Altoona Tested vehicle"

Ms. Sosa: "No, but you had to have a 175-mile range as a minimum"

See Recording of Negotiation Strategy Meeting, at 56:20:00

Although Mr. Libhaber opined during the meeting that the RFP permitted the proposers to upgrade their proposed bus configuration, Ms. Sosa and Mr. Lee's initial remarks correctly fall in line

with a basic tenant in procurement law: a proposer must be disqualified when its proposal fails to comply with the minimum requirements of the solicitation.

During the meeting, Mr. Libhaber suggested that the requirements of the RFP were analogous to a solicitation to design and build a bridge. *Id.*, at 57:40:00. The bridge did not need to have been built. Instead, according to Mr. Libhaber, the committee only had to consider whether, based on the proposers' experience, they believed the proposer could design and build the bridge according to the County specifications.

Mr. Libhaber's analysis could be applicable to either a request for qualifications - where respondents are only asked to provide their experience and qualifications - or an invitation to bid - where proposers are required to demonstrate that they meet the minimum qualifications and that they will comply with the construction specifications provided in the solicitation document. Mr. Libhaber's analogy, however, does not apply to this case, where the RFP included a twelve-page questionnaire in Attachment A, Technical Specifications, requiring proposers to provide the specifications of their proposed bus. It also overlooks the FDOT 14-90 Certification included in Attachment A where the proposers are asked to certify that "*the vehicle offered in this procurement complies with Chapter 341.061(2), Florida Statutes and the current revision of Rule 14-90.007 – Vehicle Equipment Standards and Procurement Criteria, Florida Administrative Code (FAC).*" See RFP, Attachment A, Technical Specifications. The certification clearly refers to the vehicle specifications that the proposers had to include in the questionnaire immediately preceding the certification. It does not refer to a hypothetical bus to be eventually delivered to the County.

#### **F. County's Request for References**

In an email dated January 22, 2019, the County's procurement officer requested that Proterra, "...provide new references and their contact information for most recent award for buses similar to the subject solicitation." See E-Mail from Jesus Lee, Procurement Contracting Officer, Miami-Dade County (Jan. 22, 2019) (Exhibit 12.) In its response dated January 24,

2019, Proterra confirmed to ISD that its new electric drive system: (i) is materially different from the one included in its proposal; and (ii) is so new that the company cannot provide a single reference for the system. See E-Mail from Ethan Carbaugh, Director, Business Engagement, Proterra, Inc. (Jan. 24, 2019) (Exhibit 12.) In that same email, Proterra representative Ethan Carbaugh informed that County that:

*"To be clear, these customers are operating 40' E2 buses that do NOT have the new DuoPower drivetrain which is included in the final configuration for DTPW. These customer buses have our base ProDrive electric drive system which is not as efficient (range) or powerful (acceleration & gradeability) as the DuoPower system that DTPW will be receiving. No customers have production DuoPower models in service; hence the lack of ability to provide reference customers with the exact configuration requested." See id.*

Mr. Carbaugh's email confirmed New Flyer's claims that Proterra materially redesigned its bus in a belated effort to comply with federal standards and RFP specifications. The email reveals that the ProDrive electric drive system included in Proterra's original proposal is not as efficient (range) or powerful (acceleration & gradeability) as the DuoPower system now proposed by Proterra. This provided further evidence that Proterra's original bus configuration failed to meet the County's 175-mile range requirement.

#### **G. Final Proposed Contract**

The final contract with Proterra includes an attachment titled "Attachment A, Technical Specifications." See Final Draft of Miami-Dade County Contract with Proterra, Inc. (Aug. 29,

2018) (**Exhibit 13.**) According to Article 2 of the Contract, Attachment A provides the Scope of Services that Proterra must provide to the County and takes precedence over the requirements in the RFP and Proterra's original proposal. The document is a copy of Attachment A, Technical Specifications, that the County included in the RFP and which the proposers had to fill-out with the specifications of their proposed bus. In Section III.B of this Protest we discussed how Proterra's responses to this form demonstrated that the Catalyst E2 did not meet the RFP specifications. However, the version of Attachment A included in the final proposed contract does not provide any specifications involving the bus model that Proterra will be delivering to the County. The unclear scope in the final proposed contract appears to indicate that the County is allowing Proterra absolute freedom to disregard its original proposal and the RFP specifications.

#### **H. Safety Recall of Proterra's Catalyst E2 Model**

In January 2019, the National Highway Traffic Safety Administration (NHTSA) issued two safety recall for Proterra's Catalyst 40 and Catalyst 35 buses, validating New Flyer's concerns regarding Proterra's proposed design and capacity specifications. *See* NHTSA, Part 573 Safety Recall Report 19V-034, (Jan. 16, 2019); *and* NHTSA, Part 573 Safety Recall Report 19V-062, (Jan. 30, 2019) (**Exhibit 14.**)

The NHTSA safety recall impacted approximately 200 Proterra buses, creating a problem for every single customer that has every received a bus from Proterra. Not surprisingly, the NHTSA's concerns focused on the serious consequences associated with tire overloading. The NHTSA specifically noted that:

*"Certain Catalyst buses have incorrect gross axle weight rating and/or incorrect tire pressure on the certification label. The*

*certification label may list an incorrect gross front axle weight rating and/or incorrect tire pressures. As such, these vehicles fail to comply with the requirements of 49 CFR Part 567, 'Certification.' If the tire pressure is understated, an underinflated tire may result in an increased risk of tire failure, increasing the risk of a crash."*

See Part 573 Safety Recall Report 19V-034

And

*"Proterra Catalyst buses are equipped with a 4-point ride height system from Hadley. Through testing, Proterra determined that the system could induce diagonal load imbalance resulting in an overload condition on one tire."*

See Part 573 Safety Recall Report 19V-062

NHTSA's two recalls further validated New Flyer's position that the Catalyst E2 model proposed by Proterra to Miami-Dade County suffers from serious design limitations that render the bus operationally inadequate and non-responsive to the RFP.

#### **IV. Legal Argument**

While public agencies are afforded wide discretion in the bidding process, this discretion is not absolute. Indeed, *"the discretion vested in a public agency in respect to letting public contracts may not be exercised arbitrarily or capriciously, but that its judgments must be bottomed upon facts reasonably tending to support a conclusion."* *Miami-Dade County v. Church & Tower, Inc.*, 715 So. 2d 1084, 1089 (Fla. 3d DCA 1998) (emphasis added).

Moreover, to protect the integrity of the competitive process and secure equal footing for all competitors, public agencies must ensure that proposals adhere strictly to the material specifications of the solicitation. See *Harry Pepper & Assocs., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1192-93 (Fla. 2d DCA 1977); see also § 287.012(26), Fla. Stat. (2018) (defining “[r]esponsive bid” as one “which conforms in all material respects to the solicitation”); *Air Support Servs. Int’l, Inc. v. Metro. Dade Cnty.*, 614 So. 2d 583, 584 (Fla. 3d DCA 1993).

In keeping with these principles, the law generally permits public bodies to waive minor defects in bid submissions and bidders to cure minor irregularities, but material deviations from specifications cannot be waived or altered. *Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm’rs*, 955 So. 2d 647, 653 (Fla. 1st DCA 2007) (“public body is not entitled to omit or alter *material* provisions required by the RFP because in doing so the public body fails to ‘inspire public confidence in the fairness of the [RFP] process’”) (emphasis in original) (quoting *State Dep’t of Lottery v. Gtech Corp.*, 816 So. 2d 648, 652 (Fla. 1st DCA 2001)). Thus, public agencies have no discretion to accept proposals that materially vary from the specifications in the bid or RFP. See *Glatstein v. City of Miami*, 399 So. 2d 1005, 1008 (Fla. 3d DCA 1981) (bid containing material variance from specifications was unacceptable); *Gtech Corp.*, 816 So. 2d at 651-53 (state agency had no discretion to accept bid proposal that materially deviated from RFP requirements); *Harry Pepper*, 352 So. 2d at 1191, 1192-93 (city had no authority to accept nonconforming bid that was “subsequently amended, prior to acceptance, to conform to the specifications as stated in the original proposal”).

The determination of whether a variance is material turns on whether it gives the deviating bidder a competitive advantage or benefit over other bidders. *Tropabest Foods, Inc. v. State, Dep’t of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986). Given the critical importance

of this materiality assessment, a court or hearing officer is required to conduct an independent inquiry rather than defer to the opinion of the procuring agency. *See, e.g., Harry Pepper*, 352 So. 2d at 1192-93 (overturning city's determination regarding materiality of bid deviation and holding that city had no authority to accept materially nonconforming bid).

**A. Proterra Is Non-Responsive Because Its Proposal did not meet the material requirements of the RFP**

Proterra's proposal must be rejected as non-responsive because it includes several material modifications to the technical specifications of the RFP by: (1) exceeding the Gross Vehicle Weight Rating ("GVWR") and front axle Gross Axle Weight Rating ("GAWR") of the vehicle; (2) failing to comply with state and federal regulations; and (3) failing to meet County's minimum range requirements.

These deviations deprive the County from receiving necessary assurances that the bus Proterra proposed will perform according to the requirements of the RFP. Moreover, each of these deviations afford Proterra an unfair competitive advantage not enjoyed by the other Proposers. Stated differently, if other Proposers had been afforded the same opportunity to modify the material technical specifications, thereby significantly reducing the cost of production of each vehicle, they could have offered more attractive pricing to the County.

The minimum range requirement provided by the County was a material requirement of the RFP. In fact, in its proposal Proterra highlights the material character of the County's minimum range requirement when it stated: "*while we would gladly supply DTPW with our lower-priced 40' Catalyst XR+ product, based on our real-world experience, no vehicle with 330kWh or less will meet the DTPW's rigorous range requirements. If desired, we would be glad to discuss lower-priced options with DTPW if vehicle range requirements are relaxed.*"

See Solicitation Tabulation Packet, p. 1414.

Contrary to Proterra, to meet the RFP specifications, New Flyer invested on additional battery capacity to meet the range requirement as well as more robust axles, brakes, suspension components, understructure and body design all of which resulted in a higher cost vehicle. Because Proterra's changes were material, the County had no discretion to accept Proterra's Proposal. The proposal should have been rejected as non-responsive.

**B. The County Arbitrarily Allowed Proterra an Unfair Competitive Advantage by Permitting Significant Modifications in the Design of Proterra's Proposed Bus**

Rather than rejecting Proterra's proposal for being non-responsive, the County allowed Proterra to perform twelve material modifications to its bus design to meet the technical specifications of the RFP. However, allowing a proposer to alter its proposal to address material deviations from the RFP specifications is against even the most basic principles of procurement law and County policy.

In *Department of Lottery v. Gtech Corporation*, the Florida Department of Lottery issued an RFP for the provision of computerized gaming systems and selected its "preferred and longtime vendor," Automated Wagering International, Inc. (AWI), as the highest-ranked proposer. 816 So. 2d 648, 652 (Fla. 1st DCA, 2001). During negotiations, the parties negotiated an agreement that bore "little resemblance to the proposal that earned AWI preferred provider status in the first instance."<sup>10</sup> *Id.* at 653. *Gtech*, the unsuccessful bidder, challenged the award to AWI, claiming that AWI had purposely "low balled" its proposal in order to attain a superior ranking during evaluations and then negotiated a contract on much more favorable terms than it initially proposed. *Gtech*, 816 So. 2d at 650. Rather than contest this allegation, AWI and the

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<sup>10</sup> Based on the transcripts of the case, it appears the contract allowed AWI to implement its computerized gaming system over a 33-month period with no liquidated damages, even though the RFP required a 6-month implementation period and included liquidated damages. Transcript of Oral Argument at 6-7, *Florida Dept. of Lottery v. Gtech Corp.*, 822 So. 2d 1243 (Fla. June 6, 2002) (May 8, 2002)

Department filed a motion for summary judgment, arguing that they were “*free to negotiate without limitation*” after Gtech was eliminated from the process. *Id.*, at 652. The Court disagreed and ultimately voided the contract, finding that the Department could not “*treat the RFP process as little more than a ranking tool to determine a preferred provider with little or no concern for the original proposal of that preferred provider.*” *Id.* at 653 (emphasis added). The Court noted that to hold otherwise would “*encourage responders to RFPs to submit non-competitive, unrealistic proposals solely for the purpose of receiving the highest ranking for subsequent negotiations.*” *Id.* at 652.

Here, the RFP allocated as many as 20 points out of a total of 100 points of the evaluation criteria were assigned to the proposers’ approach to design, construction, and performance (since there were five evaluation Committee members proposers could obtain a maximum of 100 points for this criterion out of 500 total points.) *See* Final Evaluation Committee Scoring (May 3, 2017) (Exhibit 15.) In reviewing the proposals under this criterion, the Committee members were directed to address “*how the technical design and construction approach meets the requirements of the Technical Specifications.*” The Committee awarded Proterra a total of 92 points and New Flyer 85 points, giving Proterra a 7-point advantage over New Flyer under this category. *See id.* Like in *Gtech*, the Committee scored the proposals based on the design specifications provided by the proposers in their proposal (including the questionnaire in the Attachment A Technical Specifications document.) The scores of Proterra’s proposal do not account for the completely re-designed vehicle Proterra offered the County during the Responsibility Review meeting.

These changes were material because they negatively affected New Flyer. As acknowledge by Ms. Sosa during the strategy session, the bus Proterra originally included in its proposal did not meet the minimum requirements under this criterion. However, Proterra

obtained full credit for its approach. Given that Proterra surpassed New Flyer in the overall total scoring by a mere 5% margin (New Flyer was scored 440 and Proterra 463 out of 500 total points), the final scoring could have switched in favor of New Flyer had the Committee known that the bus design Proterra offered did not comply with the technical requirements in the RFP and that it had not been tested to ensure compliance with FTA requirements.

Although the County may attempt to justify its acceptance of the modifications based on the flexible nature of an RFP, upholding the County's decision would be contrary to the holding in *Gtech* and against the competitive nature of the procurement process. During the strategy session the County attorney opined that the bus manufacturers were not bound to the design specifications they offered in their proposal. However, upholding this opinion would yield the results that *Gtech* sought to prevent: encouraging proposers to submit unrealistic, non-competitive design specifications *solely for the purpose of receiving the highest ranking for subsequent negotiations*. The RFP specifically requested proposers to include the technical specifications of their proposed bus in their submission and the evaluation committee members were bound to the four corners of the proposals when making their assessment.

The courts have allowed a proposer to deviate from the RFP specifications or modify its proposal after proposal submission in limited circumstances. In those instances, all the proposers had the same opportunity to propose innovative solutions or obtained an equal opportunity to modify their proposals after proposal submission. *See Sys. Dev. Corp. v. Dep't of Health & Rehab. Services*, 423 So. 2d 433, 434 (Fla. 1st DCA 1982) (holding that the proposer receiving award of the contract did not obtain a palpable economic advantage over the other offerors where all of the other offerors were given the same opportunity to be innovative); and *AT & T Corp. v. State, Dept. of Mgmt. Services*, 201 So. 3d 852, 858 (Fla. 1st DCA 2016)(finding that the

changes that occur during negotiations were not material and did not restrict competition because both the appellant and intervenor had an equal opportunity to alter their proposals during the negotiations process.)

In this case, New Flyer did not obtain an opportunity to compete on equal terms as Proterra. Proterra's original proposed bus configuration did not meet the minimum requirements in the technical specifications of the RFP. Its proposed bus did not offer an innovative approach. Rather, it was deficient and could not legally operate under both Federal and Florida law. Finally, the design modifications accepted by the County after the Responsibility Review are inconsistent with Proterra's original proposal. Instead of obtaining a better solution, the County is at the mercy of serving as Proterra's laboratory for experimental technology without the assurances provided by proper FTA Altoona testing. This is reflected in the final proposed contract where the scope of services does not include the final technical specifications of the buses that will be delivered to the County.

**C. Proterra Made Material Misrepresentations About the Testing that the Catalyst E2 Model Had Undergone and Its Ability To meet the Minimum Range Requirement**

Proterra provided in its proposal a test report dated May 2015, for a BE-40 model, which is different from the Catalyst E2 model being proposed by Proterra. *See Solicitation Tabulation Packet, p. 1222.* While the RFP allows proposers to undergo the required FTA Altoona Testing prior to first acceptance of the buses, Proterra's misrepresentations about its Altoona Testing were a material factor in the Evaluation Committee's recommendation to enter negotiations with Proterra.

To demonstrate compliance with the County's 175-mile range requirement, Technical Specification 8 of the RFP required proposers to submit the results from the Altoona fuel economy tests or other applicable test procedures. To meet this requirement, Proterra used the

Altoona Test Report for the BE-40 model, and misleadingly stated that the Catalyst E2 model had been tested for efficiency, when it stated that: "*the 40-foot Proterra Catalyst is the most efficient 40-foot transit bus ever tested at Altoona; achieving an impressive 1.7kWh/mi efficiency.*" Solicitation Tabulation Packet, p. 1413 (emphasis added). However, since the Catalyst E2 model is heavier than the BE-40 model, the fuel economy documented in Proterra's proposal is inapplicable to its proposal. Throughout the process, Proterra refused to address the accurate range of the Catalyst E2, which was published in the September 2017 FTA report, after proposal submission. Contrary to Proterra's claims, according to the updated report, the Catalyst E2 model does not meet the County's 175-mile range requirement.

A closer review of the summary of the vehicles that Proterra has delivered or tested shows that the Catalyst E2 has not been delivered nor tested. *See* Solicitation Tabulation Packet, p. 1472-1473, 1478-1473. Proterra was only able to document an order – not a delivery – of thirteen Catalyst E2 vehicles for Foothill Transit. *Id.*, 1478. Furthermore, as admitted in its January 24, 2019, email to the County, Proterra does not have a single customer using the DuoPower drivetrain which Proterra proposed as part of the twelve design modifications it made to its proposed bus after proposal submission. In fact, the FTA has not conducted Altoona testing of the system. This contradicts Proterra's repeated claims of experience and reliability included in its proposal.

There were additional instances during the procurement process that evidence Proterra's successful attempt to use an FTA report that is inapplicable to its proposed bus to misleadingly influence the County's Evaluation Committee. For example, before oral presentations, Evaluation Committee member Mercedes Sosa scored New Flyer higher than Proterra. *See* Pre-Oral Presentations Evaluation Committee Scoring (Apr. 19, 2017) (Exhibit 16.) However, after

oral presentations, Ms. Sosa stated that she decided to “switch to Proterra” given that Proterra’s failures during the Altoona Testing appeared to have been addressed. She had been concerned about structural failures involving Proterra’s vehicles, but now felt confident that Proterra had gone “overboard to make sure it doesn’t happen again.” See Transcript of Evaluation Committee Meeting, p. 2 (May 3, 2017) (Exhibit 17.)

Counsel for New Flyer notified the County through written correspondence dated May 26, 2017, that Proterra had misrepresented the information regarding its proposed Catalyst E2 model by supplying information about a different vehicle. See Exhibit 8. Despite being on notice of Proterra’s material misrepresentations, the County decided to proceed with its Award Recommendation to Proterra. This decision was arbitrary and capricious. See *Academy Express, LLC v. Broward Cnty.*, 53 So. 3d 1188 (Fla. 4th DCA 2011) (“A contract award based on known misrepresentations by a vendor could constitute arbitrary and capricious action”); see also *Statewide Process Serv. of Fla., Inc. v. Dep’t of Transp.*, No. 95-5035BID, 1995 WL 1053244 (Fla.Div. Admin. Hrgs. Dec. 18, 1995) (finding that the procuring agency acted arbitrarily and capriciously in recommending the award of a contract to a vendor that had made material misrepresentations regarding its proposal, and where these misrepresentations had been identified by the protesting party following the award recommendation).

**V. Request for Relief**

Based on the foregoing, New Flyer respectfully requests that the Hearing Officer: (1) reject Proterra’s Proposal as non-responsive and recommend award to New Flyer as the remaining responsive, responsible proposer; (2) alternatively, find that the County acted arbitrarily and capriciously and recommend that the Award Recommendation under the RFP be rescinded; (3) for such further relief as the Hearing Officer deems appropriate.

Respectfully submitted this 9th day of July 2019.

By:   
\_\_\_\_\_

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Alexander P. Heckler Esq.  
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*Attorneys for New Flyer*

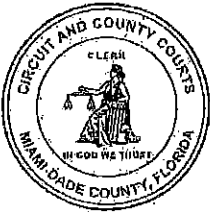
**Certificate of Service**

I hereby certify that on this 9<sup>th</sup> day of July 2019, a true and correct copy of the foregoing was mailed to to Bruce Libhaber (Bruce.Libhaber@miamidade.gov) and Dale Clarke (Dale.Clarke@miamidade.gov), Miami-Dade County Attorney's Office; Joseph M. Goldstein, Counsel for Proterra, Inc. (JGoldstein@shutts.com), and Greg Davis (macy.neshati@byd.com), BYD Motors Inc.

Dated: July 9, 2019

  
\_\_\_\_\_  
Diana C. Mendez, Esq.

**Harvey Ruvin**  
CLERK OF THE CIRCUIT AND COUNTY COURTS  
Miami-Dade County, Florida



CLERK OF THE BOARD OF COUNTY COMMISSIONERS  
STEPHEN P. CLARK CENTER  
SUITE 17-202  
111 N.W. 1<sup>st</sup> Street  
Miami, FL 33128-1983  
Telephone: (305) 375-5126

August 5, 2019

Ms. Diane Mendez  
LLORENTE & HECKLER, PA  
801 Arthur & Godfrey Road, Suite 401  
Miami Beach, FL 33140

Re: Contract No. REP-00456 – Battery-Electric Buses and Charging System

Dear Ms. Diane Mendez:

Forwarded for your information is a copy of the Findings and Recommendation filed by Judge Loree Rene Schwartz, Hearing Examiner, in connection with the bid protest hearing held on Friday, July 26, 2019.

Should you have any questions regarding this matter, please do not hesitate to contact Daysha McBride at 305-375-1293.

Sincerely,

HARVEY RUVIN, Clerk  
Circuit and County Courts

By *Linda L. Cave*  
Linda L. Cave, Director  
Clerk of the Board Division

LLC:dmcb

CC: Honorable Chairwoman Audrey M. Edmonson and Members, Board of County Commissioner (via email)  
Honorable Carlos A. Gimenez, Mayor, Miami-Dade County (via email)  
Alina T. Hudak, Deputy Mayor (via email)  
Jennifer Moon, Deputy Mayor (via email)  
Abigail Price-Williams, County Attorney (via email)  
Geri Bonzon-Keenan, First Assistant County Attorney (via email)  
Hugo Benitez, Assistant County Attorney (via email)  
Bruce Libhaber, Assistant County Attorney (via email)  
Jenelle Snyder, County Attorney's Office (via email)

Ms. Diane Mendez

Page 2

August 5, 2019

YoJanda Negrin, County Attorney's Office (via email)  
Elizabeth Alfonso Ruiz, County Attorney's Office (via email)  
Adeyinka Majekodunmi, Commission Auditor (via email)  
Tara C. Smith, Director, Internal Services Department (via email)  
Namita Uppal, Chief Procurement Officer, Internal Services Department (via email)  
Rita A. Silva, Division Director 2, Internal Services Department (via email)  
Jeanise Cummings-Labossiere, Vendor Services Manager, Internal Services Department (via email)  
Vanessa Stroman, Procurement Contracting Manager, Internal Services Department (via email)  
Rene Guerrero, Procurement Vendor Service Specialist, Internal Services Department (via email)  
Reginald L. Hires, Procurement Quality Control Specialist, Internal Services Department (via email)  
Jesus Lee, Procurement Contracting Officer 3 (via email)  
Nicole.Robertus@newflyer.com, New Flyer of America Inc.  
ECarbaugh@Proterra.com, Proterra Inc.  
bobby.hill@byd.com, BYD Motors LLC

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**MEMORANDUM**  
(Revised)

**TO:** Honorable Chairwoman Audrey M. Edmonson  
and Members, Board of County Commissioners

**DATE:** October 3, 2019

**FROM:** Abigail Price-Williams  
County Attorney

**SUBJECT:** Agenda Item No. 8(F)(24)

Please note any items checked.

- "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
- Statement of social equity required
- Ordinance creating a new board requires detailed County Mayor's report for public hearing
- No committee review
- Applicable legislation requires more than a majority vote (i.e., 2/3's present \_\_\_\_, 2/3 membership \_\_\_\_, 3/5's \_\_\_\_, unanimous \_\_\_\_, CDMP 7 vote requirement per 2-116.1(3)(h) or (4)(c) \_\_\_\_, CDMP 2/3 vote requirement per 2-116.1(3)(h) or (4)(c) \_\_\_\_, or CDMP 9 vote requirement per 2-116.1(4)(c)(2) \_\_\_\_ ) to approve
- 
- Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required

Approved \_\_\_\_\_ Mayor  
Veto \_\_\_\_\_  
Override \_\_\_\_\_

Agenda Item No. 8(F)(24)  
10-3-19

RESOLUTION NO. R-1041-19

RESOLUTION APPROVING AWARD OF CONTRACT NO. RFP-00456 TO PROTERRA, INC. FOR PURCHASE OF BATTERY-ELECTRIC BUSES AND CHARGING SYSTEM FOR THE DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS IN A TOTAL AMOUNT NOT TO EXCEED \$72,176,322.00 FOR THE FIVE-YEAR TERM; AND AUTHORIZING THE COUNTY MAYOR OR COUNTY MAYOR'S DESIGNEE TO EXECUTE SAME FOR AND ON BEHALF OF MIAMI-DADE COUNTY AND TO EXERCISE ALL PROVISIONS OF THE CONTRACT, INCLUDING ANY CANCELLATION, RENEWAL AND EXTENSION PROVISIONS PURSUANT TO SECTION 2-8.1 OF THE CODE OF MIAMI-DADE COUNTY, FLORIDA AND IMPLEMENTING ORDER 3-38; AND AUTHORIZING THE USE OF CHARTER COUNTY TRANSPORTATION SURTAX FUNDS FOR SUCH PURPOSES WHICH ARE IN THE ORIGINAL PEOPLE'S TRANSPORTATION PLAN

**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:

**Section 1.** This Board approves award of Contract No. RFP-00456 to Proterra, Inc. for purchase of battery-electric buses and charging system for the Department Transportation and Public Works, in substantially the form attached and made a part hereof, in a total amount not to exceed \$72,176,322.00 for the five-year term, and authorizes the County Mayor or County Mayor's designee to execute same for and on behalf of Miami-Dade County and to exercise all provisions of the contracts, including any cancellation, renewal and extension provisions pursuant to 2-8.1 of the Code of Miami-Dade County and Implementing Order 3-38. A copy of the contract is on file and available upon request from the Internal Services Department, Strategic Procurement Division.

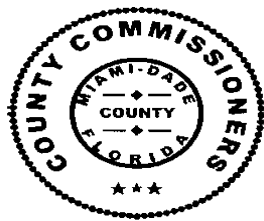
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**Section 2.** This Board authorizes the use of Charter County Transportation Surtax Funds for such purposes.

The foregoing resolution was offered by Commissioner **Barbara J. Jordan**, who moved its adoption. The motion was seconded by Commissioner **Sally A. Heyman** and upon being put to a vote, the vote was as follows:

Audrey M. Edmonson, Chairwoman			<b>aye</b>
Rebeca Sosa, Vice Chairwoman			<b>aye</b>
Esteban L. Bovo, Jr.	<b>aye</b>	Daniella Levine Cava	<b>aye</b>
Jose "Pepe" Diaz	<b>absent</b>	Sally A. Heyman	<b>aye</b>
Eileen Higgins	<b>aye</b>	Barbara J. Jordan	<b>aye</b>
Joe A. Martinez	<b>aye</b>	Jean Monestime	<b>absent</b>
Dennis C. Moss	<b>aye</b>	Sen. Javier D. Souto	<b>aye</b>
Xavier L. Suarez	<b>absent</b>		

The Chairperson thereupon declared this resolution duly passed and adopted this 3<sup>rd</sup> day of October, 2019. This resolution shall become effective upon the earlier of (1) 10 days after the date of its adoption unless vetoed by the County Mayor, and if vetoed, shall become effective only upon an override by this Board, or (2) approval by the County Mayor of this resolution and the filing of this approval with the Clerk of the Board.



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

HARVEY RUVIN, CLERK

**Linda L. Cave**

By: \_\_\_\_\_  
Deputy Clerk

Approved by County Attorney as  
to form and legal sufficiency.

Bruce Libhaber

Title: BATTERY-ELECTRIC TRANSIT BUSES AND CHARGING SYSTEM  
Contract No. RFP-00456

THIS AGREEMENT made and entered into as of this \_\_\_\_\_ day of \_\_\_\_\_ by and between Proterra, Inc., a corporation organized and existing under the laws of the State of Delaware, having its principal office at 1815 Rollins Road, Burlingame, CA 94010 (hereinafter referred to as the "Contractor"), and Miami-Dade County, a political subdivision of the State of Florida, having its principal office at 111 N.W. 1st Street, Miami, Florida 33128 (hereinafter referred to as the "County"),

WITNESSETH:

WHEREAS, the Contractor has offered to provide Battery-Electric Buses and Charging System, on a non-exclusive basis, that shall conform to the Scope of Services in Attachments A and B, Miami-Dade County's Request for Proposals (RFP) No. RFP-00456, and all associated addenda and attachments, incorporated herein by reference; and the requirements of this Agreement; and,

WHEREAS, the Contractor has submitted a written proposal dated February 13, 2017, hereinafter referred to as the "Contractor's Proposal" which is incorporated herein by reference; and,

WHEREAS, the County desires to procure from the Contractor such goods and services for the County, in accordance with the terms and conditions of this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained, the parties hereto agree as follows:

**ARTICLE 1. DEFINITIONS**

The following words and expressions used in this Agreement shall be construed as follows, except when it is clear from the context that another meaning is intended:

- a) The words "Contract" or "Agreement" to mean collectively these terms and conditions, the Technical Specification and Construction Documents (Attachments A and B respectively), all other appendices and attachments hereto, all amendments issued hereto, RFP No.00456 and all associated addenda, and the Contractor's Proposal.
- b) The words "Contract Date" to mean the date on which this Agreement is effective.
- c) The words "Contract Manager" to mean Miami-Dade County's Director, Internal Services

- Department, or the duly authorized representative designated to manage the Contract.
- d) The word "Contractor" to mean Proterra, Inc., and its permitted successors.
  - e) The word "Days" to mean Calendar Days.
  - f) The word "Deliverables" to mean all documentation and any items of any nature submitted by the Contractor to the County's Project Manager for review and approval pursuant to the terms of this Agreement.
  - g) The words "directed", "required", "permitted", "ordered", "designated", "selected", "prescribed" or words of like import to mean respectively, the direction, requirement, permission, order, designation, selection or prescription of the County's Project Manager; and similarly the words "approved", "acceptable", "satisfactory", "equal", "necessary", or words of like import to mean respectively, approved by, or acceptable or satisfactory to, equal or necessary in the opinion of the County's Project Manager.
  - h) The words "Extra Work" or "Additional Work" to mean additions or deletions or modifications to the amount, type or value of the Work and Services as required in this Contract, as directed and/or approved by the County.
  - i) The words "Project Manager" to mean the County Mayor or the duly authorized representative designated to manage the Project.
  - j) The words "Scope of Services" to mean the document appended hereto as the RFP and Attachments A and B, which details the work to be performed by the Contractor.
  - k) The word "subcontractor" or "subconsultant" to mean any person, entity, firm or corporation, other than the employees of the Contractor, who furnishes labor and/or materials, in connection with the Work, whether directly or indirectly, on behalf and/or under the direction of the Contractor and whether or not in privity of Contract with the Contractor.
  - l) The words "Work", "Services" "Program", or "Project" to mean all matters and things required to be done by the Contractor in accordance with the provisions of this Contract.

## **ARTICLE 2. ORDER OF PRECEDENCE**

If there is a conflict between or among the provisions of this Agreement, the order of precedence is as follows: 1) these terms and conditions, 2) the Scope of Services (Attachments A and B), 3) the Miami-Dade County's RFP No. RFP-00456 and any associated addenda and attachments thereof, and 4) the Contractor's Proposal.

## **ARTICLE 3. RULES OF INTERPRETATION**

- a) References to a specified Article, section or schedule shall be construed as reference to that specified Article, or section of, or schedule to this Agreement unless otherwise indicated.
- b) Reference to any agreement or other instrument shall be deemed to include such agreement or other instrument as such agreement or other instrument may, from time to time, be modified, amended, supplemented, or restated in accordance with its terms.

- c) The terms "hereof", "herein", "hereinafter", "hereby", "herewith", "hereto", and "hereunder" shall be deemed to refer to this Agreement.
- d) The titles, headings, captions and arrangements used in these Terms and Conditions are for convenience only and shall not be deemed to limit, amplify or modify the terms of this Contract, nor affect the meaning thereof.

#### **ARTICLE 4. NATURE OF THE AGREEMENT**

- a) This Agreement incorporates and includes all prior negotiations, correspondence, conversations, agreements, and understandings applicable to the matters contained in this Agreement. The parties agree that there are no commitments, agreements, or understandings concerning the subject matter of this Agreement that are not contained in this Agreement, and that this Agreement contains the entire agreement between the parties as to all matters contained herein. Accordingly, it is agreed that no deviation from the terms hereof shall be predicated upon any prior representations or agreements, whether oral or written. It is further agreed that any oral representations or modifications concerning this Agreement shall be of no force or effect, and that this Agreement may be modified, altered or amended only by a written amendment duly executed by both parties hereto or their authorized representatives.
- b) The Contractor shall provide the goods and services set forth in the Scope of Services and Technical Specification, and render full and prompt cooperation with the County in all aspects of the Services performed hereunder.
- c) The Contractor acknowledges that this Agreement requires the performance of all things necessary for or incidental to the effective and complete performance of all Work and Services under this Contract. All things not expressly mentioned in this Agreement but necessary to carrying out its intent are required by this Agreement, and the Contractor shall perform the same as though they were specifically mentioned, described and delineated.
- d) The Contractor shall furnish all labor, materials, tools, supplies, and other items required to perform the Work and Services that are necessary for the completion of this Contract. All Work and Services shall be accomplished at the direction of and to the satisfaction of the County's Project Manager.
- e) The Contractor acknowledges that the County shall be responsible for making all policy decisions regarding the Scope of Services. The Contractor agrees to provide input on policy issues in the form of recommendations. The Contractor agrees to implement any and all changes in providing Services hereunder as a result of a policy change implemented by the County. The Contractor agrees to act in an expeditious and fiscally sound manner in providing the County with input regarding the time and cost to implement said changes and in executing the activities required to implement said changes.

#### **ARTICLE 5. CONTRACT TERM**

The Contract shall become effective on \_\_\_\_\_ and shall continue through the last day of the sixtieth (60) month. Currently, the Federal Transit Administration (FTA) limits rolling stock contracts to five (5) years.

**ARTICLE 6. NOTICE REQUIREMENTS**

All notices required or permitted under this Agreement shall be in writing and shall be deemed sufficiently served if delivered by Registered or Certified Mail, with return receipt requested; or delivered personally; or delivered via fax or e-mail (if provided below) and followed with delivery of hard copy; and in any case addressed as follows:

**(1) to the County**

- a) to the Project Manager: TBA

Miami-Dade County, Department of Transportation and Public Works (DTPW)  
Attention: TBA  
Phone: TBA  
Fax: TBA  
E-mail: TBA

and,

- b) to the Contract Manager:

Miami-Dade County  
Internal Services Department, Procurement Management Division  
111 N.W. 1<sup>st</sup> Street, Suite 1375  
Miami, FL 33128-1974  
Attention: Assistant Director  
Phone: (305) 375-2363  
Fax: (305) 375-2316  
E-mail: TBA

**(2) To the Contractor**

- a) to the Customer Project Manager:

Attention: Jarrett Stoltzfus  
Bid & Proposal Manager  
Proterra Inc  
Phone: 909-569-0510  
Fax: 864-281-1874  
E-mail: [jstoltzfus@proterra.com](mailto:jstoltzfus@proterra.com)

and,

- b) to the Legal Department:

Attention: JoAnn Covington  
Proterra Inc  
LEGAL DEPARTMENT  
Phone: 650-689-8284  
Fax: 650-689-8271  
E-mail: [jcovington@proterra.com](mailto:jcovington@proterra.com)

Either party may at any time designate a different address and/or contact person by giving notice

as provided above to the other party. Such notices shall be deemed given upon receipt by the addressee.

#### **ARTICLE 7. PAYMENT FOR SERVICES/AMOUNT OBLIGATED**

The Contractor warrants that it has reviewed the County's requirements and has asked such questions and conducted such other inquiries as the Contractor deemed necessary in order to determine the price the Contractor will charge to provide the Work and Services to be performed under this Contract. The compensation for all Work and Services performed under this Contract, including all costs associated with such Work and Services, shall be in the total amount of seventy-two million, one hundred seventy-six thousand, three hundred twenty-two dollars (\$72,176,322.00). The County shall have no obligation to pay the Contractor any additional sum in excess of this amount, except for a change and/or modification to the Contract, which is approved and executed in writing by the County and the Contractor.

All Services undertaken by the Contractor before County's approval of this Contract shall be at the Contractor's risk and expense.

#### **ARTICLE 8. PRICING**

Awarded prices shall be the Base Order Price and Customer Configurable Options (Attachment C and D), and shall remain firm and fixed for one hundred- eighty (180) days after contract award. After the initial 180 day firm and fixed price period, the price shall be calculated based on the formula below, which utilizes the U.S. Department of Labor/Bureau Of Labor Statistics Producer Price Index (PPI) Category 1413, "Trucks and Bus Bodies" - <http://data.bls.gov/timeseries/WPU1413>

PPI Index: Future Award Month	141.1
Less PPI Index: Base Award Month	137.6
Equals Index Point Change	3.5

#### Index Percent Change

Index Point Change	3.5
Divided by PPI Index: Base Award Month	137.6
Equals	0.0254
Results Multiplied by 100	0.0254 x 100
Equals to a Percent Change of:	2.54%

Base Order Price	\$1,000.00
Plus Percent Change (2.54% x \$1,000)	25.44
Revised Price for Future Order	\$1,025.44

The change in this index will be used to adjust the Base Order Prices. However, in no event will the result in a price increase be greater than five percent per year above the Base Order Price.

#### **Example:**

Agency awarded its contract in July 2003, and has received its base order of buses. In August 2004, agency elects to purchase more buses for delivery in 2005. The published data for PPI-Category 1413 shows an index value of 141.1 in August 2004 (Future Award Month). The index

for July 2003 (Base Award Month) was 137.6. The percentage change in the index values from July 2003 to August 2004 would be 2.54%. The buses ordered in August 2004 would be priced 2.54% higher than the base award price. This example assumes that the August 2004 order contained no significant equipment modification when compared with the original order.

**ARTICLE 9. METHOD AND TIMES OF PAYMENT**

The Contractor agrees that under the provisions of this Agreement, as reimbursement for those actual, reasonable and necessary costs incurred by the Contractor, which are directly attributable or properly allocable to the Services, the Contractor may bill the County periodically, but not more than once per month, upon invoices certified by the Contractor pursuant to Revised Form 1, Price Proposal Schedule, dated March 25, 2018.

All invoices shall be taken from the books of account kept by the Contractor, shall be supported by copies of payroll distribution, receipt bills or other documents reasonably required by the

County, shall show the County's contract number, and shall have a unique invoice number assigned by the Contractor.

It is the policy of Miami-Dade County that payment for all purchases by County agencies and the Public Health Trust shall be made in a timely manner and that interest payments be made on late payments. All firms, including Small Business Enterprises, providing goods and services to the County, shall receive payment to maintain sufficient cash flow. In accordance with Florida Statutes, Section 218.74 and Section 2-8.1.4 of the Miami-Dade County Code, the time at which payment shall be due from the County or the Public Health Trust shall be forty-five (45) days from receipt of a proper invoice.

All payments due from the County or the Public Health Trust, and not made within the time specified by this section shall bear interest from thirty (30) days after the due date at the rate of one percent (1%) per month on the unpaid balance. Further, proceedings to resolve disputes for payment of obligations shall be concluded by final written decision of the County Mayor, or his or her designee(s), not later than sixty (60) days after the date on which the proper invoice was received by the County or the Public Health Trust.

In accordance with Miami-Dade County Implementing Order 3-9, Accounts Receivable Adjustments, if money is owed by the Contractor to the County, whether under this Contract or for any other purpose, the County reserves the right to retain such amount from payment due by County to the Contractor under this Contract. Such retained amount shall be applied to the amount owed by the Contractor to the County. The Contractor shall have no further claim to such retained amounts which shall be deemed full accord and satisfaction of the amount due by the County to the Contractor for the applicable payment due herein.

Invoices and associated back-up documentation shall be submitted in duplicate by the Contractor to the County as follows:

Miami-Dade County  
\_\_\_\_\_  
\_\_\_\_\_  
Attention: \_\_\_\_\_

The County may at any time designate a different address and/or contact person by giving written notice to the other party.

**ARTICLE 10. INDEMNIFICATION AND INSURANCE**

Contractor shall indemnify and hold harmless the County and its officers, employees, agents and instrumentalities from any and all liability, losses or damages, including attorneys' fees and costs of defense, which the County or its officers, employees, agents or instrumentalities may incur as a result of claims, demands, suits, causes of actions or proceedings of any kind or nature arising out of, relating to or resulting from the performance of this Agreement by the Contractor or its employees, agents, servants, partners principals or subcontractors. Contractor shall pay all claims and losses in connection therewith and shall investigate and defend all claims, suits or actions of any kind or nature in the name of the County, where applicable, including appellate proceedings, and shall pay all costs, judgments, and attorney's fees which may issue thereon. Contractor expressly understands and agrees that any insurance protection required by this Agreement or otherwise provided by Contractor shall in no way limit the responsibility to indemnify, keep and save harmless and defend the County or its officers, employees, agents and instrumentalities as herein provided.

The Contractor shall furnish to the Internal Services Department / Procurement Management Services, 111 NW 1st Street, Suite 1300, Miami, Florida 33128-1989, Certificate(s) of Insurance which indicate that insurance coverage has been obtained which meets the requirements as outlined below:

In addition to the referenced certificates, Miami Dade County reserves the right to request the applicable policy (policies) in its entirety.

- A. Worker's Compensation Insurance for all employees of the Contractor as required by Florida Statute 440.
- B. Commercial General Liability Insurance on a Comprehensive basis including Products and Completed Operations in an amount not less than \$2,000,000 combined single limit per occurrence for bodily injury and property damage. **Miami-Dade County must be shown as an additional insured with respect to this coverage.**
- C. Automobile Liability Insurance covering all owned, non-owned and hired vehicles used in connection with the work, in an amount not less than \$1,000,000 combined single limit per occurrence for bodily injury and property damage.

All insurance policies required above shall be issued by companies authorized to do business under the laws of the State of Florida, with the following qualifications:

The company must be rated no less than "A-" as to management, and no less than "Class VII" as to financial strength by A.M. Best Company, Oldwick, New Jersey, or its equivalent, subject to the approval of the County Risk Management Division.

or

The company must hold a valid Florida Certificate of Authority as shown in the latest "List of All Insurance Companies Authorized or Approved to do Business in Florida" issued by the State of Florida Department of Financial Services.

**The mailing address of Miami-Dade County as the certificate holder must appear on the certificate of insurance as follows:**

**Miami-Dade County  
111 N.W. 1st Street  
Suite 1300  
Miami, Florida 33128-1974**

Compliance with the foregoing requirements shall not relieve the Contractor of this liability and obligation under this section or under any other section in this Agreement.

Award of this Contract is contingent upon the receipt of the insurance documents, as required, within ten (10) business days. If the insurance certificate is received within the specified timeframe but not in the manner prescribed in this Agreement, the Contractor shall have an additional five (5) business days to submit a corrected certificate to the County. If the Contractor fails to submit the required insurance documents in the manner prescribed in this Agreement

within fifteen (15) business days, the Contractor shall be in default of the contractual terms and conditions and award of the Contract may be rescinded, unless such timeframe for submission has been extended by the County.

The Contractor shall assure that the Certificates of Insurance required in conjunction with this Section remain in full force for the term of the Contract, including any renewal or extension periods that may be exercised by the County. If the Certificate(s) of Insurance is scheduled to expire during the term of the Contract, the successful Bidder shall submit new or renewed Certificate(s) of Insurance to the County a minimum of ten (10) calendar days before such expiration. In the event that expired Certificates of Insurance are not replaced or renewed to cover the Contract period, the County may suspend the Contract until the new or renewed certificates are received by the County in the manner prescribed herein. If such suspension exceeds thirty (30) calendar days, the County may, at its sole discretion, terminate the Contract for cause and the Contractor shall be responsible for all direct and indirect costs associated with such termination.

#### **ARTICLE 11. MANNER OF PERFORMANCE**

- a) The Contractor shall provide the Services described herein in a competent and professional manner satisfactory to the County in accordance with the terms and conditions of this Agreement. The County shall be entitled to a satisfactory performance of all Services described herein and to full and prompt cooperation by the Contractor in all aspects of the Services. At the request of the County, the Contractor shall promptly remove from the project any Contractor's employee, subcontractor, or any other person performing Services hereunder. The Contractor agrees that such removal of any of its employees does not require the termination or demotion of any employee by the Contractor.
- b) The Contractor agrees to defend, hold harmless and indemnify the County and shall be liable and responsible for any and all claims, suits, actions, damages and costs (including attorney's fees and court costs) made against the County, occurring on account of, arising from or in connection with the removal and replacement of any Contractor's personnel performing services hereunder at the behest of the County. Removal and replacement of any Contractor's personnel as used in this Article shall not require the termination and or demotion of such Contractor's personnel.
- c) The Contractor agrees that at all times it will employ, maintain and assign to the performance of the Services a sufficient number of competent and qualified professionals and other personnel to meet the requirements to which reference is hereinafter made. The Contractor agrees to adjust its personnel staffing levels or to replace any its personnel if so directed upon reasonable request from the County, should the County make a determination, in its sole discretion, that said personnel staffing is inappropriate or that any individual is not performing in a manner consistent with the requirements for such a position.
- d) The Contractor warrants and represents that its personnel have the proper skill, training, background, knowledge, experience, rights, authorizations, integrity, character and licenses as necessary to perform the Services described herein, in a competent and professional manner.
- e) The Contractor shall at all times cooperate with the County and coordinate its respective work efforts to most effectively and efficiently maintain the progress in performing the Services.

- f) The Contractor shall comply with all provisions of all federal, state and local laws, statutes, ordinances, and regulations that are applicable to the performance of this Agreement.

#### **ARTICLE 12. EMPLOYEES OF THE CONTRACTOR**

All employees of the Contractor shall be considered to be, at all times, employees of the Contractor under its sole direction and not employees or agents of the County. The Contractor shall supply competent employees. Miami-Dade County may require the Contractor to remove an employee it deems careless, incompetent, insubordinate or otherwise objectionable and whose continued employment on County property is not in the best interest of the County. Each employee shall have and wear proper identification.

#### **ARTICLE 13. INDEPENDENT CONTRACTOR RELATIONSHIP**

The Contractor is, and shall be, in the performance of all work services and activities under this Agreement, an independent contractor, and not an employee, agent or servant of the County. All persons engaged in any of the work or services performed pursuant to this Agreement shall at all times, and in all places, be subject to the Contractor's sole direction, supervision and control. The Contractor shall exercise control over the means and manner in which it and its employees perform the work, and in all respects the Contractor's relationship and the relationship of its employees to the County shall be that of an independent contractor and not as employees and agents of the County.

The Contractor does not have the power or authority to bind the County in any promise, agreement or representation other than specifically provided for in this Agreement.

#### **ARTICLE 14. AUTHORITY OF THE COUNTY'S PROJECT MANAGER**

- a) The Contractor hereby acknowledges that the County's Project Manager will determine in the first instance all questions of any nature whatsoever arising out of, under, or in connection with, or in any way related to or on account of, this Agreement including without limitations: questions as to the value, acceptability and fitness of the Services; questions as to either party's fulfillment of its obligations under the Contract; negligence, fraud or misrepresentation before or subsequent to acceptance of the Contractor's Proposal; questions as to the interpretation of the Scope of Services; and claims for damages, compensation and losses.
- b) The Contractor shall be bound by all determinations or orders and shall promptly comply with every order of the Project Manager, including the withdrawal or modification of any previous order and regardless of whether the Contractor agrees with the Project Manager's determination or order. Where orders are given orally, they will be issued in writing by the Project Manager as soon thereafter as is practicable.
- c) The Contractor must, in the final instance, seek to resolve every difference concerning the Agreement with the Project Manager. In the event that the Contractor and the Project Manager are unable to resolve their difference, the Contractor may initiate a dispute in accordance with the procedures set forth in this Article. Exhaustion of these procedures shall be a condition precedent to any lawsuit permitted hereunder.
- d) In the event of such dispute, the parties to this Agreement authorize the County Mayor or designee, who may not be the Project Manager or anyone associated with this Project, acting personally, to decide all questions arising out of, under, or in connection with, or in any way related to or on account of the Agreement (including but not limited to claims in

the nature of breach of contract, fraud or misrepresentation arising either before or subsequent to execution hereof) and the decision of each with respect to matters within the County Mayor's purview as set forth above shall be conclusive, final and binding on parties. Any such dispute shall be brought, if at all, before the County Mayor within 10 days of the occurrence, event or act out of which the dispute arises.

- e) The County Mayor may base this decision on such assistance as may be desirable, including advice of experts, but in any event shall base the decision on an independent and objective determination of whether Contractor's performance or any Deliverable meets the requirements of this Agreement and any specifications with respect thereto set forth herein. The effect of any decision shall not be impaired or waived by any negotiations or settlements or offers made in connection with the dispute, whether or not the County Mayor participated therein, or by any prior decision of others, which prior decision shall be deemed subject to review, or by any termination or cancellation of the Agreement. All such disputes shall be submitted in writing by the Contractor to the County Mayor for a decision, together with all evidence and other pertinent information in regard to such questions, in order that a fair and impartial decision may be made. Whenever the County Mayor is entitled to exercise discretion or judgement or to make a determination or form an opinion pursuant to the provisions of this Article, such action shall be fair and impartial when exercised or taken. The County Mayor, as appropriate, shall render a decision in writing and deliver a copy of the same to the Contractor. Except as such remedies may be limited or waived elsewhere in the Agreement, Contractor reserves the right to pursue any remedies available under law after exhausting the provisions of this Article.

#### **ARTICLE 15. MUTUAL OBLIGATIONS**

- a) This Agreement, including attachments and appendices to the Agreement, shall constitute the entire Agreement between the parties with respect hereto and supersedes all previous communications and representations or agreements, whether written or oral, with respect to the subject matter hereto unless acknowledged in writing by the duly authorized representatives of both parties.
- b) Nothing in this Agreement shall be construed for the benefit, intended or otherwise, of any third party that is not a parent or subsidiary of a party or otherwise related (by virtue of ownership control or statutory control) to a party.
- c) In those situations where this Agreement imposes an indemnity obligation on the Contractor, the County may, at its expense, elect to participate in the defense if the County should so choose. Furthermore, the County may at its own expense defend or settle any such claims if the Contractor fails to diligently defend such claims, and thereafter seek indemnity for costs from the Contractor.

#### **ARTICLE 16. QUALITY ASSURANCE/QUALITY ASSURANCE RECORD KEEPING**

The Contractor shall maintain, and shall require that its subcontractors and suppliers maintain, complete and accurate records to substantiate compliance with the requirements set forth in the Scope of Services. The Contractor and its subcontractors and suppliers, shall retain such records, and all other documents relevant to the Services furnished under this Agreement for a period of three (3) years from the expiration date of this Agreement and any extension thereof.

**ARTICLE 17. AUDITS**

The County, or its duly authorized representatives or governmental agencies, shall until the expiration of three (3) years after the expiration of this Agreement and any extension thereof, have access to and the right to examine and reproduce any of the Contractor's books, documents, papers and records and of its subcontractors and suppliers which apply to all matters of the County. Such records shall subsequently conform to Generally Accepted Accounting Principles requirements, as applicable, and shall only address those transactions related to this Agreement.

Pursuant to Section 2-481 of the Miami-Dade County Code, the Contractor will grant access to the Commission Auditor to all financial and performance related records, property, and equipment purchased in whole or in part with government funds. The Contractor agrees to maintain an accounting system that provides accounting records that are supported with adequate documentation, and adequate procedures for determining the allowability and allocability of costs.

**ARTICLE 18. SUBSTITUTION OF PERSONNEL**

In the event the Contractor wishes to substitute personnel for the key personnel identified by the Contractor's Proposal, the Contractor must notify the County in writing and request written approval for the substitution at least ten (10) business days prior to effecting such substitution.

**ARTICLE 19. CONSENT OF THE COUNTY REQUIRED FOR ASSIGNMENT**

The Contractor shall not assign, transfer, convey or otherwise dispose of this Agreement, including its rights, title or interest in or to the same or any part thereof without the prior written consent of the County.

**ARTICLE 20. SUBCONTRACTUAL RELATIONS**

- a) If the Contractor will cause any part of this Agreement to be performed by a Subcontractor, the provisions of this Contract will apply to such Subcontractor and its officers, agents and employees in all respects as if it and they were employees of the Contractor; and the Contractor will not be in any manner thereby discharged from its obligations and liabilities hereunder, but will be liable hereunder for all acts and negligence of the Subcontractor, its officers, agents, and employees, as if they were employees of the Contractor. The services performed by the Subcontractor will be subject to the provisions hereof as if performed directly by the Contractor.
- b) The Contractor, before making any subcontract for any portion of the services, will state in writing to the County the name of the proposed Subcontractor, the portion of the Services which the Subcontractor is to do, the place of business of such Subcontractor, and such other information as the County may require. The County will have the right to require the Contractor not to award any subcontract to a person, firm or corporation disapproved by the County.
- c) Before entering into any subcontract hereunder, the Contractor will inform the Subcontractor fully and completely of all provisions and requirements of this Agreement relating either directly or indirectly to the Services to be performed. Such Services performed by such Subcontractor will strictly comply with the requirements of this Contract.
- d) In order to qualify as a Subcontractor satisfactory to the County, in addition to the other requirements herein provided, the Subcontractor must be prepared to prove to the satisfaction of the County that it has the necessary facilities, skill and experience, and

ample financial resources to perform the Services in a satisfactory manner. To be considered skilled and experienced, the Subcontractor must show to the satisfaction of the County that it has satisfactorily performed services of the same general type which is required to be performed under this Agreement.

- e) The County shall have the right to withdraw its consent to a subcontract if it appears to the County that the subcontract will delay, prevent, or otherwise impair the performance of the Contractor's obligations under this Agreement. All Subcontractors are required to protect the confidentiality of the County's and County's proprietary and confidential information. Contractor shall furnish to the County copies of all subcontracts between Contractor and Subcontractors and suppliers hereunder. Within each such subcontract, there shall be a clause for the benefit of the County in the event the County finds the Contractor in breach of this Contract, permitting the County to request completion by the Subcontractor of its performance obligations under the subcontract. The clause shall include an option for the County to pay the Subcontractor directly for the performance by such Subcontractor. Notwithstanding, the foregoing shall neither convey nor imply any obligation or liability on the part of the County to any subcontractor hereunder as more fully described herein.

#### **ARTICLE 21. ASSUMPTION, PARAMETERS, PROJECTIONS, ESTIMATES AND EXPLANATIONS**

The Contractor understands and agrees that any assumptions, parameters, projections, estimates and explanations presented by the County were provided to the Contractor for evaluation purposes only. However, since these assumptions, parameters, projections, estimates and explanations represent predictions of future events the County makes no representations or guarantees; and the County shall not be responsible for the accuracy of the assumptions presented; and the County shall not be responsible for conclusions to be drawn therefrom; and any assumptions, parameters, projections, estimates and explanations shall not form the basis of any claim by the Contractor. The Contractor accepts all risk associated with using this information.

#### **ARTICLE 22. SEVERABILITY**

If this Agreement contains any provision found to be unlawful, the same shall be deemed to be of no effect and shall be deemed stricken from this Agreement without affecting the binding force of this Agreement as it shall remain after omitting such provision.

#### **ARTICLE 23. TERMINATION AND SUSPENSION OF WORK**

- a) The County may terminate this Agreement if an individual or corporation or other entity attempts to meet its contractual obligation with the County through fraud, misrepresentation or material misstatement.
- b) The County may, as a further sanction, terminate or cancel any other contract(s) that such individual or corporation or other entity has with the County and that such individual, corporation or other entity shall be responsible for all direct and indirect costs associated with such termination or cancellation, including attorney's fees.
- c) The foregoing notwithstanding, any individual, corporation or other entity which attempts to meet its contractual obligations with the County through fraud, misrepresentation or material misstatement may be debarred from County contracting for up to five (5) years in accordance with the County debarment procedures. The Contractor may be subject to debarment for failure to perform and all other reasons set forth in Section 10-38 of the

County Code.

- d) In addition to cancellation or termination as otherwise provided in this Agreement, the County may at any time, in its sole discretion, with or without cause, terminate this Agreement by written notice to the Contractor.
- e) In the event that the County exercises its right to terminate this Agreement, the Contractor shall, upon receipt of such notice, unless otherwise directed by the County:
- i. stop work on the date specified in the notice ("the Effective Termination Date");
  - ii. take such action as may be necessary for the protection and preservation of the County's materials and property;
  - iii. cancel orders;
  - iv. assign to the County and deliver to any location designated by the County any non-cancelable orders for Deliverables that are not capable of use except in the performance of this Agreement and has been specifically developed for the sole purpose of this Agreement and not incorporated in the Services;
  - v. take no action which will increase the amounts payable by the County under this Agreement; and
- f) In the event that the County exercises its right to terminate this Agreement, the Contractor will be compensated as stated in the payment Articles herein for the:
- i. portion of the Services completed in accordance with the Agreement up to the Effective Termination Date; and
  - ii. non-cancelable Deliverables that are not capable of use except in the performance of this Agreement and has been specifically developed for the sole purpose of this Agreement, but not incorporated in the Services.
- g) All compensation pursuant to this Article are subject to audit.

#### **ARTICLE 24. EVENT OF DEFAULT**

- a) An Event of Default shall mean a breach of this Agreement by the Contractor. Without limiting the generality of the foregoing, and in addition to those instances referred to herein as a breach, an Event of Default shall include the following:
- i. the Contractor has not delivered Deliverables on a timely basis;
  - ii. the Contractor has refused or failed to supply enough properly skilled staff personnel;
  - iii. the Contractor has failed to make prompt payment to subcontractors or suppliers for any Services;
  - iv. the Contractor has become insolvent (other than as interdicted by the bankruptcy laws), or has assigned the proceeds received for the benefit of the Contractor's creditors, or the Contractor has taken advantage of any insolvency statute or

- debtor/creditor law or if the Contractor's affairs have been put in the hands of a receiver;
- v. the Contractor has failed to obtain the approval of the County where required by this Agreement;
  - vi. the Contractor has failed to provide "adequate assurances" as required under subsection b below;
  - vii. the Contractor has failed in the representation of any warranties stated herein.
- b) When, in the opinion of the County, reasonable grounds for uncertainty exist with respect to the Contractor's ability to perform the Services or any portion thereof, the County may request that the Contractor, within the timeframe set forth in the County's request, provide adequate assurances to the County, in writing, of the Contractor's ability to perform in accordance with the terms of this Agreement. Until the County receives such assurances, the County may request an adjustment to the compensation received by the Contractor for portions of the Services which the Contractor has not performed. In the event that the Contractor fails to provide to the County the requested assurances within the prescribed timeframe, the County may:
- i. treat such failure as a repudiation of this Agreement; and
  - ii. resort to any remedy for breach provided herein or at law, including but not limited to, taking over the performance of the Services or any part thereof either by itself or through others.
- c) In the event the County shall terminate this Agreement for default, the County or its designated representatives may immediately take possession of all applicable equipment, materials, products, documentation, reports and data.

#### **ARTICLE 25. NOTICE OF DEFAULT - OPPORTUNITY TO CURE**

If an Event of Default occurs in the determination of the County, the County may so notify the Contractor ("Default Notice"), specifying the basis for such default, and advising the Contractor that such default must be cured immediately or this Agreement with the County may be terminated. Notwithstanding, the County may, in its sole discretion, allow the Contractor to rectify the default to the County's reasonable satisfaction within a thirty (30) day period. The County may grant an additional period of such duration as the County shall deem appropriate without waiver of any of the County's rights hereunder, so long as the Contractor has commenced curing such default and is effectuating a cure with diligence and continuity during such thirty (30) day period or any other period which the County prescribes. The default notice shall specify the date the Contractor shall discontinue the Services upon the Termination Date.

#### **ARTICLE 26. REMEDIES IN THE EVENT OF DEFAULT**

If an Event of Default occurs, the Contractor shall be liable for all damages resulting from the default, including but not limited to:

- a) lost revenues;
- b) the difference between the cost associated with procuring Services hereunder and the amount actually expended by the County for re-procurement of Services, including procurement and administrative costs; and

- c) such other direct damages.

The Contractor shall also remain liable for any liabilities and claims related to the Contractor's default. The County may also bring any suit or proceeding for specific performance or for an injunction.

#### **ARTICLE 27. PATENT AND COPYRIGHT INDEMNIFICATION**

- a) The Contractor shall not infringe on any copyrights, trademarks, service marks, trade secrets, patent rights, other intellectual property rights or any other third party proprietary rights in the performance of the Work.
- b) The Contractor warrants that all Deliverables furnished hereunder, including but not limited to: equipment, programs, documentation, software, analyses, applications, methods, ways, processes, and the like, do not infringe upon or violate any copyrights, trademarks, service marks, trade secrets, patent rights, other intellectual property rights or any other third party proprietary rights.
- c) The Contractor shall be liable and responsible for any and all claims made against the County for infringement of patents, copyrights, service marks, trade secrets or any other third party proprietary rights, by the use or supplying of any programs, documentation, software, analyses, applications, methods, ways, processes, and the like, in the course of performance or completion of, or in any way connected with, the Work, or the County's continued use of the Deliverables furnished hereunder. Accordingly, the Contractor at its own expense, including the payment of attorney's fees, shall indemnify, and hold harmless the County and defend any action brought against the County with respect to any claim, demand, cause of action, debt, or liability.
- d) In the event any Deliverable or anything provided to the County hereunder, or portion thereof is held to constitute an infringement and its use is or may be enjoined, the Contractor shall have the obligation to, at the County's option to (i) modify, or require that the applicable subcontractor or supplier modify, the alleged infringing item(s) at its own expense, without impairing in any respect the functionality or performance of the item(s), or (ii) procure for the County, at the Contractor's expense, the rights provided under this Agreement to use the item(s).
- e) The Contractor shall be solely responsible for determining and informing the County whether a prospective supplier or subcontractor is a party to any litigation involving patent or copyright infringement, service mark, trademark, violation, or proprietary rights claims or is subject to any injunction which may prohibit it from providing any Deliverable hereunder. The Contractor shall enter into agreements with all suppliers and subcontractors at the Contractor's own risk. The County may reject any Deliverable that it believes to be the subject of any such litigation or injunction, or if, in the County's judgment, use thereof would delay the Work or be unlawful.

#### **ARTICLE 28. CONFIDENTIALITY**

- a) All Developed Works and other materials, data, transactions of all forms, financial information, documentation, inventions, designs and methods obtained from the County in connection with the Services performed under this Agreement, made or developed by the Contractor or its subcontractors in the course of the performance of such Services, or the results of such Services, or which the County holds the proprietary rights, constitute Confidential Information and may not, without the prior written consent of the County, be used by the Contractor or its employees, agents, subcontractors or suppliers for any

purpose other than for the benefit of the County, unless required by law. In addition to the foregoing, all County employee information and County financial information shall be considered Confidential Information and shall be subject to all the requirements stated herein. Neither the Contractor nor its employees, agents, subcontractors or suppliers may sell, transfer, publish, disclose, display, license or otherwise make available to others any part of such Confidential Information without the prior written consent of the County. Additionally, the Contractor expressly agrees to be bound by and to defend, indemnify and hold harmless the County, and their officers and employees from the breach of any federal, state or local law in regard to the privacy of individuals.

- b) The Contractor shall advise each of its employees, agents, subcontractors and suppliers who may be exposed to such Confidential Information of their obligation to keep such information confidential and shall promptly advise the County in writing if it learns of any unauthorized use or disclosure of the Confidential Information by any of its employees or agents, or subcontractor's or supplier's employees, present or former. In addition, the Contractor agrees to cooperate fully and provide any assistance necessary to ensure the confidentiality of the Confidential Information.
- c) It is understood and agreed that in the event of a breach of this Article damages may not be an adequate remedy and the County shall be entitled to injunctive relief to restrain any such breach or threatened breach. Unless otherwise requested by the County, upon the completion of the Services performed hereunder, the Contractor shall immediately turn over to the County all such Confidential Information existing in tangible form, and no copies thereof shall be retained by the Contractor or its employees, agents, subcontractors or suppliers without the prior written consent of the County. A certificate evidencing compliance with this provision and signed by an officer of the Contractor shall accompany such materials.

#### **ARTICLE 29. PROPRIETARY INFORMATION**

As a political subdivision of the State of Florida, Miami-Dade County is subject to the stipulations of Florida's Public Records Law.

The Contractor acknowledges that all computer software in the County's possession may constitute or contain information or materials which the County has agreed to protect as proprietary information from disclosure or unauthorized use and may also constitute or contain information or materials which the County has developed at its own expense, the disclosure of which could harm the County's proprietary interest therein.

During the term of the contract, the Contractor will not use directly or indirectly for itself or for others, or publish or disclose to any third party, or remove from the County's property, any computer programs, data compilations, or other software which the County has developed, has used or is using, is holding for use, or which are otherwise in the possession of the County (hereinafter "Computer Software"). All third-party license agreements must also be honored by the contractors and their employees, except as authorized by the County and, if the Computer Software has been leased or purchased by the County, all hired party license agreements must also be honored by the contractors' employees with the approval of the lessor or Contractors thereof. This includes mainframe, minis, telecommunications, personal computers and any and all information technology software.

The Contractor will report to the County any information discovered or which is disclosed to the Contractor which may relate to the improper use, publication, disclosure or removal from the

County's property of any information technology software and hardware and will take such steps as are within the Contractor's authority to prevent improper use, disclosure or removal.

### **ARTICLE 30. PROPRIETARY RIGHTS**

- a) The Contractor hereby acknowledges and agrees that the County retains all rights, title and interests in and to all materials, data, documentation and copies thereof furnished by the County to the Contractor hereunder or furnished by the Contractor to the County and/or created by the Contractor for delivery to the County, even if unfinished or in process, as a result of the Services the Contractor performs in connection with this Agreement, including all copyright and other proprietary rights therein, which the Contractor as well as its employees, agents, subcontractors and suppliers may use only in connection with the performance of Services under this Agreement. The Contractor shall not, without the prior written consent of the County, use such documentation on any other project in which the Contractor or its employees, agents, subcontractors or suppliers are or may become engaged. Submission or distribution by the Contractor to meet official regulatory requirements or for other purposes in connection with the performance of Services under this Agreement shall not be construed as publication in derogation of the County's copyrights or other proprietary rights.
- b) All rights, title and interest in and to certain inventions, ideas, designs and methods, specifications and other documentation related thereto developed by the Contractor and its subcontractors specifically for the County, hereinafter referred to as "Developed Works" shall become the property of the County.
- c) Accordingly, neither the Contractor nor its employees, agents, subcontractors or suppliers shall have any proprietary interest in such Developed Works. The Developed Works may not be utilized, reproduced or distributed by or on behalf of the Contractor, or any employee, agent, subcontractor or supplier thereof, without the prior written consent of the County, except as required for the Contractor's performance hereunder.
- d) Except as otherwise provided in subsections a, b, and c above, or elsewhere herein, the Contractor and its subcontractors and suppliers hereunder shall retain all proprietary rights in and to all Licensed Software provided hereunder, that have not been customized to satisfy the performance criteria set forth in the Scope of Services. Notwithstanding the foregoing, the Contractor hereby grants, and shall require that its subcontractors and suppliers grant, if the County so desires, a perpetual, irrevocable and unrestricted right and license to use, duplicate, disclose and/or permit any other person(s) or entity(ies) to use all such Licensed Software and the associated specifications, technical data and other Documentation for the operations of the County or entities controlling, controlled by, under common control with, or affiliated with the County, or organizations which may hereafter be formed by or become affiliated with the County. Such license specifically includes, but is not limited to, the right of the County to use and/or disclose, in whole or in part, the technical documentation and Licensed Software, including source code provided hereunder, to any person or entity outside the County for such person's or entity's use in furnishing any and/or all of the Deliverables provided hereunder exclusively for the County or entities controlling, controlled by, under common control with, or affiliated with the County, or organizations which may hereafter be formed by or become affiliated with the County. No such License Software, specifications, data, documentation or related information shall be deemed to have been given in confidence and any statement or legend to the contrary shall be void and of no effect.

**ARTICLE 31. VENDOR REGISTRATION/CONFLICT OF INTEREST****a) Vendor Registration**

The Contractor shall be a registered vendor with the County – Internal Services Department, Procurement Management Division, for the duration of this Agreement. In becoming a Registered Vendor with Miami-Dade County, the Contractor confirms its knowledge of and commitment to comply with the following:

1. **Miami-Dade County Ownership Disclosure Affidavit**  
(Section 2-8.1 of the County Code) (Executive Order 11-116)
2. **Miami-Dade County Employment Disclosure Affidavit**  
(Section 2-8-1(d)(2) of the County Code)
3. **Miami-Dade Employment Drug-free Workplace Certification**  
(Section 2-8.1.2(b) of the County Code)
4. **Miami-Dade Disability and Nondiscrimination Affidavit**  
  
(Section 2-8.1.5 of the County Code)
5. **Miami-Dade County Debarment Disclosure Affidavit**  
(Section 10.38 of the County Code)
6. **Miami-Dade County Vendor Obligation to County Affidavit**  
  
(Section 2-8.1 of the County Code)
7. **Miami-Dade County Code of Business Ethics Affidavit**  
  
(Section 2-8.1(i) and 2-11(b)(1) of the County Code through (6) and (9) of the County Code and Section 2-11.1(c) of the County Code)
8. **Miami-Dade County Family Leave Affidavit**  
(Article V of Chapter 11 of the County Code)
9. **Miami-Dade County Living Wage Affidavit**  
(Section 2-8.9 of the County Code)
10. **Miami-Dade County Domestic Leave and Reporting Affidavit**  
(Article 8, Section 11A-60 11A-67 of the County Code)
11. **Subcontracting Practices**  
(Ordinance 97-35)
12. **Miami-Dade County E-Verify Affidavit**
13. **Subcontractor/Supplier Listing**  
(Section 2-8.8 of the County Code)
14. **Environmentally Acceptable Packaging**  
(Resolution R-738-92)
15. **W-9 and 8109 Forms**  
(as required by the Internal Revenue Service)
16. **FEIN Number or Social Security Number**  
In order to establish a file, the Contractor's Federal Employer Identification Number (FEIN) must be provided. If no FEIN exists, the Social Security Number of the owner or individual must be provided. This number becomes Contractor's "County Vendor Number". To comply with Section 119.071(5) of the Florida Statutes relating to the collection of an individual's Social Security Number, be aware that the County requests the Social Security Number for the following purposes:
  - Identification of individual account records
  - To make payments to individual/Contractor for goods and services provided to Miami-Dade County
  - Tax reporting purposes
  - To provide a unique identifier in the vendor database that may be used for searching and sorting departmental records
17. **Office of the Inspector General**  
(Section 2-1076 of the County Code)
18. **Small Business Enterprises**  
The County endeavors to obtain the participation of all small business enterprises pursuant to Sections 2-8.2, 2-8.2.3 and 2-8.2.4 of the County Code and Title 49 of the Code of Federal Regulations.
19. **Antitrust Laws**  
By acceptance of any contract, the Contractor agrees to comply with all antitrust laws of the United States and the State of Florida.

**b) Conflict of Interest/Code of Ethics**

Section 2-11.1(d) of Miami-Dade County Code requires that any County employee or any member of the employee's immediate family who has a controlling financial interest, direct or indirect, with Miami-Dade County or any person or agency acting for Miami-Dade County, competing or applying for a contract, must first request a conflict of interest opinion from the County's Ethics Commission prior to their or their immediate family member's entering into any contract or transacting any business through a firm, corporation, partnership or business entity in which the

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employee or any member of the employee's immediate family has a controlling financial interest,

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direct or indirect, with Miami-Dade County or any person or agency acting for Miami-Dade County. Any such contract or business engagement entered in violation of this subsection, as amended, shall be rendered voidable. All autonomous personnel, quasi-judicial personnel, advisory personnel, and employees wishing to do business with the County are hereby advised they must comply with the applicable provisions of Section 2-11.1 of the Miami-Dade County Code relating to Conflict of Interest and Code of Ethics. In accordance with 2-11.1 (y), the Miami Dade County Commission on Ethics and Public Trust (Ethics Commission) shall be empowered to review, interpret, render advisory opinions and letters of instruction and enforce the Conflict of Interest and Code of Ethics Ordinance.

## **ARTICLE 32. INSPECTOR GENERAL REVIEWS**

### **Independent Private Sector Inspector General Reviews**

Pursuant to Miami-Dade County Administrative Order 3-20, the County has the right to retain the services of an Independent Private Sector Inspector General (hereinafter "IPSIG"), whenever the County deems it appropriate to do so. Upon written notice from the County, the Contractor shall make available to the IPSIG retained by the County, all requested records and documentation pertaining to this Agreement for inspection and reproduction. The County shall be responsible for the payment of these IPSIG services, and under no circumstance shall the Contractor's prices and any changes thereto approved by the County, be inclusive of any charges relating to these IPSIG services. The terms of this provision apply to the Contractor, its officers, agents, employees, subcontractors and assignees. Nothing contained in this provision shall impair any independent right of the County to conduct an audit or investigate the operations, activities and performance of the Contractor in connection with this Agreement. The terms of this Article shall not impose any liability on the County by the Contractor or any third party.

### **Miami-Dade County Inspector General Review**

According to Section 2-1076 of the Code of Miami-Dade County, Miami-Dade County has established the Office of the Inspector General which may, on a random basis, perform audits on all County contracts, throughout the duration of said contracts. **The cost of the audit for this Contract will NOT be deducted.**

**Exception:** The above application of one quarter (1/4) of one percent fee assessment shall not apply to the following contracts: (a) IPSIG contracts; (b) contracts for legal services; (c) contracts for financial advisory services; (d) auditing contracts; (e) facility rentals and lease agreements; (f) concessions and other rental agreements; (g) insurance contracts; (h) revenue-generating contracts; (i) contracts where an IPSIG is assigned at the time the contract is approved by the Commission; (j) professional service agreements under \$1,000; (k) management agreements; (l) small purchase orders as defined in Miami-Dade County Administrative Order 3-38; (m) federal, state and local government-funded grants; and (n) interlocal agreements. ***Notwithstanding the foregoing, the Miami-Dade County Board of County Commissioners may authorize the inclusion of the fee assessment of one quarter (1/4) of one percent in any exempted contract at the time of award.***

Nothing contained above shall in any way limit the powers of the Inspector General to perform audits on all County contracts including, but not limited to, those contracts specifically exempted above. The Miami-Dade County Inspector General is authorized and empowered to review past, present and proposed County and Public Health Trust contracts, transactions, accounts, records and programs. In addition, the Inspector General has the power to subpoena witnesses, administer oaths, require the production of records and monitor existing projects and programs. Monitoring of an existing project or program may include a report concerning whether the project is on time, within budget and in conformance with plans, specifications and applicable law. The

Inspector General is empowered to analyze the necessity of and reasonableness of proposed change orders to the Contract. The Inspector General shall have the power to audit, investigate, monitor, oversee, inspect and review operations, activities, performance and procurement process, including but not limited to project design, specifications, proposal submittals, activities of the Contractor, its officers, agents and employees, lobbyists, County staff and elected officials to ensure compliance with contract specifications and to detect fraud and corruption.

Upon written notice to the Contractor from the Inspector General or IPSIG retained by the Inspector General, the Contractor shall make all requested records and documents available to the Inspector General or IPSIG for inspection and copying. The Inspector General and IPSIG shall have the right to inspect and copy all documents and records in the Contractor's possession, custody or control which, in the Inspector General's or IPSIG's sole judgment, pertain to performance of the contract, including, but not limited to original estimate files, change order estimate files, worksheets, proposals and agreements form and which successful and unsuccessful subcontractors and suppliers, all project-related correspondence, memoranda, instructions, financial documents, construction documents, proposal and contract documents, back-charge documents, all documents and records which involve cash, trade or volume discounts, insurance proceeds, rebates, or dividends received, payroll and personnel records, and supporting documentation for the aforesaid documents and records.

### **ARTICLE 33. LOCAL, STATE, AND FEDERAL COMPLIANCE REQUIREMENTS**

Contractor agrees to comply, subject to applicable professional standards, with the provisions of any and all applicable Federal, State and the County orders, statutes, ordinances, rules and regulations which may pertain to the Services required under this Agreement, including, but not limited to:

- a) Equal Employment Opportunity (EEO), in compliance with Executive Order 11246 as amended and applicable to this Contract.
- b) Miami-Dade County Florida, Department of Small Business Development Participation Provisions, as applicable to this Contract.
- c) Environmental Protection Agency (EPA), as applicable to this Contract.
- d) "Conflicts of Interest" Section 2-11 of the County Code, and Ordinance 01-199.
- e) Miami-Dade County Code Section 10-38 "Debarment".
- f) Miami-Dade County Ordinance 99-5, codified at 11A-60 et. seq. of Miami-Dade Code pertaining to complying with the County's Domestic Leave Ordinance.
- g) Miami-Dade County Ordinance 99-152, prohibiting the presentation, maintenance, or prosecution of false or fraudulent claims against Miami-Dade County.

The Contractor shall hold all licenses and/or certifications, obtain and pay for all permits and/or inspections, and comply with all laws, ordinances, regulations and building code requirements applicable to the work required herein. Damages, penalties, and/or fines imposed on the County or Contractor for failure to obtain and maintain required licenses, certifications, permits and/or inspections shall be borne by the Contractor. The Project Manager shall verify the certification(s), license(s), permit(s), etc. for the Contractor prior to authorizing work and as needed.

Notwithstanding any other provision of this Agreement, Contractor shall not be required pursuant to this Agreement to take any action or abstain from taking any action if such action or abstention would, in the good faith determination of the Contractor, constitute a violation of any law or regulation to which Contractor is subject, including but not limited to laws and regulations requiring that Contractor conduct its operations in a safe and sound manner.

#### **ARTICLE 34. NONDISCRIMINATION**

During the performance of this Contract, Contractor agrees to not discriminate against any employee or applicant for employment because of race, color, religion, ancestry, national origin, sex, pregnancy, age, disability, marital status, familial status, sexual orientation, gender identity or gender expression, status as victim of domestic violence, dating violence or stalking, or veteran status, and on housing related contracts the source of income, and will take affirmative action to ensure that employees and applicants are afforded equal employment opportunities without discrimination. Such action shall be taken with reference to, but not limited to: recruitment, employment, termination, rates of pay or other forms of compensation, and selection for training or retraining, including apprenticeship and on the job training.

By entering into this Contract, the Contractor attests that it is not in violation of the Americans with Disabilities Act of 1990 (and related Acts) or Miami-Dade County Resolution No. R-385-95. If the Contractor or any owner, subsidiary or other firm affiliated with or related to the Contractor is found by the responsible enforcement agency or the County to be in violation of the Act or the Resolution, such violation shall render this Contract void. This Contract shall be void if the Contractor submits a false affidavit pursuant to this Resolution or the Contractor violates the Act or the Resolution during the term of this Contract, even if the Contractor was not in violation at the time it submitted its affidavit.

#### **ARTICLE 35. CONFLICT OF INTEREST**

The Contractor represents that:

- a) No officer, director, employee, agent, or other consultant of the County or a member of the immediate family or household of the aforesaid has directly or indirectly received or been promised any form of benefit, payment or compensation, whether tangible or intangible, in connection with the award of this Agreement.
- b) There are no undisclosed persons or entities interested with the Contractor in this Agreement. This Agreement is entered into by the Contractor without any connection with any other entity or person making a proposal for the same purpose, and without collusion, fraud or conflict of interest. No elected or appointed officer or official, director, employee, agent or other consultant of the County, or of the State of Florida (including elected and appointed members of the legislative and executive branches of government), or a member of the immediate family or household of any of the aforesaid:
  - i) is interested on behalf of or through the Contractor directly or indirectly in any manner whatsoever in the execution or the performance of this Agreement, or in the services, supplies or work, to which this Agreement relates or in any portion of the revenues; or
  - ii) is an employee, agent, advisor, or consultant to the Contractor or to the best of the Contractor's knowledge any subcontractor or supplier to the Contractor.
- c) Neither the Contractor nor any officer, director, employee, agency, parent, subsidiary, or affiliate of the Contractor shall have an interest which is in conflict with the Contractor's faithful performance of its obligation under this Agreement; provided that the County, in

its sole discretion, may consent in writing to such a relationship, provided the Contractor provides the County with a written notice, in advance, which identifies all the individuals and entities involved and sets forth in detail the nature of the relationship and why it is in the County's best interest to consent to such relationship.

- d) The provisions of this Article are supplemental to, not in lieu of, all applicable laws with respect to conflict of interest. In the event there is a difference between the standards applicable under this Agreement and those provided by statute, the stricter standard shall apply.
- e) In the event Contractor has no prior knowledge of a conflict of interest as set forth above and acquires information which may indicate that there may be an actual or apparent violation of any of the above, Contractor shall promptly bring such information to the attention of the County's Project Manager. Contractor shall thereafter cooperate with the County's review and investigation of such information, and comply with the instructions Contractor receives from the Project Manager in regard to remedying the situation.

#### **ARTICLE 36. PRESS RELEASE OR OTHER PUBLIC COMMUNICATION**

Under no circumstances shall the Contractor without the express written consent of the County:

- a) Issue or permit to be issued any press release, advertisement or literature of any kind which refers to the County, or the Work being performed hereunder, unless the Contractor first obtains the written approval of the County. Such approval may be withheld if for any reason the County believes that the publication of such information would be harmful to the public interest or is in any way undesirable; and
- b) Communicate in any way with any contractor, department, board, agency, commission or other organization or any person whether governmental or private in connection with the Services to be performed hereunder except upon prior written approval and instruction of the County; and
- c) Except as may be required by law, the Contractor and its employees, agents, subcontractors and suppliers will not represent, directly or indirectly, that any product or service provided by the Contractor or such parties has been approved or endorsed by the County.

#### **ARTICLE 37. BANKRUPTCY**

The County reserves the right to terminate this contract, if, during the term of any contract the Contractor has with the County, the Contractor becomes involved as a debtor in a bankruptcy proceeding, or becomes involved in a reorganization, dissolution, or liquidation proceeding, or if a trustee or receiver is appointed over all or a substantial portion of the property of the Contractor under federal bankruptcy law or any state insolvency law.

#### **ARTICLE 38. GOVERNING LAW**

This Contract, including appendices, and all matters relating to this Contract (whether in contract, statute, tort (such as negligence), or otherwise) shall be governed by, and construed in accordance with, the laws of the State of Florida. Venue shall be Miami-Dade County.

**ARTICLE 39. LIQUIDATED DAMAGES**

It is mutually understood and agreed by and between the parties to the Contract that time is of the essence with respect to the completion of the Work and that in case of any failure on the part of the Contractor to deliver the buses within the time specified in "Delivery Schedule," except for any excusable delays as provided in "Excusable Delays/Force Majeure" or any extension thereof, the Agency will be damaged thereby. The amount of said damages, being difficult if not impossible of definite ascertainment and proof, it is hereby agreed that the amount of such damages due to the Agency shall be fixed at \$660 per calendar day per bus not delivered in substantially good condition as inspected by the Agency at the time released for shipment.

The Contractor hereby agrees to pay the aforementioned amounts as fixed, agreed and liquidated damages, and not by way of penalty, to the Agency and further authorizes the Agency to deduct the amount of the damages from money due the Contractor under the Contract, computed as aforesaid. If the money due the Contractor is insufficient or no money is due the Contractor, then the Contractor shall pay the Agency the difference or the entire amount, whichever may be the case, within thirty (30) days after receipt of a written demand by the Contracting Officer.

The payment of aforesaid fixed, agreed and liquidated damages shall be in lieu of any damages for any loss of profit, loss of revenue, loss of use, or for any other direct, indirect, special or consequential losses or damages of any kind whatsoever that may be suffered by the Agency arising at any time from the failure of the Contractor to fulfill the obligations referenced in this clause in a timely manner. The total amount of such liquidated damages shall not exceed 20 percent of the total Contract amount.

**ARTICLE 40. BUY AMERICA OPTION YEARS**

The cost of the components and subcomponents produced in the U.S. must be more than:

1. 60 percent for FY2016 and FY2017
2. 65 percent for FY2018 and FY2019
3. 70 percent for FY2020 and beyond

**ARTICLE 41. SURVIVAL**

The parties acknowledge that any of the obligations in this Agreement will survive the term, termination and cancellation hereof. Accordingly, the respective obligations of the Contractor and the County under this Agreement, which by nature would continue beyond the termination, cancellation or expiration thereof, shall survive termination, cancellation or expiration hereof.

IN WITNESS WHEREOF, the parties have executed this Agreement effective as of the contract date herein above set forth.

Contractor

Miami-Dade County

By: *RP*

By: \_\_\_\_\_

Name: Ryan Popple

Name: Carlos A. Gimenez

Title: President & CEO

Title: Mayor

Date: August 29, 2018

Date: \_\_\_\_\_

Attest: *Kristina Griffin*

Attest: \_\_\_\_\_

Corporate Secretary/Notary Public

Clerk of the Board

*Kristina Griffin*

Corporate Seal/Notary Seal

Approved as to form  
and legal sufficiency


*Bruce Zhabner*  
Assistant County Attorney





## Memorandum

**To:** Honorable Chairwoman Audrey M. Edmonson  
and Members, Board of County Commissioners

**From:** Javier A. Betancourt, Executive Director 

**Date:** September 20, 2019

**Re: CITT AGENDA ITEM 5C:**  
RESOLUTION BY THE CITIZENS' INDEPENDENT TRANSPORTATION TRUST RECOMMENDING THE BOARD OF COUNTY COMMISSIONERS (BCC) APPROVE AWARD OF CONTRACT NO. RFP-00456 TO PROTERRA, INC. FOR PURCHASE OF BATTERY-ELECTRIC BUSES AND CHARGING SYSTEM FOR THE DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS IN A TOTAL AMOUNT NOT TO EXCEED **\$72,176,322.00** FOR THE FIVE-YEAR TERM; AUTHORIZE THE COUNTY MAYOR OR COUNTY MAYOR'S DESIGNEE TO EXECUTE SAME FOR AND ON BEHALF OF MIAMI-DADE COUNTY AND TO EXERCISE ALL PROVISIONS OF THE CONTRACT, INCLUDING ANY CANCELLATION, RENEWAL AND EXTENSION PROVISIONS PURSUANT TO SECTION 2-8.1 OF THE CODE OF MIAMI-DADE COUNTY, FLORIDA AND IMPLEMENTING ORDER 3-38; AND AUTHORIZE THE USE OF CHARTER COUNTY TRANSPORTATION SURTAX FUNDS FOR SUCH PURPOSES (DTPW – BCC Legislative File No. 191770) **SURTAX FUNDS REQUESTED**

On September 18, 2019, the CITT voted (9-0) to forward a favorable recommendation to the Board of County Commissioners (BCC) for the approval of the above referenced item, CITT Resolution No. 19-058. The vote was as follows:

Glenn J. Downing, CFP®, Chairperson – Aye  
Joseph Curbelo, 1<sup>st</sup> Vice Chairperson – Aye  
Alfred Holzman, 2<sup>nd</sup> Vice Chairperson – Aye

Oscar Braynon – Aye  
Prakash Kumar – Aye  
Jonathan Martinez – Absent  
Marilyn Smith – Aye

Evan Fancher – Absent  
Hon. Anna E. Lightfoot-Ward, Ph.D. – Aye  
Miles E. Moss, P.E. – Aye  
L. Elijah Stiers, Esq. – Aye

cc: Alina Hudak, Deputy Mayor  
Bruce Libhaber, Assistant County Attorney