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September 13, 2018

**Via Email, U.S. Mail and
Hand Delivery**

Thomas D. Carruthers
City Attorney
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Re: Transdev Services, Inc. Notice of Appeal to City Council

Dear Tom:

This firm represents Transdev Services, Inc. ("Transdev"). On August 2, 2018, the City of Greensboro/Greensboro Transit Authority ("GTA") recommended that the City's bus transit contract be awarded to Keolis North America. Transdev filed a protest of that recommendation to the GTA on August 9, 2018 (the "Protest"), citing several grounds, including that the decision was arbitrary, capricious, wrongful, unreasonable, and in violation of state law. GTA denied the protest on September 5, 2018. Transdev gives notice that it appeals the GTA decision to the City Council pursuant to Provision II. F. of the Request for Proposals ("RFP").

Transdev's presentation to the City Council will address the following points in support of its protest:

1. The GTA Board conducted two illegal closed sessions in connection with the process of determining the composition of the Selection Committee. Pursuant to N.C. Gen. Stat. § 143-318.9 *et seq.*, "each official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting." The GTA Board is a public body as defined N.C. Gen. Stat. § 143-318 in that it "administers the legislative, policy-making, quasi-judicial, administrative, [or] advisory functions of North Carolina and its political subdivisions" and "exists solely to conduct the people's business."

A public body is only permitted to conduct a closed session for one of the narrowly defined reasons set forth in N.C. Gen. Stat. § 143-318.11. Before calling a closed session, a motion must be made and adopted by the public body at an open meeting, citing which of the permissible purposes set forth in the statute is the basis for the



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closed session. N.C. Gen. Stat. § 143-318.11(c). While a public body may call a closed session “to consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body” **it may not discuss “general policy matters” and nothing in the statute “shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant.”** N.C. Gen. Stat. § 143-318.11(a)(3). “A motion based on subdivision (a)(3) . . . **shall identify the parties in each existing lawsuit concerning which the public body expects to receive advise during the closed session.**” N.C. Gen. Stat. § 143-318.11(c).

On March 27, 2018, the GTA Board conducted an “official meeting” as defined by N.C. Gen. Stat. § 143-318.10(d) because the meeting was “for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business within the jurisdiction, real or apparent, of the public body.” Accordingly, North Carolina law requires such a meeting to be open to the public. During that meeting, the GTA Board went into an illegal closed session to discuss the RFP process and the composition of the Selection Committee when it asked members of the public, specifically representatives of Transdev, to leave the room – without any motion to enter a closed session or providing any basis for so doing.

Prior to asking the Transdev representatives to leave the room, the GTA Board did not vote to go into closed session, nor was any motion to go into a closed session even considered, clearly in violation of the procedure set forth under N.C. Gen. Stat. § 143-318.11(c). As set out on pages 8-11 of the March 27, 2018 Board Meeting minutes, the GTA Board engaged in extensive discussion about the composition and make-up of the Selection Committee during this closed session. The GTA Board minutes for this portion of the March 27, 2018 meeting show that the GTA Board discussed, and ultimately selected, specific individuals to serve on the Selection Committee during this closed session. These discussions included substantial consideration of the qualifications of certain potential members of the Selection Committee and decisions regarding the composition of the Selection Committee. During this discussion, specific objections were made as to potential Committee members and certain members were ultimately selected. There is no permitted purpose set out in N.C. Gen. Stat. § 143-318.11(a) under which a discussion of this type would be allowed in a closed session.

Additionally, while N.C. Gen. Stat. § 143-318.11(a)(6) is typically referenced in regard to personnel decisions, subsection (a)(6) is relevant here because under that subsection a “public body **may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the**



public body or another public body and may not consider or fill a vacancy among its own membership **except in an open meeting.**” N.C. Gen. Stat. § 143-318.11(a)(6). By discussing the qualifications, competence, and potential appointments of the Selection Committee in this closed session, such discussion was directly in violation to subsection (a)(6).

The conducting of business related to general policy matters related to the composition of the Selection Committee by the GTA Board in a closed session is clearly illegal as contemplated by N.C. Gen. Stat. § 143-318.9 *et seq.* As a result of the GTA Board’s decision to enter into the unlawful closed session, representatives of Transdev, as members of the public, were unfairly denied an opportunity to be present during said discussion, despite having a stake in the discussion and serious concerns about the decisions made during this closed session.

At the June 26, 2018 GTA Board meeting, the GTA Board made a motion to go into a “private session in order to have discussion with the Board’s Attorney Fox on the telephone.” As set out on page five of the June 26, 2018 GTA Board Meeting minutes, the GTA Board then went into a closed session with the Assistant City Attorney and Attorney Fox. During that closed session, the GTA Board discussed the composition of the Selection Committee. Specifically, the GTA Board discussed that the composition of the Selection Committee did not meet the requirement that at least one member of the Selection Committee be an officer of the GTA Board. Further, the GTA Board formulated a plan to have an officer of the GTA Board step down from her role as Secretary, to be replaced in her role by another member of the GTA Board who was already on the Selection Committee, thus bringing the Selection Committee into compliance. Such discussion was not “concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure.” N.C. Gen. Stat. § 143-318.11(a)(3). Indeed, such a discussion clearly falls within the “[g]eneral policy matters [which] may not be discussed in a closed session.” Under state law, the GTA Board is not legally allowed “to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant.” *Id.* As such, this closed session was also clearly in violation of North Carolina law.

As a result of these improper closed sessions, the process of evaluating the bids and ultimately making the Recommendation was fundamentally flawed from the outset. Members of the public were deliberately excluded from being present when the very decisions regarding the Selection Committee’s composition were made. As such, the process for making the Recommendation was illegitimate from the start, and the Recommendation should be discarded and the RFP should be re-issued.



2. The composition of the Selection Committee ultimately resulted in the Selection Committee making an arbitrary, capricious, wrongful, and unreasonable Recommendation, because the composition of the Selection Committee was deliberately selected to exclude individuals with knowledge of the technical service considerations that make up a majority of the evaluation process.

The Selection Committee was composed of eight people and seven voting members. Upon information and belief, the composition of the committee was: three (3) GTA Board members (only two (2) of which were voting members); one (1) representative from the Piedmont Authority for Regional Transportation ("PART"); one (1) representative from Winston-Salem Transit; one (1) representative from the Greensboro Urban Area Metropolitan Planning Organization ("MPO"); one (1) representative from the Greensboro Department of Transportation ("GDOT"); and one (1) SCAT rider. The representative from GDOT had been with GDOT for less than a year, had limited knowledge of the Greensboro transit system, and was not affiliated with GTA itself.

No one affiliated with GTA served on the Selection Committee, and as a result there was no member who could adequately assess the technical service components of the RFP bids. Members of the Selection Committee had no experience or knowledge as to the workings of GTA's public transit program such that they could assess the Technical Proposal portion of any bid. As a result, a disproportionate focus was placed on bidding party's Price Proposal at the expense of the Technical Proposal.

Under the RFP evaluation process, a bid is evaluated on both its Technical Proposal and its Price Proposal. Over sixty percent (60%) of the possible points come from the evaluation of a bidding party's Technical Proposal, which is evaluated on the following components: "project experience and references," "thoroughness and comprehensiveness of proposed implementation plans and supporting documentation," "financial capacity," and "disadvantaged business enterprise plan." The remaining portion of points comes from the bidding party's price proposal.

Because the Selection Committee did not have anyone who could speak to GTA's technical needs or the service component of the proposed bids, the Selection Committee significantly undervalued the Technical Proposal portion of the bid despite that portion being weighted more heavily than the Price Proposal. By not placing anyone on the Selection Committee who had the capability to adequately assess a bidder's ability to provide the required technical services, the Recommendation did not – and could not – accurately reflect a fair and reasonable evaluation of the bids. Upon information and belief, a decision not to include a Selection Committee member with an understanding of GTA's needs was a deliberate decision made by the GTA Board. As noted on page 10 of the March 27, 2018 GTA



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Board Meeting minutes, Counsel Fox specifically advised the GTA Board of the benefit of “populating the [Selection] Committee with people who have subject matter expertise that can lend itself to the Committee making an informed and good decision.” Doing so, he explained “would add value and help produce a better outcome because of their stakeholder interest.”

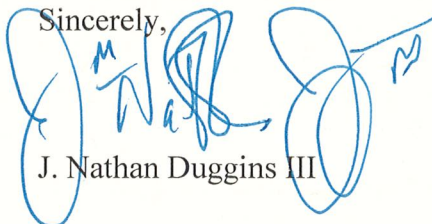
In that same discussion, as memorialized on page 11 of the March 27, 2018 GTA Board Meeting minutes, Board Member Cheryl McQueary stated that she “knew one of the people that is proposed to serve as a non-Board member and she does not feel that person is appropriate.” Upon information and belief, Ms. McQueary was referring to a GTA representative in that conversation.

By consciously choosing to disregard this suggestion, opting instead for a Selection Committee which had **no representation** by any stakeholder or representative of GTA, the GTA Board created a Selection Committee which was incapable of accurately assessing the most heavily weighted portion of the bids from the outset.

Furthermore, for several months of the Selection Committee’s existence, it was out of compliance with the requirement that at least one member of the Selection Committee be an officer of the GTA Board. This defect was cured only through unlawful activity in violation of North Carolina’s open meetings laws as outlined above.

The end result was an arbitrary and capricious Recommendation made by the Selection Committee – with no GTA representation – that was not based on the criteria set forth in the RFP. As such, the Recommendation was unreasonable and should be disregarded, and a new RFP should be issued by the City of Greensboro/GTA.

Transdev hereby formally appeals the GTA decision to the City Council on the grounds outlined above. Please do not hesitate to contact me with any questions.

Sincerely,

J. Nathan Duggins III

JND3/mcl

cc: Ed Overn (via email only)