



# Illinois Department of Transportation

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To: Bill Grunloh, Chief Procurement Officer

From: Michael A. Forti, Chief Counsel 

Subject: Recommendation on EMD's Protest on the Multi-State Locomotive Procurement (14-1-DPIT)

Date: February 18, 2014

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On February 3, 2014, Electro-Motive Diesel, Inc. ("EMD") filed a protest on the Multi-State Locomotive Procurement (14-1-DPIT) ("Procurement") led by the Illinois Department of Transportation ("IDOT"). Based upon the legal requirements and criteria for a protest, IDOT recommends that the protest be denied for the following reasons:

1. EMD's protest alleges that Siemens Industry Inc. ("Siemens") lacks contractor responsibility which is not a valid ground for protest
2. EMD's protest was not filed in a timely manner; and
3. Assuming for the sake of argument that EMD's protest should not be denied on procedural grounds, the protest should be denied because the allegations do not conclusively demonstrate by the preponderance of relevant information that fraud, corruption or illegal acts have occurred that undermine the integrity of the procurement process.

For protests, Illinois law requires the Chief Procurement Officer ("CPO") to "establish procedures to be followed in resolving protested solicitations and awards and contract controversies, for debarment or suspension of contractors, and for resolving other procurement-related disputes." 30 ILCS 500/20-75. Pursuant to this mandate, IDOT's CPO has established procedures and criteria for protests, which are set forth in the Illinois Administrative Code ("Rules"). In accordance with the Rules, IDOT's CPO can sustain a protest only if he finds "that the protest conclusively demonstrates by the preponderance of relevant information submitted that fraud, corruption or illegal acts have occurred that undermine the integrity of the procurement process." Ill. Admin. Code tit. 44, § 6.440. EMD's protest does not meet these requirements and therefore the CPO should deny the protest.

### EMD's Protest Alleges that Siemens Lacks Contractor Responsibility Which Is Not a Valid Ground for Protest.

An interested party may only file a protest regarding "fraud, corruption or illegal acts [that] undermin[e] the objectives and integrity of the procurement process." Ill. Admin. Code tit. 44, § 6.410. Protests regarding "issues of prequalification, lack of contractor responsibility, suspension or debarment" cannot be raised. *Id.* A responsible offeror is "a person who has the capability in all respects to

perform fully the contract requirements and the integrity and reliability that will assure good faith performance.” 30 ILCS 500/1-15.80. As an Offeror in the Procurement, EMD is an interested party; however by alleging that Siemens’ locomotive cannot achieve and sustain 125 mph, EMD questions Siemens’ capability in all respects to perform fully the contract requirement, because achieving and sustaining 125 mph under the conditions set forth in the Passenger Rail Investment and Improvement Act (“PRIIA”) Specification No. 305-005 (Rev. A) (“PRIIA Spec”) is a contract requirement. Whether Siemens can fully perform the contract requirement is a matter of contractor responsibility, which is not a valid ground for protest. EMD’s protest should be denied, because it raises an invalid ground for protest.

#### EMD’s Protest Was Not Filed in Timely Manner.

The Rules require a protest to contain “[a]ll information establishing the timeliness of the protest. Ill. Admin. Code tit. 44, § 6.420. A protest that is not filed in a timely manner must be denied. EMD failed to protest the Notice of Intent to Award and the specifications in a timely manner.

#### *Protest of Notice of Intent to Award*

A timely protest must be filed “with the CPO within 7 calendar days after the protester knows or should have known of the facts giving rise to the protest. Protests filed after the 7 calendar day period will not be considered.” *Id.* The Evaluation Committee for the Procurement issued its Final Offer Evaluation report on December 18, 2013, in which it recommended award to Siemens as the apparent awardee, and the CPO concurred. The Notice of Intent to Award was posted on the same day, December 18. Timely protests should have been submitted by December 25, 2013, seven days after the Notice of Intent to Award was posted.

Assuming for the sake of argument that EMD did not know or could not have known of the facts giving rise to its protest on December 18, EMD still failed to file a timely protest. On or around Thursday, January 23, 2014, EMD contacted Kevin Kesler, Chief of Rolling Stock, R&D Division, Federal Railroad Administration (“FRA”), informing him that EMD intended to protest on the basis that Siemens’ locomotive could not achieve and sustain 125 mph. This communication with the FRA shows that EMD knew or should have known the facts giving rise to its protest no later than January 23. Under this argument, EMD was required to file its protest by January 30. However, EMD did not file its protest until February 3; EMD did not meet the filing deadline.

In its protest, EMD claims that the seven day filing period should begin on January 29, 2014, the date on which EMD received documents in response to a Freedom of Information Act (“FOIA”) request. While the documents contained details related to the Procurement, EMD had already discussed the basis of its protest with the FRA nearly one week earlier. EMD did not meet the filing deadline and use of the FOIA response date is an attempt at misdirection.

### *Protest of Specifications*

The Rules provide that “protests that raise issues of fraud, corruption or illegal acts affecting specifications, special provisions, supplemental specifications and plans must be received by the CPO no later than 14 calendar days before the date set for opening of bids.” *Id.* In its protest, EMD also alleges that the specifications relating to the specific track profiles on which the locomotives would be operating (“JPE Routes”) in the Procurement’s Request for Proposal (“RFP”) were inadequate. This protest was not filed timely. This allegation also fails substantively, which is discussed below.

As a matter of timeliness, any protest of specifications had to be filed by November 21, 2013, fourteen days before the Final Offers were opened. However, EMD did not protest the specifications by that date. Moreover, IDOT received 264 questions regarding the RFP, including various questions related to the performance simulations, between the release of the RFP and the end of the question period. Neither EMD nor any other Offeror commented on any perceived problem or inadequacy with the requirement to use a composite route based on the Railroad Test Track (“RTT”) Loop at the Transportation Test Center, Inc. (“TTCI”) as the basis for simulations. EMD did not protest the specifications provided in the RFP until after the bids were opened and the Final Offer Evaluation report was released.

EMD failed to file protest on the Notice of Intent to Award within seven days of when it knew or should have known of the facts giving rise to its protest. In addition, EMD did not protest the specifications fourteen days before the Final Offers were opened. Accordingly, EMD’s protest should be denied, because it was not filed in a timely manner.

### EMD’s Allegations Do Not Conclusively Demonstrate by the Preponderance of Relevant Information that Fraud, Corruption or Illegal Acts Have Occurred that Undermine the Integrity of the Procurement.

Assuming for the sake of argument that EMD’s protest should not be denied on the two procedural grounds provided, invalid protest ground and lack of timeliness, the protest should be denied because it fails to “conclusively demonstrate[] by the preponderance of relevant information submitted that fraud, corruption or illegal acts have occurred that undermine the integrity of the procurement process.” Ill. Admin. Code tit. 44, § 6.440. EMD’s protest is based on subjective interpretations of the RFP and Siemens’ Final Offer, as opposed to the objective approach and criteria required by the RFP and used by the Evaluation Committee, as illustrated by the following:

1. EMD erroneously alleges that Siemens’ locomotive has insufficient horsepower to achieve and maintain 125 mph, as required by the RFP.
  - a. IDOT’s review confirms that Siemens’ locomotive will achieve and maintain 125 mph when using the values specified in the RFP. EMD’s allegation is based on faulty interpretations of the information presented in Siemens’ Final Offer, specifically an unspecified and

subjective 90% efficiency factor that EMD introduced in its protest calculation.

2. EMD mistakenly alleges that Siemens used incorrect formulas and assumptions in its simulation calculations.
  - a. IDOT's review confirms that Siemens' simulation calculations were in fact performed with the Davis formula, as specified by the RFP, and the locomotive has sufficient horsepower to achieve and maintain 125 mph. The references to the Sauthoff formula in Siemens' Final Offer were included only as a comparison between the specified values, because the Sauthoff formula is an internationally accepted method of calculating the performance of high speed passenger trains.
3. EMD incorrectly states that Siemens' Final Offer violated the page length requirements for the Vehicle Major Systems section.
  - a. The RFP limited the Vehicle Major Systems section of a Final Offer to 160 pages. Siemens' Vehicle Major Systems section was 148 pages long and included an 11-page overview for the section, which totals 159 pages. EMD claims that Siemens submitted 175 pages for its Vehicle Major Systems section. It is unclear how EMD arrived at this figure, although EMD may have included the plastic section dividers in its page count. IDOT does not include plastic section dividers when calculating page counts.
4. EMD erroneously implies questionable business practices by Siemens or inappropriate procurement practices by IDOT, regarding Siemens' use of iPads as part of its Final Offer.
  - a. IDOT and the Chief Procurement Office are aware of their responsibilities regarding the conduct of fair, open, and transparent procurements. As such, the iPads in question were returned to Siemens immediately without being viewed, operated, or turned on prior to their return. The Evaluation Team never saw the iPads, so they were not used in the evaluation of Siemens' Final Offer. It should also be noted that the delivery of the iPads was openly referenced in Siemens' Final Offer, a document which Siemens would have known would become public. As such, it is apparent that Siemens did not attempt to hide the delivery of the iPads in a secretive or deceptive manner. Nevertheless, because the delivery of the Final Offer or any other materials via iPad or similar device was not requested or required, the Chief Procurement Office promptly returned the devices.
5. EMD misleadingly states that IDOT did not provide the JPE Routes, as required by the PRIIA Spec.
  - a. Section 9.2 of the PRIIA Spec states that simulation route profiles will be "based on Customer-specified routes." The RFP (Attachment EE, Appendix G) contained the customer-specified route. The RFP clearly stated that simulations would be developed based on the RTT Loop at TTCI and provided evidence that the RTT Loop allowed the creation of a composite route, consistent with existing JPE Routes in the Midwest, California, and Washington. IDOT was able to confirm the consistency between the composite route and the JPE Routes based

on the review of public information from Amtrak timetables regarding route lengths and station stops. Given that the composite route used for simulations is a loop, all ascending grades are balanced by descending grades for each trip around the RTT Loop, which is consistent with round trips on JPE Routes.

6. EMD erroneously alleges Siemens' noncompliance regarding acceleration performance simulations.
  - a. Siemens provided the data in question as extra information that shows how long it will take Siemens' locomotive to reach 125 mph. IDOT's review found that Siemens' simulations and calculations were adequate and met the requirements of the RFP.

IDOT's review confirms that the Siemens' locomotive has sufficient horsepower to achieve and maintain 125 mph for the PRIIA-required eight cars and two locomotives consist. Moreover, Siemens will be contractually obligated to deliver this requirement. The Evaluation Team performed the necessary due diligence in its evaluation of all Final Offers. The allegations in EMD's protest lack merit. Consequently based on a review of the merits of EMD's protest, the protest should be denied because it fails to conclusively demonstrate by the preponderance of relevant information submitted that fraud, corruption or illegal acts have occurred that undermine the integrity of the procurement process.

#### Conclusion

IDOT Chief Counsel recommends that EMD's protest be denied because 1) it does not allege a valid ground for protest; 2) it was not filed in a timely manner; and 3) it does not conclusively demonstrate by the preponderance of relevant information that fraud, corruption or illegal acts have occurred that undermine the integrity of the procurement process.