



DATE: September 18, 2018

TO: Thomas D. Carruthers, City Attorney

FROM: James A. Dickens, Deputy City Attorney

DEPARTMENT: Office of the City Attorney

SUBJECT: Memorandum of Opinion Regarding the September 13, 2018 Notice of Appeal to City Council filed by Transdev Services, Inc. of the City of Greensboro/Greensboro Transit Authority Board's Decision to Deny Its Protest of the Board's 2019-20122 Transit Services Contract Award Recommendation to Keolis Transit Services, LLC.

Background

On August 9, 2018, Mr. Bruce Adams, the City's Department of Transportation's Public Transportation Division Manager, received a letter and protest from Transdev Services, Inc. ("Transdev"), attached hereto as Exhibit A, protesting the City of Greensboro/Greensboro Transit Authority ("City/GTA") Board's recommendation to City Council that the contract for the operations and management of the City of Greensboro Transit Services be awarded to Keolis Transit Services, LLC ("Keolis"). The recommendation followed the review and evaluation of proposals submitted pursuant to the Request for Proposal for the Management and Operation of Transit Services ("RFP"). Transdev protests the City/GTA Board's resolution on the grounds that (1) "the GTA Board held two illegal closed sessions in connection with the process of determining the composition of the Selection Committee" and (2) "the composition of the Selection Committee ultimately resulted in the Selection Committee making an arbitrary, capricious, wrongful, and unreasonable recommendation, because 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.” Transdev requested the City/GTA to “investigate the unlawful closed sessions and decision-making irregularities, hold a hearing and reissue the RFP.” Transdev also made a number of public records requests and requested that officials with the City/GTA meet with it “in an effort to resolve [the] Protest after being allowed an opportunity to review” the documents responsive to its public records requests.

City/GTA Staff provided Transdev with the documents responsive to its public records request on August 23, 2018. The Public Transportation Division Manager sent the City/GTA Board his Recommended Disposition on September 4, 2018, attached hereto as Exhibit B, after consulting the City/GTA Board’s outside counsel, Anthony Fox, of Parker Poe Adams & Bernstein, LLP and me. On September 5, 2018, the City/GTA Board voted unanimously to deny Transdev’s Protest and affirmed its recommendation to award the transit services contract to Keolis Transit Services, LLC. The decision of the City/GTA Board was issued to Transdev on September 11, 2018, and it is attached hereto as Exhibit C. Transdev filed its Notice of Appeal to the City Council on September 13, 2018, attached hereto as Exhibit D. This Memorandum will address the two issues Transdev raised in its protest.

Protest Procedural Requirements To The City of Greensboro /GTA Board Were Not Met.

Pre-Award Protests are permitted under the RFP pursuant to Part II, Section F. Consistent with this section, Transdev is an Interested Party as an actual bidder and appears to have a direct economic interest affected by an award. Transdev submitted its August 9, 2018 protest in writing through its representative, J. Nathan Duggins, III of Tuggle Duggins, Attorneys at Law. The protest included documentation, evidence and legal authority as required by Section F. However, the protest was not certified and failed to be notarized. Part II, Section F, Subsection 2(c) of the RFP specifically states that: “The protest must be certified . . . and be signed by the protester, and be notarized.” The failure to meet this requirement is a material

defect and challenges the validity of the protest. It also subjected the protest to denial without further review or action by the City /GTA Board, and its decision could be affirmed for this reason alone.

2. The GTA Board Complied with the North Carolina Open Meetings Law.

Transdev states that “the GTA Board held two illegal closed sessions in connection with the process of determining the composition of the Selection Committee.” Transdev identified these dates as March 27, 2018 and June 26, 2018. Transdev correctly states that 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.”

a. **The Incident at the March 27, 2018 Meeting was not a Closed Session.**

The March 27, 2018 meeting of the GTA Board was a duly called and properly advertised public meeting. Members of the public attended and were present throughout the course of the meeting. The GTA Board did not ask the public to leave the March 27th meeting; it only extended an invitation to Transdev to leave the room as the Board discussed the RFP. Transdev was the incumbent contractor for the procurement and no other proposers were present at the meeting. Transdev agreed to the request and other members of the public remained. A review of the official minutes of the March 27th GTA Board meeting confirms that Transdev's departure was completely voluntary. The minutes read, in part, as follows:

3 MR. BRYSON: We'll move on to Item Number Five
4 (5), but at this time I'm going to allow the Transdev representatives, if you
5 want to step out while we talk about this RFP Update. We'll let you know
6 when you can come back in. Hopefully, it won't take too long and you
7 won't be able to go to sleep out there. But thank you.

8 (Thereupon, the Transdev representatives left the Board Room
9 during the RFP presentation)

10 (Thereupon, Counsel Fox was called in via Conference Call to
11 participate in the discussion concerning the RFP Update)
12 COUNSEL DICKENS: Mr. Chair, would you state for
13 the record that the Transdev representatives voluntarily exited the room?
14 In order to discuss the RFP.
MR. BRYSON: Transdev has voluntarily exited the
Room for this portion of the Agenda.
17 COUNSEL DICKENS: On its own discretion.
18 MR. BRYSON: On its own discretion.
19 MR. FOX: Okay. And we're going to let the record reflect
20 that.

Part II, Section G of the RFP prohibits proposers from having contact with the GTA Board on matters pertaining to the RFP. The Chairman's request sought to prevent Transdev from being accused of inappropriate contact with the Board on a matter concerning the RFP and it sought to ensure that Transdev was not provided a benefit not enjoyed by the other proposers. Transdev too saw the wisdom in this approach and consented to the request without objection.

In addition, it is important to note that at the time the Board reached the Agenda Item to discuss the Transit Services RFP, Transdev had already stood up and began leaving the room voluntarily. Further, Transdev did not object to the request at the meeting, after the meeting or at any subsequent meetings of the Board. Transdev raises this issue for the first time in this August 9th protest. This is an argument of convenience and has no merit.

Further, Transdev's claims regarding the March 27th meeting are time barred. The minutes from this March 27, 2018 meeting were publicly posted on the Greensboro Transit Authority's website on May 22, 2018. Therefore, even if we were to assume, *arguendo*, that the GTA Board's discussion and vote comprising the Selection Committee constituted an improper "closed session", pursuant to N.C. Gen. Stat. 143-318.16A, Transdev had 45 days from May 22,

2018 to file a lawsuit in the Guilford County Superior Court to declare the actions of the GTA Board in selecting the composition of the Selection Committee null and void. *See*, N.C. Gen. Stat. 143-318.16A(b) (“A suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void ...”). Moreover, case law suggests that if the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed to have occurred on the date the minutes are first available for public inspection. Hence, the law is clear. Transdev cannot now complain that the GTA Board’s discussion and vote to select the individuals to serve on the Selection Committee on March 27, 2018 was improper or that they were prejudiced in any way since those claims are time barred.

b. The June 26, 2018 Closed Session Meeting of the City/GTA Board was permissible and proper.

Transdev also states that the City/GTA Board held an improper closed session on June 26, 2018. In this instance, the City/GTA Board moved to go into a Closed Session to discuss a legal matter with the City/GTA Board’s attorney. The verbatim transcript of the motions that were made to go into closed session is as follows:

MS. MCQUEARY: For this report prior to Ms. Brown speaking, I need this Board to go into Private Session in order to have discussion with our Attorney on the telephone. This is important.

COUNSEL DICKENS: I think the request is to go into a Closed Session to discuss a legal issue with the Board’s attorney?

MS. MCQUEARY: Correct. So moved.

MR. HAMPSTEN: Second.

CHAIR BRYSON: It’s been moved and properly seconded that we go into Closed Session to discuss a legal matter with our Attorney. All in favor say Aye.

MS. MCQUEARY: Aye

MS. CUNNINGHAM: Aye

MS. WALLACE: Aye

MR. HAMPSTEN: Aye

MR. BRYSON: Aye

CHAIR BRYSON: All opposed?

(No Response)

CHAIR BRYSON: The Ayes have it. . . .

N.C. Gen. Stat. 143-318(a)(3) authorizes the City/GTA Board to go into a closed session “[t]o 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, which privilege is hereby acknowledged.” The statute also allows the City/GTA Board to “consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure.” N.C. Gen. Stat. 143-318(a)(3).

As evidenced above, a City/GTA Board Member, Ms. McQueary, made a motion, as amended by Counsel Dickens, to “go into a Closed Session to discuss a legal issue with the Board’s attorney.” *See*, N.C. Gen. Stat. 143-318.11(a)(3). The motion calling for a Closed Session does not have to cite the specific section of the statute. *See, David M. Lawrence, Open Meetings and Local Governments in North Carolina Some Questions and Answers*, p. 17, Question 70 (7th ed. 2008), neither is the City/GTA Board limited to discussions of claims made by or against it or to litigation to which the City/GTA Board is or will be a party. *See, Id.* at p. 21, Question 90. Rather, N.C. Gen. Stat. 143-318.11(a)(3) authorizes the City/GTA Board “to discuss any *legal* issue with its attorney” (emphasis in original).

Here, the City/GTA Board went into Closed Session to discuss a legal defect in the composition of the Selection Committee. Specifically, the RFP stated that the makeup of the Selection Committee would “include no less than the officers, employees and agents of the GTA and may include other qualified transit professionals internal and/or external to the GTA.” As of June 26, 2018, the Selection Committee did not have an officer of the City/GTA. This defect in the composition of the Selection Committee could have resulted in a protest if not corrected, and the City/GTA Board met with its legal counsel in Closed Session to be informed of the defect and to discuss how to resolve this defect and avoid potential litigation over this issue. It was determined that the best way to resolve this issue was for the current City/GTA Board Secretary, Janet Wallace (“Wallace”), to resign her position and nominate Cheryl McQueary (“McQueary”), who was already on the Selection Committee, for that position. The City/GTA Board properly adjourned the Closed Session and resumed its Open Session. In Open Session, a motion was made and properly seconded to accept the resignation of Wallace as City/GTA Board Secretary, but to remain on the Board. This motion was approved unanimously. Another motion was made and properly seconded to nominate McQueary for the position of City/GTA Board Secretary, and McQueary was unanimously elected as the City/GTA Board Secretary. In sum neither of the City/GTA Board’s actions on March 27, 2018, nor its actions June 26, 2018 constituted an unlawful or improper closed session in violation of the North Carolina Open Meetings Laws.

3. The Composition of the Selection Committee met the Requirements of the RFP.

Transdev states that 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 the individuals with knowledge of the technical service considerations that make up a majority of the evaluation process.” Transdev never explains what part or what aspect of the Selection Committee’s Recommendation was “arbitrary, capricious, wrongful, and unreasonable.” Transdev merely states, “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.”

First, it is not true that “[n]o one affiliated with the GTA served on the Selection Committee.” Candyce Brown, the City/GTA’s Central Contracting Specialist, was the Project Manager of this procurement, and she served as the Facilitator of the Selection Committee. She was a reference for the Selection Committee when they asked her specific questions.

Second, the Selection Committee included representatives from other transit agencies, such as the Piedmont Authority for Regional Transportation (“PART”), High Point Transit System (“Hi Tran”), and Winston-Salem Transit. These representatives had knowledge of the needs of any transit system, and the RFP described in detail the specific needs of the GTA. Additionally, the RFP provided the current staffing levels provided by the incumbent contractor, Transdev, and the two City/GTA Board Members who served on the Selection Committee had intimate knowledge on whether the current staffing levels provided by Transdev were sufficient to meet the needs of the transit system. Thus, Transdev’s assertion that “the Selection Committee did not have anyone who could speak to GTA’s technical needs or the service component of the proposed bids” is inaccurate and misleading.

Conclusion

For all of the reasons described hereinabove, I recommend that the City Council deny Transdev Services, Inc.'s Appeal of the City of Greensboro/Greensboro Transit Authority Board's September 11, 2018 Decision Denying Transdev Services, Inc.'s Protest of the City of Greensboro/Greensboro Transit Authority Board's Recommended Decision that the Management and Operation of the Greensboro Transit Services be awarded to Keolis Transit Services, LLC.