

MEMORANDUM

To: Metropolitan Council U.S. Employment Plan Working Group
From: Bill McCarthy, President, Minnesota AFL-CIO
Date: November 30, 2016
Subject: Response to the October 26 staff presentation to Management Committee re: USEP

This memo was prepared in response to the claims made by Metropolitan Council Staff regarding the U.S. Employment Plan (USEP)

U.S. EMPLOYMENT PLAN COMPARED TO MET COUNCIL’S CURRENT PROCUREMENT POLICY

The model USEP differs significantly from Met Council’s current procurement policy in terms of information requested of bidding contractors, how bidders’ job commitments are evaluated, and how awarded contractors are held accountable by the procuring agency. The Met Council’s last procurement appears to have been developed with the intention of promoting equity and U.S. job retention or creation, but the language does not provide enough incentive for bidders to enhance their commitments in these categories. The table below illustrates the differences between the jobs language Met Council used on the last RFP and the model USEP language.

Table 1: Comparison of Met Council Jobs Language from Light Rail Vehicle Request for Proposals 15P148 and Model USEP

		Model USEP	Met Council LRV RFP
Category 1: Disclosure Content		Included?	Included?
<i>Are bidders asked to:</i>	Describe their understanding of job market conditions?	Yes	No
	Detail the number and types of full time equivalent jobs they intend to create or retain on the contract?	Yes	Somewhat; bidders are asked a simple yes or no question about whether they will create or retain jobs connected to the contract. Job types are not requested.

	Detail the compensation (including wages and benefits) for the jobs they intend to create or retain on the contract?	Yes	No
	Detail the dollar value of investments in workforce development, such as apprenticeship, job readiness, and career ladders?	Yes	No
	Detail any investments in new or existing facilities?	Yes	No
	Detail the number of jobs they intend to set aside for workers facing barriers to employment and able to list the category of barrier?	Yes	No
Category 2: Evaluation Content		Included?	
<i>Are bidders' USEP commitments:</i>	Part of the overall evaluation criteria, meaning will bidders' job commitments be considered as factors in determining contract award (like common RFP categories, including technical specifications, project management history, and price)?	Yes, recommended at least 10% of overall criteria.	Somewhat. The scoring methodology has not been disclosed, so the value of job commitments is unknown.
	Differentiated and rated accordingly based on robustness in evaluation?	Yes	No
	Able to receive a significant number of points based on the level of USEP commitments for the categories of jobs, compensation, training, recruitment, and diverse hiring plans?	Yes	No the yes or no question about whether they will create or retain jobs is ranked lowest out of five categories of evaluation. Training, recruitment, and diverse hiring plans are not requested.
Category 3: Accountability Content		Included?	
<i>After contract award, will the contractor be required to:</i>	Fulfill all of the USEP commitments made in the original proposal, meaning the USEP commitments are incorporated into the final executed contract?	Yes	No

	Produce quarterly reports demonstrating compliance with job creation/retention plans, investment in training, and job access?	Yes	No
	Make USEP quarterly reports available to the public if a freedom of information act is filed of the contracting agency?	Yes	No
	Access to remedies if it fails to comply with its USEP commitments, up to breach of contract?	Yes	No

As demonstrated in the above table, the Met Council’s current approach does little to incentivize job creation and retention, requests very limited information from bidders about their job commitments, and does not provide the agency with a mechanism to hold awarded contractors accountable.

LEGALITY OF U.S. EMPLOYMENT PLAN

The USEP was developed by the Brookings Institution, University of Massachusetts at Amherst, the University of Southern California, and Jobs to Move America, with input from several transit agencies of varying sizes. Industry and economic development experts from around the country collaborated to develop the USEP with the purpose of protecting procuring agencies. Since Jobs to Move America’s language has been legally vetted, transit agencies should utilize the model language USEP rather than deviating from it or work with Jobs to Move America to tailor is in a way that still legally conforms to federal regulations. The USEP has been legally approved since 2011 by the U.S. Department of Transportation (U.S. DOT) and U.S. DOT’s Secretary Anthony Foxx officially endorsed the USEP in February 2016 in a letter to all U.S. DOT grantees. Below is a timeline of the USEP legal advancements.¹

Table 2: USEP Legal Timeline

Year	Legal advancement for USEP
2011	U.S. DOT approves Los Angeles’ pilot of the USEP.
2012	National version of the USEP was submitted to U.S. DOT for legal Review.
2013	U.S. DOT approves use of the USEP on a case-by-case basis.
2014	U.S. DOT approves use of the USEP by Amtrak, Maryland DOT, and the Chicago Transit Authority.
2016	U.S. DOT Secretary Foxx approves broad national use of the USEP and NY Metropolitan Transportation Authority adopts the USEP.

Bombardier alleges that the USEP used in Chicago improperly deviated from Jobs to Move America’s U.S. DOT approved language. The Chicago Transit Authority determined that Bombardier’s bid protest has no merit.

¹ U.S. Department of Transportation, Federal Transit Administration, Procurement Section. https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/S10-160211-003_F.pdf

In 2012, New Flyer, a bus manufacturer was awarded a contract to build 550 clean-fuel buses and create 200 jobs at its U.S. facilities. There is a legal dispute about public access to quarterly reports under the Freedom of Information Act which, once resolved, will provide guidance on this issue for the future.

Staff also implied that Sound Transit had voted against using the U.S. Employment Plan in the context of litigation concerns. In fact, Sound Transit CEO Peter Rogoff spoke at the most recent APTA symposium in favor of USEP, saying that inclusion work like USEP is the right thing to do and also a smart business decision.

EVALUATION AND ENSURING ACCOUNTABILITY IS NOT BURDENSOME

Members of Met Council staff asserted that evaluation of USEP commitments and ensuring accountability of awarded contractors is too burdensome, claiming Los Angeles Metro staff had to hire an outside contractor specifically to evaluate the USEP portions of bidders' proposals and to review the awarded contractor's quarterly reports.

However, this claim is misleading because Los Angeles Metro staff have explained that they generally hire technical advisors to evaluate the technical aspects of bidders' submissions for most vehicle procurements.²

The USEP is accompanied by a labor value form that enables transit agency staff to easily make comparisons of bidders' commitments.

SCORING USEP AND OTHER EVALUATION CRITERIA

Members of MET Council staff have stressed the importance of retaining control over the Council's scoring methodology in order to preserve the ability to determine the factors deemed most significant in the solicitation. Staff have also claimed that refraining from weighting any factors in the evaluation criteria aligns with the Federal Transit Administrations' best practices manual.

The USEP, however, does not require transit agencies to disclose scoring methodology to the public. Jobs to Move America does recommend that the USEP represent a serious factor in the consideration of contract award, worth the equivalent of 15-20 percent of the overall evaluation criteria, but it is not necessary that this percentage be disclosed to the public or bidders. While Los Angeles Metro was very transparent with the public and bidders about the weighting of the USEP, Chicago Transit Authority and Amtrak did not disclose the value of the USEP to the public or bidders.

In regards to the Federal Transit Administration's Best Practices Procurement Manual (FTA BPPM), the claims Met Council staff have made misrepresent the actual text in this manual,

² Personal communication with Los Angeles Metro staff, Victor Ramirez. August 12, 2016.

which actually outlines advantages and disadvantages to disclosing specific weights of the individual evaluation factors, as detailed in the table below. Regardless, Jobs to Move America does not have a position in terms of whether a transit agency discloses the weights of evaluation to the public.

Tables 3: Advantages and Disadvantages to Disclosing Weights of Evaluation Factors³

Advantages	“The full description of the process guides proposers in understanding your needs, bolsters the objectivity of your evaluation team, encourages candor from the proposers during negotiations, and encourages competition through the perception of fair treatment.”
Disadvantages	“Disclosing the specific weights and scoring processes may encourage proposers to distort their proposals, and may strengthen the disappointed proposer's attack on the agency decision.”

Additionally, contrary to claims made by Met Council staff, the FTA BPPM does not state that transit agencies should avoid weighting all factors and does not assert that this represents a best practice. Instead, the manual instructs transit agencies to avoid assigning predetermined weights to price, and to avoid scoring price proposals. The FTA BPPM explains, *“The difficulties in trying to assign a predetermined weight to price and then scoring price proposals is that no one is smart enough to predict in advance how much more should be paid for certain incremental improvements in technical scores or rankings.”*⁴

Jobs to Move America agrees that it is not ideal to score price and recommends that price only serve as a tie breaker after technical proposals have been scored. CTA utilized this approach, which demonstrated to bidders that superior technical proposals and commitment to good job creation were greater priorities than price in the evaluation.

³ Federal Transit Administration Best Practices Procurement Manual. 2001. Page 80. https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/BPPM_fulltext_0.pdf

⁴ Federal Transit Administration Best Practices Procurement Manual. 2001. Page 85. https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/BPPM_fulltext_0.pdf