

# Memorandum



**Date:** November 28, 2011

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

**From:** Carlos A. Gimenez  
Mayor 

**Subject:** Federal Transit Agency Decision related to CAF USA, INC. USA's Protest Appeal  
RE: RFP654, New Heavy Rail Vehicles

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On November 24, 2011, I received the attached communication from Mr. Dorval Carter, Jr., the Federal Transit Agency's (FTA) Chief Counsel advising of his decision to uphold the protest filed by CAF USA, Inc (CAF) in response to the County's recommendation to award the referenced solicitation to AnsaldoBreda, S.p.A. (AnsaldoBreda).

Following a competitive Request for Proposals (RFP) process, a recommendation to award a contract to AnsaldoBreda was filed with the Clerk of the Board. CAF subsequently filed a protest. The Hearing Officer upheld the recommendation to award. Both proposers submitted best and final offers (BAFO) to the County. AnsaldoBreda's BAFO price was \$298,887,200 (\$2,197,700 per car), and CAF USA, Inc.'s price was \$303,566,408 (\$2,232,106 per car). Since the County is purchasing 136 cars, the AnsaldoBreda proposal is \$4.6 million less than CAF's.

CAF appealed the decision to the Federal Transit Administration (FTA), citing a violation of federal requirements prohibiting the use of local preference.

FTA advised that it intended to accept CAF's protest appeal as soon as CAF exhausted its administrative remedies with the County. The County informed FTA that it was reluctant to present the award recommendation to the Board of County Commissioners (Board) before the FTA considered CAF's protest appeal. To avoid awarding a contract that might be found ineligible for federal assistance by FTA, the County waived its right to oppose the appeal based upon CAF's failure to exhaust its administrative remedies. This allowed the FTA to review CAF's protest appeal before presenting the recommendation to the Board.

The FTA was to determine whether: 1) the County violated Federal requirements by failing to disclose in the RFP that local preference or the establishment of a local facility and the creation of local jobs would be factors for determining best value, and 2) the County violated Federal restrictions on the use of local preference by considering AnsaldoBreda's proposal to establish a local assembly facility.

The FTA's Chief Counsel concluded that, based on transcripts from Evaluation Committee (Committee) discussions, the Committee's decision to recommend to AnsaldoBreda was partially based on the final assembly location in Miami-Dade County. He asserts the solicitation did not clearly articulate the location of final assembly as a selection factor. Mr. Carter concludes the Committee violated federal procurement rules when it discussed the location of the final assembly facility, and the local job creation benefits in its discussions. In order to gain eligibility for federal funding, Mr. Carter recommends the Committee reevaluate the proposers' BAFOs without consideration of final assembly location. To this end, I will request written confirmation from both CAF and AnsaldoBreda that they wish to remain in consideration and will honor their BAFO proposal.

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Honorable Chairman Joe A. Martinez and Members  
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In accordance with the FTA decision, I will reconvene the Committee to consider the BAFO proposals, and instruct them to carefully review the guidance offered by the FTA to ensure there is no consideration of local preference, the effect of a local assembly facility on the local economy, or the potential project cost savings based on the location of the final assembly facility in the evaluation of the BAFOs received from the two firms. I will advise the Board of the recommendation to award the resultant contract following the implementation of the FTA guidance.

The then-County Manager's recommendation to award dated February 18, 2011 is hereby rescinded. As such, please be advised that the Cone of Silence is hereby reinstated.

Attachment

c: Alina T. Hudak, Deputy Mayor/County Manager  
Robert A. Cuevas, Jr., County Attorney  
Lester Sola, Director, Internal Services Department  
Ysela Llort, Interim Director, Miami Dade Transit  
Miriam Singer, Assistant Director, Procurement Management, Internal Services Department  
Clerk of the Board



U.S. Department  
Of Transportation  
**Federal Transit  
Administration**

Chief Counsel

1200 New Jersey Avenue S.E.  
Washington DC 20590

November 23, 2011

Ms. Ysela Llort  
Assistant County Manager, Transportation  
Miami-Dade County  
111 NW 1<sup>st</sup> Street, Suite 2910  
Miami, Florida 33128

Re: Decision—Protest Appeal of CAF USA, Inc.  
Request for Proposals No. 654, Purchase of New Heavy Rail Vehicles

Dear Ms. Llort:

This is the decision of the Federal Transit Administration (FTA) on the March 24, 2011 protest appeal filed by CAF USA, Inc. (CAF). CAF's appeal became ripe for FTA review on July 29, 2011.

CAF appeals Miami-Dade County's denial of CAF's protest that challenged Miami-Dade Transit's (MDT) decision to award a contract to Ansaldo Breda, S.p.A. (AnsaldoBreda) pursuant to Request for Proposals (RFP) for Purchase of New Heavy Rail Vehicles, No. 654. Based on FTA's review of the record, including additional documents and arguments submitted by MDT, CAF, and AnsaldoBreda, FTA finds that MDT violated Federal procurement requirements when it considered the location of the final assembly facility as an evaluation or selection factor without specifically including this factor in the RFP, and when it considered local geographic preference as a selection factor.

#### **I. Statement of Facts**

On March 30, 2009, MDT issued a solicitation for the procurement of new heavy rail vehicles under RFP No. 654.<sup>1</sup> The RFP provided that evaluation of the proposals and the determination of award to a proposer would be based upon "best value" to MDT and to the proposal that would be "most advantageous to the County."<sup>2</sup>

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<sup>1</sup> RFP No. 654 for Purchase of New Heavy Rail Vehicles (HRV) originally called for 144 HRVs with options to purchase up to fifty-four additional vehicles. MDT later reduced the quantity to 136 vehicles without the options. See Memorandum from the County Manager to the Board of County Commissioners on the Recommendation for Approval to Award Contract No. 654: Purchase of New Heavy Rail Vehicles 4 (Feb. 18, 2011).

<sup>2</sup> See RFP No. 654 for Purchase of New HRVs § 4.0 (Evaluation Process).

Decision – Protest Appeal of CAF USA, Inc.

The RFP originally required all proposers to complete a Local Business Preference Form that would have provided a preference to businesses located in Miami-Dade County. On April 29, 2009, MDT issued Addendum No. 3 that deleted from the RFP the Local Business Preference Form as well as all references to the form and any local business preference requirements.

By September 29, 2009, three companies had submitted responses to the RFP: Alstom Transportation, Inc. (Alstom), AnsaldoBreda, and CAF. In accordance with the evaluation factors set forth in the RFP, MDT's Evaluation/Selection Committee (Selection Committee) rated the three proposers as follows:

	Commercial <sup>3</sup> (out of 10)	Technical (out of 50)	Price (out of 40)	Total Score (out of 100)
Alstom	6.94	29.15	N/A	36.09
AnsaldoBreda	5.12	31.61	35.30	72.03
CAF	6.59	30.95	34.80	72.34

On March 15, 2010, the MDT Evaluation/Selection Committee recommended to the County Manager that the County negotiate with both AnsaldoBreda and CAF. MDT also determined that Alstom was non-responsive because its price exceeded the RFP's maximum per unit vehicle price limit. MDT did not advance Alstom to the BAFO stage.<sup>4</sup>

On May 4, 2010, the County Manager approved the appointment of a four-member negotiating committee and approved the Evaluation/Selection Committee's recommendation that MDT enter into negotiations with AnsaldoBreda and CAF.<sup>5</sup>

During the negotiations, MDT's team visited the final assembly facilities of CAF and AnsaldoBreda. Both proposers stated in their offers that their final vehicle assembly facilities would be located within the United States. CAF proposed to perform final assembly in its Elmira, New York facility and AnsaldoBreda proposed to perform final assembly in two locations, at its facility in Pittsburg, California, and at a facility to be established in Miami-Dade County. Because AnsaldoBreda's final assembly facility in Miami-Dade County, Florida, did not yet exist, the MDT team visited AnsaldoBreda's Pittsburg, California facility.<sup>6</sup>

The two offerors submitted their best and final offers (BAFO) to MDT on August 9, 2010. The next day, August 10, 2010, the negotiating committee met and held a public hearing to reveal the BAFO pricing, to evaluate all other factors relevant to the

<sup>3</sup> The term "Commercial" includes staffing, resources, and qualifications. See Memorandum from the County Manager to the Board of County Commissioners on the Recommendation for Approval to Award Contract No. 654: Purchase of New Heavy Rail Vehicles 4 (Feb. 18, 2011).

<sup>4</sup> See Memorandum from the Assistant County Attorney to the Director of Procurement and the Procurement Contract Office, on Railcar Procurement Responsiveness – Alstom Transportation, Inc. (Mar. 4, 2010).

<sup>5</sup> See Memorandum from Chairperson of the Evaluation/Selection Committee to County Manager on the Report of Evaluation/Selection Committee for RFP No. 654: Purchase of New Heavy Rail Vehicles 3 (April 16, 2010).

<sup>6</sup> See Hearing p. 7, 36.

Decision – Protest Appeal of CAF USA, Inc.

procurement based upon the criteria established in the RFP, and to make its final recommendation for award to the County Manager (who would then recommend a proposer to the Board of County Commissioners).

The proposers' BAFOs were revealed as follows: \$298,887,200, or \$2,197,700 per car by AnsaldoBreda; \$303,566,408, or \$2,232,106 per car by CAF.<sup>7</sup> During this hearing, the committee discussed various factors including the final assembly facility locations of both CAF and AnsaldoBreda.<sup>8</sup> The negotiating committee concluded that, while most aspects of the two proposals were "pretty much the same," based upon the "two factors of the final assembly by AnsaldoBreda here in Miami-Dade County and the price," the AnsaldoBreda proposal was the "best value to the county."<sup>9</sup> The committee recommended that the County Manager recommend awarding the contract to AnsaldoBreda.

By letter dated January 26, 2011, CAF notified FTA of a potential violation by MDT of Federal requirements prohibiting the use of local preference in the determination of contract award, and expressed its intention to file a protest appeal with FTA. CAF alleged that MDT considered local preference when evaluating the two proposals, and ultimately made its recommendation based in large part upon this factor, notwithstanding the Federal prohibition on considering local preference and the fact that MDT specifically excluded local preference from the RFP as an evaluation factor.

In a February 18, 2011 recommendation memorandum to the Board of County Commissioners, the County Manager stated that:

AnsaldoBreda advised of its intention to take advantage of the local labor pool [in Miami-Dade County], e.g.[,] mechanical and electrical engineers, technicians, and semi-skilled personnel, coupled with its own resources to complete vehicle final assembly in Miami-Dade County.<sup>10</sup>

The recommendation memorandum further states that,

[t]he County did not include local preference in the solicitation, did not give extra points in evaluating proposals for having a local vehicle final assembly, or require proposers to have a local vehicle final assembly facility. Favorable consideration regarding advantages of having vehicle final assembly performed in Miami-Dade did not constitute a local preference, and cannot be construed as providing a geographical preferences.<sup>11</sup>

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<sup>7</sup> Hearing of the Evaluation Committee in re: RFP-654, CAFUSA and AnsaldoBreda 30 (Aug. 10, 2010) (pp. 118-119).

<sup>8</sup> *Id.* at 19-24 (pp. 76-96).

<sup>9</sup> *Id.* at 47 (pp. 187-88).

<sup>10</sup> Memorandum from the County Manager to the Board of County Commissioners on the Recommendation for Approval to Award Contract No. 654: Purchase of New Heavy Rail Vehicles 5 (Feb. 18, 2011).

<sup>11</sup> *Id.* at 6.

## Decision – Protest Appeal of CAF USA, Inc.

On February 24, 2011, CAF filed a Formal Written Intent to Protest MDT's award recommendation. On March 23, 2011, a Hearing Examiner appointed in accordance with local procedures to adjudicate CAF's protest determined that MDT made its award decision properly, and recommended that the Board deny CAF's protest. CAF formally filed its appeal to FTA by letter dated March 24, 2011.<sup>12</sup>

By letter dated July 14, 2011, FTA informed the parties that it intended to accept CAF's protest appeal as soon as CAF had exhausted its administrative remedies with MDT. This would normally require the Board's action on the Hearing Examiner's recommendation to deny the protest.<sup>13</sup> However, because MDT procedures typically require the Board to make this decision concurrent with an action to award the contract, MDT informed FTA by telephone that it was reluctant to require the Board to act before FTA considered CAF's protest appeal. Thus, to avoid awarding a contract that might be found by FTA to be ineligible for Federal assistance, MDT waived its right to oppose the appeal based upon CAF's failure to exhaust its administrative remedies.<sup>14</sup> Thereafter FTA began its review of CAF's protest appeal.

## II. FTA PROTEST APPEAL AUTHORITY

When deciding a protest appeal, FTA applies its third party contracting requirements as set forth in 49 U.S.C. § 5325, the "Common Grant Rule" at 49 C.F.R. § 18.36, FTA's Circular 4220.1F entitled "Third Party Contracting Guidance," and Section 15 of FTA's Master Agreement. Pursuant to Circular 4220.1F, FTA's review is limited to: (1) a recipient's failure to have or comply with its protest procedures, or its failure to review a protest; or (2) violations of Federal law or regulations.<sup>15</sup>

Here, FTA has determined that the following issues are of significant Federal interest:

- (1) Whether MDT violated Federal requirements by failing to disclose in its RFP that local preference or the establishment of a local assembly facility and the creation of local jobs would be factors for determining best value; and
- (2) Whether MDT violated Federal restrictions on the use of local preferences by considering AnsaldoBreda's proposal to establish a local assembly facility.

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<sup>12</sup> In both its August 29, 2011, and September 6, 2011, letters, AnsaldoBreda argued that CAF's appeal was untimely. FTA Circular 4220.1F requires that the protestor file an appeal with FTA within five working days "when the protestor has received actual or constructive notice of the recipient's decision." However, AnsaldoBreda's argument is without merit because, under 49 C.F.R. § 18.36(b)(12), a protestor is first required to exhaust all administrative remedies prior to appeal to FTA, and CAF notified FTA on March 24, 2011, of its appeal—one day after the Hearing Examiner's decision.

<sup>13</sup> See Miami-Dade County Code, § 2-8.4(g)-(h).

<sup>14</sup> See Miami-Dade County's Cert. Reply in Opposition to CAF USA Inc.'s Appeal to the Federal Transit Administration at 4, n. 4 (July 29, 2011).

<sup>15</sup> FTA Circular 4220.1F, "Third Party Contracting Guidance," § VII.1.b(2)(a)-(b) (Feb. 15, 2011).

### III. DISCUSSION

- a. *MDT failed to state in the RFP that location of the vehicle final assembly facility would be a factor in determining award of the contract.*

CAF alleges that MDT improperly considered the location of AnsaldoBreda's proposed final assembly facility in Miami-Dade County as an evaluation or award factor.

When procuring through the use of competitive proposals, the Common Grant Rule requires, among other things, that "[r]equests for proposals will be publicized and identify all evaluation factors and their relative importance."<sup>16</sup> Furthermore, when awarding a contract to an offeror based upon best value, "the recipient's solicitation must inform potential offerors that the award will be made on a 'best value' basis and *identify what factors will form the basis for award.*"

In evaluating bids or proposals:

FTA expects the recipient to consider all evaluation factors specified in its solicitation documents, and *evaluate the bids or offers only on the evaluation factors included in those solicitation documents.* The recipient may not modify its evaluation factors after bids or proposals have been submitted without re-opening the solicitation.<sup>17</sup>

Facts from the MDT hearing transcripts and memoranda indicate that MDT based its decision to recommend awarding a contract to AnsaldoBreda, at least in part, on the location of its final assembly location in Miami-Dade County despite failing to disclose in the RFP that the location of the final assembly facility would be a selection factor.

During the August 10, 2010 public hearing, members of the MDT negotiating committee, discussed AnsaldoBreda's proposed local final assembly plant at length. It was "item number eight" out of eleven items discussed at the hearing.<sup>18</sup>

Similarly, the County Manager's Recommendation to the Board for Approval to Award Contract No. 654: Purchase of New Heavy Rail Vehicles, indicates that MDT considered the location of AnsaldoBreda's final assembly facility in Miami-Dade county as a selection factor:

AnsaldoBreda's offer to include performing vehicle final assembly at a facility located in Miami-Dade County received favorable consideration from County staff. Since AnsaldoBreda's proposed facility will be local,

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<sup>16</sup> 49 C.F.R. § 18.36(d)(3)(i).

<sup>17</sup> FTA Circular 4220.1F. § VI.7.a. (emphasis added).

<sup>18</sup> The other items discussed were price; financial capacity; decommissioning; reliability of the proposers; subcontracting, effects on integration, and risks associated with deliveries; test track; car shells; technical aspects (e.g., propulsion and animated air schematics for training); project manager experience; and weight management program. See Transcript of the Hearing in re: RFP-654, CAFUSA and AnsaldoBreda Conducted on Tuesday, August 10, 2010, at 27-47 (pp. 108-188).

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project oversight efforts by MDT are improved, inspections can be more frequent, and travel costs that would be incurred to conduct oversight of final vehicle assembly activities will be significantly reduced. Efforts to review drawings, project plans for testing, schedule, and progress meetings can be more effectively coordinated locally, allowing faster reviews and better communications in resolving project issues.<sup>19</sup>

In its July 29, 2011 response and September 6, 2011 reply to CAF's protest appeal, MDT presents two arguments. First, MDT argues that it provided notice to the proposers, through Section 3.3.5 of the RFP, that the location of the final assembly facility would be an evaluation factor. Second, MDT claims to have followed the advice of an FTA Regional Counsel when it considered the location of the final assembly facility as an evaluation factor. Neither argument is persuasive.

The only reference in the RFP to the location of the vehicle final assembly facility is contained in Section 3.3.5, Organization and Management Plan, and requires offerors to submit, as part of their Organization and Management Plan, *inter alia*:

(f) A list of locations for the major engineering, manufacturing and installation portions of the Work and how the Proposer plans to handle local coordination of the Work. In particular, each Proposer shall identify the facility to be used for final assembly of the Vehicles.

Contrary to MDT's assertion that Section 3.3.5 provides a basis for considering the location of the final assembly location as an evaluation factor, the foregoing language merely states that the proposer must list the locations of the facilities to be used, including the final assembly facility. However, there is no indication that a *local* facility would be given greater weight in the evaluation process. I do not find that this provision adequately put offerors on notice that location of the final assembly facility would be a significant factor in evaluating the proposals.

Moreover, in Addendum No. 3, dated April 29, 2009, Form A-4: Local Business Preference was deleted, "as well as any reference to the form and any requirement regarding local preference."<sup>20</sup>

I find that Section 3.3.5 of the RFP did not clearly articulate that the location of the final assembly facility was to be considered as an evaluation or selection factor. Thus, it was improper for MDT to consider it as such.

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<sup>19</sup> Memorandum from the County Manager to the Board of County Commissioners on the Recommendation for Approval to Award Contract No. 654: Purchase of New Heavy Rail Vehicles 6 (Feb. 18, 2011).

<sup>20</sup> Although Addendum No. 14, dated July 31, 2009, includes the deleted Form A-4, FTA believes that this form was mistakenly included in that addendum. Moreover, MDT specifically stated that it "did not include local preference in the solicitation." See Memorandum from the County Manager to the Board of County Commissioners on the Recommendation for Approval to Award Contract No. 654: Purchase of New Heavy Rail Vehicles 6 (Feb. 18, 2011).

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MDT also argues that it considered the location of the final assembly facility as an evaluation factor based on guidance from Paul Jensen who at that time was an FTA Regional Counsel. The following is an excerpt from a March 16, 2009 e-mail from Mr. Jensen:

[I]ts [sic] important that the solicitation avoids any implication that points are being awarded for local preference. Total points should be awarded based upon the factors listed in the solicitation. If locating a facility in the area is one of those factors, its [sic] ok because the solicitation would state that having a facility in the Miami area would create economies of scale and would reduce project costs. As a result, you could award more points to a bidder who agreed to provide a local plant. That's different than local preference since there's a valid basis for awarding the points. I hesitate to use the term "extra points". Its [sic] just that a bidder locating a facility in the local area would be awarded more points than one who doesn't due to cost savings, etc. FTA would participate in the award of a contract as outlined above.<sup>21</sup>

Mr. Jensen followed with additional guidance on March 23, 2009:

[L]et me reiterate that local preference is prohibited but the location of the facility can be a consideration in the ranking process so long as it is quantifiable in that economies of scale may be realized in having the facility located locally. Thus, a company assembling vehicles locally might present favorable opportunities for purposes of lower shipping costs, inspection costs, ease of inspection, etc.

It is important to note that MDT did not, in fact, follow Mr. Jensen's guidance when developing the RFP. His advice was that MDT could consider the location of the final assembly facility (as it related to quantifiable reduction in projects costs) only if it listed the factor in the solicitation. MDT did not list the location of the final assembly facility as an evaluation factor in the RFP. Therefore, MDT's reliance on Mr. Jensen's emails is misplaced.

Based on the foregoing, I find that MDT improperly considered the location of AnsaldoBreda's proposed final assembly facility in Miami-Dade County as an evaluation factor.

b. *MDT violated Federal restrictions on the use of local preferences.*

CAF asserts that MDT violated the Federal prohibition against imposing local geographic preferences in the evaluation of bids or proposals.

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<sup>21</sup> Miami-Dade County's Response in Opposition to CAF USA Inc's Bid Protest to the Federal Transit Administration 6 (July 29, 2011).

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Federal law, 49 U.S.C. § 5325(h), prohibits use of FTA funding for procurements that use of exclusionary or discriminatory specifications. In addition, the Common Grant Rule provides that:

Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in [cases not applicable here].<sup>22</sup>

In this procurement, MDT originally included provisions explicitly providing for local preference. While it later deleted all reference to local preferences from the RFP, the record demonstrates that MDT applied local preference nonetheless.

FTA found evidence of this fact in the transcript of the Hearing of the Evaluation Committee, dated August 10, 2010. The following statements by members of the Evaluation Committee indicate that AnsaldoBreda's proposal to build a final assembly facility in Miami was a major factor in MDT's decision to recommend award of the contract to AnsaldoBreda:

- MR. NAVARRETE: ... We forget [sic] to ask you about the jobs created in the final assembly here in Miami-Dade County.  
MR. CARTER: Right. I didn't address the jobs that were created here. Fred has asked me to confine my comments to the project itself and the direct relation to the project. Jobs that will be created here I think were in the vicinity of--I think it--  
MR. SIMMONS: Of 95 jobs here.  
MR. CARTER: Basically 95 jobs here.<sup>23</sup>

\* \* \*

- MR. NAVARRETE: "It's hard not to think about the 95 – potentially 95 jobs created in Miami-Dade County at this time, you know, good paying jobs, and the impact to the local economy, a significant impact to the local economy. How do you guys feel about that?"  
MR. SIMMONS: "You can't overlook that. I mean, that's a big factor here . . ." <sup>24</sup>

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- MR. CARTER: "You've got to compare, I mean . . . the jobs in Miami, the local assembly plant. I mean, you got to weigh that all in." <sup>25</sup>

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<sup>22</sup> 49 C.F.R. § 18.36(c)(2).

<sup>23</sup> Transcript of the Hearing in re: RFP-654, CAFUSA and AnsaldoBreda Conducted on Tuesday, August 10, 2010, at 23 (p. 91).

<sup>24</sup> *Id.* at 36 (p. 141-42).

<sup>25</sup> *Id.* at 38 (p. 151).

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- MR. NAVARRETE: “The question is when you look at the advantages and disadvantages do you say that the value or the deal . . . you’re getting from CAF is better than the one from Breda to overcome the –what I see as a significant advantage of the final assembly locally and the jobs . . . .”<sup>26</sup>

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- MR. NAVARRETE: We have considered these 11 factors. We have deliberated. We’ve thought about the advantages and disadvantages, the risks. We’ve also looked at price being one of the factors, although not the only one, probably not the most important one, and the consensus of the committee is that we believe that the AnsaldoBreda proposal or deal is the best value to the county.

We believe that the final assembly here in Miami-Dade County has significant advantages. It would make it easier to manage the project. We talked about the savings in travel, easier to visit the plant. We cannot ignore the impact to the local economy directly in jobs and other spin-off benefits to the economy.”<sup>27</sup>

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- MR. NAVARRETE: “There were some other minor advantages, but in the end we kept coming back to the two factors of the final assembly by AnsaldoBreda here in Miami-Dade County and the price.”<sup>28</sup>

\* \* \*

- MR. SIMMONS: “Unfortunately somebody’s got to win and somebody’s got to lose. It’s a tough decision, but hopefully we’ll move on and get the cars built for Miami-Dade County and create some jobs. That’s it.”<sup>29</sup>

These discussions show that MDT’s Evaluation Committee considered, as an undisclosed evaluation factor, the location of the final assembly facility in Miami-Dade County. This is a clear violation of the Federal prohibition against local geographical preferences found at 49 U.S.C. § 5325, the “Common Grant Rule” at 49 C.F.R. § 18.36(c)(2); FTA Circular 4220.1F § VI.4.2.a(4)(g); and Section 15 of FTA’s Master Agreement.

MDT cites as support for its selection decision, the Hearing Examiner’s conclusion that,

[t]he manner in which the County Manager considered AnsaldoBreda’s proposed final assembly facility in Miami-Dade County is consistent with all federal, state and county guidelines and procurement requirements.<sup>30</sup>

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<sup>26</sup> *Id.* at 44 (p. 175).

<sup>27</sup> *Id.* at 47 (p. 187).

<sup>28</sup> *Id.* (p. 188).

<sup>29</sup> *Id.* at 48 (p. 191).

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The Hearing Examiner's rationale for this conclusion is that the County Manager, in his recommendation, stated that, "[t]he County did not include local preference in the solicitation, did not give extra points in evaluating proposals for having a local vehicle final assembly facility, or require proposers to have a local final assembly."<sup>31</sup>

I respectfully disagree with the Hearing Examiner's conclusions. The Hearing Examiner failed to take into account the negotiating committee's deliberations during the August 10, 2010 hearing in determining which proposer to recommend for award, and thus overlooked the extensive discussion on AnsaldoBreda's proposed local final assembly facility and the number of comments made by the Committee with respect to the jobs the local final assembly facility would create.

Despite the fact that MDT deleted all reference to local preferences from the RFP, I find that MDT officials nonetheless considered local geographic preferences in the evaluation of CAF's and AnsaldoBreda's proposals.

#### CONCLUSION

Based upon the foregoing, I find that MDT violated Federal procurement rules when it considered the location of the final assembly facility as an evaluation factor without disclosing this factor in the RFP, and when it applied a local geographic preference when making its selection decision. Accordingly, this procurement is currently ineligible to receive Federal funding. In order to regain eligibility for Federal funding, I recommend that MDT reevaluate the proposers' Best and Final Offers without considering local preference the effect of a local assembly facility on the local economy, or the potential project cost savings based upon the location of the final assembly facility.

If you have any questions, you may contact Kerry L. Miller at (202) 366-0942 or [kerry.miller@dot.gov](mailto:kerry.miller@dot.gov).

Sincerely,



Dorval R. Carter, Jr.  
Chief Counsel

Cc: Virginia Verdeja, CAF USA, Inc.  
Albert E. Dotson, Jr., Esq.  
Bruce Libhaber, Esq.  
Steven M. Polan, Esq.

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<sup>30</sup> Hearing Examiner's Recommendation, Findings of Fact and Conclusions of Law re Bid Protest—RFP No. 654—Purchase of New Heavy Rail Vehicles 6.

<sup>31</sup> *Id.* at 5.