Memorandum

U.S. Department
of Transportation
Federal Transit
Administration

Subject: Report of Investigation
Houston METRO—Buy America & Procurement

Date: SEP - 3 2010

From: Kerry L. Miller, Assistant Chief Counsel
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Reply to Attn. of: Jayme L. Blakesley

To: Dorval R. Carter, Chief Counsel

I. INTRODUCTION

On April 23, 2010, the Federal Transit Administration (FTA) initiated an investigation to determine whether the Metropolitan Transit Authority of Harris County, Texas (Houston METRO or METRO) complied with FTA's Buy America and procurement rules when it entered into contracts with Construcciones y Auxiliar de Ferrocarriles (CAF) to purchase Light Rail Vehicles (LRVs) for several federally funded projects. At your request we reviewed the documents supplied to FTA by Houston METRO, purporting to be all documents related to METRO's procurement of 103 light rail vehicles and subsequent sole source procurement of two additional vehicles from CAF.[1] During our four-month investigation we have gathered, reviewed, and analyzed more than 14.2 Gigabytes of information provided by Houston METRO. This Report of Investigation explains and documents our findings.

II. SUMMARY

We have found three substantial violations of FTA's Buy America and procurement rules:

a. METRO and CAF violated FTA's Buy America requirements. This began with METRO's release of a Request for Proposals (RFP) that stated FTA's Buy America requirements did not apply to the procurement; continued with METRO's unsupported evaluation of the various offeror's Buy America compliance, including the Certificate of Compliance submitted by CAF; and culminated with METRO's decision not to require CAF to meet its contractually mandated Buy America obligations and to circumvent the Buy America requirements by entering into a separate, locally funded contract with CAF for the pilot vehicles;

b. METRO violated FTA's competitive procurement rules when it chose to negotiate with one of the offerors, CAF, to the exclusion of all other offerors, and allowed that offeror to continue revising its price while refusing to allow other offerors the opportunity to present their Best and Final Offers (BAFOs); and

[1] Affidavit of George Greanias, Acting President and CEO, Houston METRO (July 26, 2010).

c. METRO's LRV procurement was flawed due to the sum of many failures, including the lack of an adequate procurement plan, the lack of an adequate source selection evaluation plan, METRO's failure to disclose all evaluation factors in the solicitation, METRO's failure to inform potential offerors of the relative importance of those factors that were disclosed in the evaluation, METRO's use of undisclosed changes in evaluation factors, and METRO's failure to perform a complete best value analysis.

In addition to being violations of the law, these findings describe an unfair procurement. METRO's actions resulted in less than full and open competition for a several-hundred-million-dollar LRV contract. Not only did it give CAF an unfair advantage, but by acquiescing to CAF's plan to produce pilot vehicles in Spain, METRO's actions had the effect of moving work from the United States to Spain.

III. BACKGROUND

The American public has entrusted FTA with many billions of dollars in grant and acquisition funds and rightly expects that FTA will act as an effective steward of these funds to ensure a safe, efficient, secure, accessible and convenient transportation system.

In order to maintain public confidence in the public procurement process and in the integrity of public procurement employees, public procurements should be conducted in a manner above reproach, with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct.

To this end, and as part of its stewardship obligations to the American public, FTA is responsible for ensuring that Federal funds are used responsibly and consistent with legal requirements.

Two of the most fundamental of these legal requirements are that grantees that enter into contracts using FTA assistance do so in a manner that affords full and open competition to all, and that goods purchased with FTA assistance are produced in the United States.

The requirement of full and open competition not only advances the goal that the public's money should be spent in a way that maximizes competition, thereby resulting in the best value for taxpayer dollars, but also that the procedures used to conduct the procurement are fair, transparent, and consistently applied.

The purpose of this investigation was to determine whether Houston METRO[2] followed Federal procurement and Buy America rules when it awarded two contracts to CAF to produce LRVs for several federally funded projects.

[2] Throughout this memorandum, when discussing the light rail vehicle procurement, the terms "Houston METRO" and "METRO" include the Metropolitan Transit Authority of Harris County, Houston Rapid Transit JV, Metro Solutions, Washington Group International, Washington Group Transit Management Co., Parsons Transportation Group, and all other METRO limited liability companies, affiliates, and agents.

The grant funds brought into question by this investigation include three New Starts[3] projects—the North,[4] Southeast,[5] and University[6] Corridors—and one grant pursuant to the American Recovery and Reinvestment Act of 2009[7] (ARRA). Of the three projects, the North and Southeast Corridors are closest to eligibility for a Full Funding Grant Agreement, having entered into Final Design in August 2009. The University Corridor project has entered into Preliminary Engineering.

In addition to the LRVs needed for the North, Southeast, and University Corridor projects, METRO intended to replace the 19 LRVs currently operating on its existing Red Line. This portion of the LRV procurement was to be funded with a $64,000,000 grant awarded by FTA under ARRA.[8] Thus, the projects for which Houston METRO is seeking Federal participation will require 104 LRVs and the use of up to $205 million in Federal funds.[9]

METRO is delivering its projects through an innovative project delivery method whereby a Facility Provider, comprised of a team of engineering, construction, construction management, and vehicle manufacturing firms, designs and expedites construction of several rapid transit improvements throughout Houston. The Facility Provider is responsible for procuring the LRVs and operation and maintenance of the North and Southeast Corridors.[10] METRO initially engaged the Washington Group Transportation Management Corporation (Washington Group) as its Facility Provider. However, on April 30, 2008, METRO terminated its relationship with Washington Group and engaged Parsons Transportation Group (Parsons) as its Facility Provider.[11] Although the light rail vehicle procurement was conducted in the name of METRO's then-Facility Provider, Washington Group, METRO made it clear that Washington Group was to defer to METRO on all LRV procurement issues.[12]

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[3] New Starts projects develop according to the terms of FTA's Major Capital Investment Grant Program. 49 U.S.C. § 5309. New Starts projects are those whose sponsors are requesting $75 million or more in New Starts funds, or anticipating a total capital cost of $250 million or more. 49 U.S.C. § 5309(d).
[4] The North Corridor project consists of a 5.2-mile, eight station, light rail transit (LRT) line from the existing University of Houston-Downtown station in the Houston central business district to the Northline Mall Transit Center. This project requires the purchase of 24 LRVs.
[5] The Southeast Corridor project consists of a 6.5-mile, thirteen station, LRT line from the Houston central business district to the Palm Center in the vicinity of Martin Luther King, Jr. Boulevard/Griggs Road. This project requires the purchase of 29 LRVs and the construction of a maintenance facility.
[6] The University Corridor project consists of an 11.3-mile, 19-station, LRT line from the Hillcroft Transit Center to the Eastwood Transit Center. This project includes the purchase of 32 LRVs.
[7] Pub. L. 111-5.
[8] See Project No. TX-96-X017-00.
[9] We reached our estimate of $205 million by adding the $64 million from the ARRA grant to $141 million METRO anticipates receiving from FTA's Major Capital Investment Program (New Starts). The $141 million New Starts money is the rolling stock portion of three Full Funding Grant Agreements sought by METRO for its North and Southeast Corridor (approximately $91 for LRVs, combined) projects and its University Corridor (approximately $50 million for LRVs) project.
[10] *Annual Report on Funding Recommendations, Fiscal Year 2011, New Starts, Small Starts, and Paul S. Sarbanes Transit in Parks Program, Report of the Secretary of Transportation to the United States Congress Pursuant to 49 U.S.C. 5309(k)(1)* at A-91.
[11] Letter from Frank J. Wilson, President and Chief Operating Officer, Houston METRO, to Houston METRO employees (April 30, 2008).
[12] *See*, E-mail from John Coulter, Manager of Systems, Infrastructure & Service Delivery, METRO, to Navin Sagar, Senior Director of Engineering, METRO (June, 29, 2007, 7:56 AM) ("METRO will chose the vehicle supplier and WGI [Washington Group International] must accept the decision and operate the vehicles."); E-mail from Bryan Pennington, Senior Vice President, Engineering & Construction, METRO, to Drew Masterson, Managing Director, First Southwest Co. (July 5, 2007, 4:45 PM) ("Strictly speaking this will be a WGI procurement but we will want to 'control', with WGI

The project delivery method utilized by Houston METRO was a form of Public-Private Partnership (PPP). As such, on May 25, 2007, FTA selected the North and Southeast Corridor projects to participate in the Public-Private Partnership Pilot Program (Penta-P), a program intended to demonstrate the advantages and disadvantages of PPPs for certain new fixed guideway capital projects funded by FTA by studying whether, in comparison to conventional procurements, PPPs better reduce and allocate risks associated with new construction, accelerate project delivery, improve the reliability of projections of project costs and benefits, and enhance project performance.[13] Penta-P allowed FTA "to relax certain requirements . . . applicable to major capital projects funded by FTA."[14] However, as FTA stated in a February 26, 2008, letter, "[w]hile FTA may confer certain benefits on Houston METRO through Penta-P, these benefits do not include a waiver of FTAs Buy America requirements or any other applicable Federal cross-cutting requirements."[15]

a. Light Rail Vehicle Procurement

Houston METRO initiated the LRV procurement on August 31, 2007, when it released an RFP that called for a base order of 103 LRVs with an option to purchase 75 more.[16] Houston METRO describes its procurement process in its June 10, 2010, letter to FTA:

> The RFP informed proposers that a vehicle contractor would be selected using a two step process. Step 1 would consist of a review of the technical proposals for responsiveness to the requirements identified in the RFP.

Those firms meeting the Step 1 requirements would be invited to participate in Step 2, which would involve the submission of pricing and the negotiation of full scope and terms and conditions.[17]

According to the RFP, "[t]he evaluation process and criteria to be used in Step-2 will be shared with those Contractors selected for Step-2 consideration." METRO and Washington Group supplemented the RFP by issuing six Addenda between September 21, 2007, and April 8, 2008.

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ultimately taking 'responsibility' for the vehicle."); E-mail from Ron Chance, Washington Group, to Brian Middleton, Phase 2 Lead Negotiator, Booz Allen Hamilton (September 4, 2007, 9:48 PM) ("My thought is WGTMC [Washington Group Transit Management Co.] has to project itself as the lead even if it is Metro's approach."); E-mail from Dennis Hough, Director of Program Initiation Planning, Engineering & Construction, METRO, to Jim Mills, Contract Officer, Washington Group (September 13, 2007, 3:24 PM) (" A reminder Jim. Absolutely nothing goes out unless I approve."); E-mail from John Coulter, Manager of Systems, Infrastructure & Service Delivery, METRO, to Navin Sagar, Senior Director of Engineering (June, 29, 2007, 7:56 AM) ("FJW [Frank J. Wilson] will lead the entire process.").

[13] Notice of establishment of Public-Private Partnership Pilot Program, 72 Fed. Reg. 2583 (Jan. 19, 2007).

[14] Notice of establishment of Public-Private Partnership Pilot Program, 72 Fed. Reg. 2583, at 2586 (Jan. 19, 2007).

[15] Letter from Severn E.S. Miller, Chief Counsel, Federal Transit Administration, to Robin A. Stimson, Vice President, Siemens Transportation Systems, Inc. (Feb. 26, 2008) (FTA sent copies of the letter to David S. Wolff, Chairman of the Board, Houston METRO, and Frank J. Wilson, General Manager, Houston METRO).

[16] Letter from Ed Hrinewski, Project Director, Washington Group Transit Management Company, to Charles Wochele, Vice President, Alstom; Lorenzo Reffreger, Director of Marketing, AnsaldoBreda; Virginia Verdeja, Vice President, CAF; Rainer Hornback, Vice President and General Manager, Kinkisharyo; Steve Roescher, Director of Business Development, Siemens Transportation Systems, Inc.; Rob Edgcumbe, Vice President, Angel Trains; and Charlie Hahn, Manager, Skoda Electric A.S. (August 31, 2007).

[17] Attachment A to Letter from Paula J. Alexander, General Counsel, Metropolitan Transit Authority, to Dorval R. Carter, Jr., Chief Counsel, Federal Transit Administration (June 10, 2010), at 7.

On several occasions over the course of the LRV procurement, FTA cautioned METRO to follow Federal procurement and Buy America rules.

On December 4, 2007, FTA informed METRO that,

> FTA cannot financially participate in vehicle procurements, nor can such procurements be eligible for federal reimbursement under a potential FFGA [Full Funding Grant Agreement] . . . when the procurement departs from Federal procurement rules, including Buy America.[18]

In February 2008, Siemens Transportation, Inc. (Siemens), an LRV manufacturer competing in the procurement, informed FTA that METRO had made statements and representations that the Buy America provisions of 49 C.F.R. Part 661 did not apply to its LRV procurement.[19] FTA sent METRO a copy of its response to Siemens, in which FTA stated:

> [A]ll projects funded by FTA are subject to Buy America . . . [and] to the extent that the scope of work under an FFGA for either the North or Southeast Corridor projects would include LRVs . . . Houston METRO would have to comply with Buy America and all other applicable Federal cross-cutting requirements.[20]

By letter dated March 6, 2008, FTA outlined several issues that could affect the progress of METRO's North and Southeast Corridor projects, and explained, specifically, that METRO's LRV procurement must comply with the Buy America requirements.[21]

On April 8, 2008, FTA instructed METRO that it "may cure the deficiencies in the original RFP by issuing an addendum informing suppliers that this procurement will be subject to all Federal procurement requirements, including but not limited to Buy America."[22]

The LRV procurement process ended on March 4, 2009, when Houston METRO's Board of Directors authorized METRO President Frank J. Wilson to execute a contract with CAF.[23]

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[18] Letter from Sherry E. Little, Deputy Administrator, Federal Transit Administration, to Frank J. Wilson, President and Chief Executive Officer, Metropolitan Transit Authority (Dec. 4, 2007).
[19] Letter from Robin A. Stimson, Vice President, Siemens Transportation Systems, Inc., to Jayme L. Blakesley, Attorney-Advisor, Federal Transit Administration (Feb. 11, 2008).
[20] Letter from Severn E.S. Miller, Chief Counsel, Federal Transit Administration, to Robin A. Stimson, Vice President, Siemens Transportation Systems, Inc. (February 26, 2008).
[21] Letter from James S. Simpson, Administrator, Federal Transit Administration, to Frank J. Wilson, President and Chief Executive Officer, Metropolitan Transit Authority (March 6, 2008).
[22] Letter from Severn E.S. Miller, Chief Counsel, Federal Transit Administration, to Paula J. Alexander, General Counsel, Metropolitan Transit Authority (April 8, 2008).
[23] Minutes from Metropolitan Transit Authority Board of Directors Special Board Meeting, Resolution No. 2009-12 (March 4, 2009).

b. METRO's Request for a Buy America Waiver

By letters dated March 6 and March 23, 2009, Houston METRO asked FTA to waive its Buy America requirements to allow CAF to assemble two pilot LRVs in Spain. METRO based its request on an argument that, because CAF's engineers reside in Spain, allowing final assembly of two pilot LRVs to take place in Spain would be more efficient than addressing the technical, quality control, reliability, and process-related issues in the United States.

On April 9, 2009, in connection with the pending waiver request, Houston METRO General Counsel Pauline E. Higgins wrote FTA Acting Chief Counsel Scott A. Biehl, to propose the "leasing of two prototype railcars for testing purposes only." According to Ms. Higgins, the lease arrangement would be entered into "using solely local funds, and . . . unrelated to any prior commitment."[24]

By letter dated April 14, 2009, FTA denied METRO's request for a Buy America waiver and responded to Ms. Higgins' letter of April 9, 2009.[25] FTA determined that CAF was ineligible for a waiver because it signed a Certificate of Compliance with FTA's Buy America requirements. According to the Buy America regulations, "[w]here a bidder or offeror certifies that it will comply with the applicable Buy America requirements, the bidder, offeror, or grantee is not eligible for a waiver of these requirements."[26] CAF is bound by its Certificate of Compliance.

In addition to denying Houston METRO's request for a Buy America waiver, FTA used its April 14, 2009, letter to remind METRO about the importance of full and open competition and to explain how inappropriate actions after contract award could prejudice manufacturers that were competing with CAF for the LRV contract. FTA explained:

> [Because] a Certificate of Compliance was a condition of responsiveness to METRO's RFP, any grant of a Buy America waiver after CAF has certified compliance would prejudice other manufacturers that submitted offers or proposals to METRO.[27]

For similar reasons, FTA explained:

> [T]he two pilot LRVs are integral to CAF's proposal on which it certified compliance with the Buy America requirements and won the competition for METRO's procurement of LRVs. Thus, for purposes of Buy America, the pilot LRVs cannot be separated from METRO's contract with CAF for production and assembly of LRVs for use on the North and Southeast corridors.[28]

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[24] Letter from Pauline E. Higgins, Senior Vice President and General Counsel, Metropolitan Transit Authority, to Scott A. Biehl, Acting Chief Counsel, Federal Transit Administration (April 9, 2009).
[25] Letter from Scott A. Biehl, Acting Chief Counsel, Federal Transit Administration, to Frank J. Wilson, President and Chief Executive Officer, Metropolitan Transit Authority (April 14, 2009).
[26] 49 C.F.R. 661.13(c).
[27] Letter from Scott A. Biehl, Acting Chief Counsel, Federal Transit Administration, to Frank J. Wilson, President and Chief Executive Officer, Metropolitan Transit Authority (April 14, 2009).
[28] Letter from Scott A. Biehl, Acting Chief Counsel, Federal Transit Administration, to Frank J. Wilson, President and Chief Executive Officer, Metropolitan Transit Authority (April 14, 2009).

c. The Investigation

On April 23, 2010, after learning that Houston METRO had entered into a separate, locally funded contract with CAF to build two pilot LRVs in Spain, and because LRV manufacturers informed FTA that Houston METRO had not allowed for full and open competition during the LRV procurement, FTA advised METRO that it was initiating an investigation and required METRO to produce all records relating to the LRV procurement.[29]

Over a 10-week period, and following repeated requests for information from FTA, METRO provided four separate document deliveries, totaling 14.2 Gigabytes of data.[30] We have reviewed this information and summarized it for purposes of issuing this decision.

To confirm that Houston METRO provided a complete record, on July 22, 2010, FTA asked Houston METRO to certify under oath that it provided FTA with copies of any and all documents and communications related to the investigation. George Greanias, Houston METRO's Acting President and Chief Executive Officer, signed such an Affidavit on July 26, 2010.

IV. LEGAL AUTHORITY

a. Buy America Requirements

With certain exceptions, FTA's Buy America requirements prevent FTA from obligating an amount of Federal funds for a project unless "the steel, iron, and manufactured goods used in the project are produced in the United States."[31] For rolling stock procurements, like METRO's LRV procurement,

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[29] Letter from Dorval R. Carter, Jr., Chief Counsel, Federal Transit Administration, to Frank J. Wilson, President and Chief Executive Officer, Metropolitan Transit Authority (April 23, 2010).

[30] A list of formal exchanges between FTA and Houston METRO follows:

- Letter from Paula J. Alexander, General Counsel, Metropolitan Transit Authority, to Dorval R. Carter, Jr., Chief Counsel, Federal Transit Administration (May 14, 2010).
- Letter from Dorval R. Carter, Jr., Chief Counsel, Federal Transit Administration, to Paula J. Alexander, General Counsel, Metropolitan Transit Authority (May 27, 2010).
- Letter from Dorval R. Carter, Jr., Chief Counsel, Federal Transit Administration, to Paula J. Alexander, General Counsel, Metropolitan Transit Authority (June 3, 2010) (FTA forwarded a letter June 1, 2010, letter from Dana Wordes, Associate General Counsel, Alstom Transportation, Inc., and asked Houston METRO to respond to the following allegations from Alstom: (i) "By changing the criteria for final assembly after award, METRO did not give all interested suppliers an equal opportunity to compete"; and (ii) "METRO's post-award attempt to split the contract invites abuse.").
- Letter from Paula J. Alexander, General Counsel, Metropolitan Transit Authority, to Dorval R. Carter, Jr., Chief Counsel, Federal Transit Administration (June 10, 2010).
- E-mail from Jayme L. Blakesley, Attorney-Advisor, Federal Transit Administration, to Paula J. Alexander, General Counsel, Metropolitan Transit Authority (July 7, 2010).
- Letter from Dorval R. Carter, Jr., Chief Counsel, Federal Transit Administration, to Paula J. Alexander, General Counsel, Metropolitan Transit Authority (July 22, 2010).
- Letter from Paula J. Alexander, General Counsel, Metropolitan Transit Authority, to Jayme L. Blakesley, Attorney-Advisor, Federal Transit Administration (July 15, 2010).
- Letter from Paula J. Alexander, General Counsel, Metropolitan Transit Authority, to Jayme L. Blakesley, Attorney-Advisor, Federal Transit Administration (July 26, 2010).

[31] 49 U.S.C. § 5323(j).

FTA's Buy America requirements are twofold: (1) the cost of the components and subcomponents produced in the United States must total at least 60 percent of the cost of all components in the rolling stock; and (2) final assembly of the rolling stock must occur in the United States.[32] The same rules apply to grants funded by ARRA.[33]

To ensure compliance with its Buy America requirements, FTA grantees must include a Buy America provision in their procurement documents.[34] Such notice must require, as a condition of responsiveness, that the bidder or offeror submit with the bid or offer a completed Buy America certificate in accordance with 49 C.F.R. 661.12. METRO's Procurement Manual also required the inclusion of FTA mandatory clauses, including the Buy America Clause, in the solicitation for all FTA-funded contracts.[35]

Bidders or offerors must sign one of the two forms of certificate set forth at 49 C.F.R. 661.12—the Certificate of Compliance or the Certificate of Non-Compliance. By signing a Certificate of Compliance, a bidder or offeror "certifies that it will comply with the requirements of 49 U.S.C. § 5323(j), and the applicable regulations of 49 C.F.R. 661.11. By signing a Certificate of Non-Compliance, a bidder or offeror "certifies that it cannot comply with the requirements of 49 U.S.C. § 5323(j), *but may qualify for an exception to the requirement*."[36] A bidder or offeror "is not permitted to change its certification after bid opening or submission of a final offer. Where a bidder or offeror certifies that it will comply with the applicable Buy America requirements, the bidder, offeror, or grantee is not eligible for a waiver of those requirements.[37]

b. Procurement Requirements

FTA rules require full and open competition for all federally funded procurements. The relevant statutory and regulatory authority a recipient of Federal funds must follow when conducting an FTA-assisted procurement begins with the 49 U.S.C. § 5325(a) requirement that recipients of FTA assistance "conduct all procurements in a manner that provides full and open competition." Similarly, the Common Grant Rule provision at 49 C.F.R. § 18.36(c)(1) provides that: "[a]ll procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of §18.36."

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[32] 49 U.S.C. § 5323(j)(2)(C).
[33] On March 5, 2009, the FTA issued a Notice relating to ARRA Public Transportation Apportionments, Allocations, and Grant Program Information. 74 *Fed. Reg*. 9657. With respect to Buy America, the FTA expressly provided for the applicability of the typical Buy America requirements for transit procurements as follows:

> [T]he Buy America requirements under 49 USC § 5323(j) that typically apply to projects accepting federal assistance under the Federal transit program authorized under Chapter 53 of Title 49, United States Code, apply to all capital public transportation projects funded with amounts appropriated in the ARRA. Therefore, an applicant, in carrying out a procurement financed with federal assistance authorized under the ARRA must comply with the applicable Buy America requirements in 49 USC § 5323(j) and 49 CFR part 661.105.

Id. At 9664.
[34] 49 C.F.R. 661.13(b).
[35] Metropolitan Transit Authority of Harris County Texas, Procurement Manual (Rev. 12/18/02), Chapter 11 at 1.
[36] 49 C.F.R. 661.12 (emphasis added).
[37] 49 C.F.R. 661.13(c).

One of the situations considered to be restrictive of competition is the presence of "[a]ny arbitrary action in the procurement process."[38] The Common Grant Rule also requires grantees to have written selection procedures for procurement transactions:

> These procedures will ensure that all solicitations (i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured . . . and (ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.[39]

FTA Guidance in place at the beginning of METRO's LRV procurement echoes the requirements of the Common Grant Rule. FTA Circular 4220.1E, Third Party Contracting Requirements, mandates that:

> All procurement transactions will be conducted in a manner providing full and open competition. Some situations considered to be restrictive of competition include, but are not limited to . . . Any arbitrary action in the procurement process.[40]

The Circular also requires grantees to have written selection procedures for procurement transactions:

> All solicitations shall:
>
> (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured . . . [and]
>
> (2) Identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals.[41]

The Circular also outlines the requirements to be followed when conducting procurements using competitive proposals:

> The competitive proposal method of procurement is normally conducted with more than one source submitting an offer, i.e., proposal. Either a fixed price or cost reimbursement type contract is awarded. This method of procurement is generally used when conditions are not appropriate for the use of sealed bids. If this procurement method is used the following requirements apply:
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> (1) Requests for proposals will be publicized. All evaluation factors will be identified along with their relative importance.[42]

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[38] 49 C.F.R. § 18.36(c)(1)(vii).
[39] 49 C.F.R. § 18.36(c)(3)(i).
[40] FTA Circular 4220.1E, ¶ 8.a.
[41] FTA Circular 4220.1E, ¶ 8.c.
[42] FTA Circular 4220.1E, ¶ 8.d.

c. Investigation Authority and Procedures

Federal law grants FTA the authority to "have access to and the right to examine and inspect all records, documents, and papers, including contracts, related to a project for which a grant is made."[43]

The procedures for conducting Buy America investigations are located at 49 C.F.R. § 661.15. According to these procedures, FTA presumes that a bidder or offeror who has submitted the required Buy America certificate is complying with the Buy America rules.[44] However, FTA may initiate an investigation if FTA has information overcoming the presumption of compliance. FTA's investigation procedures place the burden of proof on the successful bidder or offeror to document its compliance with its Buy America certificate.

V. DISCUSSION

a. METRO and CAF violated FTA's Buy America requirements. This began with METRO's release of an RFP that stated FTA's Buy America requirements did not apply to the procurement; continued with METRO's unsupported evaluation of the various offeror's Buy America compliance, including the Certificate of Compliance submitted by CAF; and culminated with METRO's decision not to require CAF to meet its contractually mandated Buy America obligations and to circumvent the Buy America requirements by entering into a separate, locally funded contract with CAF for the pilot vehicles.

During the LRV procurement, Houston METRO asserted that it had no Buy America obligations under 49 U.S.C. § 5323(j), as implemented at 49 C.F.R. Part 661. METRO apparently believed that by having its Facility Provider issue the RFP and buy the vehicles, or by separating the procurement into Federal and non-federal parts, METRO was free to acquire vehicles without regard to FTA requirements.[45] Moreover, when offerors certified compliance with the Buy America requirements despite overt plans to produce pilot vehicles outside the United States, METRO failed to adequately assess the correctness of the Buy America certificates submitted by the offerors.

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[43] 49 U.S.C. § 5325(g).
[44] 49 C.F.R. 661.15(a).
[45] One may reasonably conclude that Houston METRO and CAF have exhibited a pattern of trying to avoid Buy America final assembly requirements.

METRO's prior rail car procurement was similarly troubled. By letter dated August 15, 2002 FTA instructed Houston METRO and its rail car manufacturer Siemens that final assembly of rail cars must take place in the United States. Letter from Gregory B. McBride, Deputy Chief Counsel, Federal Transit Administration, to Dennis Hough, Director of Contracts, Metropolitan Transit Authority (August 15, 2002).

Past FTA decisions reveal at least one other occasion when CAF certified compliance with the Buy America requirements despite plans to produce pilot vehicles in Spain, and then sought a waiver from FTA after contract award. *See*, Letters from Patrick W. Reilly, Chief Counsel, FTA, to John C. Segerdell, Director of Engineering Services, Sacramento Regional Transit District (Aug. 12 and Oct. 20, 1999).

In the early stages of the LRV procurement, during a June 21, 2007, meeting, METRO's President directed that, "[t]o improve foreign competition, [the LRV procurement should] keep the 'Buy America' as an optional requirement."[46]

Also, some internal METRO discussions centered on whether METRO would purchase the LRVs without FTA financial assistance.[47] However, in July 2007, METRO staff noted that direction was needed on whether FTA requirements for Buy America and competitive bidding should be included in the LRV procurement. METRO's Expedited Procurement Plan for Light Rail Vehicles prepared by METRO on July 5, 2007, was annotated to indicate that such requirements were not to be used.[48]

The initial release of METRO's RFP on August 31, 2007, stated to all potential offerors:

> There is no requirement that the manufacturer must abide by any "North American" or Federal Transit Administration standards, e.g., Buy America, or any other restraints normally applied to such procurements . . . .[49]

METRO staff continued to express concerns that the solicitation's lack of Federal requirements might be problematic. However, on September 5, 2007, METRO's Director of Program Initiation, Planning, Engineering and Construction reasserted: "[t]he president [of METRO] was emphatic that this procurement will be predicated on, in any manner be federalized."[50] He quickly followed up with another e-mail that clarified: "Let me rephrase, the procurement will NOT be predicated in a Federalization."[51] Similarly, in a request to remove reference to Federal requirements, Donald Pieper wrote: "Our CEO has made it perfectly clear that federal requirements should not restrict this program."[52]

This direction notwithstanding, some METRO staff argued that Federal clauses should be included in the solicitation to preserve METRO's right to use future Federal funds or to use local funds spent on the

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[46] E-mail from Navin Sagar, Senior Director of Engineering, METRO, to Bryan Pennington, Senior Vice President for Engineering and Construction, (June 22, 2007; 3:52 p.m.).
[47] See, E-mail from John Coulter, Senior Manager of Systems, Infrastructure and Service Delivery, METRO, to Navin Sagar, Senior Director of Engineering, METRO (June 29, 2007) (quoting METRO President Frank Wilson: "since METRO is purchasing the vehicles, there will be no FTA involvement."); E-mail from Nancy C. Smith, Nossaman, Guthner, Knox & Elliott, LLP, to Thomas Jasien, METRO Associate Vice President for Government Affairs, *et. al* (Sept. 25, 2007) ("We should also discuss the need to set up subaccounts or other accounting mechanisms to deal with the fact that METRO plans to segment the Development Agreement into non-federalized and federalized pieces, and consider whether any special approval is required from FTA to bless that plan (the most significant concern probably being the vehicles)."); Applicable Regulations for LRV Procurement – Houston Metro, Booz Allen Hamilton at 4 (Sept. 28, 2007) ("We have been advised that the LRV procurement will not make use of Federal funds.").
[48] Expedited Procurement Plan for Light Rail Vehicles, METRO-PEC at 8 (July 5, 2007).
[49] RFP, Section 1.3.1 at 5.
[50] Email from Dennis Hough, Director of Program Initiation, Planning, Engineering and Construction, METRO, to Navin Sagar, Senior Director of Engineering, *et. al* (Sept. 5, 2007, 4:26 PM) (emphasis in original).
[51] Email from Dennis Hough, Director of Program Initiation, Planning, Engineering and Construction, METRO, to Navin Sagar, Senior Director of Engineering, *et. al* (Sept. 5, 2007, 4:27 PM).
[52] E-mail from Donald Pieper, Senior Program Initiation Specialist, METRO, to James Mills, Contract Officer, Washington Group (Sept. 6, 2007, 8:42 AM).

rail cars as a local match for a future FTA grant.[53] The response: "We are not federalizing the vehicle procurement."[54] METRO's Sr. Vice President, Engineering & Construction, Bryan Pennington noted: "Obviously, this is not an issue for discussion with FTA till we have the full 'package' put together."[55]

Potential offerors had similar concerns about the lack of Buy America requirements. Addendum 1 to the RFP, issued on September 21, 2007, in response to questions submitted by potential offerors, contained the following guidance:

> Question No. 23: "Will there be any Buy America Clauses?"
>
> A: "No. Refer to the RFP Section 1.3.1, second paragraph."
>
> *   *   *
>
> Question No. 26: "Are there any federal requirements in this procurement?"
>
> A: "There are no federal requirements except ADA in this procurement."[56]

By October 29, 2007, six companies had submitted initial proposals in response to the RFP. CAF's proposal clearly stated its plan to build two prototype vehicles in Spain and highlighted that fact in its cover letter.[57]

On December 4, 2007, FTA advised METRO that it "cannot financially participate in vehicle procurements, nor can such procurements be eligible for federal reimbursement under a potential FFGA . . . when the procurement departs from Federal procurement rules, including Buy America."[58]

Despite this direct guidance from FTA and the absence of a Buy America provision in the RFP, METRO continued with the procurement under the terms of the original RFP, selected five firms to proceed to Step 2 of the procurement, and invited each to submit Commercial Proposals.

On February 14, 2008, METRO advised FTA Region VI that its LRV procurement plan "does not start out avoiding Buy America nor do we expect to get a waiver at this time, we are leaving the option open."[59]

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[53] E-mail from Edith Lowery, Director of Grant Programs, METRO, to Dennis Hough, Director of Program Initiation, Planning, Engineering and Construction, METRO (Sept. 17, 2007, 2:19 PM).
[54] E-mail from Dennis Hough, Director of Program Initiation, Planning, Engineering and Construction, METRO, to Edith Lowery, Director of Grant Programs, METRO (Sept. 17, 2007, 5:57 PM).
[55] E-mail from Bryan Pennington, Senior Vice President, Engineering and Construction, to Dennis Hough, Director of Program Initiation, Planning, Engineering and Construction, METRO, and Edith Lowery Director of Grant Programs, METRO (Sept. 17, 2007, 6:19 PM).
[56] RFP Addendum No. 1, at 5 (Sept. 21, 2007).
[57] CAF Technical Proposal, Sec. 1, page 3, and cover letter.
[58] Letter from Sherry E. Little, Deputy Administrator, Federal Transit Administration, to Frank J. Wilson, President and Chief Executive Officer, Houston METRO (Dec. 4, 2007).
[59] E-mail from Adriana Moreno, Assistant to METRO President and CEO Frank J. Wilson, METRO, to Robert Patrick, Regional Administrator, FTA (Feb. 14, 2008, 2:34 PM).

On February 26, 2008, FTA copied METRO in its response to an inquiry from Siemens, one of the competitors in the procurement. The letter advised:

> All projects funded by FTA are subject to Buy America. FTA has not waived or held out the possibility of relaxing its Buy America requirements by virtue of Houston METRO's participation in [the Public-Private Partnership Pilot Program] Penta-P," and "to the extent that the scope of work under an FFGA for either the North or Southeast Corridor projects would include LRVs, the RFP used to procure those LRVs would have to include a Buy America provision and Houston METRO would have to comply with Buy America.[60]

In a March 6, 2008, letter to METRO, FTA reiterated:

> <u>METRO must comply with Federal Buy America law</u>. METRO has been pursuing vehicle procurement through its private sector partner, Washington Group Transit Management Company. That request for proposal (RFP) *did not* include a Buy America provision. As FTA stated in its November 30, 2007, letter to METRO and in its more recent response to an inquiry from Siemens Transportation Systems, Inc., Federal Buy America law prohibits FTA from obligating an amount appropriated for a project unless the steel, iron, and manufactured goods, including rolling stock, used in the project are produced in the United States (49 U.S.C. § 5323(j)). Accordingly, METRO must issue an RFP containing an appropriate notice of the Buy America requirements for any vehicles used in federally funded projects (49 CFR 661.13(b)).[61]

Despite this clear mandate from FTA, METRO senior management continued to resist the inclusion of Buy America provisions in the LRV procurement. In an e-mail from METRO's General Counsel to METRO's outside counsel, METRO's General Counsel stated:

> I just left a meeting with the CEO and staff regarding the purchase of light rail vehicles. He would prefer that the addendum not include a listing of the federal requirements, but rather a short statement of their applicability, such as the following: 'To the extent that Federal law and regulations apply to the procurement of vehicles, the Proposer shall comply with all applicable terms and conditions of such Federal laws and regulations, including but not limited to, 49 CFR 661.11, as amended . . .'[62]

Outside counsel suggested adding language regarding federally required certifications.[63] But METRO President and Chief Executive Officer (CEO) Frank Wilson balked at the proposed Buy America language, preferring a short statement of the applicability of the federal requirements rather than a listing

[60] Letter from Severn E.S. Miller, Chief Counsel, Federal Transit Administration, to Robin A. Stimson, Vice President, Siemens Transportation Systems, Inc. (February 26, 2010).
[61] Letter from James S. Simpson, Administrator, Federal Transit Administration, to Frank J. Wilson, President and Chief Operating Officer, Metropolitan Transit Authority (Mar. 6, 2008) (emphasis in original).
[62] E-mail from Paula J. Alexander, General Counsel, Metropolitan Transit Authority to Edward J. Gill, Thompson Coburn LLP (Mar. 20, 2008, 12:57 PM).
[63] E-mail from Kent G. Woodman, Thompson Coburn LLP, to Paula J. Alexander, General Counsel, Metropolitan Transit Authority (Mar. 20, 2008).

of those requirements.[64] METRO's outside counsel cautioned: "If BAFOs will be utilized, the language as written will be fine—if not, the Buy America certification has to be submitted along with the other certifications."[65]

In a letter dated April 8, 2008, FTA advised METRO that it could "cure the deficiencies in the original RFP by issuing an addendum informing suppliers that this procurement will be subject to applicable Federal procurement requirements, including but not limited to Buy America."[66] FTA warned METRO, however, that the general statement in "the addendum [METRO] submitted to FTA on March 27, 2008, [was] insufficient . . . and inadequate," instructed METRO to "add a comprehensive list of statutory and regulatory requirements with clauses detailing each applicable requirement," and attached an addendum that followed the third party contracting requirements outlined in FTA Circular 4220.1E.[67]

On April 8, 2008, METRO issued Addendum No. 6 adding Buy America and other federal clauses to the solicitation. The transmittal letter directed proposers to revise, substitute or revalidate their proposals by April 22, 2008, but informed them that they were not required to submit a Buy America certification until the time for submission of BAFOs. No date was given for the submission of BAFOs.[68]

By letter dated April 18, 2008, CAF stated that it "will comply" with Buy America regulations and revalidated its February 29, 2008, commercial proposal "with no changes."[69] However, CAF did not file a Buy America certification at that time.

According to METRO, CAF submitted an undated Buy America certification on June 10, 2008, in which the company certified that it would comply with the Buy America requirements, and the applicable regulations in 49 C.F.R. 661.11.[70]

METRO then drafted a Buy America waiver request addressed to the FTA Chief Counsel. METRO's draft, seeking a public interest waiver stated that "[i]t would be of considerable advantage to Metro and the riding public if the successful competitor could assemble the first two vehicles, the prototypes for the entire fleet, at their offshore facility."[71] There is no indication that this letter was signed or transmitted to FTA.

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[64] E-mail from Navin Sagar, Senior Director of Engineering, Houston METRO, to Paula J. Alexander, General Counsel, METRO (Mar. 24, 2008, 12:26 PM).
[65] E-mail from Edward J. Gill, Thompson Coburn LLP, to Paula J. Alexander, General Counsel, Metropolitan Transit Authority, and Thomas Jasien, Associate Vice President for Government Affairs, METRO (April 3, 2008, 8:56 AM).
[66] Letter from Severn E.S. Miller, Chief Counsel, Federal Transit Administration, to Paula J. Alexander, General Counsel, Metropolitan Transit Authority (April 8, 2008).
[67] Letter from Severn E.S. Miller, Chief Counsel, Federal Transit Administration, to Paula J. Alexander, General Counsel, Metropolitan Transit Authority (April 8, 2008).
[68] RFP Addendum No. 6 (April 8, 2008).
[69] Letter from Virginia Verdeja, Vice President, CAF, to Ed Hrinewski, Project Director, Washington Group (April 18, 2008).
[70] Buy America Certification, CAF, undated.
[71] Draft letter to Severn E.S. Miller, Chief Counsel, Federal Transit Administration (document last saved on June 11, 2008) (the document's metadata identifies the author of the document as Peter Stetler).

Separately, in an undated and unattributed spreadsheet, and notwithstanding CAF's clearly stated intention in its proposal to perform final assembly of the pilot LRVs in Spain, METRO rated CAF's offered vehicles to be Buy America compliant.[72]

In a second review, conducted on June 20, 2008, Houston METRO staff again reviewed all proposals and again failed to address CAF's announced plan to assemble pilot LRVs in Spain. Each of the reviewers concluded that CAF's proposal was Buy America compliant, along with Siemens who also proposed to assemble prototypes overseas. The Reviewers acknowledged that Alstom certified non-compliance, but noted that Alstom had addressed potential Buy America waivers, and that price might increase as Buy America compliance became clearer. In this evaluation METRO staff again failed to address CAF's announced plan to assemble its prototypes in Spain.[73]

As described in further detail, *infra*, METRO concluded in July 2008 that CAF's proposal offered the best value and began extensive negotiations with the company.

On October 21, 2008, Alstom sent METRO a copy of an FTA Federal Register notice seeking public comment on the subject of Buy America waivers for pilot locomotives.[74] Alstom noted: "Remember you need to do the same for us."[75] Two days later, METRO's Navin Sagar requested internal approval to begin efforts to seek a waiver from FTA for the purpose of allowing its vehicle supplier to perform final assembly overseas of the first two pilot vehicles.[76] The first direct evidence of CAF's intention to prompt METRO to seek a Buy America public interest waiver for the prototype vehicles occurred on November 3, 2008, when CAF transmitted to METRO a copy of a Buy America public interest waiver request submitted by the Washington Metropolitan Area Transit Administration (WMATA) to FTA in 1998. That waiver request sought permission for CAF to assemble WMATA's two heavy rail prototype vehicles in Spain.[77] FTA granted the 1998 request.[78]

On March 4, 2009, METRO's Board of Directors held a special Board Meeting and authorized METRO to contract with Parsons to supply the LRVs. The Board also approved the assignment of the LRV contract by Parsons to Houston LRV 100 LLC, an entity owned by Parsons and CAF.[79]

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[72] Light Rail Procurement Comparison Matrix of Commercial Proposal (After the Workshop)—Confidential Draft (undated).
[73] Step 2 Proposal Evaluation Ranking Summary (After Workshop-1).
[74] See, 73 Fed. Reg. 62587 (Oct. 21, 2008) (By letter dated September 3, 2008, MBTA asked FTA for a public interest waiver. If granted, the waiver would have allowed Vossloh to produce two pilot locomotives in Spain. After publishing a notice in a Federal Register and reviewing more than 300 public comments, FTA denied MBTA's request. *See*, letter from Sherry E. Little, Deputy Administrator, FTA, to Daniel A. Grabauskas, General Manager, MBTA (Nov. 14, 2008)).
[75] E-mail from Charles R. Wochele, Vice President, Marketing and Business Development, Alstom Transportation, Inc., to Dennis Hough, Director of Program Initiation, Planning, Engineering, and Construction, METRO, and Navin Sagar, Senior Director of Engineering, METRO (Oct. 21, 2008, 5:55 PM).
[76] E-mail from Navin Sagar, Senior Director of Engineering, METRO, to Bryan Pennington, Senior Vice President, Engineering and Construction, METRO, and Jim Cody, Senior Director of Construction, METRO (Oct. 23, 2008, 4:55 PM).
[77] E-mail from Virginia Verdeja, Vice President, CAF, to Navin Sagar, Senior Director of Engineering, METRO (Nov. 3, 2008, 11:52 AM).
[78] Letter from Patrick W. Reilly, Chief Counsel, FTA, to D.A. Tarantino, Contracting Officer, WMATA (Sept. 11, 1998).
[79] METRO Board Resolution No. 2009-12 (March 4, 2009).

Two days later, on March 6, 2009, CAF formally requested that METRO pursue a waiver of the Buy America final assembly requirement with respect to the first two prototype vehicles, seeking to assemble them at its "Center of Excellence" in Beasain, Spain.[80]

That same day, METRO sent a letter to FTA requesting a "public interest" waiver for assembly of two pilot LRVs in Spain.[81] METRO sent an almost identical request to FTA on March 23, 2009.[82]

In addition, while METRO's request for a public interest waiver was pending, on April 9, 2009, METRO's General Counsel wrote to FTA regarding its intent to lease two pilot LRVs. METRO asserted that the lease would be undertaken without the use of Federal funds and would be "unrelated to any prior contractual commitment."[83]

On April 13, 2009, METRO staff was instructed to prepare as soon as possible an Executive Decision Document authorizing the purchase of two pilot LRVs from CAF.[84]

On April 14, 2009, FTA denied METRO's request for a public interest waiver. The letter referenced both the request for a waiver and METRO's letter regarding the lease of two prototypes. FTA's decision noted:

> [T]he two pilot LRVs are integral to CAF's proposal on which it certified compliance with the Buy America requirements and won the competition for METRO's procurement of LRVs. Thus, for purposes of Buy America, the pilot LRVs cannot be separated from METRO's contract with CAF for production and assembly of LRVs for use on the North and Southeast corridors.[85]

According to the Buy America regulations, "[w]here a bidder or offeror certifies that it will comply with the applicable Buy America requirements, the bidder, offeror, or grantee is not eligible for a waiver of these requirements.[86] Thus, CAF was bound by its Certificate of Compliance.

On the day FTA issued its decision, METRO President and CEO Frank Wilson signed an Executive Decision Document seeking METRO Board authorization to negotiate a sole source contract with CAF

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[80] Letter from Virginia Verdeja, Vice President, CAF, to Navin Sagar, Senior Director of Engineering, METRO (March 6, 2009).
[81] Letter from Frank J. Wilson, President and Chief Executive Officer, METRO, to Robert C. Patrick, Regional Administrator, FTA (Mar. 6, 2009).
[82] Letter from Frank J. Wilson, President and Chief Executive Officer, METRO, to Robert C. Patrick, Regional Administrator, FTA (Mar. 23, 2009).
[83] Letter from Pauline E. Higgins, General Counsel, METRO, to Scott Biehl, Acting Chief Counsel, FTA (April 9, 2009).
[84] E-mail from Pauline Higgins, General Counsel, METRO, to David Feeley, Senior Vice President, Operations, METRO, *et al*. (April 14, 2009, 7:45 PM) ("Navin and Bryan: based on last night's EDD assignment, which was to be relayed to you by Jim, Frank [Wilson] and John [Sedlak] need the EDD for the purchase of two cars from CAF. Pls [sic] complete and deliver to Frank/John first thing in the morning.").
[85] Letter from Scott Biehl, Acting Chief Counsel, FTA, to Frank J. Wilson, President and CEO, METRO (April 14, 2009).
[86] 49 C.F.R. § 661.13(c).

for the purchase of the two pilot LRVs that were the subject of the unsuccessful request for a Buy America waiver.[87]

Two days later, on April 16, 2009, CAF Vice President Virginia Verdeja sent a series of e-mail messages to Houston METRO President Frank Wilson suggesting that METRO could avoid Buy America by doing the same thing CAF did in a prior procurement in which another transit agency "decided to finance the first two vehicles with 'own' funding, meaning local funding or funding coming from the County or the State which permitted us to produce the first two in Spain."[88]

That same day, April 16, 2009, METRO Vice President Bryan Pennington signed a Sole Source Justification for the two-LRV procurement.[89]

On April 22, 2009, Parsons and METRO executed the initial LRV contract for 103 vehicles.[90] Parsons then assigned the contract to Houston LRV 100, L.L.C, an entity that was 99 percent owned by CAF and 1 percent owned by Parsons.[91] At that time, METRO claims that Virginia Verdeja, Secretary of Houston LRV 100, L.L.C. executed a Buy America certification on behalf of Houston LRV 100, L.L.C.[92]

On April 23, 2009, the METRO Board authorized the negotiation of a sole source contract with CAF for two prototype light rail vehicles.[93] The METRO Board concluded that METRO needed the prototype vehicles to "conduct due diligence with regard to quality assurance, performance, reliability, safety, and for operating and maintenance training in advance of the purchase of additional vehicles."[94]

Houston METRO has argued that it relied on a voice message from FTA Acting Chief Counsel Scott Biehl when it authorized the two-LRV contract with CAF. The facts belie this argument. In actuality, as described below, METRO took actions in furtherance of the two-LRV contract, including the execution of an Executive Decision Document (EDD) authorizing the two-LRV contract, even before FTA denied its request for a Buy America waiver and several days before METRO's outside counsel received a voice message from Mr. Biehl.

According to METRO,

> On April 16, 2009, after denial of the waiver, [METRO's outside counsel Ed] Gill contacted [Scott] Biehl by voicemail, soliciting his guidance, in part, on whether an

[87] Houston METRO Executive Decision Document (April 14, 2009). NOTE: METRO claims that it relied on a voice message from FTA Acting Chief Counsel Scott A. Biehl when it entered into a separate, locally funded, sole-source contract with CAF for two pilot LRVs. It is important to note, however, that the EDD signed by Mr. Wilson on April 14, 2009, predated by three days the voice message left by Mr. Biehl on April 17, 2009.
[88] E-mail messages from Virginia Verdeja, Vice President, CAF, to Frank J. Wilson, President & CEO, Houston METRO (April 16, 2009; 7:47, 8:31, and 11:10 a.m.).
[89] Houston METRO Sole Source Justification, April 17, 2009.
[90] Contract for Supply of Light Rail Vehicles for Metropolitan Transit Authority of Harris County, Texas GRT Corridors Project, Contract No. CT0800138, April 22, 2009.
[91] Executive Summary – Facility Provider Contracts, at 2, 6.
[92] Houston LRV100, LLC – Buy America Certificate, April 22, 2009.
[93] METRO Board Resolution No. 2009-21 (April 23, 2009).
[94] METRO Board Resolution No. 2009-21 (April 23, 2009).

> outright purchase of the LRVs with purely local funds would reconcile with Buy America.[95]

Mr. Biehl responded by voice message on April 17, 2009, stating:

> The answer is we don't care . . . where you're doing that prototype acquisition with local funds only, FTA doesn't much care and we're not going to respond to [Pauline Higgins'] letter of a week ago [April 9, 2009].

METRO asserts that it was left with two conflicting communications from Mr. Biehl. In the first, his letter dated April 14, 2009, responding to METRO's request for a waiver and an April 9, 2009, letter from Pauline Higgins, Mr. Biehl stated: "For purposes of Buy America, the pilot LRVs cannot be separated from METRO's contract with CAF for production and assembly of LRVs for use on the North and Southeast corridors."[96] In the second, his voicemail of April 17, 2009, he stated: "FTA doesn't much care."[97]

Assuming, for the sake of argument, that the two communications did contradict, we believe the formal, written communication would have controlled. It would have been irresponsible for METRO to base a several-hundred-million-dollar decision on oral advice when it had received formal, written advice just days before. The responsible action would have been for METRO to seek clarification from FTA.

We need not address the above argument in detail, however, because we have found that Houston METRO did not rely on the voice message from Mr. Biehl when it decided to enter into a separate, locally funded, sole-source contract with CAF for two pilot LRVs. In fact, METRO took actions in furtherance of the two-LRV contract even before it received the letter from FTA denying its request for a Buy America waiver and several days before it received the voice message from Mr. Biehl:

- On April 13, 2009, one day before FTA issued its decision and nearly a week before Mr. Biehl left the voice message, Houston METRO staff started preparing an EDD for the purchase of two LRVs from CAF.[98]

- The following day, on April 14, 2009, Houston METRO President Frank Wilson signed the EDD asking the Board to authorize him to negotiate a sole-source contract with CAF for two LRVs.[99]

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[95] Letter from Paula J. Alexander, General Counsel, Houston METRO, to Dorval R. Carter, Jr., Chief Counsel, FTA (May 14, 2010.
[96] Letter from Scott A. Biehl, Acting Chief Counsel, FTA, to Frank J. Wilson, President and CEO, Houston METRO (April 14, 2009).
[97] Voice message from Scott A. Biehl, Acting Chief Counsel, FTA, to Ed Gill, Outside Counsel to Houston METRO (April 17, 2009). Houston METRO has provided no record of the exact question Mr. Gill asked, however, and Mr. Biehl cannot recall the exact question he was answering.
[98] See e-mail from Pauline Higgins, General Counsel, Houston METRO, to Navin Sagar, Senior Director of Engineering, METRO, and Bryan Pennington, Vice President, METRO (April 14, 2009, 7:45 p.m.) ("Navin and Bryan: based on last night's EDD assignment, which was to be relayed to you by Jim, Frank [Wilson] and John [Sedlak] need the EDD for the purchase of two cars from CAF. Pls [sic] complete and deliver to Frank/John first thing in the morning.").
[99] Houston METRO Executive Decision Document (April 14, 2010).

- Two days later, on April 16, 2010, CAF Vice President Virginia Verdeja sent a series of e-mail messages to Houston METRO President Frank Wilson suggesting that METRO could avoid Buy America by doing the same thing CAF did in a prior procurement in which another transit agency "decided to finance the first two vehicles with 'own' funding, meaning local funding or funding coming from the County or the State which permitted us to produce the first two in Spain."[100]

- That same day, April 16, 2009, METRO Vice President Bryan Pennington signed a Sole Source Justification for the two-LRV procurement for the purpose of producing pilot LRVs in Spain and thereby avoiding the Buy America rules that require CAF to produce all of the LRVs in the United States. [101]

Thus, from start to finish, METRO sought to avoid the Buy America requirements of 49 U.S.C. § 5323(j) and 49 C.F.R. Part 661. When FTA forced METRO to include the Buy America requirements in its solicitation, METRO evaluated the proposals in a way that failed to adequately consider the Buy America implications of the specific technical proposals. METRO assumed from a very early stage in the procurement process that the selected rail car manufacturer would have the benefit of an FTA waiver, relieving METRO of the obligation to fully comply with Buy America. Finally, when FTA denied its request for that waiver, METRO split the procurement through the award of an additional, sole-source contract, in an attempt to allow its selected railcar manufacturer to avoid full compliance.[102]

b. METRO violated FTA's competitive procurement rules when it chose to negotiate with one of the offerors, CAF, to the exclusion of all other offerors, and allowed that offeror to continue revising its price while refusing to allow other offerors the opportunity to present their Best and Final Offers.

In a negotiated procurement, initial proposals received in response to a solicitation are evaluated and either an award is made based on those initial proposals or further procurement steps are taken, such as allowing all proposers to revise their proposals. This process of proposal revision is also known as the submission of best and final offers (BAFOs). The information contained in the BAFOs is then evaluated and forms the basis for a source selection or best value decision.

In its LRV procurement, METRO chose not to make an award based on the initial proposals. Instead, it evaluated those proposals on a pass or fail basis. After this first step, METRO concluded that one of the proposals was insufficient and the proposer, SKODA, was notified that it would no longer be considered for award.[103] The five offerors remaining in the competitive range were invited to participate in Step 2,

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[100] E-mail messages from Virginia Verdeja, Vice President, CAF, to Frank J. Wilson, President and CEO, Houston METRO (April 16, 2009; 7:47, 8:31, and 11:10 a.m.).
[101] Houston METRO Sole Source Justification (April 17, 2009).
[102] The documents provided by METRO also contain an e-mail sent on May 3, 2010, approximately one week after FTA initiated its Buy America investigation, from CAF to METRO's President and CEO that reads "I would like you to confirm your understanding of CAF USA's commitment to comply with BUY America regulations for the supply of 103 Light Rail Vehicles for the Metropolitan Transit Authority of Harris County, Texas GRT Corridors Project." E-mail from Virginia Verdeja, Vice President, CAF, to Frank J. Wilson, President and CEO (May 3, 2010). Mr. Wilson's reply, if any, was not provided by METRO.
[103] Letter from Ed Hrinewski, Project Director, to Charles Hahn, Manager US Operations, SKODA Electric (Jan. 18, 2008).

where they submitted what METRO called "commercial proposals." Notwithstanding language in the RFP reserving the right not to seek BAFOs, METRO's internal and external communications indicated METRO would ask the offerors to submit BAFOs. Indeed, METRO's own Procurement Manual required that upon completion of discussions in a negotiated procurement, the "Contract Administrator shall issue to all offerors still within the competitive range a request for best and final offers."[104]

During METRO's internal discussion about whether they would include Buy America provisions in the solicitation, METRO also considered the timing of the submission of any required Buy America certification. At that time, METRO was planning a standard procurement approach that would have called for submissions of BAFOs from all offerors prior to making a best value decision. METRO's General Counsel asked outside counsel if the Buy America certification was the only certification required by the solicitation that could be submitted with the BAFO.[105] Outside counsel responded: "We will have to obtain Buy America certification---those can either be obtained now or when BAFOs are submitted if that is the approach that Metro will use."[106] Later, outside counsel again cautioned: "If BAFOs will be utilized, the language as written is fine—if not, the Buy America certification has to be submitted along with the other certifications."[107]

On April 8, 2008, METRO issued RFP Addendum No. 6, adding Buy America and other federal clauses to the solicitation. The transmittal letter directed proposers to revise, substitute, or revalidate their proposals by April 22, 2008, but told them "[t]he appropriate Buy America certificate must be submitted with each Proposer's Best and Final Offer."[108]

In response to RFP Addendum No. 6, CAF submitted a letter stating that it would comply with the Buy America regulations, but did not submit its Buy America certificate, in accordance with the Addendum's instructions to submit the certificate with the BAFO.[109] Alstom's response to the Addendum stated, "[c]onfirmation of our ability to meet the Buy America requirements and any price modifications that may result will be reflected in our BAFO submission at a later date."[110]

METRO then conducted what it described as "workshops" with the five remaining offerors during June 2008. According to METRO, CAF submitted a signed, but undated Buy America certificate at its June 10, 2008 workshop.[111]

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[104] Metropolitan Transit Authority of Harris County, Texas, Procurement Manual (Rev. 12/18/02), Chapter 8 – Contracting By Negotiation, §§ 8.5 C, 8.22 A.
[105] E-mail from Paula Alexander, General Counsel, METRO, to Edward Gill, Thompson Coburn LLP (March 12, 2008, 11:39 AM).
[106] E-mail from Edward Gill, Thompson Coburn LLP, to Paula Alexander, General Counsel, METRO (March 21, 2008, 1:28 PM).
[107] E-mail from Edward Gill, Thompson Coburn LLP, to Paula Alexander, General Counsel, METRO, and Thomas Jasien, Associate Vice President for Government Affairs, METRO (April 3, 2008, 8:56 AM).
[108] Cover letter from Ed Hrinewski, Project Director, Washington Group Transit Management Company transmitting RFP Addendum No. 6 (April 8, 2008).
[109] Letter from Virginia Verdeja, Vice President, Sales, CAF, to Ed Hrinewski, Project Director, Washington Group (April 18, 2008).
[110] Letter from Charles R. Wochele, Vice President, Alstom Transportation Inc., to James Mills, Contracting Officer (April 22, 2008).
[111] *See*, Buy America Certificate, signed by Virginia Verdeja (undated), Attachment A to letter from Paula J. Alexander, General Counsel, METRO, to Dorval R. Carter, Jr., Chief Counsel, FTA (June 10, 2010).

Soon after holding the "workshops" in June 2008, METRO decided CAF was "the most favorable proposer."[112] On June 26, 2008, METRO's Vehicle Review Committee recommended to the Chair of the Vehicle Committee that BAFOs not be requested from the offerors because there was a $64 million difference in price between CAF and Siemens, the second ranked offeror. The Vehicle Review Committee noted that CAF was fully Buy America compliant and that Buy America compliance was "considered essential" in the Committee's rankings. The Vehicle Review Committee recommended that METRO enter into negotiations with CAF exclusively and only negotiate with the second ranked offeror if the CAF negotiations were not successful.[113]

On July 24, 2008, METRO advised CAF, in a telephone conversation, that it was going to commence negotiations with the company as CAF was the highest ranked offeror.[114] Extensive negotiations with CAF followed, culminating in two price agreements signed by METRO, Parsons, and CAF.[115] Materials prepared by CAF detailing the extent of its activities after its selection, characterized its negotiations with METRO from July 27 to July 31 that culminated in the signing of two price agreements as "Price negotiations/BAFO."[116] CAF and METRO also discussed vehicle financing, and CAF began interfacing regularly with the other METRO partners in preparation for beginning vehicle production.[117]

The August 8, 2008, price agreement signed by CAF, METRO, and Parsons indicates that METRO advised CAF to revise its previously agreed upon maintenance pricing, due to changes METRO made in its rush hour service requirements.[118] There is no evidence that METRO shared this change with the other offerors, a clear violation of the rule requiring full and open competition.

By September 13, 2008, CAF was beginning negotiations with Parsons on the terms of the vehicle supply, vehicle maintenance, and operations and maintenance contracts. METRO directed CAF to quickly negotiate the details of the agreements "before we conclude our VS [vehicle supplier] contract with CAF and make general announcement for CAF being a successful supplier."[119]

Despite these extensive negotiations and resultant agreements with CAF, METRO chose not to notify any of the remaining offerors that they were no longer in consideration for award of the LRV contract. This approach differed from both generally accepted procurement practices and METRO's actions during Step 1 of the LRV procurement when it formally notified one of the offerors, SKODA, that it had

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[112] Memorandum to the Chair, Vehicle Committee (June 26, 2008).
[113] Memorandum to the Chair, Vehicle Committee (June 26, 2008).
[114] CAF Chronology; Transcript of CAF/METRO meeting (Jan. 22, 2009). These documents contradict information provided by METRO during a recent Procurement System Review, where METRO asserted that negotiations with CAF did not begin until August 25, 2008. *See*, METRO response to Draft PSR, Final Report: Metropolitan Transit Authority of Harris County, Houston, Texas (METRO) Procurement System Review, Final Report (May 7, 2010) at 150.
[115] Price Agreement between METRO, Parsons and CAF (Aug. 1, 2008); Price Agreement between METRO, Parsons and CAF (Aug. 8, 2008).
[116] CAF Chronology.
[117] CAF Chronology. According to a summary prepared by CAF, the negotiations lasted a total of 10 days and covered both price and General Provision and Special Provisions. This was followed by multiple meetings between CAF and METRO and METRO's partners Veolia and Parsons over a five month period. Both CAF and METRO recognized that CAF was working at the project stage, rather than the solicitation stage. Partial Transcript of recording of January 22, 2009, meeting between CAF and METRO, at approx.10 min. 00 sec.; Vehicle Procurement Report Committee Recommendations at 9.
[118] Price Agreement between METRO, Parsons and CAF (Aug. 8, 2008).
[119] E-mail from Navin Sagar, Senior Director of Engineering, METRO, to Daniel Hanlon, Parsons Transportation Group, et al. (Sept. 15, 2008, 11:19 AM).

been excluded from the competitive range.[120] The Step 2 offerors had every reason to expect formal notification from METRO if and when they were no longer in consideration for award of the LRV contract.

Instead, METRO misled the remaining offerors by letter dated October 2, 2008, claiming that METRO was "still in the evaluation stage" and would inform the proposers "when the evaluation is completed." That letter also asked each proposer to extend its prices.[121] METRO even sent an identical letter to CAF.[122]

Notwithstanding METRO's public assertion that it was "still in the evaluation stage," on October 17, 2008, METRO placed a provision in its vehicle supply and finance contract with its Facility Provider, Parsons, requiring it to enter into a subcontract with CAF to supply the LRVs.[123]

METRO finally notified all offerors on November 6, 2008, more than four months after it had decided to negotiate with CAF exclusively: "[B]ased on the value added offers received, METRO has decided not to require BAFOs," and advised that METRO was proceeding with discussions with the "top ranked firm."[124]

The remaining vendors expressed disappointment that METRO had not provided an opportunity for them to present revised proposals or BAFOs. Alstom advised METRO:

> The inclusion of Buy America and the associated transfer of technology to the US was a major undertaking which we did not take lightly. We have continued to negotiate with all of our suppliers since June as well as the optimization of our industrial and maintenance schemes and can now offer a substantial reduction in price on both the cars and our maintenance offering. Our BAFO numbers would have reflected these substantial reductions.[125]

Alstom went on to explained:

> [T]he reason we have not communicated these new prices to you was due to our understanding that you would call for a BAFO. In our communication to you we have always confirmed that our BAA [Buy America] conform localized prices would be submitted during the time of the BAFO. So not only can we confirm that Alstom would now easily meet the BAA requirements, but also that a large cost reduction (on cars and

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[120] METRO Executive Decision Document (Jan. 15, 2008); Letter from Ed Hrinewski, Project Director, Washington Group, to Charles Hahn, Manager US Operations, SKODA Electric (Jan. 18, 2008).
[121] Letters from Dennis Hough, Director of Program Initiation, METRO, to Alstom, AnsaldoBreda, Kinkisharyo, Siemens (Oct. 2, 2008).
[122] Letter from Dennis Hough, Director of Program Initiation, METRO, to Virginia Verdeja, Vice President, CAF (Oct. 2, 2008).
[123] § 8.6, Negotiated Final Draft of the Contract for Light Rail Vehicles and Financing for Metropolitan Transit Authority of Harris County, Texas GRT Corridors Project (Oct. 17, 2008).
[124] Letter from Dennis Hough, Director of Program Initiation, METRO (Nov. 6, 2008).
[125] E-mail from Chuck Wochele, Vice President, Marketing & Business Development, Alstom Transportation, to Dennis Hough, Director of Program Initiation Planning, Engineering & Construction, METRO (Nov. 7, 2008, 3:02 PM).

> maintenance) has not yet been considered by yourselves, as we have not yet had the opportunity to offer it to you.[126]

Alstom also noted the price reduction applied as well to its maintenance and extended warranty prices, and that an improved foreign exchange rate also acted to bring about a double-digit reduction in its price.[127]

The documentation of METRO Vehicle Committee Meeting number 7, held on December 3, 2008, notes that METRO told the proposers in the June 2008 workshops that there would be a BAFO opportunity and acknowledged that the offerors' commercial proposals did not contain their BAFO pricing. The committee also noted that this was an ideal opportunity for a BAFO as the U.S. dollar had improved, and that all offerors indicated that they would provide a better price. The committee also noted that allowing a BAFO "may force CAF-USA to be cautious and honestly resolve issues with METRO/Parsons."[128]

METRO then contacted CAF on December 9, 2008, to provide advance notice that METRO would host a one-day workshop to obtain the views of the offerors on whether a BAFO would be of interest. The next day, METRO informed the other offerors.[129]

CAF responded by arguing that it had already agreed with METRO on a contract price and reminded METRO that "CAF already took the long term risk at an early stage to support Metro" and that:

> For the last several months CAF is tirelessly working by supporting METRO and all other parties involved in this Project including PTG [Parsons Transportation Group], Veolia, Consultants and legal advisors to generate documentation for the FTA, furnishing all required detailed technical information and providing its expertise to all the above referred parties in order to advance the planning stage of this project. [130]

Finally, CAF questioned the fairness of the BAFO process because "CAF's price has already been made public potentially giving unfair advantage to our competitors should an invitation for BAFO be issued."[131]

METRO intended that the workshops be limited to providing the offerors an opportunity to provide METRO information and arguments on whether METRO should allow the offerors to submit their best and final offers. METRO President Frank Wilson instructed staff to limit their comments during the

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[126] E-mail from Chuck Wochele, Vice President, Marketing & Business Development, Alstom Transportation, to Dennis Hough, Director of Program Initiation Planning, Engineering & Construction, METRO (Nov. 7, 2008, 3:02 PM).
[127] E-mail from Roelof van Ark, President, Alstom Transportation, Inc., to Frank Wilson, President & CEO, METRO (Nov. 12, 2008, 12:16 a.m.).
[128] Vehicles Committee Meeting No. 7 (Dec. 3, 2008) at 2.
[129] WorkshopBAFOs121008.doc.
[130] Letter from Virginia Verdeja, Vice President of Sales, CAF, to Dennis Hough, Director of Program Initiation, METRO (Dec. 12, 2008).
[131] Letter from Virginia Verdeja, Vice President of Sales, CAF, to Dennis Hough, Director of Program Initiation, METRO (Dec. 12, 2008).

workshops: "My understanding is that we were to say nothing other than 'hello, talk to us, and goodbye'. Please correct me if I am wrong on this, but Frank was very specific."[132]

At the January 22, 2009, workshop, CAF Vice President Virginia Verdeja argued:

> From our point of view, I am sure you can recognize, we are in a very, very different position from [where] everybody else is.[133]
>
> * * *
>
> We negotiated a price. The price was agreed upon and signed. Later on the following week we were asked to revise our price for the maintenance contract . . . and we revised our price, we agreed, we signed, both parties.[134]
>
> * * *
>
> So, in effect, we believe we have already gone through BAFO, more than once and that puts us in a very different position to everybody else, because from that moment on we have been working continuously with all the partners, with METRO, with PTG, with Veolia, with Bravo, with FTA, supplying information, with insurance. There has been not a moment in which we have stopped working, all the way from July to today.[135]
>
> * * *
>
> For me it was, hey guys, you know, you're asking us to move forward, and we did. Because we on the other hand, we didn't want to be holding back the whole time, but from our work, we believe we are at the project state, not at the, "Are we going to go to a BAFO?" state.[136]
>
> * * *
>
> Well, we are six months of work ahead of everyone else, so that puts us in a very different position to everyone else.[137]

The remaining offerors, to varying degrees, all sought the opportunity to present their BAFOs.[138] Dennis Hough, METRO's Director of Program Initiation Planning, Engineering & Construction, in a draft Memorandum to the File dated January 22, 2009, characterized the arguments advanced in favor of

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[132] E-mail from John Sedlak, Executive Vice President, METRO, to Navin Sagar, Senior Director of Engineering, et al., METRO (Jan. 13, 2009, 1:29 PM).
[133] Transcript of recording of CAF/METRO workshop meeting (January 22, 2009) at 3 min. 45 sec.
[134] Id., at 6 min. 50 sec.
[135] Id., at 7 min. 15 sec.
[136] Id., at 10 min. 00 sec.
[137] Id., at 10 min. 35 sec.
[138] Summary of Meeting with Vehicle Proposers-Dated January 20 through 22, 2009.

BAFOs as being persuasive and noted that the "taxpayers would substantially benefit from reduced costs." He concluded:

> Recommendation: In conclusion, it would appear that favorable fiduciary prospects take precedent over non-fiscal and other points in regards to issuing a BAFO (however inherent it may be with respect to a possible protest.)[139]

Contrary to Mr. Hough's recommendation, METRO sent a letter to the offerors advising that the workshop meeting results were "vague and unsubstantiated." METRO provided the offerors the opportunity to submit "a limited amount of critical information and data to assist in our determination of your offer." Each offeror was asked to fill out and return a form comparing their originally submitted prices to the prices they might offer today.[140]

However, even while METRO's BAFO decision-making was progressing, METRO President and CEO Frank Wilson continued to negotiate with CAF. On January 30, 2009, CAF met with METRO's President and others. METRO Senior Engineer Navin Sagar memorialized these discussions in an e-mail. Sagar noted that CAF had not lowered its price enough during a January 27, 2009, negotiation. During the January 30, 2009, meeting, CAF was again asked to lower its price. METRO's President gave CAF a few days to consider the request. The President later asked staff to call one of the other offerors, Alstom, to inquire about technical clarifications and to schedule a meeting. Mr. Sagar concluded: "It appears to me that all this exercise may be a mere game to arrive [at] a target price for CAF's future meeting."[141]

In response to METRO's January 27, 2009, letter requesting more information regarding the desirability of BAFOs, Siemens wrote questioning METRO's assertions that the need for a BAFO was unsupported. Siemens reminded METRO that at its workshop it presented information that its price and delivery offers would be improved in a BAFO. It reasserted that Siemens would provide a BAFO "once such an offer is properly solicited outlining the framework and most importantly the schedule upon which to formulate the offer."[142] Alstom also responded to METRO's January 27, 2009, letter and reported that Alstom had further refined its prices.[143]

Internal METRO documents indicate that METRO staff began to suspect that they had proceeded too far with CAF, for too long, to now request BAFOs. They believed requesting BAFOs might risk a protest from CAF. In an internal analysis, METRO staff wrote that acceptance of Alstom's BAFO pricing without issuing a formal request for BAFOs, could "possibly save taxpayer millions of dollars" and "possibly [o]btain technologically superior vehicles in terms of water bogie penetration (operates in 6"

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[139] Draft Memorandum to the File from Dennis Hough, Director of Program Initiation, Planning, Engineering & Construction, METRO (Jan. 22, 2009).
[140] Letter from Dennis Hough, Director of Program Initiation Planning, Engineering & Construction, METRO (January 27, 2009).
[141] E-mail from Navin Sagar, Senior Director of Engineering, METRO, to Bryan Pennington, Senior Vice President, Engineering & Construction, METRO (Jan. 30, 2009, 9:04 PM).
[142] Letter from Robin Stimson, Siemens, to Dennis Hough, Director of Program Initiation Planning, Engineering & Construction, METRO (Jan. 28, 2009).
[143] E-mail from Roelof van Ark, President, Alstom Transportation, Inc., to Frank Wilson, President & CEO, METRO (February 11, 2009, 11:29 AM).

of water)."[144] Staff wrote that not accepting Alstom's BAFO pricing might not avoid a CAF protest but METRO would be required to "pay millions more to CAF."[145]

On February 17, 2009, METRO's Vehicle Committee met and compared the previously negotiated deal with CAF to the information Alstom provided when it tried to convince METRO to call for a BAFO. No other offers were considered. Notes of the meeting indicate that further clarifications were needed from Alstom. Also the committee discussed whether it should "keep Alstom as a stalking horse in the event CAF is selected."[146] The Committee voted to move forward with recommending to the METRO Board that it approve the contract with CAF. The Committee reported that the "Alstom proposal met all technical requirements but was not the best value by comparative analysis."[147]

On March 4, 2009, METRO's Board of Directors held a special Board Meeting and authorized METRO to contract with Parsons to supply the LRVs. The Board also approved the assignment of the LRV contract by Parsons to Houston LRV 100 LLC, an entity owned by Parsons and CAF.[148]

After the METRO Board had voted to enter into a contract with CAF, METRO staff attempted to prepare post hoc documentation of the procurement. They needed documentation of the negotiations between METRO and CAF that established the vehicle price, that established whether the price was fixed, and the rationale for METRO making large up-front payments to CAF. Dennis Hough, METRO Director of Program Initiation Planning, Engineering & Construction asked METRO consultant D.K. Chakraborty to "provide the rationale for what took place in the negotiations."[149] According to Mr. Hough,

> [T]he formal completion of the record of negotiations should have been done prior to going to the Board and the subsequent contract signing. So you can see, we are behind the eight-ball on getting document completed.[150]

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[144] Another document containing minutes of the meeting reveals that "The low fordablity issue of the CAF LF LRV due to its positioning of the drive system was discussed. The President's direction was to consider this a compromise that Houston must consider with the approval of low floor technology to Houston. The benefits outweigh the negatives and the system will be directed to shut down in high water conditions." Vehicle Committee Meeting No. 9 - Recommendations on Best Value Proposals (March 6, 2009).
[145] Procurement Considerations, undated. Staff wrote that not accepting Alstom's BAFO pricing might avoid a CAF protest but METRO would be required to "pay millions more to CAF." *Id.*, at 1.
[146] Vehicle Committee Notes, complied by Dennis Hough, METRO Director of Program Initiation Planning, Engineering & Construction (Feb. 17, 2009).
[147] Vehicle Committee Meeting No. 9-Recommendation on Best Value Proposals at 2.
[148] Apparently, further negotiations with CAF were needed even after the METRO Board's authorization. On March 25, 2009, METRO President and CEO Frank Wilson travelled to Seville, Bilboa and Madrid to "visit CAF Manufacturing Facility." The documents do not further describe the activities of the trip. Metropolitan Transit Authority Expense Report for Frank Wilson. It is unclear why a visit to CAF's rail car manufacturing facility was needed after the procurement had concluded, especially since METRO staff had visited the facility in November 2007 during Step-1 of the procurement. Trip Report - Carbuilder Visits - November 2007, METRO and WGTMC.
[149] E-mail from Dennis Hough, Director of Program Initiation Planning, Engineering & Construction, Metropolitan Transit Authority, to D.K. Chakraborty, Consultant to the Metropolitan Transit Authority (May 15, 2009, 5:18 PM).
[150] E-mail from Dennis Hough, Director of Program Initiation Planning, Engineering & Construction, Metropolitan Transit Authority, to D.K. Chakraborty, Consultant to the Metropolitan Transit Authority (May 15, 2009, 5:18 PM).

Mr. Chakraborty protested that he could not provide the rationale because he was not present at all negotiations between METRO President Frank Wilson and CAF, but would provide as much information as he could.[151] Mr. Sagar reviewed the materials from Mr. Chakraborty and decided not to use them, but to "assemble a stand-alone document that can be shared with a third party as/if needed . . . . It is intended to be generic ansd [sic] signed by DK, Clyde and CAF for the record."[152]

Meanwhile, METRO staff complained about being cut out of the procurement process. According to an April 10, 2009, e-mail message from Houston METRO Senior Vice President Bryan Pennington, in which Mr. Pennington expressed "the need to come to the defense of [his] team members who have been involved in vehicle issues," states:

> Since Clyde Garrison/Dhirin Chakraborty [Consultants to METRO] were instructed to lead the vehicle contract negotiations and to be the sole contacts with Parsons/CAF, METRO's team were in essence removed from direct involvement with Parsons/CAF, commencing in September 2008. Since that time, their direct role in the vehicles has at best been marginal, other than resolution of the procurement process. Regardless of this, they have continued to provide support, albeit with limited information.[153]

The documents provided by METRO show that METRO violated Federal procurement rules that require full and open competition when it denied all offerors the ability to present their best and final offers while continuing to negotiate with CAF on price and other issues. In addition, METRO apparently was using the BAFO discussions to obtain information from the offerors for use in METRO's negotiations with CAF. The practice of secretly selecting one offeror for negotiations, while denying all other offerors the ability to revise their proposals was fundamentally unfair to the offerors and did not lead to a comparison of the best and final offers. Moreover, instead of fully analyzing all the offers and then making a selection, METRO staff performed its analysis and prepared documentation supporting its decision after the fact. Accordingly, METRO violated procurement requirements when it based its source selection decision on incomplete and inadequate proposals, incomplete and inadequate analysis, and documented its decision after the fact.

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[151] E-mail from D.K. Chakraborty, Consultant to the Metropolitan Transit Authority, to Navin Sagar, Senior Director of Engineering, Metropolitan Transit Authority (May 15, 2009, 9:45 PM).
[152] E-mail from Navin Sagar, Senior Director of Engineering, Metropolitan Transit Authority, to Dennis Hough, Director of Program Initiation Planning, Engineering & Construction, Metropolitan Transit Authority, and Bryan Pennington, Senior Vice President, Engineering & Construction, Metropolitan Transit Authority (May 27, 2009, 11:35 AM).
[153] E-mail from Bryan Pennington, Senior Vice President, Engineering & Construction, Houston METRO, to John Sedlak, Executive Vice President, Houston METRO (April 10, 2009, 4:48 pm).

c. ***METRO's Light Rail Vehicle procurement was flawed due to the sum of many failures, including the lack of an adequate procurement plan, the failure to disclose all evaluation factors in the solicitation, the failure to inform potential offerors of the relative importance of those factors that were disclosed in the evaluation, the use of undisclosed changes in evaluation factors, and the failure to perform a complete best value analysis.***

1. METRO's LRV procurement lacked an adequate procurement plan.

METRO provided no evidence that it developed and followed a procurement plan that identified those characteristics in a rail car manufacturer's proposal that were most important to METRO and that would form the basis for METRO's best value determination. A procurement plan would have been important to assure that the overall strategy for the acquisition complied with applicable acquisition requirements as well as applicable laws, such as the Buy America requirements contained in 49 U.S.C. § 5323(j) and the prohibition on rolling stock procurements lasting longer than five years contained in 49 U.S.C. § 5325(e)(1).[154] METRO's own Procurement Manual advises:

> Planning and documenting the process in advance is necessary to ensure confidence that the procurement process is objective, so that the proposers know the criteria, and that no one can credibly allege that the process was created to achieve a specific result.[155]

Rather than developing and advertising a procurement that put all potential offerors on notice of the requirements and selection criteria, METRO opted for a less descriptive approach.

METRO President and Chief Executive Officer Frank Wilson described the LRV solicitation as a "revolutionary procurement approach" because it would enhance the "flexibility" that was afforded potential suppliers "to provide their best commercial deal."[156] The RFP avoided detailed technical specifications and encouraged the submission of "value added" proposals.[157] This approach was similar to the one used by Mr. Wilson in an earlier procurement that he managed for another transportation agency.[158]

METRO documents developed before release of the solicitation contemplated an acquisition process whereby METRO would only release the final vehicle specifications to a group of four shortlisted vendors. Then METRO would further refine the list to two finalists for further negotiations, culminating in the selection of the Best Value proposer.[159]

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[154] Section 1.4.3 of the RFP allowed for the exercise of options to purchase up to 50 additional vehicles within 7 years of the 2011 delivery of the base order. *See*, Request for Proposals. The statutory provision limits the time within which a contractual option to buy rolling stock may be exercised to "not more than 5 years after the date of the original contract." 49 U.S.C. § 5325(e)(1).
[155] Metropolitan Transit Authority of Harris County, Texas, Procurement Manual (Rev. 12/18/02), Chapter 8 – Contracting By Negotiation, § 8.9 A.
[156] *Passenger Transport*, August 20, 2007, at 1, 9.
[157] Request for Proposals, August 31, 2007.
[158] State of New Jersey Commission of Investigation Report: E-ZPass – The Making of a Procurement Disaster, June 2004, at 38-40.
[159] Expedited Procurement Plan for Light Rail Vehicles, July 5, 2007 at 6.

In an August 13, 2007, draft, METRO contemplated a more open two-step process. The first step was to be a preliminary technical evaluation of the proposals. Those offerors passing the first step would proceed to the second step and submit prices and negotiate the "full scope and terms and conditions." This process was to end in a best value determination "from a complete life cycle cost analysis including cost of infrastructure impacts and other factors as well as a risk analysis."[160]

METRO now argues that its procurement plan was revealed in the RFP itself. However, that document simply advised potential offerors:

> Sec. 1.3.2. A two-step procurement is contemplated for Contractor selection, with WGTMC [Washington Group] as the procuring entity. Step-1 will be a preliminary evaluation of the LRV design proposed by the Contractor. Each submission will be evaluated for:
>
> - Compliance with legal and financial criteria as defined herein
> - A proven record of reliable revenue service and an ability to meet all requirements stated herein
> - Quality of design as demonstrated through responses to other requested information herein
> - Viability of proposals for modifications needed to existing infrastructure to accommodate the LRVs, if needed[161]
> - Capacity of the LRV manufacturer to meet expedited and/or guaranteed fleet delivery dates and quantities
> - Proven record of the LRV manufacturer for timeliness and quality of LRV supply, and warranty support.
> - Value-added considerations[162]
>
> Those Contractors that meet or exceed the requirements for Step-1 will participate in Step-2, which will involve submission of pricing, and negotiation of full scope and terms and conditions among other items.
>
> Award of the vehicle procurement contract will be based upon the Contractor that offers the "best value" to the program. Step-2 evaluation factors will address total life cycle costs, including: (a) vehicle cost, (b) maintenance costs, (c) overhaul costs, (d) cost of operations (labor and energy) and (e) cost of infrastructure impact to accept offered vehicles in the revenue operation. Details of Commercial Proposal requirements will be provided by an addendum to this RFP.
>
> *The evaluation process and criteria to be used in Step-2 will be shared with those Contractors selected for Step-2 consideration.*[163]

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[160] Light Rail Vehicle Procurement Requirements, August 12, 2007 at 6.
[161] Addendum No. 1 to the RFP deleted this evaluation factor from §1.3.2. *See*, Addendum No. 1, September 21, 2007.

[162] Addendum No. 1 to the RFP also deleted this evaluation factor from §1.3.2. *See*, RFP Addendum No. 1, (Sept. 21, 2007).
[163] RFP § 1.3.2 (Emphasis added).

The competitive acquisition process is a subjective one that differs from the sealed bid process in that factors other than price can be considered when making an award. Obviously, these factors must be disclosed to all potential offerors in the solicitation. This is not only a matter of fundamental fairness, but is important so that offerors can accurately respond to the solicitation and clearly present the information needed for proposal evaluations. Additionally, this transparency diminishes the appearance of favoritism or unethical practice in the source selection decision.

As of the release of the RFP, the selection criteria had not been developed by METRO or shared with the potential offerors.[164]

2. METRO failed to inform offerors of the relative importance of evaluation factors and applied the evaluation factors inconsistently.

Houston METRO has not provided any internal procurement or source selection plan that laid out, in advance, those factors of most importance to METRO in its source selection decision. Similarly, the RFP and subsequent addenda failed to disclose all evaluation factors and their relative importance as required by FTA Circulars 4220.1E and F. It appears that METRO refined its selection criteria as the procurement and subsequent negotiations with CAF proceeded.

Although RFP § 1.3.2, as issued, was silent regarding the relative importance of the evaluation criteria, METRO and Washington Group staff had prepared a draft of RFP Addendum No. 3 that included in Appendix H a list of the evaluation criteria to be used by METRO to evaluate the Step-2 commercial proposals. The draft listed five criteria of varying weights, along with multiple sub criteria, each tied to a section of the RFP. The criteria and their relative importance were:

- Management, Administration Control and Commitments - 15%
- Vehicle Offer, Details, Options, and Services - 20%
- Compliance with Ts&Cs, Legal, and Financial Criteria - 10%
- Price - 25%
- Value Added - 30%[165]

[164] Indeed, as late as September 19, 2007, METRO was considering revising its evaluation methodology for evaluation of Step 1. E-mail from James Mills, Contract Officer, Washington Group, to Dennis Hough, Director of Program Initiation Planning, Engineering & Construction, METRO, et al. (Sept. 19, 2007, 4:40 PM) ("This is a departure from the current evaluation methodology; however we did not divulge process. Therefore, if agreed this can be implemented without modifying the RFP.").
[165] RFP Addendum No. 3 Draft (Oct. 5, 2007).

This clear, quantitative approach to proposal evaluation survived at least through an October 30, 2007, draft.[166] However, when RFP Addendum No. 3 was finally released on December 18, 2007, Appendix H was not included. Instead, offerors were simply advised:

> 6.3 Step 2 Evaluation Criteria
>
> WGTMC [Washington Group] will institute a private sector approach to the evaluation process that considers responsiveness to the RFP requirements, initial capital cost, proposed value added benefits, life cycle costs, and the proposed financing package if provided to determine the ultimate best value to METRO.[167]

In addition, the Addendum provided:

> 6.4 Step 2 Evaluation Process
>
> All proposals will be evaluated using the criteria identified in section 6.3 above . . . . WGTMC [Washington Group] reserves the right to negotiate with one or more Proposers which may include a Best and Final offer (BAFO) process.[168]

However, an internal METRO draft of a document entitled Proposal Review and Evaluation Procedures, dated December 21, 2007, stated that the proposals would be evaluated using an evaluation criteria identical to that listed in Appendix H to the October 5, 2007, draft of Addendum No. 3.[169] It is unclear from the documents provided by METRO why these evaluation criteria were not used. In response to the draft Proposal Review Evaluation Procedures document, METRO's Dennis Hough advised: "We are going with the low price in step 2, value-added consideration also being factored in. Work up some good wording."[170]

After the release of Addendum No. 3, some offerors were unclear about the evaluation criteria METRO was planning to use and submitted formal questions to METRO. Washington Group Contract Officer James Mills drafted a reply to a proposer's question that asked METRO to describe what Addendum No. 3 to RFP § 6.3 meant by a "private sector approach to the evaluation process."

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[166] See, Addendum No. 3 Draft (Oct. 30, 2007).
[167] RFP Addendum No. 3, Exhibit B, § 6.3 (Dec. 18, 2007).
[168] RFP Addendum No. 3, Exhibit B at § 6.4 (Dec. 18, 2007).
[169] Proposal Review and Evaluation Procedures, Draft, Appendix 2, at 9 (Dec. 21, 2007).
[170] E-mail from Dennis Hough, METRO Director of Program Initiation Planning, Engineering & Construction to Donald Pieper, METRO Sr. Program Initiation Specialist (December 21, 2007, 3:08 PM).

Although the Contracting Officer declined to further define the criteria in § 6.3, he stated that the evaluation criteria to be used, listed in descending order of importance, were:

- Responsiveness of the proposal
- Initial capital costs
- Life Cycle costs
- Value Added Benefits
- Proposal Financing package[171]

However, the answer was not issued as the Contracting Officer drafted it.[172] Instead, the answer as finally released to the offerors avoided providing the requested guidance. Question 50, transmitted in RFP Addendum No. 5 stated:

> Q: Addendum 3, Exhibit B, Section 6.3 states that WGTMC will institute a "private sector approach" to the evaluation. What is meant by "private sector approach"?
>
> A: A "private sector approach" is a Best Value procurement methodology where all relevant factors are considered in determining which offer is the most advantageous to the buyer.
>
> Q: Additionally, please provide the relative importance of each evaluation criteria. Is the evaluation criteria further defined?
>
> A: No.[173]

METRO now asserts that its one-word response to Question 50 provided guidance to offerors of its intent that the selection criteria listed in Addendum No. 3 be of equal weight. However, nowhere in this or subsequent addenda to the RFP does METRO either provide the relative importance of each evaluation criterion, or further define the evaluation criteria or sub-criteria. No fair reading of the word "no" would place prospective offerors on notice of the relative weights of the evaluation factors.

Moreover, METRO's approach was inconsistent with both METRO's Procurement Manual and FTA Circular 4220.1E.[174] The Procurement Manual requires an RFP to provide "the areas and factors to be used in the evaluation and selection process and their relative importance (Descendial order of priority—

[171] E-mail from James Mills, Contract Officer, Washington Group, to Ron Chance, Washington Group, and Dennis Hough, Director of Program Initiation Planning, Engineering & Construction, Metropolitan Transit Authority (January 17, 2008, 5:18 PM).
[172] Adding to the uncertainty, METRO's draft LRV Proposal Schedule dated January 22, 2008, stated that Step 2 proposals would be evaluated "based on Low Cost Ranking." LRV Proposal Schedule, Draft, January 22, 2008 at 2.
[173] RFP Addendum No. 5, at 4 (Feb. 7, 2008).
[174] This Circular was superseded on November 1, 2008 by FTA Circular 4220.1F. That Circular also requires "All evaluation factors and their relative importance are specified in the solicitation; but numerical or percentage ratings or weights need not be disclosed." Ch. VI, 2.d.(2)(b).

otherwise they are considered to be of equal importance)."[175] Clearly, METRO failed to list in the solicitation all evaluation factors along with their relative importance.[176]

METRO's final version of its proposal review and evaluation procedures, called for Step 2 proposals to be evaluated using "the evaluation criteria, sequence of review and forms" contained in Appendix 1 and 2 to the procedure.[177]

Appendix 2, entitled "Step 2 Proposal Evaluation Criteria" set out five broad criteria, with sub-criteria:

1. Management Proposal
   A. Management
   B. Experience
   C. Key Personnel
   D. Suppliers
   E. Schedule
2. Technical Proposal
   A. Technical Details
   B. Options
   C. Additional Services
3. Commercial Proposal (Basis for Negotiation)
   A. General Provisions
   B. Legal Criteria
   C. Financial Criteria
   D. Federal Laws & Regulations
4. Price Proposal
   A. Vehicle Price
   B. Life Cycle Costing (Vehicles, O&M, Warranty, Infrastructure, Financing)
5. Value Added Proposal

The proposal evaluators[178] were instructed to rank each of the proposers on a 1 to 5 scale.[179] Apparently, METRO intended the same evaluators to evaluate both price and technical proposals.

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[175] Metropolitan Transit Authority of Harris County, Texas, Procurement Manual, Chapter 8 – Contracting By Negotiation, § 8.8 B (Rev. Dec. 18, 2002). See also, § 8.9 B ("the solicitation shall specify at least; (1) the significant evaluation factors and, (2) the relative importance placed on each evaluation factor."). Since FTA initiated this investigation, METRO has amended its procurement procedures to provide assurance that the process used by METRO to select suppliers are properly communicated and consistently followed.[175]

[176] See, ¶ 8.d.(1), FTA Circular 4220.1E – Third Party Procurement Requirements.

[177] Parsons Transportation Group Proposal Review and Evaluation Procedure, §5.1.1, at 3 (April 2008).

[178] The Vehicle Review Committee was responsible for evaluating Step 1 proposals and for overseeing the evaluation of the Step 2 proposals. The Vehicle Committee Chairman, METRO President & CEO Frank Wilson, was "responsible for developing and implementing the vehicle procurement strategy and framework." Parsons Transportation Group Proposal Review and Evaluation Procedure, § 5.2.1 at 4 (April 2008). The Vehicle Committee was responsible for "overall evaluation of recommendations made by the Review Committee." Parsons Transportation Group Proposal Review and Evaluation Procedure, Appendix 3 at 8 (April 2008). There was considerable overlap between the members of the Vehicle Review Committee and the members of the Vehicle Committee. Four of the Vehicle Committee members were also members of the Vehicle Review Committee, and thus responsible for reviewing and evaluating their own recommendations.

Sometime after the Step 2 proposals were submitted on February 29, 2008, METRO developed an initial comparison matrix that ranked the proposals:

1. CAF
2. AnsaldoBreda
3. Alstom
4. Siemens
5. Kinkisharyo

The undated comparison matrix indicates the seven evaluation criteria used to develop this ranking:

1. Buy America Compliance
2. Technical Requirements Including the proposed modifications from Step-1
3. Vehicle Pricing Review
4. Maintenance Pricing
5. Delivery Concerns
6. Value Added Initiatives
7. Preferred Position Pricing Total Pricing for 103 Vehicles + 5 Yrs. Maintenance[180]

However, on June 20, 2008, six METRO evaluators reviewed the proposals again and this time ranked the offerors:

1. CAF (22)[181]
2. Siemens (14)
3. Kinkisharyo (13)
4. Alstom (12)
5. AnsaldoBreda (10)

The five evaluation criteria used for this second review were as follows.

1. Buy America and ADA Compliance
2. Vehicle Pricing (including options for additional vehicles, if applicable)
3. Vehicle Maintenance Pricing
4. Value Added Requirements
    - Financing
    - Others
5. Delivery Commitments[182]

Thus, the documents provided by METRO show that throughout the evaluation process, the evaluation factors changed with each evaluation and were different from those disclosed to the offerors in the RFP.

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[179] Appendix 2, Parsons Transportation Group Proposal Review and Evaluation Procedure (April 2008).
[180] Light Rail Procurement Comparison Matrix of Commercial Proposal (After the Workshop) – Confidential Draft.
[181] The parenthetical numbers represent scores given to the offerors based on a ranking of each proposal in each of the five categories on a 1 to 5 scale.
[182] Proposal Evaluation Ranking Summary (After Workshop-1).

3. METRO failed to perform a valid best value analysis.

On June 26, 2008, METRO's Vehicle Review Committee recommended to Frank Wilson, the Chair of the Vehicle Committee, that METRO not call upon the offerors to submit best and final offers because of a $ 64 million difference in the prices between CAF and Siemens, the second ranked offeror. Instead, the Vehicle Review Committee recommended that METRO enter into negotiations with CAF exclusively and only negotiate with the second ranked offeror if the CAF negotiations were unsuccessful.[183]

On July 24, 2008 METRO advised CAF, in a telephone conversation, that it was going to commence negotiations. This was followed by several meetings culminating in the signing of price agreements.[184] Extensive negotiations with CAF followed and CAF began to interface with the other METRO partners in preparation for LRV production.[185]

However, it was not until approximately seven months later, in an undated document[186] entitled "Vehicle Procurement Report," that METRO purports to both conduct and document its best value analysis. The document compared the prices of CAF and one of the other competitors, Alstom.[187] Although the committee finds that Alstom's total pricing was approximately $7 Million lower than CAF's, the committee notes that Alstom's "[a]pparent low pricing is not beneficial to METRO in light of CAF's Fixed Pricing+ Full Technical Compliance and 2% lesser inflation risk."[188] The committee unanimously recommended that CAF be selected because its:

> Proposal is superior and more beneficial to METRO. This is due to the following major reasons:
>
> - CAF offers "best value" by providing fixed pricing over the entire vehicle supply and vehicle maintenance periods. The offer reduces METRO's risk exposure to incur costs due to market and foreign exchange uncertainties over a longer period.
> - The offer meets or exceeds METRO's expectations by providing manufacturer's off-the-shelf standard, service-proven vehicles that are suitable to operate in the Houston environment.
> - Meets legal requirements including full compliance with BA [Buy America] and ADA [Americans with Disabilities Act].
> - CAF's 100% Low Floor vehicle offers better ingress/egress, enhanced interior flexibility and wider isles [sic] for passenger comfort.
> - CAF's vehicle has negligible impact on the existing Main Street line infrastructure or the recent design of new line infrastructure.

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[183] Memorandum to the Chair, Vehicle Committee (June 26, 2008).
[184] Price Agreement between METRO, Parsons and CAF (Aug. 1, 2008); Price Agreement between METRO, Parsons and CAF (August 8, 2008).
[185] According to a summary prepared by CAF, the initial negotiations lasted a total of 10 days and covered both price and General Provision and Special Provisions. This was followed by multiple meetings between CAF and METRO and METRO's partners Veolia and Parsons over a five month period. CAF Activity Summary.
[186] The document's footer contained the information "Vehicle Procurement Report-030409.doc."
[187] It is unclear why METRO compared Alstom's offer, since METRO's evaluators had rated the company 4th out of 5.
[188] Vehicle Procurement Report.

- CAF is flexible in accommodating three separate NTPs [Notices to Proceed], all for the same unit vehicle-price.
- CAF has been working diligently at risk since July 2008 in an effort to offer the best possible package to METRO.[189]

The Vehicle Procurement Report also recommended that CAF's "final pricing offer" be obtained in writing.[190]

Finally, the documentation picks up with an undated[191] Memorandum of Negotiations in which METRO's "Selection Process and Criteria" is described as: "Low price and best overall value."[192]

At the time METRO memorialized its best value determination, [193] FTA Circular 4220.1F describes the best value determination process:

> If permitted under its State or local law, the recipient may award the contract to the offeror whose proposal provides the greatest value to the recipient. To do so, the recipient's solicitation must inform potential offerors that the award will be made on a "best value" basis and identify what factors will form the basis for award. The evaluation factors for a specific procurement should reflect the subject matter and the elements that are most important to the recipient. Those evaluation factors may include, but need not be limited to, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. The recipient should base its determination of which proposal represents the "best value" on an analysis of the tradeoff of qualitative technical factors and price or cost factors. Apart from the statutory requirement that the contract must support the recipient's public transportation project consistent with applicable Federal laws and regulations, FTA does not require any specific factors or analytic process.[194]

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[189] Vehicle Procurement Report.
[190] Vehicle Procurement Report at 9.
[191] The footer of the document indicates that the document is entitled "MON 032010", possibly indicating a March 20, 2010 date. However, the last page, containing the signatures of Dennis Hough, METRO Director of Program Initiation Planning, Engineering & Construction, Navin S.Sagar, METRO Senior Director of Engineering, Bryan N. Pennington, METRO Senior Vice President, Engineering & Construction, and Dhiren K. Chakraborty, METRO consultant, indicates the document is entitled "MON 012510," possibly indicating a January 25, 2010, date. Regardless of the actual date in 2010 that the Memorandum of Negotiations was prepared, the document was not prepared contemporaneously with the negotiations that occurred in 2008 and 2009.
[192] Memorandum of Negotiations (2010).
[193] When METRO began the procurement FTA Circular 4220.E provided: "In determining which proposal is most advantageous, grantees may award (if consistent with State law) to the proposer whose proposals offer the greatest business value to the Agency based upon an analysis of a tradeoff of qualitative technical factors and price/cost to derive which proposal represents the "best value" to the Procuring Agency as defined in Section 6, Definitions. If the grantee elects to use the best value selection method as the basis for award, however, the solicitation must contain language which establishes that an award will be made on a "best value" basis." FTA Circular 4220.1E, ¶ 8.d. (5).
[194] FTA Circular 4220.F, Ch. VI, ¶ d(2)(f).

The Circular also notes:

> To achieve best value in the context of acquisitions for public transportation purposes, the evaluation factors for a specific procurement should reflect the subject matter and the elements that are most important to the recipient. While FTA does not mandate any specific evaluation factors, the recipient must disclose those factors in its solicitation.[195]

METRO's best value determination is flawed in several respects. First, the evaluation factors used in the best value analysis and which purport to form the basis for the decision were not fully disclosed in the solicitation. Second, METRO chose only to perform a best value analysis for two of the five firms remaining in the competitive range. Third, the documents provided by METRO do not document a tradeoff of qualitative factors with price or cost factors as required by FTA Circular 4220.1F. Fourth, the questionable factors contained in the METRO best value report include: (1) the assertion that CAF met its Buy America legal requirements, even though CAF's proposal clearly stated that it would assemble two of the prototype vehicles in Spain, an activity that is not in compliance with the Buy America requirements; (2) the assertion that CAF was flexible in accommodating multiple notices to proceed, when that factor does not appear among the evaluation criteria in the RFP; and (3) the assertion that CAF offered fixed pricing over the entire contract,[196] and (4) the assertion that CAF had "been working diligently at risk since July 2008." Thus, METRO used a factor that was not listed in the RFP and one that METRO created when it secretly selected CAF in July 2008 to bolster its *post hoc* March 2009 best value documentation.

VI. CONCLUSION

As explained above, we have found three substantial violations of FTA's Buy America and procurement rules:

a. METRO and CAF violated FTA's Buy America requirements. This began with METRO's release of a Request for Proposals (RFP) that stated FTA's Buy America requirements did not apply to the procurement; continued with METRO's unsupported evaluation of the various offeror's Buy America compliance, including the Certificate submitted by CAF; and culminated with METRO's decision not to require CAF to meet its contractually mandated Buy America obligations and to circumvent the Buy America requirements by entering into a separate, locally funded contract with CAF for the pilot vehicles;

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[195] FTA Circular 4220.F, Ch. I, ¶ 5.b.

[196] According to the Vehicle Procurement Report, Alstom "failed to offer true fixed pricing." Vehicle Procurement Report, at 7-8. However, just two months later, METRO staff observed that the actual contract terms with CAF did not provide METRO with fixed pricing "any more than was hotly debated in Alstom's comparison" and that now METRO was "required to make a large upfront payment" and "reimburse for performance security fee or LOC. Between the lines, Metro could have difficulty explaining when public finds out." E-mail from Navin Sagar, Senior Director of Engineering, METRO, to D.K. Chakraborty, METRO consultant (May 15, 2009, 9:00 AM). *See also*, E-mail from D.K. Chakraborty, METRO consultant, to Frank J. Wilson, President and CEO, METRO (April 22, 2009, 12:41 PM) ("It is my understanding that CAF need to lock fixed price with the material suppliers for all 103 vehicles and it requires 15% of the total amount of materials as down payment . . .").

b. METRO violated FTA's competitive procurement rules when it chose to negotiate with one of the offerors, CAF, to the exclusion of all other offerors, and allowed that offeror to continue revising its price while refusing to allow other offerors the opportunity to present their Best and Final Offer (BAFO); and

c. METRO's LRV procurement was flawed due to the sum of many failures, including the lack of an adequate procurement plan, the lack of an adequate source selection evaluation plan, METRO's failure to disclose all evaluation factors in the solicitation, METRO's failure to inform potential offerors of the relative importance of those factors that were disclosed in the evaluation, METRO's use of undisclosed changes in evaluation factors, and METRO's failure to perform a complete best value analysis.