



Florida Department of TRANSPORTATION

Office of Inspector General
Robert E. Clift, Inspector General


September 29, 2017

Advisory Report No. 17I-4002
South Florida Regional Transportation Authority (SFRTA)

What We Did

Senator Jeff Brandes, Chairman of Appropriations Subcommittee on Transportation, Tourism, and Economic Development, requested we review South Florida Regional Transportation Authority's (SFRTA) Procurement Policy in comparison to State of Florida procurement requirements.¹ Senator Brandes also requested we determine if SFRTA followed its Procurement Policy in awarding Agreement 16-010 to Herzog Transit Services, Inc., for operations on the South Florida Regional Corridor (SFRC).

What We Observed

We made the following four observations:

1. Prior to 2009, SFRTA was held to the procurement practices specified in Florida Administrative Code, Rule 30C-2, which essentially mirrored the procurement practices of state agencies. Rule 30C-2 was repealed in 2009 as the result of legislative proposed changes to Chapter 120, Florida Statutes. SFRTA incorporated the majority of the requirements of the repealed rule into their own procurement practices. However, in contrast to the repealed rule, SFRTA's Procurement Policy does not require procurements to stop upon receipt of protests and the Procurement Director has sole discretion in eliminating nonresponsive proposals.
2. SFRTA's process to review submitted proposals differed between what is stated in the Request for Proposal (RFP) 16-010 and their Procurement Policy. SFRTA followed the requirements stated in the proposal, thus, the Evaluation Selection Committee (ESC) only reviewed the one proposal deemed responsive. SFRTA's Procurement Policy states that all proposals received shall be evaluated by the ESC. Additionally, SFRTA's policy defines RFP as a "competitive negotiated procurement process"; however, negotiations did not occur on RFP 16-010.
3. SFRTA released two addendums containing material changes to the RFP, including changes to the liability insurance requirement, after the deadline for proposers to ask questions.

¹ See attachment 1

4. Before the January 2017 SFRTA Board meeting to award the agreement, Florida Department of Transportation (department) District 4 was unaware of the independent engineer's estimate for services in RFP 16-010, nor was District 4 aware of the sources of revenue to cover expenditures for the 10-year duration of the contract; consequently, the District 4 Secretary voted against awarding the \$511 million agreement. Additionally, the Fiscal Year (FY) 2016-2017 Board Chair², who expressed several concerns, including cost, voted against awarding the agreement.

Recently Enhanced Controls

With the implementation of HB 695 (2017), SFRTA is prohibited from entering or extending a contract with department funds, without the department's prior review and written approval of SFRTA's proposed expenditures. HB 695 also requires a written agreement between SFRTA and the department for review and approval of SFRTA's expenditures of state funds. The department is authorized to agree to advance one quarter of the total state funding provided to SFRTA for a state fiscal year at the beginning of each state fiscal year, with monthly payments over the fiscal year on a reimbursement basis and reconciliation of the advance against remaining invoices in the last quarter of the fiscal year. HB 695 specifies that State funds to SFRTA constitute State financial assistance.

Additional Controls for Consideration

Based on our observations and the recently enhanced controls, we are suggesting the following four controls for consideration:

1. The State Legislature may consider amending Florida Statutes to require transportation authorities listed in Chapter 343, Florida Statutes (F.S.), including SFRTA, to adhere more closely to the protest procedures outlined in Chapter 120, F.S., which includes stopping the solicitation upon receipt of protest and, when necessary, elevating the protest to the Florida Department of Administrative Hearing (DOAH) for final order.
2. SFRTA may consider ensuring alignment of the language concerning the review of proposals (Chapter 4, subsection 10(c)) and opportunities for negotiation (Chapter 4, subsection 10(a)) in its Procurement Policy with the language concerning reviews and negotiations in future RFPs.
3. SFRTA may consider increasing transparency in future RFPs by extending the question and answer deadline or holding a public noticed meeting for all proposers, if material changes to the RFP are issued after the advertised final day for questions.
4. The department should consider including in its agreement with SFRTA a requirement to be notified in writing, informing the department of upcoming procurements. Additional documentation should include an independent estimate of the cost to be incurred and the funding source for the life cycle of the procurement. Timelines for submission of these proposed procurements and department's response should be documented in future JPAs.

² Tim Ryan, Broward County Commissioner

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BACKGROUND AND INTRODUCTION

Creation of Tri-County Commuter Rail Organization (TCRO)

The TCRO, created in 1986, was formed by interlocal agreement pursuant to Chapter 163.567, Florida Statutes (F.S.) The interlocal agreement was executed between the counties of Miami-Dade, Broward, Palm Beach, and the Florida Department of Transportation (department), establishing the entities' duties and obligations relating to the development and financing of a new commuter rail service project, known as Tri-Rail.

South Florida Rail Corridor (SFRC)

In 1988, the department and CSX Transportation, Inc., (CSXT) entered into an agreement in which the department purchased approximately 81-miles of CSXT track and right-of-way for commuter rail services in South Florida. This track and right-of-way, known as the South Florida Rail Corridor³ (SFRC), runs parallel to Interstate 95 and extends from Miami International Airport into Palm Beach County. See Tri-Rail System Map in Attachment 2.

Rail System Plan

Florida Statute states that the department "in conjunction with other governmental units and the private sector, shall develop and implement a rail program of statewide application designed to ensure the proper maintenance, safety, revitalization, and expansion of the rail system to assure its continued and increased availability to respond to statewide mobility needs."⁴ Further, Statute requires the department to develop and periodically update a rail system plan. The department must update the plan every two years, at a minimum, and "include plans for both passenger rail service and freight rail service."⁵

³ The SFRC consists of all State Property conveyed by the Contract and Deed including but not limited to the rail lines, tracks, structures, signals, signal systems, communication systems, switches, crossovers, interlocking devices, state-owned building and facilities, the Hialeah Maintenance Yard, the proposed SFRTA Northern Maintenance Yard and Layover Facility, the West Palm Beach Layover Facility, the Dania Yard and the Miami Gardens Yard and stations owned by the Department and SFRTA extending from Mangonia Park to the Miami Intermodal Center ("MIC") Central Station, the New Bridge Corridor, the Replacement Bascule Bridge over the New River which is being constructed by the Department. The corridor also includes Department-owned property that was not acquired as part of the State Property, but is used and is currently being maintained.

⁴ Section 341.302, F.S. (2016)

⁵ Subsection 341.302(3)(a), F.S. (2016)

The Tri-County Commuter Rail Authority (TCRA)

The Tri-County Commuter Rail Authority (TCRA) was established by the State Legislature in 1989. The TCRA was created to be the successor and assignee of the TCRO and inherited all the rights, assets, appropriations, agreements, obligations, and privileges of the TCRO. The Authority was provided the right to operate, own, maintain, and manage Tri-Rail. The TCRA was formalized in Florida Statutes as a transportation authority.⁶

South Florida Regional Transportation Authority (SFRTA)

In 2003, the State Legislature established the South Florida Regional Transportation Authority (SFRTA) with the right to own, operate, maintain, and manage a transit system within the Miami-Dade, Broward, and Palm Beach tri-county region.⁷ SFRTA was created to be the successor and assignee of the TCRA and inherited all the rights, assets, labor agreements, appropriations, privileges, and obligations. A key purpose of the new transportation authority was to expand cooperation between Tri-Rail, commuter rail services, county transit operators, and area planning agencies.

State Statute authorizes SFRTA to:

- Plan, develop, own, purchase, lease, or otherwise acquire, demolish, construct, improve, relocate, equip, repair, maintain, operate, and manage the transit system it inherited in South Florida.
- Establish and determine the policies necessary for the best interest of the operation and promotion of a transit system.
- Adopt bylaws for the regulation of the affairs and the conduct of the business of the authority, including the preparation and adoption of an annual budget.
- Adopt rules necessary to govern the operation of a transit commuter rail system and transit commuter rail facilities.
- Have overall authority to coordinate, develop, and operate a regional transportation system within the area served.

Special District Designation

In 2003, SFRTA was designated as an independent special district by the Florida Department of Economic Opportunity (DEO).⁸ A special district is “a unit of local government created for a special purpose, as opposed to a general-purpose, which has jurisdiction to operate within a limited geographic boundary and is created by general law, special act, local ordinance, or by rule of the Governor and Cabinet.”⁹ As a requirement for continued designation as a special district, SFRTA has been renewing its status annually and is also required to:

⁶ Chapter 343, F.S. (1989)

⁷ Subsection 343.54(1)(b), F.S. (2016)

⁸ Per DEO “Official List of Special Districts Online”

⁹ Subsection 189.012(6), F.S. (2016)

- Register and report its financial activities and other activities.
- File quarterly, semiannually, or annually a schedule of its regular meetings with the local governing authority or authorities.
- Allow all meetings of the governing body of the special district be open to the public and governed by the provisions of Chapter 286, F.S.
- File amendments, modifications, or updates of the document by which the district was created with DEO within 30 days after adoption.
- Post a final adopted budget on the special district's official website within 30 days after adoption and keep it on the website for at least 2 years.

State Oversight of SFRTA

In 2007, the Legislature assigned¹⁰ the Florida Transportation Commission (FTC) oversight responsibility over the transportation authorities listed in Chapter 343, F.S. Specifically, the FTC was assigned the responsibility to “monitor the efficiency, productivity, and management of the authorities created” in Chapter 343, which includes SFRTA. The FTC was mandated to “conduct periodic reviews of each authority's operations and budget, acquisition of property, management of revenue and bond proceeds, and compliance with applicable laws and generally accepted accounting principles.”

Oversight responsibility was transferred in 2009, when the State Legislature created the Statewide Passenger Rail Commission¹¹ to serve in an advisory capacity to the department and the Legislature concerning passenger rail in Florida.

More specifically, the Rail Commission was given the following primary functions (among others):

- Monitoring the efficiency, productivity, and management of all publicly funded passenger rail systems in the State, including SFRTA, and any other authority that receives public funds for the provision of passenger rail service.
- Advising monitored authorities of their findings and recommendations.
- Conducting periodic reviews of monitored authorities' passenger rail and transit operations and budget, acquisition of property, management of revenue and bond proceeds, and compliance with applicable laws and generally accepted accounting principles.

In 2014, the State Legislature amended Section 20.23, F.S., dissolving the Florida Statewide Passenger Rail Commission.¹² This amendment returned the responsibility for rail oversight to the FTC.

¹⁰ House Bill 985 (2007)

¹¹ House Bill 1B (2009)

¹² House Bill 7175 (2014)

History of SFRTA's State Funding

During a 2009 special session, the State Legislature passed House Bill 1B, also known as the “rail bill.” The bill authorized \$30.6 million in State financial assistance to SFRTA. The funding increased to \$42.1 million when SFRTA took responsibility from CSXT for the SFRC on March 29, 2015.¹³ The funding is scheduled to end when an alternate local funding source is secured to enable SFRTA to meet its responsibilities for operating, maintaining, and dispatching the SFRC.¹⁴ In 2012, the State Legislature amended the rail bill to mandate SFRTA and the department work cooperatively to implement an alternate funding source by July 1, 2019.¹⁵

The State Legislature also amended the rail bill in 2012 to require SFRTA to inform the department of any procurement involving State funds. The language reads, “[a]t least 90 days before advertising any procurement or renewing any existing contract that will rely on state funds for payment, the authority shall notify the department of the proposed procurement or renewal and the proposed terms thereof.” The department had to provide proper notice to SFRTA to object and stop any procurements: “[i]f the department, within 60 days after receipt of notice, objects in writing to the proposed procurement or renewal, specifying its reasons for objection, [SFRTA] may not proceed with the proposed procurement or renewal. Failure of the department to object in writing within 60 days after notice shall be deemed consent.” The 90-day notification requirement and the 60-day objection period were removed and are no longer required due to the implementation of HB 695, effective July 1, 2017. However, 343.54(4), F.S., modified in 2017, now states, “...the authority may not enter into, extend, or renew any contract or other agreement that may be funded, in whole or in part, with funds provided by the department without the prior review and written approval by the department of the authority’s proposed expenditures.”

Additionally, the amended rail bill requires SFRTA to annually provide the department with its proposed budget for each upcoming fiscal year to allow the department to evaluate the authority’s proposed uses of State funds.¹⁶

¹³ The 2013 operating agreement between the department and SFRTA includes the commitment by the department to cover 100% of annual maintenance cost up to \$14.4 million in addition to the statutory \$42.1 million annual funding. According to the agreement costs in excess of the \$14.4 million will be shared with the department, based on agreed percentages outlined in the operating agreement between the department and SFRTA. SFRTA is the only authority listed in section 343.58, F.S. that receives State financial assistance.

¹⁴ House Bill 1B (2009)

¹⁵ Of the five transportation authorities in Chapter 343, SFRTA is the only one receiving State funding. Chapter 343, F.S. establishes five transportation authorities, including Northeast Florida Regional Transportation (Part I), and South Florida Regional Transportation Authority (Part II), Central Florida Rail Authority (Part III), Northwest Florida Transportation Corridor Authority (Part IV), and Tampa Bay Area Regional Transportation Authority (Part V).

¹⁶ House Bill 599 (2012)

History of Agreements between the Department and SFRTA

The department and SFRTA entered into a Joint Participation Agreement (JPA) in 2006 “to provide funds and transfer of management responsibilities for the Commuter Rail Passenger Service from the Florida Department of Transportation to the South Florida Regional Transportation Authority (SFRTA).” The agreement continued to be in effect through the normal term (2010) and was extended by request of SFRTA until the effective date of a new operating agreement in June 2013. The JPA contained language concerning documentation of project costs, monitoring, single audit compliance, and authorization of contracts.

In 2010, SFRTA asserted in a letter¹⁷ to the department that the formal JPA is no longer required with the enactment of the 2009 rail bill because SFRTA believed prior terms and conditions (including the following) were no longer appropriate:

- The review of source documentation (properly executed payrolls, time records, invoices, contracts, or vouchers evidencing in proper detail the nature and propriety of the charges).
- Payment of funds are no longer on a cost reimbursement basis.
- Funds are to be disbursed in advance via electronic funds transfer.
- Supporting and related source documents for payments made by SFRTA are no longer required.

In June 2013, the department and SFRTA executed an operating agreement as a replacement for the 2006 JPA. The operating agreement does not contain the specific requirements that were contained in the 2006 JPA.

OIG Report 14I-4002 on SFRTA

In November 2016, the Florida Department of Transportation Office of Inspector General (OIG), found that SFRTA, as determined by the Department of Financial Services (DFS), is a special district and a non-State entity that is a recipient of State financial assistance. SFRTA omitted \$153 million from audit coverage contrary to the requirements of the Florida Single Audit Act for Fiscal Years (FY) 2010-11 to 2014-15.¹⁸ Additionally, SFRTA did not provide a standard operating budget-to-actual expenditure report based upon the use of each grant or funding source.

Also discussed in OIG Report 14I-4002, the operating agreement lacks the mandatory provisions outlined in Section 215.971, F.S. SFRTA is required to adhere to these provisions for recipients and subrecipients of State financial assistance. The required provisions are:

- A scope of work that clearly establishes the tasks to be performed.

¹⁷ See Attachment 11

¹⁸ In the SFRTA FY 2015-2016 single audit report, the state financial assistance of \$42.1 million (\$30.6 million plus \$11.5 million) was omitted from single audit coverage.

- Quantifiable units of deliverables; the deliverables must be received and accepted in writing before payment.
- All deliverables directly related to the scope of work.
- The required level of service to be performed.
- Criteria for evaluating successful completion of each deliverable.
- Financial consequences if the recipient or subrecipient fails to perform.
- A requirement that a recipient or subrecipient of federal or State financial assistance may expend funds only for allowable costs resulting from obligations incurred during the specified agreement period.
- A requirement that any funds paid in excess of the amount to which the recipient is entitled under the terms and conditions of the agreement must be refunded.

The OIG made the following three recommendations to District Four and SFRTA in Report 14I-4002:

- District Four
 - Execute a revised agreement between the Department and SFRTA.
- SFRTA
 - Reissue Florida Single Audit reports for fiscal years 2010-11 to 2014-15, to provide audit coverage of the \$153 million in State financial assistance previously omitted; and
 - Provide monthly budget-to-actual expenditure reports, by each grant or other funding source, for both its operating fund and capital funds.

In response, District 4 concurred to execute a revised agreement.

In response to Report 14I-4002, SFRTA agreed to provide a comparative budget to actual expenditures report for grants in its capital fund and a standard operating budget to actual expenditure report for grants in its general fund.

History of SFRTA's Agreements with Contractors

Prior to 2007, SFRTA had a bundled contract with Herzog Transit Services, Inc. (Herzog) for Maintenance of Equipment, Train Operations, Dispatching, and Station Maintenance for services along the SFRC. According to SFRTA, due to the trends of the rail industry, SFRTA decided to unbundle the contract to obtain a lower price for services along the SFRC. Upon notice of unbundling the contract, SFRTA stated that Herzog did not compete for unbundled services.

Due to the unbundling, SFRTA executed four contracts for services along the SFRC. The four contracts are listed in Table 1.

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Table 1: SFRTA Previous Contracts for Services along the SFRC

Service	Contractor	Base Term
Maintenance of Equipment	Bombardier Mass Transit Corporation	07/01/2007 – 06/30/2017
Train Operations	Transdev Services, Inc.	07/01/2007 – 06/30/2017
Dispatching	National Railroad Passenger Corporation (Amtrak)	04/01/2007 – 06/30/2017
Station Maintenance	Meridian Rail Corporation	08/01/2010 – 06/30/2017

Bundling of Contracts along the SFRC

In the January 2016 SFRTA Board Meeting, SFRTA staff and Board discussed bundling the contracts that were set to expire on June 30, 2017. In the February 2016 SFRTA Board Meeting, the Transportation Research Board (TRB) presented a study on bundling operating contracts in the commuter rail industry. The Board further discussed bundling after the Parsons Brinckerhoff presentation on bundling services in the April 2016 Board Meeting and came to the consensus to bundle the four contracts.

The advertisement for the Request for Proposal (RFP) of the bundled contract, RFP 16-010, began September 2, 2016 and ended December 16, 2016. Six contractors submitted proposals: Herzog, Amtrak, Bombardier, First Transit, Inc., SNC-Lavalin, and Transdev Services, Inc.

On January 11, 2017, SFRTA's Procurement Director submitted letters of rejection to all contractors, except Herzog, on grounds that the five rejected proposals were non-responsive to the criteria within the RFP.

In response to the rejection, on January 17, 2017 Transdev Services, Inc., challenged its elimination from competition for the RFP. Bombardier and First Transit, Inc. joined Transdev's request for relief. On January 19, 2017, SFRTA filed a motion to dissolve ex parte preliminary injunction and memorandum in Opposition to motion for preliminary injunction in response to Transdev's pre-award proposal protest.

On January 23, 2017, the 17th Judicial Circuit Court of Florida ruled in SFRTA's favor. On January 27, 2017, SFRTA's Board voted 6-2 to award the contract to Herzog, for seven years plus a three year renewal option, for a total cost of \$511 million. The board voted as follows:

- Voted for:
 - Steven L. Abrams, Vice Chair, Palm Beach County Commissioner
 - Bruno Barreiro, Miami-Dade County Commissioner
 - Andrew Frey, Governor's Appointee, Miami-Dade County
 - Nick A. Inamdar, Citizen Representative, Miami-Dade County
 - F. Martin Perry, Citizen Representative, Palm Beach County
 - Beth Talabisco, Citizen Representative, Broward County
- Voted against:
 - Tim Ryan, Chair, Broward County Commissioner

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- Gerry O'Reilly, FDOT District Four Secretary
- Absent:
 - Frank Frione, Governor's Appointee, Palm Beach County
 - James A. Scott, Governor's Appointee, Broward County

Table 2 illustrates the events of the procurement process related to RFP 16-010 and the dates each event occurred. A more detailed timeline is outlined in Attachment 3. Hyperlinks in Table 2 navigate to the explanatory paragraphs in Attachment 3.

Table 2: Timeline of RFP 16-010

2016		
January	22	SFRTA's Board discussed the option of bundling the contract
February	26	TRB gave presentation to SFRTA's Board on bundling the contract
April	22	SFRTA's Board came to the consensus to bundle the contract
September	02 14 26 29 30	RFP 16-010 was advertised Addendum No. 1 distributed Addendum No. 2 distributed Pre-Proposal Conference Site Visit to Hialeah Rail Yard
October	13	Addendum No. 3 distributed
November	02 08 10 17 18 23	Addendum No. 4 distributed Addendum No. 5 distributed Addendum No. 6 distributed Addendum No. 7 distributed Last day of questions for RFP 16-010 Addendum No. 8 distributed
December	01 09 14 14 15 16 16 29	Addendum No. 9 distributed Original last day for submission of proposals Parsons Brinckerhoff submitted project estimate ¹⁹ to SFRTA Bombardier and Transdev submitted proposals Amtrak submitted proposal First Transit, Herzog, Inc., and SNC-Lavalin submitted proposals Last day for submission of proposals Commercial & Technical Subcommittee completed reports on proposals
2017		
January	11 17 19	Rejection letters ²⁰ sent to Amtrak, Bombardier, Transdev, First Transit, Inc., and SNC-Lavalin Court granted Ex Parte Transdev's Motion and Memorandum of Law in support of the Verified Complaint for Injunctive and Relief SFRTA filed a Motion to Dissolve Ex Parte Preliminary Injunction and Memorandum in Opposition to Motion for Preliminary Injunction

¹⁹ See Attachment 4

²⁰ See Attachment 5

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January	<u>23</u>	Circuit Court Judge McCarthy ruled in SFRTA's favor, dissolving Ex Parte Preliminary Injunction
	<u>23</u>	Notice of Intent to Award signed and published on SFRTA website
	<u>25</u>	SFRTA verified funds available for the project procurement and to authorize the development and issuance of a solicitation document ²¹
	<u>25</u>	Department District 4 Secretary O'Reilly expressed concerns of the procurement of RFP 16-010 ²²
	<u>27</u>	SFRTA's Board voted to award the contract to Herzog, Inc.
	<u>27</u>	Department Secretary Boxold expressed concerns of SFRTA's accountability for expenditure of the State funding ²³
	<u>30</u>	SFRTA's Executive Director Stephens replied to Department Secretary Boxold's concerns ²⁴
February	<u>16</u>	SFRTA Executive Director spoke before the State Senate Appropriations Subcommittee to respond to questions related to the procurement of RFP 16-010 and the rejection of five of the six proposals.
March	<u>24</u>	Department Interim Secretary Cone expressed concern in a letter on SFRTA's use and oversight of State funds. ²⁵

²¹ See Attachment 6

²² See Attachment 7

²³ See Attachment 8

²⁴ See Attachment 9

²⁵ See Attachment 10

RESULTS OF REVIEW

The OIG reviewed SFRTA's Procurement Policy, Florida Administrative Code, and Florida statutes for procurement 16-010 to determine relevant similarities and differences. In addition, the OIG compared the Procurement Policy with SFRTA's practices during the procurement of the RFP to determine if SFRTA followed its own policy during the procurement.

Comparison of SFRTA's Procurement Policy and Florida Administrative Rule and Statutes

Prior to 2009, SFRTA followed the procurement practices specified in Florida Administrative Code, Rule 30C-2²⁶, which essentially mirrors the procurement practices of state agencies. Therefore, we compared SFRTA's current Procurement Policy with Rule 30C-2.

SFRTA's Procurement Policy differs in four major ways from Rule 30C-2, as described in Table 3.

Table 3: SFRTA Procurement Policy Comparison

Procurement Policy under Rule 30C-2	SFRTA Amended Procurement Policy
<ul style="list-style-type: none">• The receipt of a formal written protest stops the solicitation process (s. 120.57(3)(c), F.S.)• Protest process is elevated to Florida Department of Administrative Hearing (DOAH) for final order.• Formal procurement threshold is \$25,000 (requires written agreement and competitive bid).	<ul style="list-style-type: none">• No requirement to stop solicitation process upon receipt of written protest.• Except for courts, appeal process is limited to SFRTA's internal process (Executive Director's decision).• Formal procurement threshold is \$100,000 (no competitive bid required below threshold).

Rule 30C-2 was repealed as a result of the implementation of HB 1021, which redefined State agency in Chapter 120, F.S., to exclude SFRTA and the other transportation authorities listed in Chapter 343. The change allowed SFRTA to develop its own procurement policies, which differed in part from the requirements of the repealed rule. SFRTA's March 2011 Board minutes stated:

Up until 2009, SFRTA was subject to Florida's Administrative Procedure Act (Chapter 120, F.S.) (the "Act"). The Act required, amongst other things, that SFRTA comply with the State's rulemaking procedures to adopt and amend its

²⁶ Also known as the Procurement Code of Tri-County Commuter Rail Authority

Procurement Code which was included in the Florida Administrative Code. **The Act also placed certain limitations on procurements, including that SFRTA stay any procurement in the event of a protest until the protest was resolved** [emphasis added]. ^{27,28,29}

Comparison of SFRTA's Procurement Policy with the Procurement of RFP 16-010

Section 1.1 of RFP 16-010 states “[a]ll SFRTA procurement activities are governed by the SFRTA Procurement Policy.” However, the RFP itself contained the following inconsistency with the procurement policy:

From RFP 16-010:

Each member of the ESC [Evaluation Selection Committee] shall receive a copy of each Technical Proposal determined initially responsive, as determined solely by SFRTA Procurement staff. The ESC members will independently evaluate the Technical Proposals using the RFP Evaluation Criteria prior to the ESC meeting [emphasis added]. (RFP section 1.14.1, RIP p.8)

From SFRTA's Procurement Policy:

Evaluation of Proposals: **All proposals received shall be evaluated by an Evaluation and Selection Committee** (Committee) comprised of SFRTA staff members and may include other governmental agency personnel selected by the Executive Director [emphasis added]. (SFRTA Procurement Policy Chapter 4 (10) (c))

The ESC did not evaluate all proposals, only the proposal deemed responsive.

²⁷ Rule 30C-2.010 (3) Receipt of Protest

²⁸ SFRTA Procurement Policy: If SFRTA determines that a Protest is valid, the Executive Director, at his or her sole discretion, may: (i) Direct the Procurement Director to issue a new or amended Solicitation; (ii) award the Contract or recommend that the Board award the Contract, if the Contract amount exceeds the Executive Director's approval authority; (iii) terminate or suspend performance of the Contract that is the subject of the Protest; or (iv) take any other action permitted by law to promote compliance with SFRTA policies and applicable law.

²⁹ 120.57(3)(d)(3)(f)

Insurance for Services along the SFRC

In RFP 16-010, the contractor is required to purchase insurance that includes Commercial General Liability (CGL). The CGL policy must have policy limits of:

- \$10 million for each occurrence of bodily injury and property damage.
- \$10 million annual aggregate.
- \$10 million per occurrence and policy aggregate for personal injury and advertising injury.
- \$10 million for completed operations and products liability per occurrence and project aggregate.

All subcontractors are required to maintain coverages, limits and terms no less restrictive than those required of the contractor.

The contractor must provide Worker's Compensation Insurance applicable to all employees. The policy must include Employer's Liability with the minimum limit of \$1,000,000. Contractors that are a railroad are subject to the Federal Employers Liability Act (FELA). Such contractors must have Employers Liability insurance covering FELA limits of at least \$10 million per occurrence for the SFRC and \$5 million for the Tri-Rail Downtown Miami Link Service. SFRTA and the Florida Department of Transportation must be named as additional insureds and the FELA coverage must be primary to FELA coverage obtained by SFRTA as part of the SFRTA Insurance Programs.

Concerning subcontractors of contractors, SFRTA stated in Sections 2.11.1.A and 2.11.2.A of the RFP that "[i]nsurance coverage provided under this Section, including coverage provided by the Self-Insurance Retention Fund [SIRF], shall not extend to the Contractor's Subcontractors." According to SFRTA, the authority started excluding subcontractors from insurance liability protection after the department informed SFRTA in 2014 that it would not cover subcontractors with its SIRF. Based on this information, SFRTA placed the language excluding subcontractors in RFP 16-010.

Communications during Advertisement

During the advertisement of RFP 16-010, contractors had the opportunity to submit questions to aid in preparation of proposals. In response, SFRTA distributed nine addenda to provide answers to contractors' questions and/or amend the RFP. SFRTA distributed the nine addenda for all contractors to view the questions, responses, and amendments to the RFP.

As stated in SFRTA's Procurement Policy, contractors were given the opportunity to protest within a protest period "three (3) business days following the date of the posting of the Intent of Contract Award on SFRTA's website or the date of the issuance of an

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addendum as to the content of such addendum or the date of issuance of the solicitation.” No protest was filed in response to any of the addendums distributed. Table 4 summarizes questions and answers in the nine addenda.

Table 4: Addendum Questions and Answers

Addendum Number	Addendum Date	Contractor Questions Submitted	Questions About Insurance
1	09/14/2016	1	0
2	09/26/2016	5	0
3	10/13/2016	1	0
4	11/02/2016	31	0
5	11/08/2016	81	18
6	11/10/2016	187	9
7	11/17/2016	263	29
November 18, 2016, the last day contractors can submit questions for RFP 16-010.			
8	11/23/2016	150	10
9	12/01/2016	75	13
Total	78 Days	794	79

SFRTA distributed addenda 8 and 9 subsequent to the last day contractors could submit questions for RFP 16-010. Addenda 8 and 9 made the following revisions to the RFP:

- RFP Instructions to Proposers (contractors)
- General Terms and Conditions
- Special Terms and Conditions
- Technical Specifications
- Substituted exhibits, and
- Added attachments to the RFP.

While SFRTA generally followed its Procurement Policy during the advertisement of RFP 16-010, including the Question and Answer period, the authority had an opportunity to clarify the insurance portion of the RFP via a meeting. SFRTA’s Procurement Policy requires a cone of silence during advertisement. However, the Policy allows exceptions, including “any communications made on the record at a publicly noticed meeting.”

Rejection of Proposals

By December 16, 2016, the submission proposal deadline, SFRTA received six proposals from six contractors. SFRTA disqualified five of the six proposals as nonresponsive proposals because they were interpreted by SFRTA to be “conditional.” SFRTA’s RFP stated that conditional proposals could be rejected and nonresponsive proposals would

be rejected. The proposal from Herzog was the only proposal not considered conditional and the only one accepted.

SFRTA rejected five of the six proposals for the following reasons³⁰:

- **Amtrak:** included “exceptions” requesting revisions of the contract relating to the insurance requirements.
- **Bombardier:** included a “costing assumption” due to its belief that the RFP requested duplicative insurance coverage.
- **First Transit:** included “points of discussion to be negotiated upon award” in its proposal. Also, First Transit was not willing to accept liability for losses or claims not caused by the contractor.
- **SNC-Lavalin:** included “proposal exceptions” that requested to revise the contract relating to the insurance requirements.
- **Transdev:** included “pricing assumptions” due to the contractor’s belief that the RFP requested duplicative insurance coverage.

In the response to the OIG’s draft report 17-4002, SFRTA stated:

[T]he integrity of the procurement process would not be maintained if the 5 proposers gained an advantage from their bad acts, i.e. because SFRTA re-procured or amended the solicitation in a manner that allowed these proposers to have another chance at award of the contract. The integrity of the process is a highly regarded principle in the public procurement profession and one that SFRTA takes very seriously.

SFRTA’s Reasons to Award

During our interview with SFRTA, they stated it did not issue a new solicitation or amend the solicitation because staff may not have had time to award the contract by June 30, 2017, the expiration date of the unbundled contracts. SFRTA also stated that it would have to negotiate the terms of extensions to the existing contracts to include the Miami connection. A delay in the Miami connection could cause SFRTA to lose county funding for the services. Moreover, resoliciting the procurement for both the new contract and the extension of the existing four contracts could have been cumbersome and there would have been no guarantee the proposals would have been better the second time. Instead, SFRTA’s Board awarded the contract to Herzog during the January 2017 Board meeting to give the firm time to mobilize to begin work on July 1, 2017.

³⁰ Noted in the Commercial Subcommittee Review and Fact-Finding Summary for RFP No.16-010

District Four Secretary Opinions on Awarding the RFP

In Secretary O'Reilly's email dated January 25, 2017, to SFRTA³¹ he stated he had "very real concerns that the Board is being asked to approved a contract that has expenditures way in excess of what is available in the budget." In our interview with Secretary O'Reilly, he stated that he believed SFRTA started the procurement later than anticipated, which caused them to terminate the RFP at the scheduled date instead of exploring other options to provide clarity to the proposers. He further explained that SFRTA could have extended the Question and Answer period to give the firms more time to understand the requirements of the RFP and to prevent being left with only one qualified proposal. He stated that SFRTA could have extended the current contracts and re-advertised the RFP due to the Miami connection not beginning until spring 2018.

Notification of RFP to Department

Before the advertisement of the procurement for the bundled contract, SFRTA staff stated that they notified the department of the impending RFP. SFRTA also stated that it gave the department the opportunity to provide feedback, which the department provided on August 29, 2016, via email. However, while we have evidence of the department's feedback, we found no clear notification or evidence from SFRTA to the department that depicts the fulfillment of s.343.58(4)(c)(1), F.S. (2016), which required SFRTA to notify the department 90 days before the advertisement. The department acknowledged they became aware of the planned procurement through routine interactions with SFRTA, rather than being notified through a formalized notification. Section 343.58(4)(c), F.S., allowed the department the opportunity to object within 60 days after receipt of notice. The department indicated they were not aware of the estimated or proposed cost of this procurement until January 24, 2017. If formal notice, including the independent engineer's estimate, had been provided to the department at the 90-day point, time would have been available to properly assess the proposal. The 90-day notification requirement and the 60-day objection period were removed and are no longer required due to the implementation of HB 695, effective July 1, 2017. However, 343.54(4), F.S., modified in 2017, now states, "...the authority may not enter into, extend, or renew any contract or other agreement that may be funded, in whole or in part, with funds provided by the department without the prior review and written approval by the department of the authority's proposed expenditures."

Before the advertisement of the procurement for the bundled contract, SFRTA's General Counsel gave a PowerPoint presentation to SFRTA's Board on the procurement process. In this presentation, a slide illustrated that the RFP is a "competitive negotiated procurement process" that evaluates the technical and price of each proposal submission for the contract, also defined in the RFP in Chapter 4, subsection 10(a) of SFRTA's Procurement Policy. Also, a slide in the presentation states that the department will approve the portion of the RFP to be funded with State monies before the RFP is advertised. However, the RFP 16-010 did not require

³¹ Attachment 7

negotiation, and that the department did not approve the portion of the contract of the RFP to be funded with State monies before the RFP was advertised.

SFRTA utilizes a flowchart to provide guidance to their staff on the process of the RFP. The flowchart illustrates that the independent engineer's estimate occurs before the RFP is advertised. However, we observed that the signed engineer's estimate, dated December 14, 2016, occurred after the advertisement and just prior to the December 16, 2016 submission deadline for proposals.

Alternatives to Awarding of Contract

On January 27, 2017, SFRTA held a Board meeting to review the procurement process leading to the selection of the contractor to perform the services for RFP 16-010 and vote on awarding the contract. Before the meeting, District 4 was unaware of the independent engineer's estimate for services in RFP 16-010, nor was District 4 aware of the sources of revenue to cover expenditures for the 10-year duration of the contract. Neither SFRTA's Procurement Policy nor Florida Statutes require the engineer's estimate to be available to Board members before a decision is made. Without this information, the Board could make a decision to award a contract without sufficient funds to support it.

At the meeting, the SFRTA Board approved the awarding of RFP 16-010. During discussion before approval, SFRTA Consultant Legal Counsel offered three options:

1. Award the contract to Herzog.
2. Reject all proposals and re-advertise the RFP.
3. An intermediary³² option between options 1 and 2.

The Consultant Legal Counsel explained that options 1 and 2 would be defensible, but option 3 would not be because SFRTA's Procurement Director decided to reject the five proposals as nonresponsive and the Circuit Court had already ruled in SFRTA's favor.³³

SFRTA General Counsel stated the possible difficulty in option 2. Option 2 would require extending the previously unbundled contracts for Tri-Rail that were to be succeeded by the Herzog contract. The new contract would have the connection to downtown Miami, while the unbundled contracts did not. SFRTA would have to renegotiate the contracts if all proposals were rejected.

The contract was executed between Herzog and SFRTA for services along the SFRC for \$511 million over 10 years. Secretary O'Reilly inquired how SFRTA would pay for the Herzog contract, given that the current operating budget for the four individual contracts is \$39.4 million, which is \$9.7 million less than the proposal price for the

³² Intermediary option: to not reject the 5 disqualified contractors and allow them an opportunity to be awarded under RFP 16-010.

³³ An intermediary option may have been more defensible if it had been used before the rejection of the five proposals and the Circuit Court ruling.

bundled contract of \$49.1 million; not including the extra operating funds for Positive Train Control (PTC) and the service extension to Miami Station. The SFRTA Deputy Director stated in response to the Secretary's questions that the budget would have built in cost savings initiatives, such as savings in fuel costs, to make up for the shortfall.

During an interview, the Board Chair told us that the Board's decision to award the contract to Herzog after SFRTA rejected the other five contractors' proposals may have been legal but did not bear in mind price, as they should have. The Board Chair expressed concern that SFRTA would not have the funds to afford the contract and would have to seek additional funding.

According to SFRTA, performance and safety were top priorities in the RFP process. Price was important, but not as much as performance and safety. Furthermore, the price for the Herzog contract (\$511 million) was still less than the independent engineer's estimate (\$535 million). Nevertheless, SFRTA stated that if the five contractors had not conditioned their proposals, the contractors' proposals would have been much higher than they were (between \$38 million and 136 million lower than Herzog's proposal).

RECENTLY ENHANCED CONTROLS

House Bill 695

On June 23, 2017, Governor Scott signed House Bill 695 (HB 695) into law. Among other changes, HB 695 specifies the way the department will provide funding to SFRTA, and identifies the agreements required between the department and SFRTA.

The implementation of HB 695 increases the department's ability to oversee SFRTA's use of State funding. SFRTA is prohibited from entering or extending a contract or other agreement funded, even partially, without the department's prior review and written approval of SFRTA's proposed expenditures.

Approval of HB 695 also enhances the department's oversight of SFRTA by requiring a written agreement between SFRTA and the department, consistent with the recommendation in OIG Report No. 14I-4002. The department is specifically authorized to agree to advance the authority 25 percent of the total funds provided under this subsection for a state fiscal year at the beginning of each state fiscal year, with monthly payments over the fiscal year on a reimbursement basis as supported by invoices and such additional documentation and information as the department may reasonably require and a reconciliation of the advance against remaining invoices in the last quarter of the fiscal year. The agreement must allow for the department to review, approve, and audit of SFRTA's expenditures of State funds. This agreement gives the department the ability to provide preferred methods of procurement for SFRTA to use when using State funding.

HB 695 specifies that State funds to SFRTA constitute State financial assistance. With this clarification, the State funds received by SFRTA are specifically referenced as subject to the Florida Single Audit Act. This enhances the transparency of SFRTA's use of funding from the Department.

Revised Agreements between the Department and SFRTA (Pending)

Note: the agreements between the department and SFRTA have not been finalized. If complete, the final report will include a synopsis of the agreements.

ADDITIONAL CONTROLS FOR CONSIDERATION

We recommend consideration of the following controls to ensure greater transparency and accountability of the use of State funds.

1. The State Legislature may consider amending Florida Statutes to require transportation authorities listed in Chapter 343, Florida Statutes (F.S.), including SFRTA, to adhere more closely to the protest procedures outlined in Chapter 120, F.S., which includes stopping the solicitation upon receipt of protest and, when necessary, elevating the protest to the Florida Department of Administrative Hearing (DOAH) for final order.
2. SFRTA may consider ensuring alignment of the language concerning the review of proposals (Chapter 4, subsection 10(c)) and opportunities for negotiation (Chapter 4, subsection 10(a)) in its Procurement Policy with the language concerning reviews and negotiations in future RFPs.
3. SFRTA may consider increasing transparency in future RFPs by extending the question and answer deadline or holding a public noticed meeting for all proposers, if material changes to the RFP are issued after the advertised final day for questions.
4. The department should consider including in its agreement with SFRTA a requirement to be notified in writing, informing the department of upcoming procurements. Additional documentation should include an independent estimate of the cost to be incurred and the funding source for the life cycle of the procurement. Timelines for submission of these proposed procurements and department's response should be documented in future JPAs.

APPENDIX A – Purpose, Scope, and Methodology

The **purpose** of this engagement is to fulfill Senator Brandes' request in reviewing SFRTA's Procurement Policy and the procurement process performed by SFRTA for RFP 16-010.

The **scope** of this engagement included the past and current procurement process and policies used by SFRTA and its predecessors, along with the State of Florida established procurement rules.

The **methodology** included:

- Created a comparison between SFRTA's Procurement Policy and Rule 30C-2, Procurement Code.
- Created a comparison between SFRTA's Procurement Policy and Chapter 287 F.S., Procurement of Personal Property and Services.
- Created a comparison between SFRTA's Procurement Policy and Chapter 120 F.S., Bid Protests.
- Created checklist of key requirements expected to be met during a properly executed procurement process.
- Reviewed key requirements expected to be met during a properly executed procurement process.
- Created a chronological timeline of events for RFP 16-010.
- Interviewed District 4 Staff.
- Interviewed SFRTA's Staff.
- Interviewed the Chairman to SFRTA Board.
- Reviewed SFRTA's board meeting minutes.
- Reviewed available communications between SFRTA, District 4 and the contractors.
- Reviewed independence of all parties involved in the RFP 16-010.
- Reviewed RFP 16-010 insurance criteria.
- Reviewed SFRTA Subcommittees' review of contractors' proposals.

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Florida Department of Transportation**

APPENDIX B – SFRTA’s Response and OIG Supplemental Comments

SFRTA’s August 31, 2017, affected entity response is provided in its entirety below. The OIG supplemental comments are included at the end of their response.



August 31, 2017

Via FedEx and Email

RE: SFRTA Response to Draft OIG Advisory Report No. 17I-4002

Dear Mr. Clift:

SFRTA respectfully submits the following response to the above referenced draft report (the “Report”).

Observation No. 1: SFRTA not required to follow APA or suspend procurement upon filing of a protest

SFRTA is specifically excluded from the definition of “Agency” and is not subject to the Administrative Procedures Act.

The Florida Legislature, pursuant to Laws of Florida, Chapter 2009-85, amended the definition of “agency” in the Florida Administrative Procedures Act in Chapter 120 F.S. (the “Act”), to specifically exclude any transportation authority created under Chapter 343, F.S. (see §120.52 (c), F.S.), which includes SFRTA. As a consequence, none of the rules or requirements of the Act apply to the SFRTA (or other similar agencies formed under Chapters 348 and 349, F.S.). However, as noted in the Report, SFRTA adopted almost all of the requirements of Chapter 120, F.S. in its Procurement Policy. Two exceptions are that SFRTA does not automatically stay procurements in the event of a protest and SFRTA does not utilize the Division of Administrative Hearing (“DOAH”) process. However, SFRTA does allow for administrative protests and all proposers can avail themselves of remedies in circuit court. As described below, the nonresponsive proposers in this case were able to get an ex parte injunction and a 4-hour evidentiary hearing before a circuit court judge, an impartial trier of fact. All of this occurred much faster than the administrative process outlined in the Act. Clearly, all SFRTA bidders and proposers are afforded due process through the availability of extensive administrative remedies and judicial relief.

The non-responsive proposers were afforded administrative and judicial due process.

As noted in the Report, the non-responsive proposers filed an action for judicial relief. In fact, the proposers were initially successful in obtaining, without notice to SFRTA, an ex-parte preliminary injunction stopping the evaluation committee from proceeding with its evaluation of the only responsive proposal. However, at a subsequent lengthy 4 hour evidentiary hearing, where SFRTA, for the first time, was able to participate, present its facts and legal arguments, the Court completely reversed its decision, by dissolving the injunction, and rendering a detailed 21 page order in favor of SFRTA. Among the findings

GOVERNING BOARD Commissioner Steven L. Abrams | Commissioner Bruno A. Barreiro | Andrew Frey | Frank Frione | Nick A. Inamdar | Gerry O'Reilly |
F. Martin Perry | Commissioner Tim Ryan | James A. Scott | Belh Talabisco | **EXECUTIVE DIRECTOR** Jack L. Stephens

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APPENDIX B – SFRTA’s Response and OIG Supplemental Comments (Continued)

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of the Court were that the non-responsive proposers did not have a substantial likelihood of prevailing on the merits. Having lost in court, the non-responsive proposers then availed themselves of their administrative remedies under the SFRTA Procurement Policy to protest the notice of intent to award. Finally, on January 27, 2017, when the proposed contract was presented to the SFRTA Board at an advertised public meeting, where the proposers were again permitted to speak, the item was presented with the following options; (i) to award to the lone responsive proposer, or (ii) to reject all bids and reissue the Request for Proposals (“RFP”). The Board deliberated for almost 2 hours before voting to approve the award to the responsive proposer. The purpose of reviewing this history is to emphasize the extraordinary amount of time and level of review afforded in this specific matter. This due process and these judicial and administrative remedies are available to anyone responding to an SFRTA procurement.

The SFRTA Procurement Policy does not grant the Procurement Director sole discretion in awarding contracts.

See OIG
Comment 1

Respectfully, the Report incorrectly states on Table 3, page 13 that the Procurement Director has sole discretion in the ultimate award of a contract. SFRTA’s Procurement Policy, like most other public agencies, provides due process through a two tiered level of administrative review. An aggrieved proposer has the right to file a timely protest which requires the Procurement Director to render a written decision (Chapter 6 (3)). If the proposer remains unsatisfied, the aggrieved proposer may further appeal to the SFRTA Executive Director (Chapter 6 (3)). If the protest is denied, the Procurement Director determines whether to proceed with the award, or, if the contract has been awarded, suspend the award pending the outcome of the protest (Chapter 6 (4)). If SFRTA determines the protest is valid, the Executive Director, in his discretion, may direct that a new solicitation be issued or amended, award or terminate the contract, or take such other action permitted by law to promote compliance with SFRTA policies and applicable law (Chapter 6 (5)). Had SFRTA been required to suspend the Procurement pending resolution of the protest (as is the case when subject to Chapter 120, F.S.), SFRTA would be at risk since the current vendor contracts were scheduled to expire. Furthermore, in this case, there was a new service due to begin and negotiations with the protesting proposers may have had to occur during any resolution of a Chapter 120 protest, which would put SFRTA at a serious disadvantage.¹ The SFRTA Procurement Policy is purposely written to allow flexibility to address protests on an individual case-by-case basis to yield a fair, just and equitable result.

¹ Stopping the service if these contract negotiations failed was not an option as SFRTA would then be in default of its other contractual obligations (including those to the federal government). The non-responsive proposers were well aware of this and could have used this to their negotiating advantage.

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See OIG
Comment 2

→ **The SFRTA Procurement Policy does not require further amendment or legislative action.**

The Report correctly states that SFRTA is not required to stop the solicitation upon receipt of a written protest. However, SFRTA, respectfully submits the absence of such a rule is not an omission or bad policy. Allowing a frivolous protest or a disgruntled or non-responsive proposer the ability to stop a solicitation by the mere filing of a protest does not serve the best interests of the public or the public entity. Such a policy provides opportunities for abuse, rewards bad actors (such as it would have done in this instance) and potentially delays critical public projects at increased public expense. The current SFRTA Procurement Policy fairly balances the due process rights of proposers with the need for SFRTA to conduct its public business in a timely and efficient manner. There is no compelling need to amend SFRTA Procurement Policy on these issues.

Observation No. 2: SFRTA’s process to review RFP 16-010 differed from the SFRTA Procurement Policy.

See OIG
Comment 3

→ The Report fails to consider or take into account all of the relevant provisions of the SFRTA Procurement Policy in reaching its conclusion. The Report wrongfully concludes that the review process for the subject RFP process deviated from the Procurement Policy’s requirement in Chapter 4 (c). This provision provides that “All proposals received shall be evaluated by an Evaluation and Selection Committee...” Based almost exclusively on this section, the Report asserts SFRTA did not follow its Procurement Policy by not requiring the non-responsive proposals to be evaluated. This conclusion fails because the section in the SFRTA Procurement Policy relied upon by the Report cannot reasonably be interpreted or applied in isolation and without considering the other applicable sections of the SFRTA Procurement Policy. The procurement process requires a series of escalating steps. Prior to committee evaluation, a proposal must first be determined to be both responsible and responsive. SFRTA Procurement Policy, Chapter 4(e)2, “Determination of Responsiveness,” specifically provides that a proposal shall be rejected when the proposer imposes conditions, or where the proposal is conditioned or qualified in a manner not authorized in the RFP.

Consistent with this policy, Section 1.10.2 of the RFP provides, in part:

Proposals which, in the opinion of SFRTA are non-responsive will be rejected. Proposals may be rejected if found to be conditional, irregular or not in conformance with the requirements or instructions contained herein. [emphasis added]

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APPENDIX B – SFRTA’s Response and OIG Supplemental Comments (Continued)

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And, Section 1.10.3 of the RFP, further provides:

Conditions Causing Disqualification of Proposers. Other conditions, which may cause rejection of Proposals, include, but are not limited to, a Proposer submitting more than one proposal, qualified or contingent proposals... [emphasis added]

The Procurement Director, acting within his authority, made a determination finding 5 of the 6 proposals non-responsive based on the definition and principals of responsiveness found in the SFRTA Procurement Policy and the specific terms of the RFP. Having found the proposals non-responsive, a determination which is properly made prior to evaluation, there was no reason to present the non-conforming proposals to the Evaluation and Selection Committee. Finally, as discussed in greater detail above, the non-responsive proposers exercised their right to seek judicial and administrative review on exactly this issue and did not prevail in either forum.

See OIG
Comment 4

Observation No. 3: SFRTA changed the RFP after the deadline for proposers to ask questions.

The Report questions the transparency of SFRTA because 2 addenda to the RFP were issued after the RFP deadline for asking questions. Table 4 of the draft Report accurately summarizes the RFP addenda and proposer question timelines. Proposers submitted a total of 794 questions, 79 of which related to insurance. Two of 9 addenda (Nos. 8 and 9) were issued after the question deadline expired. It is SFRTA’s position that all of the proposers had more than an ample opportunity to ask questions prior to the deadline. Furthermore, the nonresponsive proposers could have filed an administrative protest to challenge the responses in addenda 8 and 9 (or any of the prior addenda), but none did. SFRTA believes it acted reasonably, complied with its Procurement Policy and conducted this RFP process with extraordinary patience and fairness.

See OIG
Comment 5

Observation No. 4: FDOT was unaware of the independent engineers estimate for the RFP services and was unaware of the sources of revenue for the expenditure’s for the 10 year agreement.

Independent engineer’s cost estimates are part of all government procurements, including FDOT’s. In addition, the existence of this procurement and the decision to bundle SFRTA’s core services was widely known. FDOT had numerous opportunities to request independent cost estimates or any other information relating to the RFP. This information was not requested by FDOT during the procurement (neither by the FDOT representative on the evaluation committee or on the SFRTA Board), but it was provided to FDOT during agenda review prior to the Board meeting. In any event, what meaningful impact would the availability of this information to FDOT have made?

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Six of the 8 members of the SFRTA Board in attendance at the January 27, 2017 meeting voted in favor of awarding the contract to Herzog (including the only Governor’s appointee present). Curiously, the Report only interviewed the two Board members who voted against the item. SFRTA acts by majority of its Board, the opinions of individual Board members, regardless of side, are not relevant to the action expressed by the majority vote. Also, as pointed out by the Chair, price was only 20% of the overall score²; safety and service were weighted higher than cost. Any discussion that resulted in a different weighting would have been in violation of the RFP.

Other Comments on Report

See OIG
Comment 6

→ 1. On pages 15 and 16 of the Report, the Report states that a meeting could have been held with proposers to clarify the insurance requirements of the RFP, particularly the liability insurance program in place on the South Florida Rail Corridor. What is not noted is that three of the five non-responsive proposers were existing SFRTA contractors who were intimately familiar with the liability insurance program, as well as the other requirements. Furthermore, SFRTA answered numerous questions on insurance that were raised by several proposers and did have a pre-proposal conference in which proposers could ask questions. As stated previously, a protest on any of the addenda could have been issued by any proposer, but none did and none called for another meeting.

See OIG
Comment 7

→ 2. On page 17 of the Report, under the heading “SFRTA’s Reasons to Award,” the Report fails to mention the significant issue SFRTA previously made to the IG about why it did not re-procure or amend the solicitation. SFRTA’s position was that the integrity of the procurement process would not be maintained if the 5 proposers gained an advantage from their bad acts, i.e. because SFRTA re-procured or amended the solicitation in a manner that allowed these proposers to have another chance at award of the contract. The integrity of the process is a highly regarded principle in the public procurement profession and one that SFRTA takes very seriously.

See OIG
Comment 8

→ 3. The Report states that FDOT did not approve “the portion of the RFP to be funded with State monies before the RFP was [sic] advertised.” The prior requirements of Section 343.54(4)(c)1, F.S. that required “[a]t least 90 days before advertising any procurement or renewing any existing contract that will rely on state funds for payment, the authority shall notify the department of the proposed procurement or renewal and the proposed terms thereof.” The Report goes on to say that such formal notice would have included the independent engineer’s cost estimate. On the issue of compliance with the notification requirement, on August 12th, September 1st and September 8th of 2016, SFRTA’s Procurement Department (or the consultants working with the Procurement Department in the preparation of the procurement documents), emailed the procurement documents to FDOT for its review and approval. On the issue of submittal of an independent engineer’s cost estimate, SFRTA never previously provided that to FDOT when seeking its approval under this section and FDOT never required it to be submitted by SFRTA in order for it to obtain FDOT’s approval of procurement documents.

² Twenty percent, or another similar percentage, is commonly used by the commuter rail industry for evaluating price proposals when procuring these types of services.

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4. Under the fourth Additional Controls for Consideration, the Report states that “timelines for submission of these proposed procurements and department’s response should be documented in future JPAs.” The Report assumes, by this statement that the prior statutory language in Section 343.54(4)(c)1, F.S. requiring FDOT’s approval of proposed contracts still applies. The new statutory language adopted in HB 695 now requires the Department approve SFRTA’s “proposed expenditures.” Specifically, the amended language states, that SFRTA “...may not enter into, extend, or renew any contract or other agreement that may be funded, in whole or in part, with funds provided by the department **without the prior review and written approval by the department of the authority’s proposed expenditures.**” (emphasis added)

Under “Additional Controls for Consideration” on page 22 of the Report, the Report recommends that the agreement that SFRTA and FDOT will be entering into include a requirement that “Timelines for submittal of these proposed procurements and department’s response should be documented in future JPAs.” SFRTA does not object to notifying the Department of upcoming procurements and providing independent engineer’s cost estimates. However, there is no requirement in the current law for SFRTA to obtain the Department’s approval of same.

5. Special District Designation

SFRTA is aware of DEO’s designation of it as a “special district.” SFRTA respectfully disagrees with DEO’s position and continues to assert that it is not a special district, as that term is defined under Florida law.

The Legislature has stated that special districts are to be created and operated pursuant to the requirements contained in Chapter 189, Part 1, F.S. Specifically, “[i]t is the intent of the Legislature through the adoption of this chapter to provide general provisions for the definition, creation, and operation of special districts. It is the specific intent of the Legislature that dependent special districts shall be created at the prerogative of the counties and municipalities and that independent special districts shall only be created by legislative authorization as provided herein.” Section 189.011(1), F.S.

SFRTA’s enabling legislation, powers, duties, etc. are all found in Chapter 343, Part II, F.S. There is no reference to Chapter 189, F.S. in SFRTA’s enabling legislation. In fact, SFRTA is defined as an “agency of the state.” Any special district requirements that SFRTA currently adheres to, such as those mentioned on page 6 of the Report, are done so voluntarily and not because of a legal requirement applicable to SFRTA.

Conclusion

See OIG
Comment 9

→ SFRTA believes it is also noteworthy to point out that the Report fails to discuss in the Report the reasons for SFRTA finding the 5 proposers non-responsive. Each of the 5 either materially qualified or conditioned their proposals, in a manner that was specifically prohibited by the RFP. The proposers choose to do this despite having been told explicitly in the RFP and through other lines of communication that this was prohibited and would result in the firm being deemed

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APPENDIX B – SFRTA’s Response and OIG Supplemental Comments (Continued)

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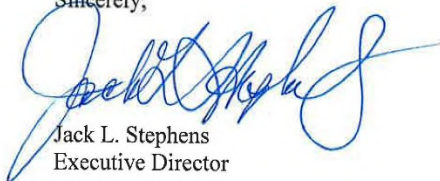
non-responsive. In addition, several of these proposers were familiar with SFRTA’s procurement process and this specific issue, having been deemed non-responsive in previous SFRTA procurements for conditioning their proposal. SFRTA’s handling of the issues presented and all of its actions in this matter were consistent with prior procurements where it deemed other proposers non-responsive.

It is also important to recognize, these were sophisticated proposers, represented by lawyers, and well versed in government procurements conducted all across the United States for the similar services sought here under similar requirements.

In summary, SFRTA accorded all proposers due process, ample opportunity to ask questions, and explicit direction with respect to the requirements of the RFP. The RFP process was transparent and open and provided proposers multiple opportunities to raise questions and ask for additional information. SFRTA Board members were also afforded the opportunity to ask for additional information about the procurement.

SFRTA respectfully requests that the IG consider each of the SFRTA responses detailed above and that the IG amend and modify the Report, including its observations, in a manner consistent with the positions expressed by SFRTA.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jack L. Stephens", is written over a printed name and title.

Jack L. Stephens
Executive Director

cc: Chris Bross (Procurement Director)
Mikel Oglesby (Deputy Executive Director)
Teresa Moore (General Counsel)

APPENDIX B – SFRTA’s Response and OIG Supplemental Comments (Continued)

OIG Comments to SFRTA Response dated August 31, 2017

Comment 1:

Concerning Table 3 on page 13 of our draft report, we have removed the bullet point that states the “Procurement Director has sole discretion in the ultimate award of the contract” and the bullet point that states the “Procurement Director has limited authority and discretion in handling protests.”

Comment 2:

Provisions of state law as referenced in our report, provide an opportunity for protest. SFRTA’s Procurement Policy does not provide the same level of protection for instances in which state money is expended. We believe that acquisitions made by SFRTA using state money should be subject to the same protest provisions as described in state law to protect the integrity of the procurement process.

Comment 3:

To clarify our report, we have changed the first paragraph in the “Comparison of SFRTA’s Procurement Policy with the Procurement of RFP 16-010” section on page 14 to:

Section 1.1 of RFP 16-010 states “[a]ll SFRTA procurement activities are governed by the SFRTA Procurement Policy.” However, the RFP itself contained the following inconsistency with the procurement policy...

SFRTA references Chapter 4(8)(e)2 “Determination of Responsiveness” to argue that the procurement policy is consistent with the Request for Proposals (RFP), but Chapter 4(8)(e)2 in SFRTA’s Procurement Policy specifically refers to the procurement method of Invitation to Bid (ITB), not a RFP which is discussed in Chapter 4(10). Additionally, SFRTA could ensure consistency between the procurement policy and the RFP by amending the Procurement Policy to clarify that competitive sealed biddings include all procurement methods, not only ITBs.

Comment 4:

We believe substantial changes to the RFP should not be made after the questions and answers period to ensure all prospective proposers fully understand SFRTA’s procurement parameters.

APPENDIX B – SFRTA’s Response and OIG Supplemental Comments (Continued)

Comment 5:

If the December 14, 2016, independent engineer’s estimate of \$535 million was provided prior to the September 2, 2016, solicitation, the department would have had a better understanding of the estimated cost of the contract and would have been provided an opportunity to ask budgetary questions. The projected cost, if provided in advance, would have allowed the board members additional time prior to the board vote to determine if funds were available to support the procurement given SFRTA’s current funding stream.

Comment 6:

Elements of the liability insurance requirements from previous procurements are different from the insurance requirements set forth in RFP 16-010, therefore assuming contractor familiarity with insurance requirements is not the same as assured transparency. SFRTA would have been acting within their procurement policy to hold a publicly noticed meeting to clarify confusion relating to insurance.

Comment 7:

Based on SFRTA’s response, we have added the following to the “Rejection of Proposals” section on page 17 of the report:

In the response to the OIG’s draft report 17-4002, SFRTA stated:

SFRTA’s position was that the integrity of the procurement process would not be maintained if the 5 proposers gained an advantage from their bad acts, i.e. because SFRTA re-procured or amended the solicitation in a manner that allowed these proposers to have another chance at award of the contract. The integrity of the process is a highly regarded principle in the public procurement profession and one that SFRTA takes very seriously.

APPENDIX B – SFRTA’s Response and OIG Supplemental Comments (Continued)

Comment 8:

SFRTA’s response incorrectly asserts that the OIG states that formal notification “would have included the independent engineer’s estimate.” We made the following recommendation in the draft report provided to SFRTA, in the “Additional Controls for Consideration” section on pages 2 and 22, for the department to consider:

Additional documentation should include an independent estimate of the cost to be incurred and the funding source for the life cycle of the procurement.

Concerning the three dates listed in SFRTA’s response (August 12th, September 1st, and September 8th), only two of these are prior to the September 2, 2016, advertisement date and none are prior to the 90-day requirement.



Comment 9:

The report does not fail to document the reasons for SFRTA finding the 5 proposers non-responsive. Page 17 of the “Rejection of Proposals” section of the report provides a brief extract from SFRTA’s Commercial Subcommittee Review and Fact-Finding Summary for RFP No.16-010 of the reasons why each of the five proposals were rejected.

**Office of Inspector General
Florida Department of Transportation**

APPENDIX C – Management Response

On September 29, 2017, the department submitted the following in response to our audit. The response is provided in its entirety below.

<p>RICK SCOTT GOVERNOR</p>	 <p>Florida Department of Transportation 605 Suwannee Street Tallahassee, FL 32399-0450</p>	<p>MIKE DEW SECRETARY</p>
<p>September 29, 2017</p>		
<p>Mr. Kristofer B. Sullivan, CIG, CIA, CISA, Director of Audit Office of Inspector General Florida Department of Transportation 2740 Centerview Drive Rhyne Building, Suite 3A Tallahassee, FL 32399</p>		
<p>RE: OIG Advisory Report No. 171-4002</p>		
<p>Dear Mr. Sullivan:</p>		
<p>As requested, this letter serves as the Department's response to the above referenced SFRTA Preliminary and Tentative (P&T) advisory report. We have no comments on the observations section. We concur with observation #4 that describes the District 4 Secretary's actions and comments at the January 2017 SFRTA Board meeting.</p>		
<p>We have no comments on the additional controls listed. With regards to control consideration #4, we are presently working with SFRTA on language and an associated process to address the contract review requirements in the Florida Statutes.</p>		
<p>We recommend that you reference the Board Chair's name, rather than just referencing "Board Chair" in the report. The chair changes each year and this has potential to cause confusion. The chair at the time in question was Commissioner Abrams.</p>		
<p>Please feel free to contact Gerry O'Reilly, the District Four Secretary, at (954) 777- 4411 should you have any questions.</p>		
<p>Sincerely,</p>  <p>Mike Dew Secretary</p>		
<p>MD:go</p>		
<p>cc: Tom Byron, P.E., Assistant Secretary – FDOT Robin Naitove, CPA, Comptroller – FDOT Gerry O'Reilly, P.E., District Four Secretary – FDOT</p>		
<p>www.fdot.gov</p>		

APPENDIX D – List of Acronyms

Commercial General Liability (CGL)
CSX Transportation, Inc., (CSXT)
Department of Administrative Hearing (DOAH)
Department of Economic Opportunity (DEO)
Department of Financial Services (DFS)
Evaluation and Selection Committee (ESC)
Federal Employers Liability Act (FELA)
Florida Statutes (F.S.)
Florida Transportation Commission (FTC)
House Bill (HB)
Invitation to Negotiate (ITN)
Joint Participation Agreement (JPA)
Office of Inspector (OIG)
Positive Train Control (PTC)
Request for Proposal (RFP)
Self-Insurance Retention Fund (SIRF)
South Florida Rail Corridor (SFRC)
South Florida Regional Transportation Authority (SFRTA)
Transportation Research Board (TRB)
Tri-County Commuter Rail Authority (TCRA)
Tri-County Commuter Rail Organization (TCRO)

**Office of Inspector General
Florida Department of Transportation**

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Steven Abrams, FY 2017-2018 Board Chair, South Florida Regional Transportation Authority

**Office of Inspector General
Florida Department of Transportation**

PROJECT TEAM

Engagement was conducted by:
 Javaughn Matthews, Auditor
 Tim Crellin, Auditor

Under the supervision of:
 Ashley Clark, Senior Audit Supervisor
 Nancy Shepherd, Audit Manager
 Kristofer B. Sullivan, Director of Audit

Approved by:
 Robert E. Clift, Inspector General

STATEMENT OF ACCORDANCE

The department's mission is to provide a safe transportation system that ensures the mobility of people and goods, enhances economic prosperity, and preserves the quality of our environment and communities.

The Office of Inspector General's mission is to promote integrity, accountability, and process improvement in the Department of Transportation by providing objective, fact-based assessments to the DOT team.

This work product was prepared pursuant to section 20.055, Florida Statutes, in accordance with the Association of Inspectors General *Principles and Standards for Offices of Inspector General*, and conforms with The Institute of Internal Auditors' *International Standards for the Professional Practice of Internal Auditing*.

Please address inquiries regarding this report to the department's Office of Inspector General at (850) 410-5800.

Office of Inspector General
Florida Department of Transportation

ATTACHMENT 1 – Letter from Senator Brandes



THE FLORIDA SENATE

Tallahassee, Florida 32399-1100

COMMITTEES:
Appropriations Subcommittee on
Transportation, Tourism, and Economic
Development, Chair
Appropriations
Community Affairs
Criminal Justice
Regulated Industries
Rules

SENATOR JEFF BRANDES
24th District

February 16, 2017

Rachel Cone, Interim Secretary
Florida Department of Transportation
605 Suwannee Street
Tallahassee, Florida 32399-0450

Secretary Cone,

This letter is in regards to the January procurement decision by the South Florida Regional Transportation Authority to award a contract for the operation of Tri-Rail services.

Today the Senate Appropriations Subcommittee on Transportation, Tourism, and Economic Development invited staff of the Authority to provide testimony related to their procurement practices. The testimony provided by the Authority was illuminating and, among other points of interest, it illustrated potential deficiencies in the procurement policies of the Authority.

The awarding of a contract in excess of \$500 million in public funds after such a short bidding process is disturbing. The procurement policies appear to lack adequate time for disqualified applicants to appeal administrative actions taken by the Authority. I am concerned that appropriate competition did not take place during the procurement process for this contract.

Only through fair and transparent competition can the taxpayers receive the best value for their money. The Authority maintains their actions are defensible because they complied with their internal procurement policies. However, the taxpayers deserve a higher scrutiny of this process.

Therefore, I am requesting the Department initiate an official investigation by the Investigator General into this matter. I further request the investigation review both the facts of this particular procurement in question, as well as the entire procurement policy of the Authority.

I look forward to a thorough review of this matter.

Kind regards,

A handwritten signature in black ink, appearing to read "Jeff Brandes".

Jeff Brandes

REPLY TO:
□ 9800 4th Street North, Suite 200, St. Petersburg, Florida 33702 (727) 563-2100
□ 418 Senate Office Building, 404 South Monroe Street, Tallahassee, Florida 32399-1100 (850) 487-0024
Senate's Website: www.florsenate.gov

JOE NEGRON
President of the Senate

ANITERE FLORES
President Pro Tempore

ATTACHMENT 2 – SFRTA Map



ATTACHMENT 3 – Timeline of RFP 16-010

On January 22, 2016, SFRTA Staff and Board discussed the possibility of bundling the rail operations and maintenance contract since the current contracts were expiring on June 30, 2017. Staff also stated that if SFRTA's Board decided to bundle the contracts, staff would like a six-month process from advertisement to award and would bring a recommendation to the Board by January 2017 to give the awarded contractor time to prepare to provide services beginning on July 1, 2017.

On February 26, 2016, the Transportation Research Board (TRB) presented on an ongoing study to bundle or unbundle operating contracts in the commuter rail industry. Some of the perceived benefits to bundling a contract included attracting more experienced competition with a larger contract and less agency oversight required. Some of the perceived risks included reduced price competition and limited number of potentially qualified contractors. SFRTA's Executive Director stated that SFRTA staff planned to complete an analysis of bundling contracts and would bring a decision to SFRTA's Board by April 2016.

On April 22, 2016, SFRTA's consulting firm (Parsons Brinkerhoff) gave a presentation to SFRTA's Board on the comparative evaluation of bundling and unbundling services. The presentation stated that bundling the contract would prevent "finger pointing" and reduce duplication of efforts for services. SFRTA's General Counsel gave a presentation to SFRTA's Board on SFRTA's procurement process. After hearing both presentations, SFRTA's Board came to the consensus to bundle the four contracts for operations, equipment maintenance, station maintenance, and dispatching.

On September 2, 2016, SFRTA's Executive Director approved the RFP 16-010, and solicitation process to obtain a contractor for SFRTA's Operating services along the corridor. The RFP was posted on SFRTA's website and other media platforms for solicitation.

On September 14, 2016, SFRTA issued Addendum No. 1, which replaced the original RFP in its entirety.

On September 26, 2016, SFRTA issued Addendum No. 2, which revised some Technical Specifications, and added attachments to the RFP.

On September 29, 2016, SFRTA hosted a Pre-Proposal Conference. SFRTA's staff gave a description of the services requested from the candidates for operations and maintenance of the South Florida Rail Corridor. As stated in the minutes from the conference:

SFRTA reserves the right to reject any or all proposals, including proposals that are conditioned. If there are any questions regarding the RFP terms and conditions, please submit those during the question and answer period. Proposals submitted with conditions are subject to rejection.

ATTACHMENT 3 – Timeline of RFP 16-010 (continued)

SFRTA provided the following advice as stated in the conference minutes regarding insurance requirements:

Proposers [contractors] are asked to carefully review the Insurance Requirements found in Sections 2.9, 2.10, 2.11 of the General Terms and Conditions, as endorsements and declaration pages are required with the insurance certificates.

The following companies attended the Pre-Proposal Conference:

- | | |
|-----------------------------|-----------------------------|
| • All Trades | • Amtrak |
| • Bombardier Transportation | • Business to Business |
| • CMT Janitorial | • First Transit |
| • Herzog Transit Services | • Keolis |
| • Keolis-Becker Polikoff | • Meridian Management Corp. |
| • RailPlan | • SNC-LAVALIN |
| • Transdev Services | • UTU30 |

On September 30, 2016, SFRTA hosted a site visit at the Hialeah Rail Yard. Attendees examined the Rail Yard to see where inventory would be stored and working facilities for staff.

On October 13, 2016, SFRTA issued Addendum No. 3, which revised portions of the General Terms and Conditions of the RFP.

On November 2, 2016, SFRTA issued Addendum No. 4, which revised the RFP instructions to Proposers [contractors], Special Terms and Conditions, Technical Specifications, substituted exhibits, and added attachments to the RFP. As stated in the addendum, a contractor asked “could the Authority confirm our understanding that only AFTER A Technical Proposal is deemed responsive will the Price Proposal be evaluated?” SFRTA responded:

The Technical Proposal and Required Documents...envelopes will be opened by SFRTA Procurement Department staff in order to determine initial responsiveness. After an initial determination of responsiveness has been conducted, only the Technical Proposals from those Proposers [contractors] deemed initially responsive will be forwarded to the Evaluation Selection Committee.

On November 8, 2016, SFRTA issued Addendum No. 5, which revised the Special Terms and Conditions, Technical Specifications, substituted exhibits, and added attachments to the RFP.

ATTACHMENT 3 – Timeline of RFP 16-010 (continued)

On November 10, 2016, SFRTA issued Addendum No. 6, which revised the RFP Instructions to Proposers [contractors], General Terms and Conditions, Special Terms and Conditions, Technical Specifications, substituted exhibits, and substituted attachments to the RFP. As stated in the addendum, a contractor asked:

Last day of submission of proposals is December 9, 2016. This is a very short window to prepare proposals, disadvantaging bidders who are not already providing operations and maintenance services for Tri-Rail. Would SFRTA consider extending the deadline by at least 6 weeks?

SFRTA responded that “there is no change to the proposal due date.” Eighteen questions related to insurance contained a response that SFRTA would provide answers in a future addendum.

On November 17, 2016, SFRTA issued Addendum No. 7, which revised the RFP Instructions to contractors, General Terms and Conditions, Technical Specifications, substituted exhibits and added attachments to the RFP. As stated in the addendum SFRTA received the following request about the proposal submission date:

Could SFRTA please provide a date by which proposers’ [contractors’] questions will be answered? Since much of the information previously requested is required for proposers [contractors] to prepare a competitive bid and has not been provided to date, we respectfully request an extension of 60 days to the proposal due date.

If SFRTA issues any addenda within fifteen business days of the proposal due date, we request that SFRTA extend the due date to allow proposals to be due at least fifteen business days from receipt of the last addendum.

SFRTA responded “There is no change to the proposal due date” and “No change” respectively.

On November 18, 2016, at 5:00pm Eastern Time, SFRTA, as planned, stopped contractors from submitting questions about the RFP.

On November 23, 2016, SFRTA issued Addendum No. 8, which revised the RFP Instructions to Proposers [contractors], General Terms and Conditions, Special Terms and Conditions, Technical Specifications, substituted exhibits, and added attachments to the RFP. As stated in the addendum, SFRTA received the following question requesting extension of the proposal submission date:

We request that Authority approve an extension to the proposal due of December 9, 2016 by two weeks following the release of addendum 6 as this will provide sufficient time to assess the MOE maintenance records.

SFRTA navigated the contractor to an answer in a previous addendum that stated “there is no change to the proposal due date.”

ATTACHMENT 3 – Timeline of RFP 16-010 (continued)

On December 1, 2016, SFRTA issued Addendum No. 9, which revised the RFP Instructions to Proposers [contractor], General Terms and Conditions, Special Terms and Conditions, Technical Specifications, and substituted exhibits for the RFP. SFRTA changed the last day for submission of proposals from December 9, 2016, to December 16, 2016. As stated in the addendum, a proposer [contractors] asked “what is SFRTA’s total estimate of liability for their open claims?” SFRTA responded “this information is not available at this time.”

On December 14, 2016, Parsons Brinckerhoff submitted an estimate of probable cost in the amount of \$539,094,016 with an average cost per year of \$53,909,402 for the proposed services contract. Also, on December 14th Bombardier and Transdev submitted their proposals.

On December 15, 2016, Amtrak submitted their proposal.

On December 16, 2016, at 5:00pm Eastern Time was the last day a candidate could submit a proposal. First Transit, Herzog, and SNC-LAVALIN submitted their proposals.

On December 29, 2016, SFRTA’s Commercial Subcommittee and Technical Subcommittee³⁴ reviewed submitted proposals. The Commercial Subcommittee report stated: The Director of Procurement separated the pricing from the Exhibit 2 Price Proposal forms from the required documents and requested that the Commercial Subcommittee to review each of the six (6) sets of required documents. While separating the price, the Procurement Department discovered that five (5) of the six (6) proposals had conditions and/or exceptions included with the Price Proposal Form contained in the Required Documents.

³⁴ The Commercial Subcommittee was established to perform commercial fact-finding reviews of proposal and provide a summary fact-finding report to the Director of Procurement. The Technical Subcommittee was established to review the technical capabilities and responsiveness of the proposals and provide a strengths and weakness summary of each proposal.

ATTACHMENT 3 – Timeline of RFP 16-010 (continued)

<p>Each of the six (6) proposals was reviewed by the Commercial Subcommittee and a list of irregularities and deficiencies were identified from each Proposal.</p> <p>The Technical Subcommittee report stated: The Technical Subcommittee informed the Director of Procurement that two (2) of the six (6) proposers [contractors] included conditions and/or exceptions in the Technical Proposal. Those Proposers [contractors] with conditions/exceptions in the Technical Proposal included Amtrak and SNC-LAVALIN.</p> <p>The Director added that if no exceptions or conditions were found in the Herzog Technical Proposal, the Technical Subcommittee should identify strengths and weaknesses for the Herzog proposal only.</p> <p>The Technical Committee evaluated Herzog's Technical proposal only because it was the one proposal that did not have any conditions or exceptions.</p>
<p>On January 11, 2017, SFRTA's Procurement Director submitted letters of rejection to Amtrak, Bombardier, First Transit Inc., SNC-LAVALIN, and Transdev Services Inc.</p>
<p>On January 17, 2017, Transdev Services Inc., challenged its elimination from a competition for a public contract pursuant to RFP 16-010 for Operating Services issued by SFRTA with a pre-award proposal protest. Bombardier and First Transit Inc. intervened without objection and joined Transdev's request for relief.</p>
<p>On January 19, 2017, SFRTA filed its motion to dissolve ex parte preliminary injunction and memorandum in Opposition to motion for preliminary injunction in response to Transdev's pre-award proposal protest.</p>
<p>On January 23, 2017, the circuit court that heard the case stated that SFRTA clearly communicated to the contractors, including in the RFP, that proposals could not be conditional and such proposals could be rejected, and that nonresponsive proposals would be rejected. The court further stated that SFRTA rejected proposals appropriately. Circuit Court Judge McCarthy ruled in SFRTA's favor dissolving ex parte Preliminary Injunction because Transdev did not prove that an injunction would serve the public interest, and Transdev failed to show any entitlement to a preliminary injunction. Moreover, the court argued that any delay in the awarding of the contract could jeopardize SFRTA's commuter rail service because the winning contractor needs to be prepared to provide the services by July 1, 2017, the beginning of the contract. SFRTA issued a Notice of Intent to Award the RFP to Herzog.</p>
<p>On January 25, 2017, SFRTA completed an in-house Verification of Funds forms for the RFP. SFRTA verified that \$48,289,122 (\$4,142,292 for FY 16-17 and \$44,146,830 for FY 17-18) will be available for the project procurement and to authorize the development and issuance of the solicitation document.</p>

ATTACHMENT 3 – Timeline of RFP 16-010 (continued)

On January 25, 2017, FDOT District 4 Secretary O'Reilly emailed SFRTA's Executive Director Jack Stephens to express the department's concern of the Board having to vote to approve a contract that has expenditures way more than what is available in the budget. Secretary O'Reilly stated that the previous operating budget for the four individual contracts was \$39.4 million, which is \$9.7 million less than the proposal price for the bundled contract of \$49.1 million.

Secretary O'Reilly also stated FDOT's contribution to SFRTA is fixed and cannot be increased. Also, the department's knowledge of increased funding for SFRTA to support operating services comes from fare increases. SFRTA would have to cut funding from other areas to support this contract.

Secretary O'Reilly requested SFRTA provide their board with the proposed operating budget reflecting how SFRTA's operations will be balanced going forward with upcoming extra expenses. O'Reilly also offered the option of delaying the approval of the new contract to address the budget shortfall.

On January 27, 2017, SFRTA's Board reviewed the procurement process that took place for the RFP. Also, the Board listened to the perspectives of representatives of rejected contractors (Amtrak, Transdev, Bombardier, and First Transit). Per the minutes of the board meeting, SFRTA's Board Chair³⁵ presented the following options to the Board regarding the selection of a candidate for the RFP:

One, is to award the contract of the bundled services to Herzog... an alternative is to reject all bids and reissue a new RFP... Also, other alternatives is to postpone the award or remove the conditions.

To which SFRTA's third-party counsel³⁶ provided a legal opinion as stated in the board meeting minutes:

In this situation, from a policy decision, should the Board decide that the 5 here did not play by the rules, the Board can make the call to redo this procurement or not. Every decision made here today, to move forward, to reject all, can be challenged. The other middle alternatives that the Chair mentioned, could be difficult to justify from a legal position.

SFRTA's Board voted by majority (6-2) to award the contract to Herzog. The contract was also executed between Herzog and SFRTA for services along the corridor for \$511 million over 10 years.

³⁵ Broward County Commissioner Ryan.

³⁶ Mr. Goldstein, Managing Partner, Broward office of Shutts and Bowen.

ATTACHMENT 3 – Timeline of RFP 16-010 (continued)

Also on January 27, 2017, department Secretary Boxold expressed concern in a letter to SFRTA regarding SFRTA's accountability for expenditure of the state funding that the department provides for SFRTA operations and maintenance costs. In the letter, Secretary Boxold stated that due to the action of SFRTA's board awarding the contract, and the department's concern related to SFRTA's "accountability for expenditure of the state funding", the department was reviewing all discretionary funding it provides SFRTA and may elect to withhold such funding in the future.

On January 30, 2017, SFRTA's Executive Director Stephens informed department Secretary Boxold of the events that took place in advertising and awarding RFP 16-010. Stephens also explained that the Legislature did not extend the department oversight requiring SFRTA to conduct audits of its expenditures of the State funds pursuant to the Single Audit Act Section 215.97, F.S., Stephens also informed Secretary Boxold that SFRTA conducts and publicizes their annual independent audit, which is required by law.

On February 16, 2017, SFRTA's Executive Director Stephens spoke before the Senate Appropriations Subcommittee on Transportation, Tourism, and Economic Development. Executive Director Stephens informed the Subcommittee of the events that took place in advertising and awarding RFP 16-010. Stephens also explained how re-advertising the contract to receive more responsive proposals could delay services into Miami.

On March 24, 2017, department Interim Secretary Cone expressed concerns with SFRTA expending significant amounts of funding to lobbying against oversight of its use of State Funds; and the department's disbelief of SFRTA's ability to fund lobbying activities without the use of State Funds. Interim Secretary Cone also stated that the department expects SFRTA to operate in the most transparent manner possible, and SFRTA's current actions (transferring funding from one account to the next for lobbying expenses) continue to disregard legitimate efforts imposed by the department to control the use of tax dollars.

Office of Inspector General
Florida Department of Transportation

ATTACHMENT 4 – Parsons Brinckerhoff Estimate of Probable Cost (Summary)

South Florida Rail Corridor

Operating Services Cost Estimate

ESTIMATE SUMMARY

Section ID	Description	Base Year	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7	Initial Contract Period	Year 8	Year 9	Year 10	Follow-on Contract Period
1.0	Mobilization Services												
	Mobilization Period	\$1,680,512							\$1,680,512				
	Total Mobilization Services	\$1,680,512							\$1,680,512				
	Operating Services												
2.0	Train Operations	\$14,159,374	\$14,654,682	\$15,167,876	\$15,698,751	\$16,248,208	\$16,816,865	\$17,405,488	\$110,151,543	\$18,014,678	\$18,645,192	\$19,297,774	\$55,957,644
3.0	Station Maintenance	\$6,621,808	\$6,750,173	\$6,886,429	\$7,020,954	\$7,164,037	\$7,306,978	\$7,455,978	\$50,736,665	\$8,297,666	\$8,588,105	\$8,888,688	\$25,774,479
4.0	Maintenance of Equipment	\$20,855,650	\$21,555,596	\$22,341,044	\$23,123,032	\$23,992,338	\$24,766,970	\$25,536,919	\$162,244,802	\$26,534,211	\$27,482,609	\$28,424,110	\$82,421,230
5.0	Dispatching	\$3,781,318	\$3,924,014	\$4,061,364	\$4,203,502	\$4,350,624	\$4,502,896	\$4,660,498	\$29,494,207	\$4,823,615	\$4,992,442	\$5,167,177	\$14,983,234
	Total Operating Services	\$45,328,248	\$46,914,737	\$48,556,753	\$50,256,239	\$52,015,208	\$53,835,740	\$55,719,991	\$332,626,916	\$57,670,190	\$59,688,647	\$61,777,750	\$179,136,587
	Major Overhaul												
6.0	Major Overhaul							\$0					
	Total Major Overhaul							\$0					
	Incentive Payment												
7.0	Incentive Payment	\$565,000	\$565,000	\$565,000	\$565,000	\$565,000	\$565,000	\$565,000	\$3,955,000	\$565,000	\$565,000	\$565,000	\$1,695,000
	Total Incentive Payment	\$565,000	\$565,000	\$565,000	\$565,000	\$565,000	\$565,000	\$565,000	\$3,955,000	\$565,000	\$565,000	\$565,000	\$1,695,000
	Extra Work												
8.0	Extra Work												
	Contingency												
	Total Extra Work												
	Overall Total	\$47,573,761	\$47,479,737	\$49,121,753	\$50,821,239	\$52,580,208	\$54,400,740	\$56,284,991	\$358,262,428	\$58,235,190	\$60,253,647	\$62,342,750	\$180,831,587

Comments:

Value estimated for all years after Year 1 based on a rate of 3.5% per annum.

Total

\$539,084,016

Avg. Per Year

\$53,909,402

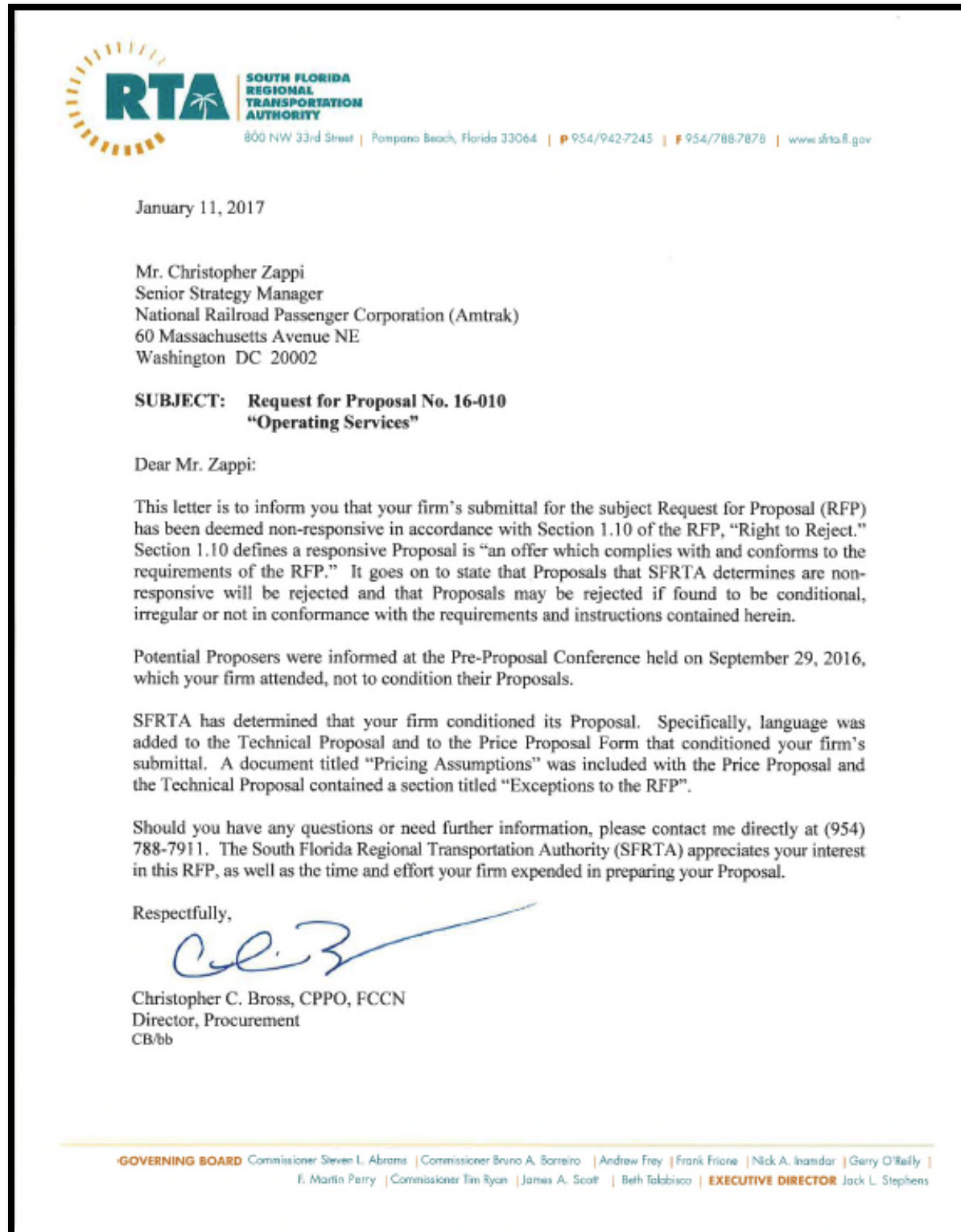
Summary

Summary

Office of Inspector General
Florida Department of Transportation

ATTACHMENT 5 – SFRTA’s Rejection Letters

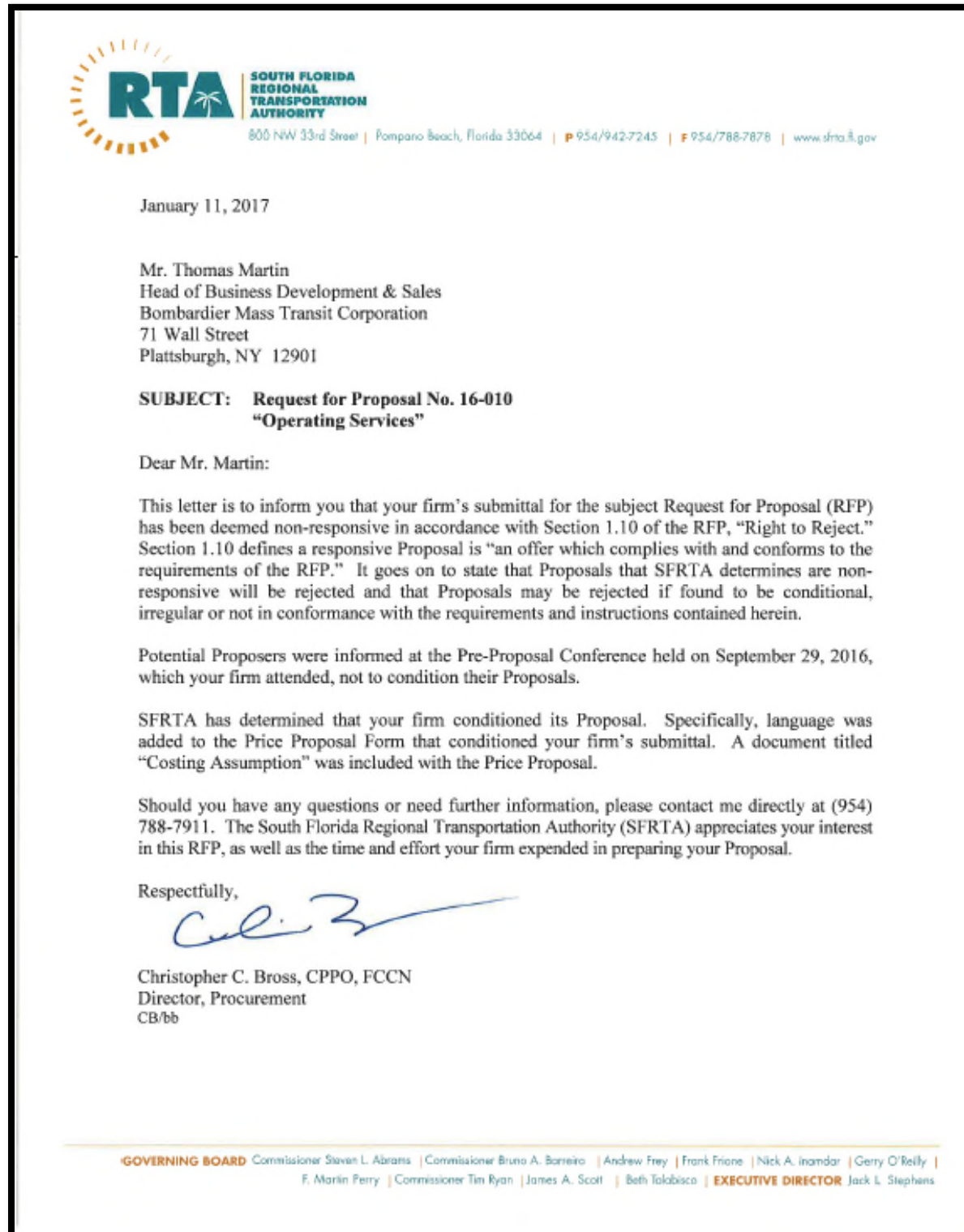
SFRTA’s Rejection Letter to Amtrak



**Office of Inspector General
Florida Department of Transportation**

ATTACHMENT 5 – SFRTA’s Rejection Letters continued

SFRTA’s Rejection Letter to Bombardier



**Office of Inspector General
Florida Department of Transportation**

ATTACHMENT 5 – SFRTA’s Rejection Letters continued

SFRTA’s Rejection Letter to Transdev Services, Inc.



January 11, 2017

Mr. Ken Westbrook
President/Rail Division
Transdev Services, Inc.
720 E. Butterfield Road
Suite 300
Lombard, IL 60148

**SUBJECT: Request for Proposal No. 16-010
"Operating Services"**

Dear Mr. Westbrook:

This letter is to inform you that your firm's submittal for the subject Request for Proposal (RFP) has been deemed non-responsive in accordance with Section 1.10 of the RFP, "Right to Reject." Section 1.10 defines a responsive Proposal as "an offer which complies with and conforms to the requirements of the RFP." It goes on to state that Proposals that SFRTA determines are non-responsive will be rejected and that Proposals may be rejected if found to be conditional, irregular or not in conformance with the requirements and instructions contained herein.

Potential Proposers were informed at the Pre-Proposal Conference held on September 29, 2016, which your firm attended, not to condition their Proposals.

SFRTA has determined that your firm conditioned its Proposal. Specifically, language was added to the Price Proposal Form that conditioned your firm's submittal. A document titled "Pricing Assumptions" was included with the Price Proposal.

Should you have any questions or need further information, please contact me directly at (954) 788-7911. The South Florida Regional Transportation Authority (SFRTA) appreciates your interest in this RFP, as well as the time and effort your firm expended in preparing your Proposal.

Respectfully,

A handwritten signature in blue ink, appearing to read "C. Bross", is written over a horizontal line.

Christopher C. Bross, CPPO, FCCN
Director, Procurement
CB/bb

GOVERNING BOARD Commissioner Steven L. Abrams | Commissioner Bruno A. Barreiro | Andrew Frey | Frank Frione | Nick A. Inamdar | Gerry O'Reilly |
F. Martin Perry | Commissioner Tim Ryan | James A. Scott | Beth Tolabisco | **EXECUTIVE DIRECTOR** Jack L. Stephens

**Office of Inspector General
Florida Department of Transportation**

ATTACHMENT 5 – SFRTA’s Rejection Letters continued

SFRTA’s Rejection Letter to First Transit, Inc.



**SOUTH FLORIDA
REGIONAL
TRANSPORTATION
AUTHORITY**

800 NW 33rd Street | Pompano Beach, Florida 33064 | P 954/942-7245 | F 954/788-7878 | www.sfirta.fl.gov

January 11, 2017

Mr. Gregg Baxter
Vice President of Rail
First Transit, Inc.
600 Vine Street
Suite 1400
Cincinnati, OH 45202

**SUBJECT: Request for Proposal No. 16-010
“Operating Services”**

Dear Mr. Baxter:

This letter is to inform you that your firm’s submittal for the subject Request for Proposal (RFP) has been deemed non-responsive in accordance with Section 1.10 of the RFP, “Right to Reject.” Section 1.10 defines a responsive Proposal is “an offer which complies with and conforms to the requirements of the RFP.” It goes on to state that Proposals that SFRTA determines are non-responsive will be rejected and that Proposals may be rejected if found to be conditional, irregular or not in conformance with the requirements and instructions contained herein.

Potential Proposers were informed at the Pre-Proposal Conference held on September 29, 2016, which your firm attended, not to condition their Proposals.

SFRTA has determined that your firm conditioned its Proposal. Specifically, language was added to the Price Proposal Form that conditioned your firm’s submittal. A document titled “Points of Discussion” was included with the Price Proposal.

Should you have any questions or need further information, please contact me directly at (954) 788-7911. The South Florida Regional Transportation Authority (SFRTA) appreciates your interest in this RFP, as well as the time and effort your firm expended in preparing your Proposal.

Respectfully,

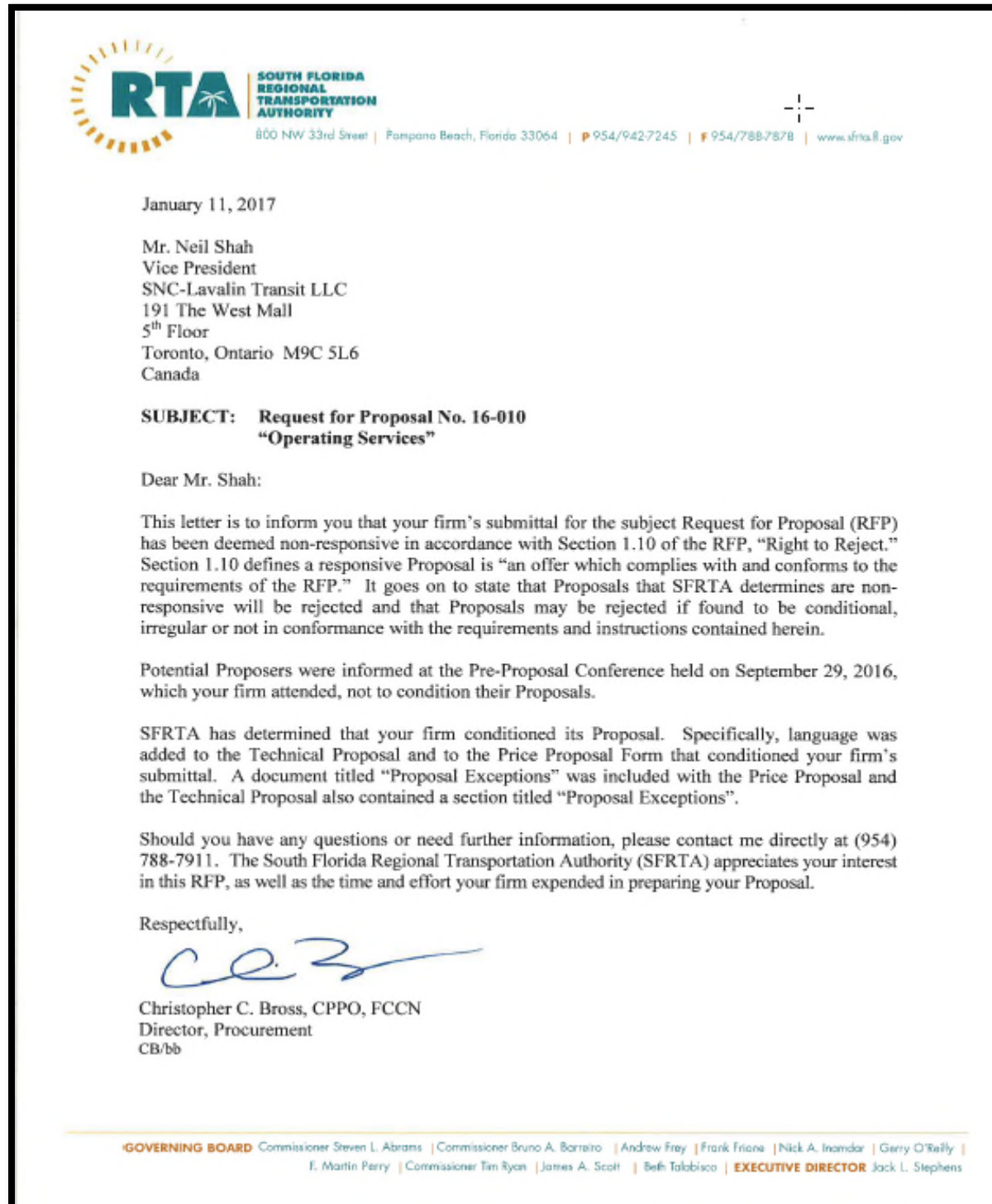
Christopher C. Bross, CPPO, FCCN
Director, Procurement
CB/bb

GOVERNING BOARD Commissioner Steven L. Abrams | Commissioner Bruno A. Barreiro | Andrew Frey | Frank Frione | Nick A. Inardar | Garry O'Reilly |
F. Martin Perry | Commissioner Tim Ryan | James A. Scott | Beth Tolabisco | **EXECUTIVE DIRECTOR** Jack L. Stephens

**Office of Inspector General
Florida Department of Transportation**


ATTACHMENT 5 – SFRTA’s Rejection Letters continued

SFRTA Rejection Letter to SNC-Lavalin Transit LLC



Office of Inspector General
Florida Department of Transportation

ATTACHMENT 6 – SFRTA's Verification of Funds for Fiscal Year 2017-2018



VERIFICATION OF FUNDS
TO BE COMPLETED FOR ALL FORMAL PROCUREMENT REQUESTS AND CHANGE ORDERS

REQUISITIONED BY: Brad Barkman DEPARTMENT: Operations
DATE: 1/25/17

REQUEST FOR PROCUREMENT ACTION:

New Procurement	<input checked="" type="checkbox"/>	Amendment	<input type="checkbox"/>
Purchase Order	<input type="checkbox"/>	Work Order	<input type="checkbox"/>
Other	<input type="checkbox"/>		

DESCRIPTION OF GOODS OR SERVICES: SFRTA Operating Services RFP # 16-010
Bundled services contract for Train Operations, Maintenance of Equipment, Station Maintenance and Dispatch

JUSTIFICATION: To continue uninterrupted train service when multiple existing contracts expire on June 30, 2016.

AMOUNT: \$ \$48,289,122 Estimate: ☐ Fixed: ☒ Estimate Derived By: Submitted Price Proposal

BUDGET CLASSIFICATION: OPERATING ☒ % CAPITAL ☐ %

PROJECT ACCOUNT NO.: FEDERAL FUNDS (Circle One Below):
GL ACCOUNT NO.: 001-110-34,37,44,47-0000 (YES or NO) YES

FISCAL IMPACT: (Attach additional forms/documentation if necessary)

Mobilization cost of \$4,142,292 for FY 16-17. Year 1 cost of \$44,146,830 for FY 17-18.

Budget Manager: Eileen Waters Date: 1-26-17

Department Director: [Signature] Date: 1/25/17

Executive Director: [Signature] Date: 1/24/17

Note: The purpose of this form is to verify funds will be available for the project procurement and to authorize the development and issuance of a solicitation document or commencement of sole source contract negotiations.

Rev. 07/16

**Office of Inspector General
Florida Department of Transportation**

ATTACHMENT 7 – FDOT District Four Secretary Email to SFRTA

From: stephensj@sfrta.fl.gov
Sent: 1/26/2017 7:54:14 AM
To: gerry.oreilly@dot.state.fl.us
Subject: Re: Board Meeting Friday
Attachment:
Tags:

It's being prepared as a result of your concerns. Currently I am comfortable we can meet this challenge. Look forward to laying it out for you from our perspective.

Sent from my iPhone

On Jan 25, 2017, at 5:16 PM, O'Reilly, Gerry
<Gerry.O'Reilly@dot.state.fl.us<mailto:Gerry.O'Reilly@dot.state.fl.us>> wrote:

Jack,

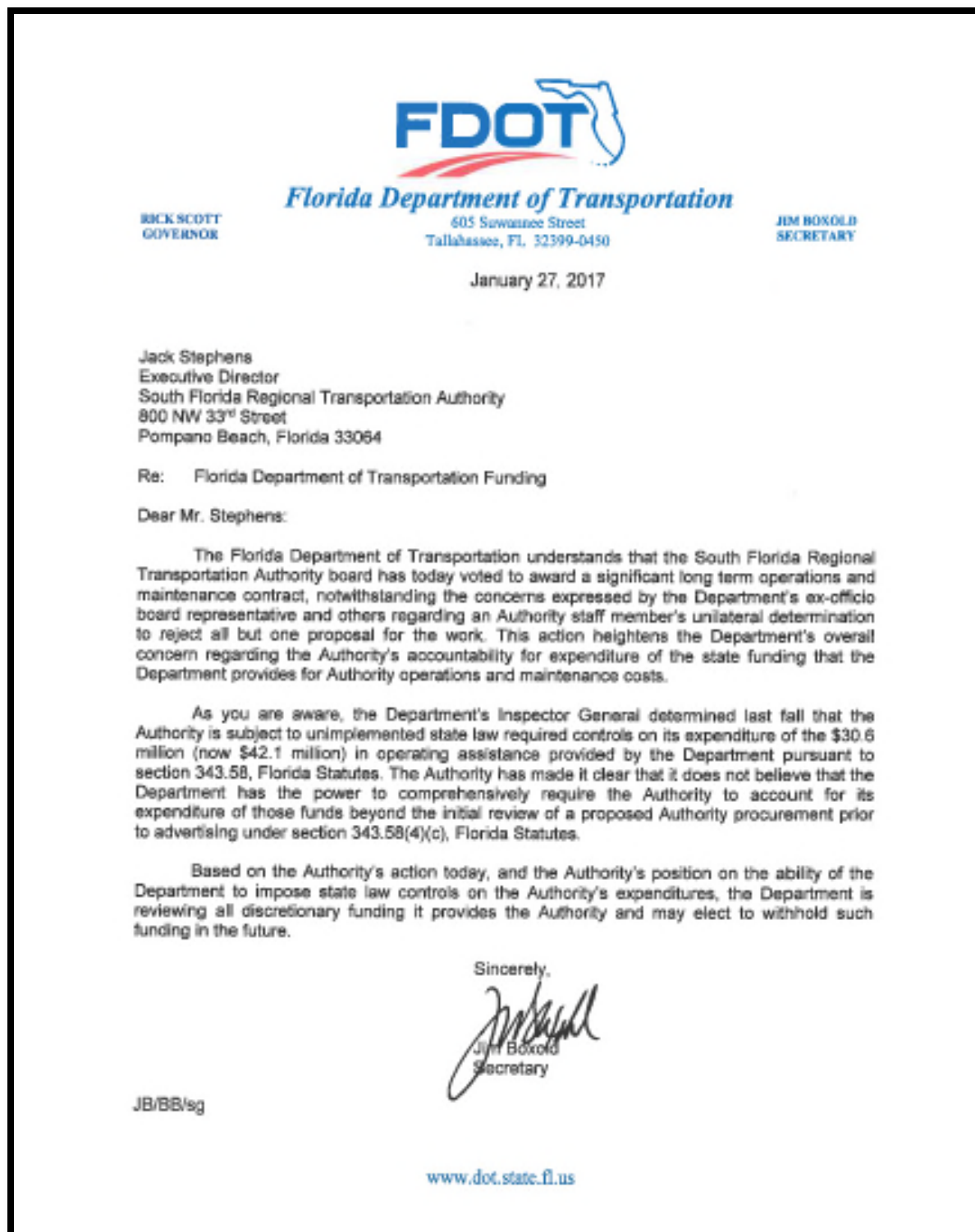
I've continued to review Agenda Item R8 since my briefing yesterday. I have very real concerns that the Board is being asked to approve a contract that has expenditures way in excess of what is available in the budget. When I look at the current operating budget I see that the four individual contracts (Operating, Train Maintenance, Station Maintenance and Dispatch) have \$39.4 million assigned to them. The bid price for the bundled contract is \$49.1 million annually. That leaves a shortfall of \$9.7 million annually. There is also going to have to be extra operating funds for PTC and for the service extension to the Miami Station. FDOT's contribution to SFRTA is a fixed number. This amount cannot be increased. I am not aware of any other sources of increased funding (other than a potential fare increase) so the only option I see is to cut funding from other areas. I believe the board needs to see a proposed operating budget that will reflect how it will be balanced going forward with these extra expenses. I understand time is of the essence for approval of the new contract but if a delay is necessary in order to address the budget shortfall fully then you may need to defer the item.

Give me a call if we need to discuss.

Gerry O'Reilly, PE
District Four Secretary
Florida Department of Transportation

Office of Inspector General
Florida Department of Transportation

ATTACHMENT 8 – FDOT Secretary Letter SFRTA



**Office of Inspector General
Florida Department of Transportation**

ATTACHMENT 9 – SFRTA’s Executive Director Letter to FDOT



January 30, 2017

Secretary Jim Boxold
Florida Department of Transportation
605 Suwannee Street
Tallahassee, Florida 32399-0450

Re: Operating Services Procurement and Dedicated State Funds

Dear Secretary Boxold,

SFRTA is in receipt of your letter dated January 27, 2017 and offers the following response.

1. Operating Services Procurement

The SFRTA Governing Board, after extensive discussion, voted 6-2 Friday to award a contract for Operating Services to the sole responsive proposer. The Governing Board members present were aware that three of the five non-responsive proposers raised their concerns with the procurement in a Court proceeding and, after a 4-hour evidentiary hearing, the Court disagreed with the objections raised, allowing SFRTA to move forward with its procurement.

SFRTA’s highly experienced Procurement Director had found five of the six proposers had conditioned their price proposals. Pursuant to the instructions in the Request for Proposals non-responsive proposals are ineligible for further participation in the procurement. The instructions clearly stated that “SFRTA Procurement staff shall perform an initial responsiveness determination of Proposals received.” Prior to issuing his determination, the Procurement Director sought advice from SFRTA’s in-house legal counsel who concurred with his conclusion. SFRTA also hired outside counsel, who specializes in government procurements, who also determined that the Procurement Director had exercised his discretion appropriately.

After hearing testimony from SFRTA’s Procurement Director, the Court agreed with the Procurement Director’s conclusion.

The concerns raised by the Department’s representative, who is a highly respected and full voting member of the Board, and his recommendation that SFRTA reject all proposals and conduct a second procurement, were discussed by the other members of the Board. The Board members who voted to award the contract noted both practical and legal issues as the grounds for their decision, including preserving the integrity of the procurement process.

It should also be noted that the successful proposer’s price was below the independent engineer’s cost estimate that was developed prior to receipt of the proposals. The prices from the five non-responsive proposers were lower than the successful proposer’s, which may be because of the conditions placed on their prices, e.g. they omitted the value of certain risks which they were told to assume or refused to agree to certain terms of the contract. Even with these conditions, the prices of two of the non-responsive proposers were within approximately 7% of the successful proposer’s price.

GOVERNING BOARD Commissioner Steven L. Abrams | Commissioner Bruno A. Barreiro | Andrew Frey | Frank Frione | Nick A. Inamdar | Gerry O'Reilly |
E. Martin Perry | Commissioner Tim Ryan | James A. Scott | Beth Tolabiano | **EXECUTIVE DIRECTOR** Jack L. Stephens

**Office of Inspector General
Florida Department of Transportation**

ATTACHMENT 9 – SFRTA’s Executive Director Letter to FDOT continued

Secretary Boxold
January 30, 2017
Page 2

2. Dedicated State Funds

By creating a dedicated source of funding for SFRTA, the State Legislature entrusted SFRTA with the responsibility for properly managing its funds (the “State Funds”), as are other local government entities that receive funds collected by the State (e.g. State Revenue Sharing).

We have maintained this position consistently since the adoption of the dedicated funding legislation in 2009. Ch. 2009-271, Laws of Florida.

The Legislature in 2012 provided the Department with some oversight responsibilities of SFRTA’s proposed use of the State Funds, which you reference in your letter.

Pursuant to Fla. Stat. §343.58(c)1., the Department has the right to review all proposed procurements that involve the proposed use of State Funds and to object to a proposed procurement, at which point SFRTA may not proceed with the procurement. The Department reviewed and provided comments on the procurement documents for this solicitation and raised no objection to its issuance.

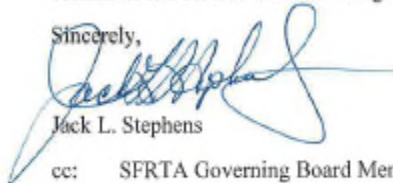
Regarding your comment on the report issued by the Office of Inspector General (OIG), the Legislature did not extend the Department’s oversight to include requiring SFRTA to conduct audits of its expenditures of the State Funds pursuant to the Single Audit Act (Fla. Stat. §215.97). SFRTA is already required by State law to have performed annual independent audits. The audits are posted online and are readily available to the Department and to members of the public. In addition, as a public agency, all of SFRTA’s financial records are public records. As such, the Department may conduct a comprehensive review of SFRTA’s records of its expenditure of State Funds at any time and we stand ready to assist the Department in that effort.

SFRTA’s position has never been that the Department cannot conduct such reviews, only that the State Funds provided to SFRTA by the Legislature are not “state financial assistance” contrary to the position taken by the OIG. We respectfully disagree with the OIG’s position as spelled out in SFRTA’s responses to the OIG’s draft and final reports regarding SFRTA’s expenditure of State Funds.

As a result of the OIG report, SFRTA representatives have begun discussions with Department (District 4) representatives to address the issues raised by the OIG and identify a mutually beneficial approach.

SFRTA’s objective is to provide the citizens of South Florida with the safest and most reliable quality commuter rail service while working in conjunction with all of our stakeholders and funding partners.

Sincerely,

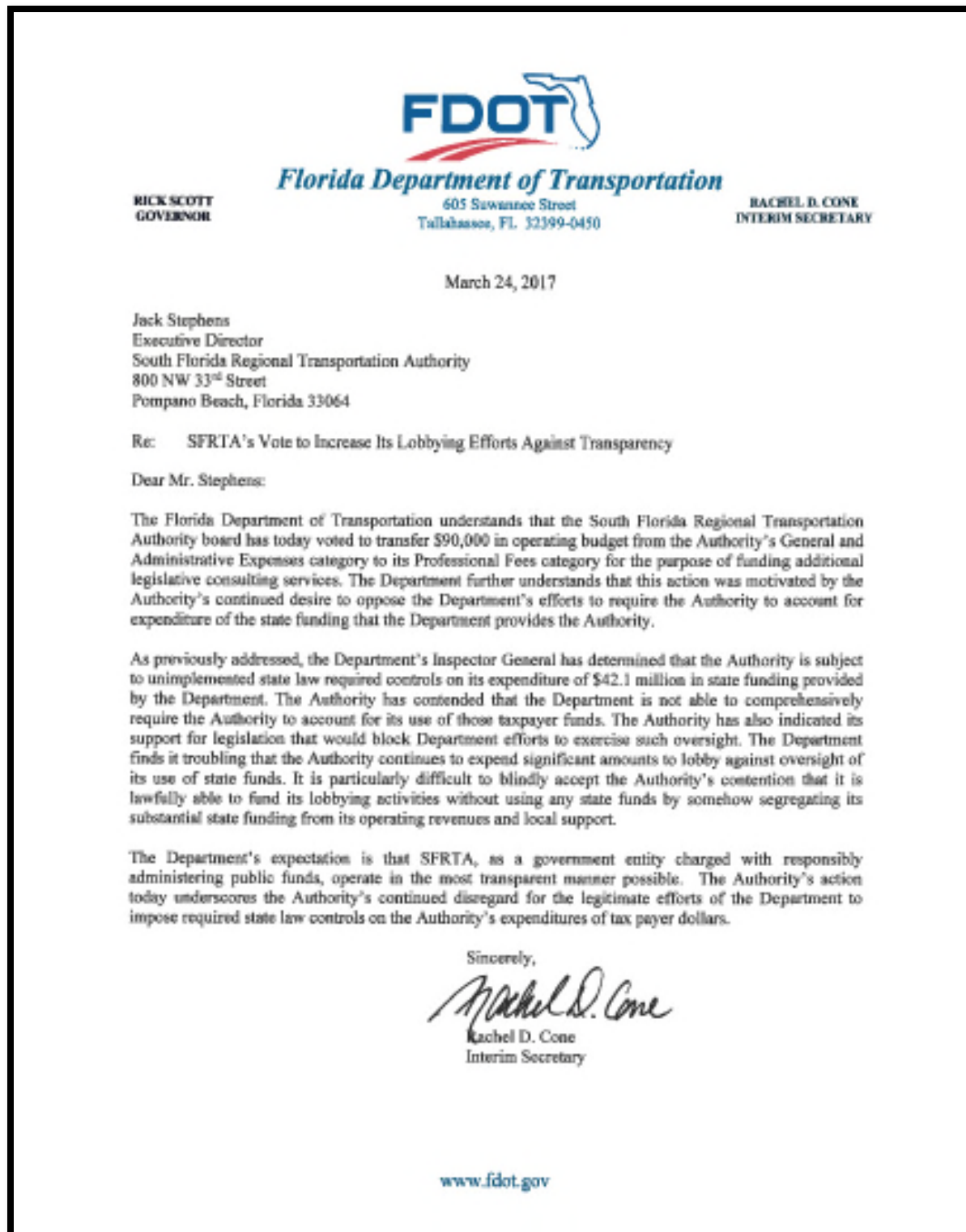


Jack L. Stephens

cc: SFRTA Governing Board Members
Rachel Cone
Mike Dew
Dick Kane
Shannan Schuessler

Office of Inspector General
Florida Department of Transportation

ATTACHMENT 10 – FDOT Interim Secretary Letter to SFRTA



**Office of Inspector General
Florida Department of Transportation**

ATTACHMENT 11 – Letter from SFRTA Chairman to FDOT



**SOUTH FLORIDA
REGIONAL
TRANSPORTATION
AUTHORITY**

800 NW 33rd Street | Pompano Beach, Florida 33064 | ☎ 954/942-7245 | ☎ 954/788-7878 | www.sfrta.fl.gov

August 27, 2010

James Wolfe, P.E.
District Secretary
Florida Department of Transportation/District 4
3400 W. Commercial Blvd
Ft. Lauderdale, FL 33309

VIA Email (james.wolfe@dot.state.fl.us) & U.S. Mail

Re: FDOT Draft Supplemental JPA for SFRTA Operating Funds

Dear Mr. Wolfe:

SFRTA has received the draft Supplemental Joint Participation Agreement ("Supplemental JPA") to JPA No. AOH 38 (the "JPA") for SFRTA's Operating Funds for fiscal year 2010-2011 from FDOT. The purpose of this letter is to bring certain matters to your attention regarding the SFRTA dedicated funding addressed by the Supplemental JPA.

Dedicated Funding

As you know, the Florida Legislature during the 2009 Special Session B, approved Chapter 2009-271, Laws of Florida (the "Law"). The Law, among other things, created a dedicated funding source for the SFRTA pursuant to the changes to Section 343.58, Florida Statutes ("F.S.") provided below.

Specifically, Section 343.58, F.S. was amended to read in relevant part:

(4) Notwithstanding any other provision of law to the contrary and effective July 1, 2010, the *department shall transfer annually* from the State Transportation Trust Fund to the South Florida Regional Transportation Authority the amounts specified in subparagraph (a)1.¹ or subparagraph (a)2.

(a)2. If the authority does not become responsible for maintaining and dispatching the South Florida Rail Corridor:

a. \$13.3 million from the State Transportation Trust Fund to the South Florida Regional Transportation Authority for operations; *and*

¹ This subsection addresses funding in the event SFRTA becomes responsible for operating, maintaining and dispatching the South Florida Rail Corridor.

GOVERNING BOARD Commissioner Bruno A. Barreiro | James A. Cummings | Marie Horenburger | Commissioner Kristin Jacobs | Commissioner Jeff Koons | Felix M. Lasarte, Esq. | George Morgan, Jr. | Gus Pego, P.E. | F. Martin Perry | **EXECUTIVE DIRECTOR** Joseph Giuliatti

Office of Inspector General
Florida Department of Transportation

ATTACHMENT 11 – Letter from SFRTA Chairman to FDOT continued

James Wolfe, P.E.
August 27, 2010
Page 2 of 3

- b. An amount no less than the work program commitments equal to \$17.3 million for fiscal year 2010-2011, as of July 1, 2009, for operating assistance to the authority.
(emphasis added)

As FDOT recognized by its previous wire transfer of part of SFRTA's dedicated funding granted by the Legislature (i.e., \$13.3 million) to SFRTA, there is no requirement in subsection (a)2.a. that any conditions be placed on the \$13.3 million. This is also the case with the \$17.3 million. The statute's use of the word "and" shows the Legislature's intent to treat the transfer of both amounts of money from the State Transportation Trust Fund ("STTF") the same. Therefore, no greater restrictions should apply to the \$17.3 million allocation in (a)2.b., than apply to the \$13.3 million provided under (a)2.a.

The STTF is now the funding source for the total \$30.6 million of dedicated funding granted to SFRTA by the Legislature ("Total Dedicated Funding"). The Total Dedicated Funding includes the \$17.3 million amount, which is defined as the amount equivalent to the work program commitments in fiscal year 2010-2011. This money is now to be transferred directly to SFRTA.

Conditioning transfer of the funds in (a)2.b. on the execution of the Supplemental JPA incorporating the provisions from the original JPA, would defeat the clear intent of the Legislature to create a dedicated funding source for SFRTA. Chapter 2009-271 clearly states that it was the intent of the Legislature to "require" that FDOT transfer the work program funds to SFRTA. By requiring FDOT to act, the Legislature did not allow FDOT to place conditions on the transfer (as it was previously permitted to do by the deleted permissive language in Section 341.303, F.S.). *The transfer of the \$17.3 million is like the transfer of the \$13.3 million, simply a pass-through to SFRTA from the STTF.*

The JPA states that the authority by which FDOT provides operating funds to SFRTA is pursuant to Section 341.303, F.S., which until amended by Chapter 2009-217, permitted FDOT to match up to 50% of the local contributions of a commuter rail service's net operating budget if that service had been in existence longer than 5 years. However, Chapter 2009-271 amended Section 341.303, F.S. to limit FDOT's authority such that it may only match 100% of a commuter rail service's net operating budget for seven years from the open-to-service date (which excludes SFRTA). Therefore, the legal authority by which FDOT previously provided operating funds to SFRTA no longer exists. In its place, the Legislature is now directly providing funding for SFRTA from the STTF.

Therefore, the mechanism by which FDOT previously transferred this money, or what the prior funding source was for this money, is no longer relevant under the Law.

Office of Inspector General
Florida Department of Transportation

ATTACHMENT 11 – Letter from SFRTA Chairman to FDOT continued

James Wolfe, P.E.
August 27, 2010
Page 3 of 3

Amount of Dedicated Funds to be Transferred

The Supplemental JPA proposes to transfer to SFRTA an amount that is *less than* the \$17.3 million required by Legislature in Chapter 2009-271. The proposed Supplemental JPA includes a figure of only \$16.705 million.

Conclusion

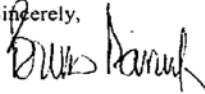
SFRTA requests that FDOT wire the remainder of SFRTA's dedicated funding, in the amount of not less than \$17.3 million, to SFRTA in the same manner as it provided the \$13.3 million portion of the Total Dedicated Funding.

In addition, we recognize that the JPA serves other functions, such as transferring to SFRTA "management responsibilities for the Florida Commuter Rail Passenger Service," which has been accomplished through an exhibit to the JPA.

However, because FDOT's authority for its use of the JPA to fund SFRTA has been removed from Section 341.303, F.S., as addressed above, and because Chapter 2009-271 now requires FDOT to transfer funding from the STTF to SFRTA without conditions, we would request that FDOT consider a new form of agreement to address SFRTA's use of the South Florida Rail Corridor (SFRC).² SFRTA is willing to provide a draft of such an agreement for FDOT to review and comment on, should FDOT concur with this approach.

We look forward to discussing with you the parameters of such an agreement that will continue the partnership between SFRTA and FDOT for commuter rail service on the South Florida Rail Corridor.

Sincerely,



Commissioner Bruno Barreiro,
as Chair of the SFRTA Board

cc: SFRTA Board
Joseph Giulietti, Executive Director
Teresa J. Moore, General Counsel
Gerry O'Reilly, FDOT/D4

² The JPA for the New River Bridge is scheduled to expire in December of this year so the operational issues addressed in that JPA could also be included in the new SFRC use agreement