

BEFORE THE CHICAGO
TRANSIT AUTHORITY

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In re:)
) Requisition No. C14FI101554098
Protest of Bombardier Transit)
Corporation)
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BOMBARDIER’S MEMORANDUM IN SUPPORT OF PROTEST

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Pursuant to Section 16.2(C) of the Chicago Transit Authority’s (“CTA” or the “Authority”) Procurement Policy and Procedures (“PPP”), Bombardier Transit Corporation (“Bombardier”) submits this Memorandum, the accompanying Declarations of Michele MacGregor and Philip Le B. Douglas,¹ and a separately bound volume of exhibits in support of its protest (the “Protest”) regarding CTA’s award of Contract No. C14FI101554098 (the “Contract”, “Award” or “Procurement”) to CSR Sifang America Joint Venture (“CSR”). As an “Interested Party”, Bombardier protests the Award because CSR fraudulently represented itself as a responsible bidder and CTA violated Federal and State law and its own regulations in awarding the Contract. For the reasons set forth below, CTA must (a) immediately issue a stop work order for the Contract; (b) terminate the Contract; (c) disqualify CSR as a fraudulent, non-responsible and non-responsive bidder; (d) re-evaluate the proposals and award the Contract to Bombardier; and (e) reimburse Bombardier for its expenses relating to its Proposal and Protest, which now total nearly \$2 million. MacGregor Dec. ¶ 3.² *E.g., State Mechanical Contractors, Inc. v. Village of Pleasant Hill*, 477 N.E.2d 509, 513 (Ill. App. 1985); *Concept Automation, Inc. v. United States*, 41 Fed. Cl. 361, 369 (Ct. Cl. 1998).

¹ Bombardier’s declarations and exhibits will be cited as “MacGregor Dec.”, “Douglas Dec.” and “Ex. ___”. Unless otherwise noted, all emphasis herein is our own.

² Because Bombardier’s Protest expenses are continuing, this amount will be updated at the appropriate time.

Preliminary Statement

Because CTA has thus far obstructed Bombardier's access to critical records, this Protest is predicated largely on the public admissions of the Authority and the Mayor of Chicago. The Award, however, stands condemned by these words alone. It is a matter of public record that the Mayor's, and even "local labor leaders'" interference in this Procurement caused the Authority to award this federally funded Contract to CSR in return for a commitment to provide Chicago jobs and a new local factory. It was, of course, illegal for the Authority to use federal funds to deny jobs to fellow Americans outside of Chicago. To ensure that America's generous contribution to Chicago's future is not exploited to the disadvantage of other communities, federal law and CTA rules prohibit exactly what happened here: a trade of federal money for local preferences.

To achieve this illegal purpose, the Authority rigged the Procurement to ensure a CSR victory. As the Mayor, his labor allies and CTA well knew, only a new entrant into the American market could provide the Chicago jobs needed to serve their political purposes. Railcar manufacturers with recent U.S. contracts all had fully operational factories in other U.S. localities and thus could not be expected to fire their existing American employees and transfer those jobs to an entirely new plant in Chicago. From the recently completed 5000-series project, CTA knew that if Bombardier were awarded the new Contract, the 7000-series cars

would be completed by American workers at Bombardier's large and modern facility in Plattsburgh, New York.

Of necessity, therefore, CTA structured and administered the procurement to ensure that CSR prevailed. Although driven by the same Mayoral directive to take jobs from other American communities, the following Authority actions to steer the Contract to CSR are each an independent ground for vacating the Award:

First, in violation of its obligation to administer this procurement independently, on the merits and confidentially, CTA took direction from, and shared confidential RFP information with, the Mayor and "local labor leaders".

Second, in order to secure the desired Chicago jobs, the Authority structured and administered the procurement so as to provide CSR with arbitrary and undisclosed advantages. For example, one of CTA's evaluation criteria gave an irrational preference to CSR's admitted lack of experience in North America (by only accounting for new jobs created and excluding jobs maintained), while another (forbidding the evaluation of experience outside of North America), was violated. As a result, CSR's admitted lack of any experience in North America, which should have weighed heavily against its proposal, was actually an advantage.

Third, the Authority did not, as the RFP required, investigate whether CSR's low-ball price was unreasonable because it was below market and subsidized.

CTA's own regulations require the disqualification of any proposal whose price is unreasonably low.

Finally, the Authority's administration of even this Protest has been unfair and arbitrary, and, thus, an independent ground for voiding the Award itself. CTA (a) misrepresented its long-standing intention to deny Bombardier adequate time to prepare the protest; (b) delayed and denied the production of relevant records; (c) provided an eleventh hour, one-sided and token "debriefing" to Bombardier; and (d) refused, without any credible explanation, any extension of the protest deadline notwithstanding its failure to produce records it had committed to provide before the deadline. As a result, Bombardier has been denied both the time and information necessary to submit a fully developed Protest.

Statement of Facts

1. The Parties

Bombardier Transportation is a world leading manufacturer of rail cars, with \$43.8 billion in sales in the last 5 years. Bombardier has successfully delivered thousands of rail cars to United States customers, including Amtrak, New Jersey Transit, New York City Transit Authority, Long Island Rail Road, Metro North Railroad and Bay Area Rapid Transit (BART). For decades, Bombardier has been a major U.S. employer with large production facilities in Plattsburgh, New York, Kanona, New York and Pittsburgh, Pennsylvania. MacGregor Dec. ¶ 2.

CSR is a joint venture ultimately owned by the People's Republic of China. CSR has never before been awarded a contract in North America. In 2012, CSR was disqualified from the BART procurement. Ex. V at 17. In 2014, CSR was again found non-responsible and disqualified from a procurement, this time for the Massachusetts Bay Transportation Authority ("MBTA"). Ex. W at 7-8.

2. The RFP

On January 25 2013, CTA issued an Invitation for Bids ("IFB") for up to 846 7000-Series rail cars. Ex. J. On January 27, 2014, the Authority opened and publicly disclosed two bids it had received: one for \$1.39 billion from Bombardier and another for \$1.55 billion from Sumitomo Corporation of America and its manufacturing partner, Nippon Sharyo U.S.A. Ex. K.

On May 20, 2014, even though "[b]y law, the CTA is required to award the contract to the 'lowest responsive and responsible bidder'" (PPP § 7.1), the Authority announced that it had rejected both bids "in an effort to drum up more competition and lower pricing." Ex. L. On July 24, 2014, Mayor Emanuel launched a "Build Chicago" partnership with CTA and the Chicago Federation of Labor ("CFL") for the "upcoming purchase of the transit agency's next-generation of rail cars." Ex. M. The Mayor stated that the new RFP would "encourage local [job] opportunities wherever possible" and that the "Build Chicago" program "further demonstrates Mayor Emanuel's commitment to bringing high quality,

high paying jobs to Chicago and the Region.” Ex. M. To achieve this end, “[t]he Mayor, CTA President Forrest Claypool and other CTA officials met with CFL representatives to discuss the upcoming procurement and its job creation opportunities. CTA will tailor its plan for its procurement of up to 846 rail cars . . . [to] include[] U.S. employment provisions . . . The 7000-series procurement is just the latest effort by the Mayor and CTA to promote U.S. and local Chicago job creation.” Ex. M.³

On October 16, 2014, CTA resumed the Procurement by issuing the Request for Proposal (“RFP”). The Federal Transit Administration (“FTA”) is to provide hundreds of millions of dollars in funding for this Project. Ex. B at § 26; Ex. C at 21–23. Consistent with Mayor Emanuel’s directive, the RFP contained criteria favoring manufacturers like CSR who, because of their lack of any prior experience in the United States and cash reserves of its ultimate corporate parent, were best positioned to build a new factory in Chicago. Ex. A at 30.

Unlike the IFB, which would have required a contract with Bombardier, the lowest bidder, the RFP required an award for “the best value based on the requirements and evaluation factors set forth in the solicitation.” PPP § 8.4(D). Consistent with the RFP, the Authority, at its November 14 Pre-Proposal meeting,

³ During the RFP process, Mayor Emanuel visited China to participate in the U.S.-China Joint Commission on Commerce and Trade and described his trip as an opportunity “to advance Chicago’s economic interests and investments from China.” Ex. O.

told prospective proposers that “CTA is more concerned with obtaining a superior rail car than with making an award at the lowest price.” Ex. N at 8:21-9:01.

According to the RFP, “price is not expected to be the controlling factor in the selection of the Proposer for this RFP.” Ex. A at 17-18. Price was to be determinative only in the event that the proposals, evaluated according to the announced criteria, were found to be “substantially equal.” Ex. A at Section S.

The RFP established five, and only five, criteria for the Authority’s evaluation of proposals. These, in descending order of importance, were:

1. Technical Proposal,
2. Schedule,
3. History of Past Performance for the North America Rail Transit Market,
4. U.S. Employment Plan, and
5. Managerial Approach

Ex. A at 4, 5, 17.⁴

The PPP also required that a proposed price be “fair and reasonable.” PPP §4.32. Accordingly, “[i]f CTA determines that the price bid or offer by a prospective Contractor is so low as to appear unreasonable or unrealistic, CTA may determine the prospective Contractor to be nonresponsible.” *Id.* § 4.23(E).

⁴ The Employment Plan and Managerial Approach criteria were to be given equal weight. Ex. A at 17.

3. The Evaluation

Notwithstanding the limited disclosures provided by CTA to date, it is clear that the Evaluation Committee and the Board of Directors misapplied most, if not all, of the RFP's stated evaluation criteria, and used at least two undisclosed and unauthorized criteria. Bombardier has reason to believe that the material responsive to its Freedom of Information Request, which CTA has been improperly withholding, will further support this conclusion.

Prior to submitting its proposal, CSR asked the Authority to modify the RFP to permit consideration of its performance outside of North America. Ex. E at 3. On April 9, 2015, CTA rejected this request, stating that "Proposer's history of past performance will be evaluated by the Authority based on the information required by Instructions to Proposers, Section E – Proposal Requirements, Section 1 – History of Past Performance, and in accordance with the Instructions to Proposers, Section S, Proposal Evaluation Criteria & Process." Ex. E at 3.

On July 28, 2015, the parties submitted their proposals. Consistent with the RFP's limitation of "History of Past Performance" to transit vehicles delivered in North America over the past five years, Bombardier's Proposal restricts its analysis to the sale of transit cars to the New York City Transit Authority ("NYCT"), the San Francisco Bay Area Rapid Transit District ("BART"), the Toronto Transit Commission ("TTC"), the Société de Transport de Montréal ("STM"), and of

course, the 714 cars delivered to CTA between 2006 and 2015. MacGregor Dec.

¶ 2. As CTA knows, Bombardier and its affiliates have expansive experience outside of North America, but Bombardier, in compliance with the RFP, did not provide this information.⁵

Bombardier's Proposal also stated that its long-established New York factory is "capable of all phases of the manufacturing cycle from carshell manufacturing to final assembly and testing." MacGregor Dec. ¶ 2. Bombardier's Proposal also noted that Bombardier's experience with the 5000-series rail cars would provide substantial benefits to the CTA and its employees, including component interchangeability, less inventory, and common maintenance procedures across the rail car fleet. MacGregor Dec. ¶ 2, 10.

As previously noted, CTA specifically rejected CSR's request that its Proposal describe contracts outside of North America. Thus, the RFP continued to require that proposals' "History of Past Performance" be restricted to contracts of similar magnitude and nature to those called for by the RFP and for the "design and assembly of self-propelled Rail Cars for the North American Rail Transit Market, as a prime contractor over the past five (5) years." Ex. A at 4-5.

⁵ The Authority did not release any portion of CSR's Proposal or BAFO until Friday, April 8, 2016 at approximately 12:30 p.m., CDT, (1:30 p.m. EDT time). Ex. RR. At that time, Bombardier retrieved a compact disc containing heavily redacted excerpts from the Contract, including part of CSR's Proposal and BAFO. Most of the redactions appear unfounded. In addition, CTA failed to provide whole sections of CSR's Proposal and Contract, including its technical proposal, with no indication of why the sections were withheld or when they will be produced. On April 11, when this Protest was due, CTA provided additional material that Bombardier has not yet had the opportunity to meaningfully review. Bombardier will supplement its Protest once it has had a fair opportunity to analyze these and other withheld materials.

CSR's Proposal violated each of these requirements and thus was entirely non-responsive. Despite acknowledging that CSR "had no project in North America in the last five years,"⁶ the Proposal went on to describe in general terms CSR's experience elsewhere in the world. Ex. H at CTA000234. In addition to having nothing to do with the North American market, none of CSR's specifically identified contracts complied with the RFP's other requirements. None were of a similar 846-car magnitude. Ex. H at CTA000237—259. Some did not concern self-propelled transit cars or were not contracts for which CSR was the prime contractor. Ex. H. at CTA000237—259

CSR's "History" was also fraudulent. In Schedule Three, CSR was required to provide "detailed information regarding debarment, suspension and other ineligibility and voluntary exclusions in the last five years." In response, CSR submitted a June 19, 2015 affidavit swearing that "there is no debarment, suspension, and other ineligibility . . . in the last five (5) years (2010—2014)." Ex. H at CTA000263—64. In fact, on August 22, 2014, the MBTA declared CSR ineligible for the MBTA procurement because it was a non-responsible proposer. Ex. DD at 1–2 . ("The Proposer has submitted an Overall Technical proposal that is UNACCEPTABLE. The Proposer has demonstrated an approach that is considered to be unacceptable in level of quality. . . . A major revision to the

⁶ In fact, CSR had never had a relevant U.S. project. Ex. H.

Proposal would be necessary before it could be considered for acceptance . . . and there is little confidence that CSR could meet the minimum, requirements.”).

These violations of express RFP requirements rendered CSR ineligible for the Award. *E.g.*, PPP § 16.5 (proposer “fraudulently represented itself as . . . responsible.”). In addition, as will be demonstrated below, CSR’s breaches caused CTA and the Board of Directors itself to evaluate CSR based on false and irrelevant information.

On October 5, 2015, CTA informed CSR and Bombardier that their proposals were within the competitive range, and, on November 11, invited them to submit their Best and Final Offers (“BAFO”).

Both BAFOs were submitted on December 11, 2015. Bombardier’s stated that 339 new jobs would be created in the United States and that 179 existing U.S. jobs would be saved. Many of Bombardier’s existing employees had worked on CTA’s 5000-series project and thus knew CTA’s particular needs and safety requirements. MacGregor Dec. ¶ 10. Bombardier further proposed to rent a Chicago facility for the 7000-Series final assembly activities. MacGregor Dec. ¶ 2.

At no time during the RFP process did CTA disclose to Bombardier that it would give any, let alone more, credit for local jobs or other investments in Chicago than for U.S. jobs. MacGregor Dec. ¶ 3.

4. **The Mayor's March 6 Announcement and the CTA Reaction**

On Sunday, March 6, 2016, before the staff had made, and the Board of Directors had considered, any recommendation, the Mayor's Office announced a "Monday AM Mayoral Announcement":

The Chicago Transit Authority (CTA) Board on Wednesday will award a contract for more than 800 new rail cars, the latest effort in Mayor Emmanuel's ongoing modernization of Chicago Transit.

The contract for the new 7000-series rail cars will include new jobs, as well as a multimillion-dollar investment in an assembly facility in Chicago^[7] – the culmination of the Mayor's efforts, in conjunction with local labor leaders, to promote U.S. jobs as part of the 7000-series procurement.

Ex. P. For undisclosed reasons, the Mayor's announced March 7 press conference did not occur.

At the time of the Mayor's announcement, the Authority began a rushed effort to complete its evaluation of the CSR proposal. In the space of a half hour that Sunday evening, the CTA initiated brief telephone conversations with CSR's customers in China, Hong Kong, and Singapore. Ex. Q. Early the next morning, CTA spent a few minutes on a call with CSR's Argentina customer. Ex. Q at CTA000027—29, 45. Despite these frenzied calls to CSR's customers outside of

⁷ It is clear that this referred to CSR's proposal. Bombardier's BAFO did not include a dollar amount with respect to its proposed rental of an assembly facility in Chicago.

North America, there is no documentation that CTA ever reached out to any Bombardier customer. Ex. Q.

5. The Staff Recommendation

At some point on, or after, March 8, 2016, the CTA staff completed its Contract Award Recommendation Summary (the “Recommendation”). Ex. R. The two-page Recommendation contains only a few sentences regarding the merits of the competing proposals: “[t]he BAFOs submitted by the two proposers offered very similar technical proposals and benefits to CTA . . . The recommended proposer submitted a BAFO which is \$226.6 million less than the other proposer.” Ex. R. at CTA000002. Other than price, which was not a controlling evaluation criterion, the Recommendation did not contain any information, including even the evaluation criteria themselves, enabling the Board of Directors to make a reasoned decision regarding the two proposals’ relative value to CTA. Ex. R. This violated the PPP requirement that “evaluations must be as thorough, objective and well-documented as possible.” PPP § 8.4(B).

6. The Board Meeting and Award

On March 9, 2016, at 9:34 a.m., the Board’s Committee on Finance, Audit and Budget (“Finance Committee”) met to consider, among other agenda items, the staff’s oral recommendation that the Contract be awarded to CSR. Ex. S at

CTA000016. There is no evidence that the Finance Committee received any written briefing materials, not even the Recommendation. Ex. S.

The initial staff presentation consisted of nothing more than a verbatim reading by Ellen McCormack, CTA's Vice President of Purchasing and Supply Chain of the Recommendation's cursory summary of the Evaluation Committee's conclusions:

Both [RFP] responses were reviewed and evaluated by an evaluation committee with respect to the criteria listed in the RFP. Both proposers were found to be in the competitive range . . . The evaluation committee reviewed and evaluated the BAFO based on the same criteria used to evaluate the initial proposals. The BAFO submitted by the two proposers offered very similar technical proposals and benefits to the CTA. The CTA determined that both proposers were capable of manufacturing the rail cars. The recommended proposer submitted a BAFO which is over \$226 million less than the other proposal.

Award is recommended to the responsive and responsible proposer CSR Sifang America, which submitted the proposal determined to be the best value to the Authority.

Compare Ex. S at CTA000016 with Ex. R at CTA000002.

Because it was not provided with any information regarding other evaluative criteria, the Finance Committee focused exclusively on price and gave no consideration at all to which proposal provided the best value. Indeed, the summary and dialogue that followed contained no information supporting the staff's conclusory claim that the two "technical proposals and benefits to the CTA"

were “very similar”. Ex. S at CTA000016. Although Ms. McCormack was followed by Donald Bonds’ description of the “technical design and features of the proposed rail cars,” Mr. Bonds did not provide any information regarding the relative merits of the Bombardier and CSR designs. Ex. S at CTA000016—18.

Ms. McCormack then described the “due diligence that we did for bidders.” Ex. S at CTA000018. Although asked to do so for both proposals, Ms. McCormack’s “due diligence” presentation was limited to CSR. Without informing the Finance Committee that the RFP limited CTA’s evaluation to a proposer’s contracts of similar magnitude required by the RFP for self-propelled electric transit car deliveries in North America since 2010, Ex. A at 4–5, Ms. McCormack reported that: “CSR has provided over 30,000 passenger rail cars for over 20 different countries since 1962.” Ex. S at CTA000016—17. As CTA knows, “passenger cars” include long-distance and inter-city vehicles, which are definitely not “transit cars.” Ex. N at 13. Most notably, the Finance Committee was never told that none of CSR’s deliveries were to North American customers and that they were not all deliveries of transit cars as required by the RFP. Ex. S.

Without revealing that her information was limited to hurried calls in connection with Mayor Emanuel’s Sunday announcement, Ms. McCormack next informed the Finance Committee that: “[w]e contacted four of CSR’s customers for a total of seven contracts . . . These transit agencies were in Hong Kong,

Shendu, China, Singapore and Argentina. Each of these transit agencies stated that deliveries were either on time or early and the vice president in Argentina stated that the work provided by CSR was excellent.” Ex. S at CTA000016—17. Again, CTA did not inform the Finance Committee that this experience could not be considered in awarding the Contract to CSR. Ex. E at 3.

In addition to being a breach of CTA’s own evaluation limits, Ms. McCormack’s reference to CSR’s Asian and Argentinean projects was materially wrong or incomplete. First, despite the RFP’s requirement that referenced contracts be of similar magnitude, none approached the CTA’s 846 car order. Second, CSR was not, as the RFP required, the prime contractor on any of the referenced Singapore projects, as each was performed by a joint venture between CSR and Kawasaki Heavy Industries. And, in each, it was Kawasaki, not CSR, that designed the rail cars. Ex. X.

Third, insofar as “Argentina” is concerned, there were several CSR-related projects, some of which CTA had not discussed with its Argentine contact. CTA’s brief call to Argentina did not concern CSR’s performance on the San Martin or Buenos Aires Subte lines. Ex. Q at CTA000027—29, 45. Nor did Ms. McCormack’s glowing report of CSR’s performance reference publicly-available reports of CSR’s recurring engine fires and other problems on certain Argentine contracts. Ex. F; Ex. G. Further, while CSR in its BAFO stated that it had

delivered cars to the Interior and Transportation Ministry of Argentina in January 2014, the press reported that CSR's deliveries began in September 2014. Ex. MM.

Fourth, Ms. McCormack did not tell the Finance Committee which of CSR's several "Shendu" contracts were the subject of her presentation. Certainly, she did not reveal that one Shendu project involved a CSR joint venture with Bombardier for the delivery of Bombardier's, not CSR's, Innovia 300 Airport People Mover. Ex. Y.

During the meeting, CTA did not state, nor was it ever asked, whether it had contacted any of Bombardier's customers. Ex. S. Nor did it report on Bombardier's performance of CTA's 5000-series contract. Ex. S.

Later in its meeting, the Finance Committee asked Ms. McCormack whether, in addition to CSR's Asian history, there was "[a]nything in America?" Ex. S at CTA000019. Ms. McCormack responded: "No, they have done—they just signed a contract with Boston last year." Ex. S at CTA000019. That statement was false. As CSR's own Proposal admitted:

"CSR Sifang and CSR America have no project in North America in the last five years."

Ex. H at CTA000234.

At the time of Ms. McCormack's representation to the Finance Committee, CTA had never communicated with or, it seems, even checked public sources

regarding, the MBTA contract. When asked whether CTA “had a chance to talk with Boston,” Ms. McCormack claimed: “[w]e’ve reached out to them several times. We have not heard back from them.” Ex. S at CTA000019.⁸ In response to the Finance Committee’s question whether CTA “knows what type of rail car [that CSR was supposedly] building for Boston,” Ms. McCormack responded: “I don’t exactly, but I can get that information for you.” Ex. S at CTA000022. It does not appear, however, that Ms. McCormack “got back” to either the Finance Committee or the Board prior to the Award to CSR.

And, of course, Ms. McCormack failed to disclose that CSR had not been awarded the MBTA contract because CSR had been declared ineligible for that procurement. If CSR had not submitted a false affidavit, the CTA and the Board would have known that only two years earlier the MBTA had determined that CSR’s proposal:

demonstrates a lack of understanding of North American car procurement standards and processes in many key areas, such as design, project approach, car safety and system integration . . . The Proposal is technically deficient and is considered to pose a significant risk to the Authority.

Ex. DD at 1–2.

⁸ CTA’s FOIA production, which included records of every unsuccessful and successful attempt to reach CSR’s customers, contains no record of any pre-Award attempt, whether successful or not, to contact MBTA. Ex. Q.

The Finance Committee later inquired whether CSR was building a facility in Chicago. Ex. S at CTA000020, 22. Because Ms. McCormack had not mentioned this subject, it is not clear what prompted the question.

Ms. McCormack answered that as “part of the commitment,” CSR will build a facility “located on the southside of Chicago.” Ex. S at CTA000020. The Finance Committee subsequently asked, “[a]s you say they are building a plant here in the Chicagoland area, how many jobs are we creating?” Ex. S at CTA000022. Ms. McCormack replied that CSR “have committed to create 169 jobs.” Ex. S at CTA000022. After Ms. McCormack represented CSR’s Chicago plant would cause others to employ additional individuals bringing the total new jobs to approximately 400-500 people, the Finance Committee concluded, “[i]n other words, we get a lot of jobs . . . That’s good.” Ex. S at CTA000022.

Ms. McCormack made no mention of, and the Finance Committee never inquired, regarding the American and Chicago jobs that would be created under the Bombardier Proposal. Nor was any consideration given to loss of existing American jobs that would result from CTA’s denial of the Bombardier Proposal. As we have already shown, the Bombardier Proposal would preserve and create more than 500 American jobs. MacGregor Dec. ¶ 2.

When the Finance Committee asked whether CSR said “anything about using any facility they build in the [Chicago] area for projects beyond the completion of this order,” Ms. McCormack responded:

When we had the negotiations . . . yes it was mentioned. They certainly aren’t making any guarantees, but I think that’s their hope that they would build this facility and if they get more work in the United States, they would be able to use this facility, but it is not guaranteed.

Ex. S at CTA000023.

Ms. McCormack, however, did not disclose that CNR MA Corporation (“CNR MA”), which was now under common control with CSR, had already committed to building a duplicative \$60 million manufacturing and final assembly plant in Springfield, Massachusetts for MBTA. Ex. W at 4. Springfield will be CNR MA’s North American manufacturing headquarters. Ex. W at 4. By contrast, CSR’s promised Chicago facility was limited to the final assembly of cars manufactured elsewhere. Ex. EE at CTA000455.

It was therefore naive, if not absurd, for CTA even to “hope” that CSR’s and CNR MA’s common owner would even consider abandoning its Springfield headquarters simply to provide post-Contract jobs to Chicago. Indeed, it was then and had long been a matter of public record that “[CNR MA] is committed to developing a rolling stock manufacturing hub in Springfield, and with an investment of more than US \$60 million, making Massachusetts the center of our

North American transportation business. . . .” Ex. Z at 1. The Massachusetts facility is expected to keep Springfield residents “working well beyond . . . 2024.” Ex. AA.

The Finance Committee then voted to recommend to the Board of Directors that the Contract be awarded to CSR. Ex. S at CTA000023. The Board of Directors met at 10 a.m. and, among other things, enacted, without discussion, an omnibus ordinance approving nine different procurements, including the Award to CSR. Ex. BB at CTA000009—10. There was no discussion whatsoever of the Award during the Board meeting. Ex. BB. Nor did the Board appear to have any related written materials.

7. The Mayor’s March 9 Press Conference

An hour after the Board vote, Mayor Emanuel appeared at CTA headquarters to hold the press conference originally scheduled for March 7. Ex. U. The Mayor admitted that the Award was “an example of the city using its purchasing power to create local employment.” Ex. U. “It’s one thing to order new cars and the customers will get a great experience,” stated Mayor Emanuel, “[i]t’s another thing to order those cars and create great manufacturing jobs in the city of Chicago, and bring back rail-car manufacturing to its proper home.” Ex. U.

8. Post-Award “Due Diligence”

One of the odder aspects of this Procurement was CTA’s “due diligence” with the MBTA the day after the Board approved the Contract. On March 10, 2016, the staff, whose prior calls had supposedly gone unanswered, had no apparent trouble getting through to MBTA. Ex. Q at CTA000037. Although MBTA reportedly gave a favorable review of CNR MA’s performance, there appears to have been no discussion of CSR’s disqualification from even bidding on the MBTA project. Ex. Q at CTA000037. It is unclear why the Authority would even contact MBTA, given CSR’s admission in its Proposal that it “had no project in North America in the last five years.” Ex. H at CTA0000234.

9. The Award Debriefing

On March 17, 2016, Bombardier asked CTA to provide the debriefing customarily provided to an unsuccessful proposer (the “Debriefing”). Ex. GG. The Debriefing did not occur until April 8, 2016, only one business day before the Protest deadline. MacGregor Dec. ¶ 8. Even though CTA knew that Bombardier planned to travel to Chicago, CTA did not announce until April 7 that the meeting would last only 30 minutes. MacGregor Dec. ¶ 8. CTA insisted that the debriefing occur without outside counsel.

During the Debriefing, the Authority declined to provide any information regarding CSR. MacGregor Dec. ¶ 8. Instead, CTA focused on Bombardier’s

performance of prior projects. MacGregor Dec. ¶ 8. The Authority did not reveal when it obtained this information, none of which was contained in any revealed RFP materials or referenced in CTA's Recommendation or Finance Committee presentations. MacGregor Dec. ¶ 8. CTA's discussion of Bombardier's prior performance cannot be reconciled with the Recommendation's finding that other than price, Bombardier's proposal was substantially equal to CSR's.

10. The FOIA Request

On March 11, 2016, Bombardier served CTA with a FOIA request for documents related to this Procurement (the "FOIA Request"). Ex. FF. The Authority was subsequently informed that regardless of FOIA it had an independent duty to provide the same records in order to vindicate Bombardier's right to file this protest. Ex. GG.

The FOIA Request seeks a variety of relevant records including (a) RFP-related communications involving the Mayor and "local labor leaders"; (b) records relating to the Authority's evaluation of the proposals; (c) those concerning any pre-Award attempt to communicate with MBTA regarding CSR's performance there; (d) materials relating to the reasonableness of CSR's price; (e) CSR's proposal and BAFO; and (f) CTA plans to ensure compliance with FTA requirements. Ex. FF.

By April 1, the Authority had provided only one previously unavailable and non-public record: CTA's two-page Recommendation. In an effort to expedite the CTA production, Bombardier engaged in a lengthy telephone conference with the Authority's FOIA officer. Ex. RR. Even though Bombardier had previously identified the records it wished to be produced first (Exs. GG & II), Bombardier, as the Authority's requested, specified in writing the categories of records for immediate production. Ex. SS. The Authority then committed to producing six categories of records on a rolling basis during the week of April 4.⁹

CTA did not produce any additional records until April 5, when it provided 22 pages of documents recording CTA's March 6 and 7, 2016 contacts with CSR customers. On April 6, the Authority produced a heavily redacted copy of its Pre-Award Buy America Audit, and four pages of redacted confidentiality agreements. On Friday afternoon, April 8, CTA provided a CD containing excessively redacted excerpts from the Contract, including highly selective portions of CSR's Proposal and BAFO. As of the filing of this Protest, the Authority has failed to produce, among other things, (a) any communications involving the Mayor; (b) any Evaluation Committee work papers or any other records regarding its assessment of the two proposals; (c) CSR's Technical Specifications; and (d) the Independent

⁹ As set forth in its correspondence dated March 30, 2016, Bombardier objects to CTA's assertion of certain FOIA exemptions under which CTA has sought to justify withholding documents. Bombardier reserves its rights with respect to its objections. Ex. II.

Cost Estimate.¹⁰ While CTA appears to have produced at least some of its negotiation letters with CSR, those letters were not provided until the evening of April 11, 2016, just before this protest was to be submitted per CTA's rules.¹¹

11. Denial of Protest Extension

Despite its obstruction of Bombardier's FOIA Request, CTA denied Bombardier's extension of the Protest deadline. Taken together with the Authority's obstruction of the FOIA Request, the CTA's denial of any Protest extension had the effect of denying Bombardier a full and fair opportunity to mount this Protest. The circumstances of this denial suggest, that for some reason, CTA would like Bombardier to file this protest without the benefit of the full factual record.

On March 17, 2016, Bombardier first requested its extension, advising the Authority that the Protest would concern, among other issues, CTA's violations of the prohibition against state or local geographic preferences and of RFP confidentiality requirements. Ex. GG.

On March 18, the Authority denied the extension as "premature" and suggested that Bombardier renew its request after the Contract was signed. Ex. HH. After the Contract was signed, Bombardier, as requested by CTA, reiterated

¹⁰ On March, 2016, Bombardier served Mayor Emanuel's office with a FOIA request, seeking, among other things, his communications with CTA. None of these communications have been produced.

¹¹ Bombardier was not able to meaningfully review these materials produced late on April 11 and reserves its right to supplement this Protest with this material and any information subsequently produced.

its extension request for precisely the reasons outlined in its March 17 letter. Ex. OO. On March 31, only 7 business days before the Protest Deadline, CTA denied Bombardier's request without explanation. Ex. JJ. Inasmuch as no relevant circumstances had changed since March 18, when the Authority suggested that Bombardier seek the extension after the Contract was executed, it is likely that from the start CTA intended to deny any Protest extensions. Indeed, when Bombardier reiterated its request for an extension on April 8 in light of the CTA's own request for an extension of its FOIA deadline and in light of the CTA's excessive redactions, the Authority was unable to provide a legitimate reason for denying any extension of the Protest deadline. Ex. KK. Instead, CTA claimed only that "CTA's practice is not to extend the time in which to file a bid protest." Ex. KK. Presumably, that was also the "practice" on March 17.

ARGUMENT

I.

THE AWARD IS VOID BECAUSE THE CSR PROPOSAL WAS EVALUATED IN LIGHT OF LOCAL PREFERENCES

Because the Award is to be supported by U.S. funds, the Authority was obligated to comply with a variety of federal requirements. Among these are the FTA's and Office of Management and Budget's ("OMB") regulations prohibiting local agencies from evaluating proposals in light of in-state or local geographic preferences. FTA Circular 4220.1F, Chapter VI, 2.a(4)(g) (prohibiting

solicitations from “[s]pecifying in-state or local geographical preferences, or evaluating bids in light of in-State or local geographic preferences, even if those preferences are imposed by State or local laws or regulations”); 2 C.F.R. § 200.319 (“The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographic preferences in the evaluation of bids or proposals . . .”).¹² Consistent with these federal requirements, CTA’s own Procurement Policy & Procedures (“PPP”) prohibit “the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of Bids or Proposals for federally funded contracts.” PPP § 3.12.

Underlying these prohibitions is the principle that funds supplied by the rest of the nation should not be used to create a job or other preferences in the recipient’s community. A contract secured in violation of these requirements must be voided. 2 C.F.R. § 200.338; *City of Cleveland v. Ohio*, 508 F.3d 827, 833–34 (6th Cir. 2007) (affirming withdrawal of federal funds).

Both Mayor Emanuel and the Authority have conceded that the CSR proposal was, indeed, “evaluate[d] in light of in-state or local geographic preferences.” For example, on Sunday, March 6, 2016, before the CTA Board and

¹² Per 2 C.F.R. § 1201.1, the Department of Transportation has adopted the Office of Management and Budget’s (OMB) “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards” set forth at 2 C.F.R. part 200.

Directors had even considered the issue, the Mayor intended to announce that the Contract “will include new jobs as well as a multimillion-dollar investment in an assembling facility in Chicago—the culmination of the Mayor’s efforts, in conjunction with local labor leaders, to promote U.S. jobs, as part of the 7000-series procurement.” Ex. P.

On March 9, 2016, the Finance Committee was told that CSR’s commitment to build the Chicago plant was discussed “[w]hen we had the negotiations.” Ex. S at CTA000023. After being assured that, indeed, “we get a lot of jobs,” a Finance Committee member stated: “That’s good.” Ex. S at CTA000022.. There can be no question, then, that the Evaluation Committee and the Board itself evaluated this local preference commitment before voting the Award to CSR. Ex. S at CTA000020 (Chairman of the CTA Board, Mr. Alejandro Silva, stating “Is that facility going to be built in Chicago?”).

Shortly after the Award, Mayor Emanuel described the Contract as “an example of the city using its purchasing power to create local employment.” Ex. U. According to the Mayor, the Award would “create great manufacturing jobs in the city of Chicago, and bring back rail-car manufacturing to its proper home.” Ex. U.

Clearly, then, the Authority considered CSR’s proposal in light of its commitment to create jobs in Chicago and build a factory in Chicago. The Award thus runs directly afoul of both the FTA’s and the CTA’s prohibitions on

“evaluating bids or proposals in light of in-State or local geographic preferences.”

FTA Circular 4220.1F, Chapter VI, 2.a(4)(g). Where, as here, a recipient of federal funds violates this prohibition, federal funding may be denied for the project in question and even future projects. 2 C.F.R. § 200.338 (“If a non-Federal entity fails to comply with Federal statutes, regulations or the terms and conditions of a federal award, the Federal awarding agency . . . may take one or more of the following actions” including “(b) Disallow (that is, deny both use of funds and any applicable matching credit for) all or part of the cost of the activity or action not in compliance; (c) Wholly or partly suspend or terminate the Federal award;” or “(e) Withhold further Federal awards for the project or program.”). *Accord, City of Cleveland*, 508 F.3d at 833-34 (federal funds properly withdrawn where contract was in “contravention of federal regulations that prohibit the use of local hiring practices”). And, regardless of the circumstances, an illegal solicitation and award must be voided. *E.g., MAPCO Alaska Petroleum v. United States*, 27 Fed. Cl. 405, 416 (Ct. Cl. 1992) (“When a contract clause drafted by the Government is inconsistent with law, whether the appellant inquired, protested, accepted or otherwise assumed any risks regarding the same is not controlling; the impropriety will not be allowed to stand.” (internal quotation marks and citations omitted)).

II. **THE MAYOR’S INTERVENTION VOIDS THE AWARD**

As a state authority, CTA is, of course, required to be “separate and independent” from the City of Chicago. *Nolan v. City of Chicago*, 125 F. Supp. 2d 324, 337 (N.D. Ill. 2000). Acting independently, the Authority must award public contracts “to ensure the fair and unbiased evaluation of competing Proposals.” PPP § 1.3(B); *see id.* at 3.7 (“The procurement business of the CTA shall be conducted in a manner above reproach and with complete impartiality and without preferential treatment.”) And, CTA’s Board of Directors have a fiduciary duty to administer federal funds on an informed and independent basis. PPP § 8.4(B), (F). These fundamental requirements were violated by CTA’s skewing of the procurement procedures to implement the Mayor’s directive that federal funds be used to deny jobs to other communities.

In addition, the Evaluation Committee’s confidentiality obligations precluded post-RFP disclosures to the Mayor or “local labor leaders”. Even within CTA, “the information contained in the Proposals . . . shall not be made available to the public or to anyone in the CTA not required to have access to the information in the performance of his or her duties” (PPP § 4.28), namely, the Evaluation Committee, the Project Manager, the DBE representative, and others that may advise the Committee or participate in the review of proposals, each of whom “must sign a Confidentiality Agreement prior to their involvement in the

RFP review process.” PPP § 8.2(B); *see also* Ex. A at 14 (“All Proposals and evaluations will be kept strictly confidential throughout the evaluation, negotiation, and selection process. Only members of the Evaluation and Selection Committee and other Authority officials, employees, and agents having a legitimate interest will be provided access to the Proposals and evaluations during this period.”).

According to CTA’s Code of Ethics, “[n]o current or former officer or employee shall use or disclose other than in the performance of his/her official duties and responsibilities, or as may be required by law, confidential information gained in the course of or by reason of his/her CTA position or employment.” CTA Code of Ethics § 2.7.¹³ Specifically, each CTA participant in the evaluation “must keep confidential all of the proposal materials . . . and all proposer information” and may not “disclose the names of the proposers . . . the number of proposers, cost or price information, technical information or any other proposer or proposal information to unauthorized CTA personnel or to anyone outside the CTA without specific written permission from the CTA Purchasing Department Staff Committee Chairman.” Ex. CC. Each member of the Evaluation Committee was also prohibited from “discussions about this procurement with anyone, including the Evaluation and Selection Committee personnel, unless the CTA Purchasing Department Staff Committee Chairman is present in the conversation or has

¹³ CTA Code of Ethics defines “confidential information” as “any information that may not be obtained pursuant to the Illinois Freedom of Information Act, as amended.” CTA Code of Ethics § 2.7.

authorized in writing that the conversation may take place without her presence.”

Ex. CC.¹⁴

Notwithstanding these requirements, the Authority’s administration of the RFP unquestionably involved disclosures of confidential information to unauthorized persons, such as the Mayor and “local labor leaders”. After all, on March 6, 2016, the Mayor effectively “awarded” the Contract to CSR before CTA had completed, and the Board had received, much less voted on, the Recommendation: “CTA Board on Wednesday will award a contract for more than 800 new rail cars,” that included “new jobs, as well as a multimillion-dollar investment in an assembly facility in Chicago.” Ex. P. Of course, the Mayor’s knowledge of these facts could only have been obtained by a breach of the Evaluation Committee’s confidentiality obligations. And, to make matters worse, the Evaluation Committee and the Board – without even questioning the circumstances surrounding the Mayor’s prior announcement – passively followed his lead.

It is also clear that to secure the new plant for Chicago, Mayor Emanuel intervened in the evaluation process to ensure that CSR prevailed. Since 2014, the Mayor had lobbied for precisely this result, and “privately hoped for the Chinese firm to win” the CTA procurement. Ex. T. When questioned about the connection

¹⁴ Violations of these confidentiality obligations include “discharge and any other civil and/or criminal sanctions provided by law.” Ex. CC.

between the Award and his attempts to secure Chinese investment, “Emanuel stopped well short of denying those rumors that awarding the pact to CSR is linked to the city’s quest for Chinese investment case for other deals.” Ex. T.

Accordingly, because CTA disregarded even its most basic standards of conduct when it prematurely and unlawfully disclosed information about the Award to Mayor Emanuel and permitted him to dictate the results, the Award must be vacated.

III. CTA VIOLATED ITS OWN EVALUATION CRITERIA

Under accepted procurement practice and as required by its own rules, the Authority had to administer the RFP without bias and in “strict conformity” with its own published requirements, including the specified evaluation criteria. The CTA could not consider unspecified criteria in rendering the Award. Ex. A at 18–19. Any evaluation based on inconsistent factors requires that the Contract be rescinded. *Matter of Smith of Galetton Gloves, Inc.*, B-271686 (Comp. Gen.) (1996) (all proposals must be “evaluated on the same basis and consistent with the solicitation requirements”).

In violation of these basic requirements, CTA secured the promised Chicago investments by structuring and administering the Procurement to provide CSR with improper advantages by, among other things, (a) violating the RFP requirement that value be accorded precedence over price; (b) breaching the RFP

requirement that the evaluation be limited to CSR's North American history; (c) giving a preference to jobs in Chicago over jobs in the United States; and (d) arbitrarily applying another criterion that did not account for the loss of existing jobs. In doing so, CTA rendered the Award void. PPP § 8.4(A). *Matter of New World Technology*, B-237158 (Comp. Gen.) (1990) ("An irregularity in a bid resulting in benefits to a bidder not extended to all bidders by the invitation renders the bid nonresponsive.").

1. Technical Proposal (Evaluation Criterion No. 1)

The RFP's first evaluation criteria required proposals include a "Technical Proposal" that "provide[d] the Proposer's best technical solution to meet the Technical Specifications and represent[ed] the Proposer's best value to the Authority." Ex. A at 7. Because CTA has failed to produce any portion of CSR's Technical Proposal, Bombardier is limited in its capacity to challenge to Ms. McCormack's suggestion that CSR's and Bombardier's proposals were substantially equal. However, history suggests that CSR's technical proposal was inferior to that of Bombardier. Bombardier has never been disqualified in a rolling stock procurement in the US during the last 5 years. Each of CSR's prior technical proposals in the United States received the lowest ratings of any proposer. Ex. V at 17; Ex. W at 7-8.

In 2012, BART gave CSR the lowest technical score of five proposers. Ex. V at 17. CSR's rating was 200% lower than the second lowest score and more than 650% lower than the highest. Ex. V. at 17. Two years later, the MBTA rated CSR's proposal "unacceptable" with respect to MBTA's technical evaluation. Ex. W at 7-8. According to the MBTA technical evaluation, CSR's proposal was "technically deficient and is considered to pose a significant risk to the Authority." Ex. DD at 2. It "demonstrated an approach that is considered to be unacceptable in quality," and that a "major revision to the Proposal would be necessary before it could be considered for acceptance." Ex. DD at 1. The MBTA went on to note that "there is little confidence that CSR could meet the minimum requirements" even after such a revision. Ex. DD at 2. CSR was also rated "unacceptable" with respect to its manufacturing, quality assurance and overall. Ex. W at 8. The MBTA did not rate any other proposer unacceptable in any category. Ex. W. at 8.

Bombardier, however, received high marks with respect to its technical proposal from both BART and MBTA. Ex. V at 17; Ex. W at 8. Both BART and MBTA had given Bombardier the highest technical score given to proposers. Ex. V at 17; Ex. W at 8. These facts apparently were not brought to the Evaluation Committee's or the Board's attention. Ex. S.

Despite CSR's troubling past evaluations, CTA staff recommended that the Board award the Contract to CSR. Ex. S at CTA000016. The Board was not told

of CSR's historical lack of technical expertise. Nor was the Board presented with any aspect of Bombardier's technical proficiency. Due to its recent completion of the 5000-series contract, Bombardier has direct knowledge of all aspects of CTA's operations and maintenance, and Chicago's weather requirements. There can be no doubt, therefore, that Bombardier is in the best position to produce technically sound rail cars. Thus, history suggests that Bombardier's technical proposal was superior to CSR's technical proposal.

2. Schedule (Evaluation Criterion No. 2)

The second RFP criterion required "Proposers [to] demonstrate the schedule logic and how the Proposer will manage the schedule to ensure delivery and acceptance of the Rail Cars by the Contract deadlines." Ex. A at 6. Again, CTA suggested to the Finance Committee that the two schedules were substantially the same. Ex. S at CTA000016. Now that the Contract has been made public, however, there is no doubt that Bombardier's accelerated schedule is far superior to that proposed by CSR.

Bombardier's proposal committed to deliver cars to CTA one year prior to the RFP's own delivery deadline. MacGregor Dec. ¶ 2. This would have reduced costs for CTA project management, operation, maintenance and engineering staff, as well as outside consultants. In addition, CTA would have saved money with respect to its federal loan because it would pay a year less in interest.

By contrast, the Contract accords CSR a delivery schedule that is almost a year behind that proposed by Bombardier. Ex. EE at CTA000455. This second most important criteria necessarily weighs heavily in Bombardier's favor.

3. History of Past Performance for the North America Rail Transit Market (Evaluation Criterion No. 3)

The RFP's Past Performance criterion required each proposer to "list . . . all contracts of similar magnitude and nature [to that required by the RFP], including design and assembly of electrically self-propelled Rail Cars for the North America Rail Transit Market, as a prime contractor over the past five (5) years which demonstrates the Proposer's technical proficiency." Ex. A at 4–5. A "transit market" is that for mass commuter rail service within an urban area. Ex. N at 13. As noted above, the CTA rejected CSR's request that "its performance within the international market be accepted by CTA as a demonstration of CSR[']s technical proficiency." Ex. E at 3. Consistent with the rules, Bombardier limited its own history to its recent transit experience in North America (New York, San Francisco, Toronto, Montreal and Chicago). MacGregor Dec. ¶ 2.

Despite CTA's express instruction not to do so, CSR's "History of Past Performance" consisted entirely of non-responsive claims regarding its performance of contracts that were (a) all outside of North America, (b) all too

small to be of “similar magnitude”¹⁵ and (c) frequently more than five years old.¹⁶

Ex. H.

Additionally, CSR’s lack of experience in North America has critical safety implications. CSR has yet to manufacture a rail car that can meet America’s highly developed safety and quality standards. For example, the RFP requires that the proposer comply with ASME Standard RT-2. This standard is not only to ensure that rail cars are structurally sound, but that they are appropriately crashworthy and safe for the North American market. Compliance with this standard is critical for the safety of passengers. Based on its lack of North American experience, CSR necessarily has no experience implementing and complying with ASME Standard RT-2.

Equally serious was CSR’s failure to disclose, and the staff’s evident failure even to uncover, CSR’s disqualification from the 2014 MBTA procurement. As we have seen, as part of its “History”, CSR submitted a June 19, 2015 affidavit falsely claiming that “there is no debarment, suspension, and other ineligibility . . . in the last five (5) years.” Ex. H at CTA000264. CSR failed to reveal, as Criterion

¹⁵ Of the 23 non relevant contracts listed in CSR’s past performance section, 17 contracts were for less than 200 cars with 7 contracts that called for less than 100 cars. Ex. H at CTA000237—259.

¹⁶ CSR’s experience in Argentina consists of delivering 20 passenger locomotives, Ex. LL, 25 nine-car electrical multiple unit cars (“EMU”), Ex. MM, and 30 six-car EMUs, Ex. MM. Even if the RFP permitted international work to be considered, which it does not, CSR’s experience in Argentina is far from a “contract of similar magnitude and nature,” as required by the RFP with respect to a proposer’s history of past performance that can be considered. Ex. A. at 4–5. In addition, it has been reported that Argentina financed its purchase from CSR with a loan from the Chinese Government covering 85% of the purchase price. Ex. NN. Unsurprisingly, CSR’s Argentinean customer had nothing bad to say about CSR given the fact that Argentina owes millions of dollars to CSR’s owner.

No. 3 required, that it had been declared ineligible for the MBTA contract. Ex. W at 8.

To make matters worse, the Finance Committee evaluated the Award based on Ms. McCormack's false representation that CSR had won the MBTA contract. This flew in the face of CSR's admission that it "had no project in North America in the last five years." Ex. H at CTA000234.

This wealth of inaccurate information infected the Award to CSR. Indeed, rather than informing the Finance Committee that the "Past Performance" section of CSR's proposal was entirely non-responsive and otherwise fraudulent (and that the Proposal had to be rejected on that ground), Ms. McCormack made that history one of the centerpieces of her March 9 presentation. Ex. S at CTA000019. This whole cascading series of false statements and omissions undoubtedly influenced the Finance Committee's conclusion that the two proposals were in every respect substantially equivalent and that CSR could be awarded the Contract simply because it offered a lower price. In sum, there can be no doubt that Bombardier's proposal was superior with respect to its Past Performance for all of the reasons set forth above.

4. U.S. Employment Plan (Evaluation Criterion No. 4)

The RFP's U.S. Employment Plan evaluation criterion gave credit for only the number of new jobs that would be created by a proposal while providing none

for those that would be preserved. As seems to have been intended, this irrational standard created a preference for new entrants to the North American market who had never created jobs here and an unfair disadvantage to experienced manufacturers, like Bombardier, who already have a large American workforce and thus could not possibly create as many new American jobs. Equally arbitrary is the fact that CTA's "new job" criterion did not account for the American jobs that would be lost if CSR, rather than Bombardier, were given the Award.¹⁷ The CTA's definition of what it would count as a job pursuant to its U.S. Employment Plan criteria is irrational and conflicts with the CTA's supposed goal of using its RFP to create jobs in the United States. *See Lab. Corp. of Am. Holdings, v. United States*, 116 Fed. Cl. 643, 650-51 (Fed. Cl. 2014) (agency must act in a rational manner in evaluating bid proposals). It is entirely consistent, however, with CTA's true objective of destroying existing jobs in other American communities in order to fulfill Mayor Emanuel's "Build Chicago" agenda. Ex. M.

According to the RFP, the "purpose of the U.S. Employment Plan is to capture relevant information about the number, description of and access to U.S. jobs created by the Proposer." Ex. A. at 30. To effectuate this purpose, the RFP required bidders to provide, among other things, the number and dollar value of

¹⁷ In March 2015, Kawasaki Rail Car Inc. raised this very issue in writing to the CTA, but CTA did not agree to allow retained jobs to be included in the U.S. Employment Plan. Ex. D at 8.

new jobs to be created, and “the commitment the Proposer will make to achieve that level of job creation in the United States.” Ex. A at 30.

Bombardier’s proposal to create 339 jobs and retain 179 more would have ensured 518 American jobs, more than twice the number of CSR’s proposal. MacGregor Dec. ¶ 2. And, Bombardier’s proposal would have indirectly created thousands more American jobs over the life of the project, for a total of 6,684 jobs compared with CSR’s 400 to 500 direct and indirect jobs. *Compare* MacGregor Dec ¶ 2, *with* Ex. S at CTA00022. Even though Bombardier’s proposal dwarfs that of CSR, the two proposals were again seem to have been “substantially the same.” Ex. S at CTA000019.

Nevertheless, that Criterion No. 4 was intended to give CSR an advantage. Without any rational basis, the RFP required that each “Proposer’s U.S. Employment Plan . . . not include current jobs in existence or jobs that are to be sustained or continue as a result of the award of the Contract.” Ex. A. at 30. In other words, the CTA would not count as a “U.S. Job” a worker employed in Bombardier’s Plattsburgh, New York manufacturing plant, even if that employee would work exclusively on the 7000-series rail cars, and even if Bombardier continued his or her employment solely due to the award of the Contract.

By constricting the definition of “created jobs” in this fashion, the Authority furthered Mayor Emanuel’s stated goal of using federal funds to create Chicago

jobs regardless of the harm caused to other American communities. Ex. M; Ex. P; Ex. U. As a result, CTA's actions with respect to its U.S. Employment Plan were a violation of federal law and, in any case, arbitrary and biased. *See Lab. Corp.*, 116 Fed. Cl. at 650 (granting injunction prohibiting government from entering into contract with bidder where government acted irrationally in considering bids). Therefore, Bombardier must have received a higher score with respect to its U.S. Employment plan based on the criteria in the RFP because Bombardier proposed creating double the amount of United States jobs compared with CSR, not even including jobs that would be retained.

5. Managerial Approach (Evaluation Criterion No. 5)¹⁸

The RFP obligates each proposer to provide information concerning its managerial approach including “planned organization charts for the project with relevant reporting relationships and descriptions.” Ex. A at 5. CSR's managerial approach, as set forth in its proposal, reveals that it suffers from its lack of U.S. experience. For example, CSR's Executive Level General Manager Li Yongle (who is directly responsible for CSR's performance), Schedule Manager Wang Tao, Project Engineer Liu Yuwin, System Integrator Han Zhiwei, Methods Engineering Manager Song Yuqing, Procurement Managers Song Yongjun and Wang Zhenhu, RAMS Engineering Manager Zhang Zhilong, and Industrial Design Manager Xiao

¹⁸ This criteria has equal weight to the U.S. Employment Plan. Ex. A at 17.

Zhi, are all based in China. Ex. I at CTA000304—05.¹⁹ Bombardier proposed only individuals with experience in the U.S. market, some of whom have experience with CTA itself.

By contrast, Bombardier’s managerial approach is a “strength” of its proposal, as CTA recognized during the April 8, 2016 debriefing. MacGregor Dec. ¶ 9. During the debriefing call, CTA representative Ms. Williams-Baxter conceded that Bombardier not only had previous managerial expertise with respect to CTA, but also that in evaluating the proposals for “managerial approach,” Bombardier’s was superior. MacGregor Dec. ¶ 9. It was, therefore, improper for the CTA staff to suggest to the Finance Committee that CSR and Bombardier were substantially equal in this respect.

* * *

After evaluating the proposals according to the five criteria in the RFP, the CTA was required to determine which proposal would provide the “best value”. Ex. A at 17–18. Price cannot be the controlling factor unless the “[p]roposals are determined to be substantially equal.” Ex. A at 18. However, as set forth above, the proposals could not possibly have been substantially equal. Accordingly, to the extent that price, rather than local jobs, controlled the Board’s Award to CSR, the Contract must be voided on that ground alone. *Aluminum Co. of Am.*, 71 Comp.

¹⁹ It is impossible for Bombardier to assess these individuals’ qualifications because their resumes have been redacted. Ex. I.

Gen. 245, 246 (1992) (“[I]n order to maintain the integrity of the competitive bidding system, a nonresponsive bid may not be accepted, even if, as here, the government could save money by accepting the bid.”).

In any case, CTA’s evaluation of CSR’s proposal according to arbitrary and undisclosed criteria also requires the Contract’s cancellation. *Concept Automation, Inc. v. United States*, 41 Fed. Cl. 361, 369 (Ct. Cl. 1998) (“It is patently unreasonable for a government agency to state a requirement on the one hand, and then treat it as malleable in awarding the contract to a bidder that did not comply with that requirement.”); *Lab. Corp.*, 116 Fed. Cl. at 651 (enjoining VA from proceeding with bid award in part because procurement lacked “a rational basis because the VA’s evaluation of the proposals differed significantly from the process disclosed in the solicitation”). The FTA Circular, for example, required CTA to “identify all factors to be used in evaluating bids or proposals.” FTA Circular 4220.1F, Chapter VI, 2.b. Illinois law similarly obligated CTA to evaluate proposals “pursuant only to criteria publicly announced in advance.” 720 ILCS 5/33E-1.

Finally, CTA’s own PPP and the RFP itself specifically prohibited the Authority’s consideration of “[f]actors not specified in the RFP.” PPP § 8.4(A); Ex. A at 18–19; (“Any selection of a Proposal from a responsible Proposer shall be

made by consideration of *only* the Proposal Evaluation Criteria & Process, as contained in Section S, of the Instructions to Proposers.”).

IV.
CTA FAILED TO DETERMINE WHETHER
CSR’S PRICE WAS REASONABLE

CTA can contract only with responsible contractors. PPP §4.23(A). A prospective contractor cannot be responsible if its price is “so low as to appear unreasonable or unrealistic.” *Id.* at §4.32 (methods for determining whether a “proposed price is fair and reasonable”).

The FOIA production to date contains no evidence that the Authority made any such inquiry.²⁰ Certainly, neither the staff Recommendation nor its briefing of the Board of Directors made any reference to the reasonable cost issue. Having established a reasonable cost evaluation requirement, CTA was, of course, obligated to evaluate it. PPP § 8.4(A). CTA’s apparent failure to conduct an evaluation specifically required by its own rules requires that the Award be vacated. *Matter of Smith of Galetton Gloves, Inc.*, B-271686 (Comp. Gen.) (1996) (all proposals must be “evaluated on the same basis and consistent with the solicitation requirements” (internal citations omitted)).

There are a variety of reasons to conclude that if the Authority had inquired into CSR’s cost structure, it would have determined that CSR’s proposal, taken as

²⁰ CTA did produce a Pre-Award Buy America Audit. That review, however, was limited to recent transactions in the market and not on CTA-specific information.

a whole, was uneconomical and necessarily subsidized by the People's Republic of China.

First, CSR's proposal is 5.7% less than Bombardier's January 2014 low bid in response to the 7000-series IFB, even though (a) costs have increased at least 2% since then; (b) the IFB called for less complex rail cars; and (c) Bombardier enjoyed a significant cost advantage due to its pre-existing 5000-series contract. MacGregor Dec. ¶¶ 6–8, 10.

Second, CSR's \$1.58 million per car base order price is far lower than those proposed by railcar manufacturers for recent and equivalent projects. MacGregor Dec. ¶ 8. Per car base order prices for the MBTA, AnsaldoBreda S.p.A., Miami Metrorail and the Washington Metropolitan Area Transit Authority contracts were respectively \$1.9 million, \$2.19 million and \$3.46 million. MacGregor Dec. ¶ 8.

Third, in order to secure the Contract, CSR and affiliated entities committed to a variety of superfluous costs, which were not included in CSR's proposal, including its investments in an unneeded \$40 million Chicago final assembly plant. CSR's illegal and completely unnecessary Chicago job creation expenditures increased the real cost of CSR's per car base order price.

Fourth, CSR's uneconomic offer to CTA follows on the heels of the CNR MA's below market price for the MBTA contract. The MBTA price was \$200 million below the minimum set by the MBTA's Independent Cost Estimate.

Inasmuch as both companies are controlled by the same entity, CSR's below-cost proposal, together with its Chicago job-creation expenditures, is clearly part of a pattern.

The Authority's apparent failure even to inquire into these circumstances necessitates voiding this Award.

V.

THE AUTHORITY HAS DENIED BOMBARDIER A FULL AND FAIR OPPORTUNITY TO PROSECUTE THIS PROTEST

CTA's failure to follow fairly and in good faith its own Protest procedures is an independent ground for vacating the Award. *See* PPA § 16.6(D)(iii). CTA has denied Bombardier a full and fair opportunity to prosecute its bid protest on a complete record. *Concept Automation*, 41 Fed. Cl. at 366 (describing purpose of bid protest scheme to make government procurement more fair and efficient); United States Government Accountability Office, "Bid Protests at GAO, 8th Ed. (2006) (providing guidance for ensuring fair bid protest procedures). First, the CTA has unreasonably delayed its response to Bombardier's FOIA Request, all the while recognizing Bombardier's urgent need for responsive documents. Second, with full knowledge that Bombardier intended to file a Protest and that Bombardier had an outstanding FOIA Request, CTA refused to provide Bombardier with an extension to file this protest as a matter of "practice." Ex. KK. CTA's actions have undoubtedly prejudiced Bombardier.

CTA has failed to produce documents to Bombardier in a timely fashion. On March 11, 2016, Bombardier sent a FOIA Request to the CTA seeking 10 categories of documents relating to Related to CTA's RFP No. C14FI101554098 for the procurement of 7000-Series railcars. Ex. FF. Despite Bombardier's subsequent correspondence reiterating its urgent need for the productions, CTA had only produced one document previously unavailable to Bombardier until April 5, 2016 when CTA produced 22 redacted documents. And when CTA finally began to produce responsive documents, the productions were incomplete and excessively redacted. For example, one business day before CTA required this Protest be filed, CTA provided Bombardier with an excessively redacted and incomplete copy of CSR's BAFO. In addition, CSR's technical proposal was missing from the production with no indication of why it was not produced or when it will be produced. The PPP explicitly recognizes that bid proposals will be produced in the event of a bid protest. PPP § 8.4(C). However, CTA has failed to produce a complete copy of CSR's proposal (with appropriate redactions) a month after it was first requested knowing it was necessary for Bombardier to file a protest on time.

Second, Bombardier had advised CTA as early as March 17 that it intended to file a bid protest and requested an extension. Ex. GG. CTA responded that it believed that Bombardier's extension request was premature until CTA signed the

contract with CSR. Ex. HH. On March 29, the day after the contract was signed, Bombardier renewed its request for an extension in order to file a protest on a complete factual record. Ex. OO. CTA denied Bombardier's request for an extension and when probed as to the reason, CTA stated that its "practice is not to extend the time in which to file a bid protest." Ex. KK. While CTA claimed that its bid protest rules in the PPP operate separately from CTA's response to FOIA requests, CTA did not provide any justification for acting in a way that deprived Bombardier from a full and fair opportunity to prosecute its Protest.

VI.

THE AUTHORITY MUST REIMBURSE BOMBARDIER FOR ITS COSTS

The Authority's failure to follow its own evaluation criteria here also requires it to reimburse Bombardier for its costs of nearly \$2 million incurred to date in preparing its Proposal and this Protest. In Illinois, it is well settled that an "unsuccessful bidder on a public works project who submits the best responsive bid" is entitled "to recover from the public body the expenses incurred in preparing and presenting that bid." *State Mechanical Contractors, Inc. v. Village of Pleasant Hill*, 477 N.E.2d 509, 513 (Ill. App. 1985); *see also CNA Corp. v. United States*, 83 Fed. Cl. 1, 11 (Ct. Cl. 2008) ("Bid preparation and proposal costs can be awarded by courts as an appropriate way to try to compensate, at least in part, a victim of unjust governmental action during the procurement process."). A proposer is also entitled to its protest costs when, as here, that party has been

subjected to “arbitrary procurement actions,” such as through the application of “unstated evaluation criterion.” *Lab. Corp. of America Holdings v. United States*, 116 Fed. Cl. 643, 650, 655, 656 (Ct. Cl. 2014). This is what has happened here. To date Bombardier has incurred nearly \$2 million in costs as a result of this unlawful Procurement. MacGregor Dec. ¶ 4. These fees will only increase as Bombardier continues to challenge the CTA’s unlawful award. Because, as explained above, Bombardier’s proposal necessarily scored higher on all five of the RFP’s evaluation criteria, and therefore was the “best responsive bid” to CTA’s RFP, Bombardier is entitled to these costs here.

CONCLUSION

For the foregoing reasons, Bombardier requests CTA (a) immediately issue a stop work order for the Contract; (b) terminate the Contract; (c) disqualify CSR as a fraudulent, non-responsible and non-responsive bidder; (d) re-evaluate the proposals and award the Contract to Bombardier; (e) reimburse Bombardier's for its expenses relating to its Proposal and Protest , which now total nearly \$2 million; and (f) award any such other relief to which Bombardier may be entitled. In any event, pursuant to Section 16.6(c) of the PPP, the CTA should suspend its contract with CSR pending the adjudication of this bid protest.

Dated: Chicago, Illinois
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JONES DAY

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