

**REPORT OF GENERAL MANAGER TO METROPOLITAN COUNCIL  
ANALYZING CLAIMS AND ALLEGATIONS OF AWARD PHASE PROTEST OF  
NEW FLYER OF AMERICA, INC., METRO TRANSIT RFP NO. 7216**

By Brian J. Lamb, General Manager, Metro Transit

May 21, 2007

**INTRODUCTION**

This report arises out actions occurring in connection with Metro Transit Solicitation No. 7216 for 314 Forty-Foot, Low-Floor Transit Buses. As more fully described below, this procurement resulted in the submission of a Best and Final Offer (“BAFO”) from each of two vendors. The Council originally rejected the Best and Final Offer of one vendor, New Flyer of America, Inc. (New Flyer), and authorized the Regional Administrator to negotiate and execute a contract with the other vendor, Gillig Corporation (Gillig). This action resulted in a bid protest on the part of New Flyer and legislative action addressing the procurement. In response to the enactment of such legislation, the Council on April 25, 2007 reconsidered its earlier action authorizing negotiation and execution of a contract for this procurement with Gillig and adopted Resolution 2007-13 that has resulted in the procurement being cancelled and New Flyer’s protest being rendered moot. Resolution 2007-13 further directed staff to prepare a report analyzing the claims and allegations submitted by the vendors in the protest proceedings for presentation to the Council. This document represents the staff report as directed by the Council.

In preparing this report, the materials New Flyer presented in its protest submission dated April 4, 2007 have been investigated and evaluated. In addition, the submission by Gillig Corporation dated April 11, 2007 in response to the New Flyer protest, as well as New Flyer's supplemental submission dated April 13, 2007 have been reviewed. Council staff involved in the procurement and legal counsel have also been consulted with.

**FACTUAL BACKGROUND**

As part of the Council’s Going Greener Initiative, Metro Transit is replacing 314 retiring buses over the next five years with 164 standard clean-diesel buses and 150 hybrid diesel-electric buses. In October 2006, Metro Transit issued a Solicitation Package seeking proposals from bus manufacturers for such a bus procurement. The Council received proposals from two vendors – New Flyer and Gillig.

The solicitation process involved an initial negotiation stage during which discussion occurred with vendors and the vendors were able to propose changes to the technical specifications for consideration by the Council. Any changes accepted by the Council would then be incorporated into the technical specifications by Council addenda. After

completion of this stage, each vendor would be required to submit a Best and Final Offer based on the specifications as modified by any changes formally accepted by issuance of addenda.

During the first stage of this process, both vendors submitted a number of suggested changes in the technical specifications and a number of these suggested changes by both vendors were accepted by the Council by inclusion in and issuance of one or more addenda. There are two areas in the technical specifications that were discussed during the first stage of this solicitation and that are of particular important with respect to the rest of the solicitation.

The Council's Solicitation Package required, among other things, the chosen vendor to provide (1) 3,000 hours of training; and (2) fleet defect coverage during the base 24-month warranty period. During discussions, New Flyer requested further clarification of the type of training to be required. In response to New Flyer's request, the Council by addendum provided additional detail on the types of training required. In addition, during discussions prior to the request for BAFOs, both vendors requested changes in the fleet defect coverage – Gillig requested that the requirement be removed entirely and New Flyer requested that the requirement be limited to one year. However, because of the importance attached to this requirement, staff did not accept the suggestions of either vendor and no change in the fleet defect coverage was incorporated into the technical specifications by any of the addenda issued.

After completion of the first stage of the procurement, both Gillig and New Flyer were found to be within the competitive range and the Council requested Best and Final Offers from both vendors. In reviewing the BAFOs, the Council's Evaluation Panel found that New Flyer took 10 deviations from the Council's requirements, the two most significant deviations being New Flyer's failure to meet the fleet defect coverage requirement and its failure to meet the requirement of 3,000 hours of training. Gillig took no deviations. The two material deviations by New Flyer were the following:

- **Fleet defect:** The New Flyer BAFO stated that “Fleet defect clauses of any kind are valid only for the first year of the 2-year bumper to bumper warranty and they do not carry over nor are they applicable and/or valid for year 2.” The Evaluation Panel determined that New Flyer's response on fleet defect coverage was a material deviation from the Council's requirement because the bumper to bumper warranty was not a substitute for the required fleet defect coverage during the base 24-month warranty period.
- **Training:** The New Flyer BAFO stated, “Training will be tracked as a dollar amount and not by hours. All training performed for the duration of the contract will be charged to the Met Council at cost. Once training dollars are used, the contractual training is considered complete, regardless of the actual number of hours provided.” The Evaluation Panel determined that New Flyer's response materially deviated from the Council requirement that the contractor provide

3,000 hours of training because New Flyer did not commit to provide a certain number of hours but indicated it would provide, instead, an unstated dollar amount of training.

With respect to the fleet defect coverage and the training requirement, the Evaluation Panel determined that both were material deviations because they would have a significant impact on price.<sup>1</sup> This was especially true in light of the new technologies on the buses to be delivered including hybrid propulsion systems and engine emissions systems. These technologies are expected to impact warranty, fleet defects and training needs and requirements.

On March 12, 2007, the Evaluation Panel recommended to the Council's Transportation Committee that the Council reject New Flyer's BAFO due to New Flyer's material deviations and authorize the Regional Administrator to negotiate and execute a contract with Gillig for purchase of 314 buses with an option on an additional 300 buses, in accordance with the Council's specification and Gillig's BAFO of February 2, 2007, contingent on satisfactory results for the Buy America Pre-Award Audit. The Transportation Committee, after hearing presentations from representatives of both Gillig and New Flyer, unanimously adopted the recommendation of the Evaluation Panel at its meeting on March 12, 2007. On March 28, 2007, the full Council heard the recommendation of the Transportation Committee and also heard presentations from representatives of New Flyer and Gillig. The Council unanimously adopted the recommendations of the Transportation Committee and a set of Findings and Conclusions.

On April 4, 2007, the Council received a Bid Protest ("Protest") from New Flyer for RFP No. 7216 from New Flyer's legal counsel. On April 11, 2007, Gillig submitted a response to New Flyer's Protest and on April 13, 2007, New Flyer submitted a supplemental submission on the Protest. The Protest Authority for this procurement under the Council's Protest Procedure was the General Manager of Metro Transit who proceeded to consider the submissions of the parties. In the meantime the Minnesota Legislature became involved in the proceedings and began considering legislation addressing this procurement in the context of the state Deficiency Appropriation Bill, Senate File 846. This bill contains a deficiency appropriation for the Council's transit operations in the amount of \$7,847,000.

Prior to its regular meeting on April 25, 2007, the Council became aware that the Deficiency Appropriation Bill would, in all likelihood, contain language conditioning the Council's deficiency appropriation on cancellation of the referenced procurement and that the bill was likely to become law shortly. In light of that information, the Metropolitan Council at its April 25 meeting reconsidered its earlier action authorizing negotiation and execution of a contract for this procurement with Gillig Corporation. It then approved Resolution 2007-13. That resolution directed Council staff, upon enactment of Senate

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<sup>1</sup> Even if allowable, price evaluation of New Flyer's deviations would not be feasible and highly speculative because the costs associated with these deviations were not included in the New Flyer BAFO.

File 846, to cancel Solicitation No. 7216 if the legislation contained the described condition. The bill was enacted, the legislation became effective May 3, 2007, and does contain language providing that the Council's deficiency appropriation is subject to the condition that the Council cancel the above-referenced procurement. Accordingly, pursuant to the Council's resolution, staff cancelled the procurement and advised the parties that cancellation of the procurement rendered the New Flyer protest moot, that no formal decision or response would be rendered with respect to the New Flyer protest, and that the Protest was now considered closed. As noted above, Resolution 2007-13 further directed staff to prepare a report analyzing the claims and allegations submitted by the vendors in the protest proceedings for presentation to the Council which has resulted in preparation of this report.

## **FACTUAL INACCURACIES AND UNSUPPORTED ALLEGATIONS IN NEW FLYER'S PROTEST**

Before going through a legal analysis of New Flyer's claims, this report will address several factual inaccuracies and unsupported allegations in New Flyer's Protest submissions.

### **1. New Flyer Alleges That A Separate Contract with the Council Should Have Some Bearing On the Subject Procurement.**

**Allegation:** New Flyer claims in its protest that a recent award by the Council of a contract to New Flyer for ten articulated buses in which the Council accepted a one year fleet defect coverage should have some bearing on the present procurement.

**Response:** The recent contract with New Flyer for articulated buses has no bearing whatsoever on the present procurement. In that procurement, New Flyer was the single bidder and the procurement was small in number in contrast to the present procurement. Because New Flyer was the sole bidder, there was little leverage to require the two year fleet defect requirement. In addition, because of the small number of vehicles involved in the procurement, fleet defect coverage was less useful than normal for its purposes. In the present procurement, new technologies on the buses to be delivered, including hybrid propulsion systems and engine emission systems are expected to significantly impact warranty, fleet defects and training needs and requirements.

### **2. New Flyer Claims That The Technical Specifications Were Written In Favor of Gillig.**

**Allegation:** New Flyer alleges that the Council's technical specifications were written to favor the Gillig product.

**Response:** This claim is wholly inaccurate and unsupported by the bidding process set forth in the Specifications. Prior to the request for the BAFOs, the Council engaged in a process of extensive discussion and clarification with both New Flyer

and Gillig, the vendors found to be within the competitive range for the procurement. This process involved both New Flyer and Gillig seeking and, in the majority of cases, obtaining deviations from the Specifications. This process allowed both New Flyer and Gillig to bid their products. In fact, the process worked as it was intended to in allowing the two vendors with their different products to bid them, thereby maximizing competition. Moreover, if New Flyer seriously believed that the bid specifications were written to favor Gillig, it certainly would have filed a solicitation-phase protest. The Solicitation included a very clear process for filing solicitation-phase protests to address precisely the type of bid specification issues of which New Flyer later complained - yet no solicitation-phase protests were filed.

**3. New Flyer Claims That It Was Awaiting Clarification On The Training Requirements And That It Misunderstood the Requirement For Fleet Defect Coverage.**

**Allegation:** New Flyer claims in its protest that it was awaiting clarification from the Council on the type of training required under the Specification and that it misunderstood the Council's requirements on fleet defect coverage.

**Response:** With respect to the training requirement, New Flyer's position is inconsistent with the language of the Specification and New Flyer's own response in the BAFO on training in which New Flyer expressly declined to provide 3,000 hours of training and instead offered an unspecified dollar amount cap after which no further hours of training would be provided. Contrary to its assertions, no specific dollar amount for training was provided by New Flyer in the initial or subsequent written proposals. New Flyer does not identify what further information it was awaiting on training other than a claim that the "types" of training were not identified. However, Section 00:06, Training in the Bid Package, provides a detailed description of the training requirements. New Flyer simply declined to provide the 3,000 hours required under Addendum 3.

The two-year fleet defect coverage was a clear requirement of the specifications, and New Flyer unambiguously refused to accept that requirement in its BAFO. "[F]leet defect clauses of any kind are only valid for the 1st year of the 2 year bumper to bumper warranty and they do not 'carry over' nor are they 'applicable and/or valid' for year #2." As stated in New Flyer's protest, "New Flyer also indicated that it preferred not to offer a non-standard two-year fleet defect warranty." New Flyer Protest at 7. The Council had no indication that New Flyer would refuse in its BAFO to offer fleet defect protection during the base warranty period, only that it preferred not to do so.

The Specification clearly required fleet defect coverage during the base 24-month warranty period and 3,000 hours of training, neither of which New Flyer accepted in its BAFO. The Solicitation Package unambiguously provides that "Deviations from these requirements will result in rejection or disrating of the BAFO."

**4. New Flyer Claims There Were Different Due Dates for BAFOs.**

**Allegation:** New Flyer suggests there were different submission dates for the New Flyer and Gillig BAFOs.

**Response:** There was a single due date for submission of the BAFOs by both New Flyer and Gillig, February 6, 2007. The Council made a clerical error in its letter to Gillig, mistakenly providing for an earlier submission date for Gillig. However, the Council discovered the error and promptly notified Gillig of the correct date prior to Gillig's submission. Gillig's BAFO arrived at the Council a day before the due date, which had no impact, favorable or unfavorable, on the BAFOs of either New Flyer or Gillig.

**5. New Flyer Claims That Its Proposal Was \$5.6 Million Lower Than Gillig.**

**Allegation:** New Flyer alleges that its proposal was \$5.6 million lower than the Gillig proposal.

**Response:** Because New Flyer failed to comply with the requirements for training and fleet defect coverage for the 24 month base warranty period, there is no way to compare New Flyer's BAFO to Gillig's BAFO. To the extent that New Flyer's BAFO is lower in price, it can be attributed in whole or part to the savings it would have derived from the material deviation New Flyer took on training and fleet defect coverage.

Contrary to New Flyer's allegations, its claimed pricing on training and fleet defect coverage was not known at the time of New Flyer's submission of its BAFO, nor can the pricing be determined now after the fact. New Flyer claimed in its protest submission that it can price these requirements and that complying with fleet defect coverage would cost \$950,000.00 and complying with 3,000 hours of training would cost approximately \$105,000.00.

New Flyer's after-the-fact pricing and admission that it excluded from its BAFO at least \$1,055,000 in required training and fleet defect coverage underscores the materiality of New Flyer's deviation from the specification. Whether New Flyer would have been the low bidder simply cannot be known after the fact, and to allow New Flyer to sharpen its pencil and subsequently revise its BAFO would fly in the face of the most basic principles of public bidding. Gillig bid this procurement in full compliance with the requirements for training and fleet defect coverage. New Flyer refused to meet the requirements and cannot now complain about its own admitted material deviations from the specifications.

**6. New Flyer Suggests A Procedural Defect In The Council's Hearings.**

**Allegation:** New Flyer seems to claim there were procedural defects in the meetings of the Transportation Committee and the Council at which this matter was considered.

**Response:** This claim is also wholly without merit. The Transportation Committee was not required to give either Gillig or New Flyer the opportunity to speak at its meeting on March 12, 2007, but did so in the interests of hearing the parties' concerns.

Again, while not required to hear presentations of the parties at the March 28, 2007, Council meeting, the Council determined that both New Flyer and Gillig would have an opportunity to be heard.

**7. New Flyer Alleges The Council's Findings And Conclusions Are Erroneous.**

**Allegation:** New Flyer complains about the Council's Findings and Conclusions as erroneous and suggests that the Council is now limited in its record to those allegedly erroneous Findings and Conclusions. New Flyer also suggests somehow that the Council should have issued a signed decision. New Flyer cites no authority for its position.

**Response:** The rationale for the Council's decision is adequately and fully set forth in the Findings and Conclusions, unlike the situation in *In the Matter of Russ Livingood*, 594 N.W.2d 889, 895 (Minn. 1999), where the public authority admitted that it gave inadequate reasons for its decision.

**LEGAL ANALYSIS**

**1. An RBAFO Process Is Not Appropriate When Used Solely To Allow New Flyer To Correct Its Defective Bid.**

The procurement process on this Solicitation Package complies both with state and federal law. The Solicitation Package provides for a period of negotiation, clarification, and a process for vendor proposal and discretionary acceptance by the Council of deviations from the specifications during the prequalification stage. However, once the Council requests BAFOs and BAFOs are submitted, the Council does not assume "any responsibility for errors or misinterpretations resulting from the use of an incomplete set of these documents by an offeror." (Solicitation Package, Part A, p. 2.) The Solicitation Package expressly states that, "[f]ailure to follow the requirements of this Solicitation Package may result in rejection of an offer." *Id.*

The Council has the right to cancel the Solicitation, reject any provision of any proposal, waive informalities, minor irregularities and discrepancies, issue addenda, issue a revised Solicitation Package, or to proceed to obtain goods otherwise. The Council is not compelled to take any of these actions where the actions are neither necessary nor legal.

New Flyer seeks a RBAFO solely for the purpose of correcting material defects in its original BAFO in the areas of training and fleet defect coverage. The competitive bidding process set forth in the Solicitation Package, as well as state and federal law,

prohibit the issuance of an RBAFO solely for the purpose of allowing one of the proposers to correct its failure to comply with material requirements of the specifications.

The Comptroller General's decisions cited by New Flyer in its argument that the Council must issue RBAFOs are not persuasive. In *In re Ogden Support Servs. Inc.*, B-270354, 96-1, CPD P 175, 1996 WL 154345 (Comp. Gen.), the CIA was found to have failed to inform the bidder of a deficiency during the discussion phase of the procurement. In the present case, both the training and fleet defect coverage were the subjects of clarifications and discussion during the pre-BAFO stage. An RBAFO process is not required in this case where New Flyer simply declined to comply with specification requirements.

New Flyer argues that the Council failed to advise it of two alleged central defects and by doing so, "failed to conduct meaningful negotiations." (Memorandum at 26.) The time for discussions and clarifications was prior to submission of the BAFO by New Flyer. During those discussions, there was no indication by New Flyer that it intended to rewrite in its BAFO the training and fleet defect requirements. For the Council to engage in discussions with New Flyer after its submission of the BAFO to correct or clarify its submission would have been unfair to Gillig and inconsistent with the competitive bidding process.

**2. The Minnesota Uniform Municipal Contracting Law Compelled the Council to Reject the BAFO of New Flyer.**

As a political subdivision of the state, the Metropolitan Council is required to correctly apply controlling law to the evidence in the administrative record, and in doing so may not act arbitrarily, oppressively, or unreasonably. *Minn. Vikings Football Club, Inc. v. Metropolitan Council*, 289 N.W.2d 426 (Minn. 1979); *City of New Brighton v. Metropolitan Council*, 306 Minn. 425, 237 N.W.2d 620, 623 (1977). In reviewing the record and applicable law in light of New Flyer's protest, it is clear that the Council did not act arbitrarily, oppressively, or unreasonably in rejecting New Flyer's bid and taking steps to award the contract to Gillig. Accordingly, New Flyer's Protest in this respect had no merit.

The Council employs competitive bidding "to prevent such abuses as fraud, favoritism, extravagance, and improvidence, and to promote honesty, economy, and aboveboard dealing." *Transit Team, Inc. v. Metropolitan Council*, 657 N.W.2d 390, 396 (Minn. Ct. App. 2004). The focus is on the taxpayer—"to assure taxpayers of the best bargain for the least money." *Id.* To these ends, when the Council anticipates entering a contract for more than \$50,000, sealed bids are required pursuant to the Minnesota Uniform Municipal Contracting Law, Minn. Stat. § 471.345, subd. 3; *see also Collier v. City of Saint Paul*, 223 Minn. 376, 26 N.W.2d 835 (1947) (requiring competitive bidding and disallowing material deviations); *Transit Team, Inc.*, 657 N.W.2d at 396 (Minn. Ct. App. 2004) (applying *Collier* principles to Metropolitan Council contract for transit service). Plans and specifications must be "definite" and "be so framed as to permit free

and open bidding by all interested parties.” *Coller*, 223 Minn. at 385, 26 N.W.2d at 840. “[A] bid shall constitute a definite offer for the contract which can be accepted without further negotiations,” and after bids are received the public authority’s sole role “shall be to determine who is the lowest responsible bidder.” *Id.* “It necessarily follows also that a bid must conform substantially to the advertised plans and specifications, and that where there is a substantial variance between the bid and the plans and specifications it is the plain duty of the public authority to reject the bid.” *Id.* While “minor defects” in bid responsiveness are permitted, “substantial” deviations are not. *Transit Team, Inc.*, 679 N.W.2d at 396.

### **3. The Council's Specifications on Training and Fleet Defect Coverage Were Not Ambiguous.**

In this situation, New Flyer’s bid did not conform substantially to the Council’s specifications. New Flyer’s deviations from fleet defect and training requirements were material because they significantly affected the pricing of the bid, a fact that New Flyer does not dispute. New Flyer’s deviations from the Council’s clearly stated requirements, if accepted, would give New Flyer “a substantial advantage or benefit not enjoyed by other bidders.” *Coller*, 223 Minn. At 385, 26 N.W.2d at 840. Accordingly, New Flyer’s bid cannot be considered an offer, but instead a counteroffer, which the Council was required to reject pursuant to Minn. Stat. § 471.345. Acting otherwise would have been an arbitrary and unauthorized action to the detriment of Gillig, which submitted a compliant bid.

New Flyer generally states that the Council’s specification regarding training “was ambiguous because it did not provide a detailed breakdown of the types of training the Council required, which made it difficult for New Flyer to allocate prices for each training category.” *See* Memorandum at 25. The training specification in Solicitation Package Part E runs to nearly three pages and provides detailed information on the Council’s expectations. (Part E, pages 10-12.) Addendum 3 to the Solicitation Package clearly sets the requirement of 3,000 hours of training.

With respect to fleet defect coverage, the requirement of coverage during the 24-month base warranty period is also without ambiguity. New Flyer clearly understood the requirement and clearly proposed in its BAFO a material deviation, specifically declining to provide two years of coverage, stating “fleet defect clauses of any kind are only valid for the 1st year of the 2 year bumper to bumper warranty and they do not ‘carry over’ nor are they ‘applicable and/or valid’ for year #2.”

A fair review of the solicitation documents does not reveal any substantive ambiguities. Further, even if there were any such ambiguities, New Flyer chose to submit a BAFO even in light of the claimed ambiguities, and under these circumstances New Flyer proceeded at its own peril.

**4. There Is No De Facto Sole-Sourcing In this Procedure.**

New Flyer has cited to no evidence in the record, and a review of the documents has found none, at all suggesting that “the Council’s Specifications were crafted around a Gillig product” and therefore were illegal. *See* New Flyer Memorandum at 28. The record is devoid of any materials to support the suggestion that “New Flyer and other vendors were concerned from the outset of the Project that the Council sought only a Gillig manufactured bus.” *See* Memorandum, at 29.

In fact the pre-BAFO procurement process in this Solicitation Package underscores the Council's efforts to draw in competitive bids even when there were variations in the products proposed. The process of discussion, clarification and the granting of deviations, allowed for both New Flyer and Gillig to competitively bid. The rejection of New Flyer's bid is not based on product considerations - - rather the rejection is simply based on New Flyer's failure to accept the requirements on training and fleet defect coverage.

**5. A Two-Year Fleet Defect Requirement is Not Illegal.**

There is no authority suggesting that the Council’s requirement regarding fleet-defect warranties “is illegal as specified” because “FTA funds can only be used to pay for certain expenses.” *See* Memorandum, at 30. The fact that Gillig requested and received deviations from similar requirements in Nevada, California, and North Carolina, *see* Memorandum at 31, is irrelevant. In this situation, Gillig made a similar deviation request to the Council, but the request was denied and in its bid Gillig acquiesced to the Council’s requirements. New Flyer did not. Under general principles of commercial dealing, New Flyer was and is fully empowered to reject the Council’s requirement, and in return the Council was fully empowered to reject New Flyer’s bid.

**6. The Council Has Not Acted Arbitrarily or Capriciously In This Procurement.**

New Flyer’s general suggestion that the Council acted in an arbitrary or capricious way by failing to consider past dealings between the parties regarding “prior acceptance of New Flyer’s bidding training dollars, rather than training hours,” *see* Memorandum at 25, violates principles of contract and public-bidding law that require parties to adhere to the plain language and four corners of written documents. Further, should the Council have considered prior dealings with New Flyer to somehow be relevant in New Flyer’s favor, the Council would have risked violating the prohibitions against sole sourcing that New Flyer cites. *See* Memorandum, at 27.

Additionally, New Flyer’s suggestion that the Council erred by failing to reopen negotiations as it previously had done for other RFPs is without merit. The suggestion that “[t]he Council obviously knows it has the authority to seek RBAFOs as it has done so in the last few months,” *see* Memorandum at 26, tends to further the conclusion that the

Council was completely aware of its authority, and determined it was not proper to reopen negotiations.

New Flyer puts great weight on the fact that parties submitting bids could, and did, submit deviations, and that “the Council cannot penalize New Flyer for doing what the Specifications stated was permissible.” But the deviations must be submitted in the pre-BAFO stage not afterward, as New Flyer attempted to do through the documents submitted with its protest. *See Collier*, 223 Minn. At 387, 26 N.W.2d at 841 (stating that “[a]fter bids have been received and opened, no material change may be made in any bid”). As the court made clear in *Collier*, after-the-fact modification “amount[s] to negotiation of the contract in disregard of the requirements of competitive bidding.” *Id.*

#### **7. Federal Law Compels the Council to Adhere to State Law that Guards Against Arbitrary and Capricious Actions.**

As New Flyer observes, the United States Department of Transportation has promulgated regulations governing competitive procurements in Title 49, Part 18, Subpart C of the Code of Federal Regulations, 49 C.F.R. § 18.36. Still, under section 18.36, “procurement by local or state governments remains a matter predominantly entrusted to the respective governments, even when federal dollars are expended.” *GFI Genfare v. Regional Transp. Auth.*, 932 F.Supp. 1049, 1052 (N.D. Ill. 1996) (citing 49 C.F.R. § 18.36(b)(1), (11)-(12)). Further, “there exists no private right of action to enforce § 18.36.” *Id.*; *accord 24 Hour Fuel Oil Corp. v. Long Island R.R. Co.*, 903 F.Supp. 393, (E.D. N.Y. 1995) (“49 C.F.R. Part 18 does not explicitly provide for a private cause of action”). Any attempt by New Flyer to enforce a private right of action pursuant to 49 C.F.R. § 18.36 must be rejected.

To the degree that the federal regulations are relevant, they require local governments to ensure “full and open competition” between and among grantees and subgrantees. *See* 49 C.F.R. § 18.36(c). The regulations’ prohibition against “[a]ny arbitrary action in the procurement process,” *see* 49 C.F.R. § 18.36(c)(1)(vii), is consistent with controlling state law outlined above, and the Council is in complete compliance with these regulations.

Importantly, the regulations instruct that grantees and subgrantees specifically require that procurements be conducted “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 those cases where applicable Federal statutes expressly mandate or encourage geographic preference.” 49 C.F.R. § 18.36(c)(2). In light of these regulations, reopening negotiations to solicit RBAFOs solely for the purpose of allowing New Flyer to correct its defective bid would be an arbitrary and capricious act detrimental to Gillig and might be construed as a “geographical preference” contrary to federal law.

Further, as New Flyer acknowledges numerous times in its submission, the Council’s authority to reopen BAFOs is permissive. For example, New Flyer states that

the Council “may ‘issue a new request for revised proposals’ as a result of [a] protest.” *See* Memorandum in Support, at 20 (citing 48 C.F.R. § 15.505(b)(2)). As part of its independent review, Council staff has been unable to locate the provision cited by New Flyer as 48 C.F.R. § 15.505(b)(2), but does recognize that 48 C.F.R. § 15.507 sets procedures for addressing protests and generally recognizes that the Council might choose to “[i]ssue a new request for revised proposals on the protested contract award.” *See* 48 C.F.R. § 15.507(b)(2). Staff has been unable to locate any federal authority that would require it to reopen BAFOs in this instance.

At New Flyer’s request, the Comptroller General’s decision in *In re Federal Security Systems, Inc.*, No. B-281745.2, 99-1 CPD P 86, 1999 WL 292729 (Comp. Gen. April 29, 2999) was reviewed. But this decision, where a protest denial was affirmed, underscores that the *federal* agency at issue acted reasonably and within its discretion in denying a protest. Further, as New Flyer acknowledges, *see* Memorandum at 21 n.9, the Comptroller General is head of the Government Accountability Office, whose Office of General Counsel issues decisions on bid protests based on allegations that a contract “has been or is about to be awarded in violation of the laws and regulations that govern contracting *with the federal government*.” *See* [www.gao.gov/decisions/bidpro/bidpro.htm](http://www.gao.gov/decisions/bidpro/bidpro.htm) (emphasis supplied). In this situation, New Flyer did not propose to contract with the federal government. Accordingly, these decisions are of little or no import.

Finally, federal regulations direct that “[v]iolations of law” are to be referred to the local, State, or Federal authority having proper jurisdiction.” In this situation, the local authority having proper jurisdiction under Minnesota law is the Council, which, as discussed above, determined that the Council did not act arbitrarily and capriciously in rejecting New Flyer's BAFO and in extending the contract to Gillig.

## CONCLUSION

Based on the above analysis, I believe there are two conclusions that can be reached regarding this procurement:

- (1) The protest of New Flyer in this procurement was completely without merit.
- (2) Although the Council ultimately reconsidered its initial decision on the procurement as a result of legislative action, the Council's initial decision to authorize the Regional Administrator to negotiate and execute a contract with Gillig was the appropriate decision and had a firm legal basis."

By \_\_\_\_\_  
Brian J. Lamb  
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