



REPORT ON THE INTEGRITY OF THE R179 PROCUREMENT

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INTRODUCTION

On October 21, 2011, Thomas Prendergast, President, NYC Transit, informed the Metropolitan Transportation Authority Inspector General that Mario Guerra, Vice President/Chief Mechanical Officer, Department of Car Equipment, had notified Senior Vice President Carmen Bianco that Guerra had been contacted by a representative of Bombardier, Inc. regarding potential future employment. At the time of that contact, Guerra was serving on the procurement Selection Committee (R179) for the purchase of subway cars regarding which Bombardier had submitted a proposal. The Office of the Metropolitan Transportation Authority Inspector General (OIG) initiated an investigation at the request of the acting chairman of the MTA Board and the president of NYC Transit to determine whether the procurement was compromised in any fashion.

In the course of this investigation, the OIG interviewed Mario Guerra and other NYC Transit employees involved in the R179 procurement, including members of the Executive and Selection Committees. The OIG also interviewed Bombardier employees, including those who were either directly responsible for, had knowledge of, or were involved with Bombardier's contact with Guerra regarding future employment. Additionally, the OIG acquired and reviewed relevant cell phone records, emails and text messages, as well as documents generated in connection with the R179 procurement itself, including the Request for Proposals, the proposals submitted by Bombardier and the other responding vendor, along with committee notes and evaluations. Finally, we analyzed the laws and ethical rules relevant to the procurement.

Our investigation revealed no evidence or reason to believe that Guerra or Bombardier corrupted or otherwise impaired the integrity of the R179 procurement itself or attempted to do so. We did find, however, that each failed to act in accordance with obligations established respectively by the MTA Code of Ethics and the MTA Vendor Code of Ethics.

BACKGROUND

The R34179 (R179) Procurement

R179 was initiated to select a subway car builder to design, furnish and deliver 300¹ “B” Division Rapid Transit Cars. As required by NYC Transit’s Procurement Policy Instruction Manual for Competitively Negotiated Contracts (Request for Proposal Section IV-F), the procurement includes a written plan that delineates the process, personnel and time frame for this procurement. The plan indicated that a “competitive negotiation method to select the most preferred car builder” was to be utilized and that the “proposer whose technical and price proposals are judged to be most advantageous and provide best value to NYCTA [New York City Transit] and who is otherwise responsible will be selected and recommended for award of this procurement.”

Mario Guerra’s role in the R179

Prior to his hiring by NYC Transit, Mario Guerra was the General Superintendent, Rail Cars and Shops, with the Toronto Transit Commission. In December 2010, Guerra was hired by NYC Transit as Assistant Chief Mechanical Officer to serve as deputy to George Cortes, who was promoted to Chief Mechanical Officer (CMO) around the same time Guerra was hired and whose retirement was anticipated within the coming 18 months. However, Cortes retired earlier than expected and Guerra was appointed CMO in October 2011. Meanwhile, in March 2011, Guerra was assigned to the Selection Committee and shared a single vote with Cortes until the latter’s retirement in October.

Executive and Selection Committees

As part of the proposal evaluation process, the plan describes the members and roles of the Executive and Selection Committees.

In sum, the Executive Committee is to provide senior management’s perspective and “based upon the recommendation of the Selection Committee, determine the contractor who will be presented to the Board for approval.” The Executive Committee consists of Thomas Prendergast, President, NYC Transit; Carmen Bianco, Senior Vice President, Department of Subways (Chair); and Charles Monheim, then MTA Chief Operating Officer.

The Selection Committee’s role is to “provide guidance on strategic direction of the RFP [request for proposal], make all determinations and develop the overall agency recommendation regarding the selection of a proposer for award of the contract.” The Selection Committee focuses primarily on two areas: (1) Technical Proposals and (2) Terms and Conditions and Price Proposals. Along with Guerra and Cortes, the other members assigned were Timothy Forker, Senior Director – Capital Programs, Department of Subways; John Gaul, VP and Chief Officer,

¹ The original RFP called for 290 subway cars with options for more. The quantity was subsequently changed in September 2011 to a flat 300 cars.

Service Delivery; Marian Murray, Sr. Director, Procurement; Keith Falk, Director, Car Equipment; and Mike Wetherell, Assistant CMO, Car Equipment.²

The Selection Committee is assisted in its evaluation by a non-voting Technical Advisory Committee, consisting of the leaders of the Technical Proposal and the Price Proposal Work Groups. These work groups report to the Selection Committee and are charged with conducting detailed reviews and evaluations of all aspect of the group's assignments. Guerra was not a member of the Technical Advisory Committee.

Relevant Events in the RFP Process

The RFP release date was June 3, 2010 and the initial proposals were submitted on November 12, 2010. Two companies responded to the RFP: Bombardier, Inc. and ALSKAW LLC, which comprised the Alstom and Kawasaki companies. The Technical Advisory Committee members conducted a review of both proposals and, in a March 16, 2011 memorandum to the Selection Committee, concluded that "both proposers were found to be technically qualified with a good probability for success." In a meeting later that month, the Selection Committee concurred with the evaluation that both vendors were technically qualified. Oral presentations were made by both proposers in early April. Guerra attended both presentations.

Thereafter, the Selection Committee decided that it needed to send members to visit certain proposed Bombardier facilities and suppliers to assess their capacity and qualifications. Similar trips were not scheduled for ALSKAW as NYC Transit was already familiar with ALSKAW's suppliers from an earlier rail car procurement (R160). During May 2011, the entire Selection Committee made visits to Bombardier's facility in Plattsburgh, NY, and smaller groups went to Bombardier's facilities in Mexico and its suppliers in China.

On June 6, 2011, the Selection Committee held a meeting at which members completed preliminary evaluation forms; the final evaluations were to be made following submission of the Best and Final Offer (BAFO) by each vendor. After discussion, the Selection Committee decided to move forward to technical and price negotiations with both vendors. Our review of the individual forms showed that Guerra's evaluation was essentially consistent with those of the other committee members.

In a Memorandum dated July 26, 2011, constituting the R179 Selection Committee Initial Evaluation Summary, issued by Senior Procurement Director Marian Murray and signed by each of the Selection Committee members (including Guerra and Cortes), the Committee confirmed agreement "that technical and price negotiations proceed with both ALSKAW and Bombardier on the R34179 contract."

The technical and price negotiations took place between June and October 2011. On July 20, 2011, there was a negotiation meeting with Bombardier regarding technical alternatives. Guerra was not present at this presentation.

² Falk and Wetherell also share a single vote on the Selection Committee.

On October 14, 2011, a request for BAFOs was sent to each vendor with a due date of November 3, 2011.

In the morning of October 20, 2011, Marian Murray sent an email to the Selection Committee members indicating that ALSKAW had requested a one week extension of the BAFO due date to November 10, 2011. Later that morning, Guerra responded with an email to Stephen Plochochi, NYC Transit VP, Materiel, stating “I do not believe that an extension is warranted especially due to the tight timeline [sic]. ALSKAW has had plenty of time during negotiation to gather the required information. Please deny the request.” Nevertheless, Plochochi granted ALSKAW an extension until November 10, 2011.

According to Guerra, before he sent the email to Plochochi he conferred with Wetherell regarding the request. He and Wetherell were both of the opinion that the request should be denied because it would further delay the procurement. OIG investigators interviewed Wetherell who confirmed this. OIG investigators also interviewed Plochochi and Murray about Guerra’s email and both said that Guerra’s response was not unexpected as Guerra, the Chief Mechanical Officer, would typically be concerned about additional delays in the procurement. Additionally, Murray noted that a delay in the delivery of new subway cars could have a financial impact in that it could result in an increase in the cost of maintenance of the existing fleet. This type of impact would be of substantial concern to Guerra and Wetherell, who are responsible for that maintenance.

Meanwhile, in the afternoon of October 20, following his email to Plochochi, Guerra notified Bianco about his contact with Bombardier and stated that he was recusing himself from the Selection Committee. Within hours, Bianco notified Prendergast, who called the MTA Inspector General, who in turn commenced an investigation. NYC Transit suspended further action on the procurement pending the Inspector General’s investigation and report.

TIMELINE OF EVENTS LEADING TO GUERRA'S DISCLOSURE TO BIANCO

The Office of the MTA Inspector General made the following determination based on its interviews and examination of cell phone records, emails, text messages and documents.³

Guerra Contemplates Future Employment

Guerra's Relocation to New York for NYC Transit Position Raises Personal Issues

Guerra stated that during his employment with the Toronto Transit Commission (TTC) he had not been actively seeking employment outside of the Greater Toronto Area (GTA). Nevertheless, after being contacted by a headhunter regarding the CMO position with NYC Transit, Guerra pursued the opportunity, accepted the position, and relocated with his wife to New York City in December 2010. Shortly after the move, however, a series of family-related problems arose making their life away from their former home in Toronto very difficult. As his personal situation became more stressful, Guerra said he began to consider moving back to the GTA in 2012.

The Golf Outing (June)

On June 23, 2011, Guerra attended a transportation industry golf outing in Toronto hosted by the TTC. Guerra informed us that he used to attend this TTC outing each year when he worked there. Throughout the day, Guerra said that he was asked by many people how things were going in New York. He replied that he liked his job but that his wife was not happy in New York and that he would be coming back to Toronto at some point.

One of the people to whom Guerra spoke was Peter Schrum, Bombardier's Director of Business Development and Sales in Ontario, Canada. Guerra had known Schrum for a number of years when Guerra was with the TTC. In a conversation between Guerra and Schrum at the golf outing, Guerra stated that the move to New York had been difficult for his family and that he was considering returning to the GTA by the end of the year. Soon thereafter on July 7, 2011, Schrum forwarded a job posting to Guerra for a position with Metrolinx-Go Transit, based in Toronto.

Guerra Seeks Advice from a Toronto Friend about Leaving NYC Transit (August)

In an email dated August 8, 2011, from Guerra to David Dixon, a former friend/colleague from the TTC, Guerra sought advice as to whether he should tell NYC Transit Senior VP Carmen Bianco that he intended to look for employment in the GTA. The following day, August 9, 2011, Dixon responded to Guerra's email: "I don't think I would say anything at this time. If it comes up I would address it then. If you bring it up now they may just terminate you and they would not be obligated to much termination pay. I would give them one months [sic] notice."

³ Although this time line is based in part on interviews with Bombardier personnel, and contains some reference to these interviews, to assist the reader we have discussed these interviews more fully under separate heading to follow.

Guerra responded shortly thereafter: “Thanks. The only reason I was considering it was so that I can start looking for a job late this year without fear of him finding out.”

Bombardier Internal Communication re Guerra (August)

According to Schrum, on August 18, 2011, while making preparations for a golf outing, he was reminded of his conversation with Guerra from the June golf outing. This memory prompted Schrum to begin the following text message exchange with Matt Byrne Vice President, Services, Bombardier:

Schrum: *I have a guy, former General Superintendent [sic] @ TTC , now with NYCT who wants to move back to Toronto. Knows ops, maintenance, etc as he was responsible for all rail cars and shops for TTC. (Not busses [sic] or surface tracks.) Interested in having a chat with him. He is looking at early next year.*

Byrne: *What about Ottawa or Chicago? Would he be interested in those areas?*

Schrum: *I can ask*

Byrne: *Is it Mario?*

Schrum: *Yes*

Schrum: *But very hush due to R175*

Byrne: *Jesus, he is a big name*

Byrne: *R179 in fact*

During the course of our interview with Schrum, focusing on his comment about keeping Guerra’s possible candidacy “very hush” (page 11), he stated that he was aware of the procurement but not that Guerra was involved. Rather, he explained, he believed that Guerra’s candidacy had to be kept quiet because it could negatively affect Bombardier’s procurement bid if Bombardier was seen as attempting to lure away a high level employee from NYC Transit while simultaneously trying to sell them subway cars. He explained further that this type of sensitivity to the timing of career moves is necessary and common in an “intimate,” “incestuous” transportation market.

Cortes Retires; Guerra Again Contacts Friend in Toronto (October 10 - 11)

According to Guerra, on Monday, October 10, 2011, Cortes informed Guerra that he had decided to retire effective the previous Friday, October 7, 2011, which meant that Guerra would assume the CMO role immediately.⁴ Our email review established that following this news Guerra emailed Dixon to say, in pertinent part: “I received a call this morning from George Cortes, the existing VP, that he is retiring effective immediately so as of this morning I am in charge. It came as a complete surprise but a welcome one as I can now begin to assert myself and make required changes.”

Dixon replied to Guerra the next day, October 11, 2011, stating, in pertinent part: “Are you planning to stay longer now that George is leaving?”

Roughly 45 minutes later, Guerra responded, in pertinent part: “George’s sudden exit has me thinking, at this point I will see how things go and keep my ears open for other opportunities. I am still committed to going back at some point, if a suitable job came up in the GTA I would probably have to consider it seriously.”

Bombardier Contacts Guerra re Employment (October)*Schrum Sends Text Message to Guerra Requesting Meeting (October 12)*

According to Guerra, he and Schrum had no communication after the summer 2011 golf outing⁵ until Guerra received a text message from Schrum on October 12, 2011. The following exchange occurred between Guerra and Schrum on that date:

Schrum: *When you in town next. Have someone who wants to meet with you.*

Guerra: *I am planning on being in TO [Toronto] Nov 24 to 26, who is this person?*

Schrum: *VP Services*

Guerra: *Excellent I would like to meet him. I am still looking to relocate in the GTA after Dec.*

Schrum: *I will check if he is open.*

Guerra: *ok*

Schrum: *We should get together for a beer regardless*

⁴ Cortes’ appointment to the CMO position was for 18 months, which would have expired in May 2012.

⁵ A review of text messages, emails, and telephone records revealed no evidence to the contrary.

Guerra: *for sure*

Again during our interview with Schrum, now focusing on the timing of his text message coming one day after Guerra's email communication with Dixon (page 12), Schrum stated that shortly before he sent Guerra the October text message, he was visiting a TTC office – which he does frequently – when some TTC employees made mention of Guerra's desire to return to Toronto. Schrum said that Dixon was not present.

Schrum Internal Text Messages re Guerra (October 12)

Schrum sent a text message to Matthew Byrne, the VP of Services on October 12 that: “Mario in town Nov 24 to 26. Is happy to meet. I will call Craig in the am” [referring to Craig Haswell, Director of Human Resources, Service Businesses Unit for North America, Bombardier, Inc.]. Byrne responded, “excellent.” Thereafter, there was an email exchange between Schrum and Haswell, in which Haswell asked Schrum if he had received his voicemail from the previous day. Schrum responded, “Yes I did. Sorry for not getting back but the 24th at 10 is good. I need to talk to you about location.” Haswell responded, “Okay. Give me a call next week. And don't forget resume if you can...” Schrum wrote to Haswell that Guerra said he would send his resume.

Schrum-Guerra Communications Continue; Guerra Sends Resume; Bombardier Internal Communications; Meeting Arranged (October 17)

Over the next two days, Schrum and Guerra communicated regarding scheduling a time to meet. On October 17, 2011 Guerra responded, “I sent you my resume via e-mail along with a couple of questions.” In the email to which Guerra referred, also sent on October 17, 2011, Guerra inquired whether the meeting would be a “meet and greet” or if he was being considered for a specific position with Bombardier. He also asked for more information about the company, including organizational charts and annual reports.

In mid-afternoon on October 17, Schrum sent an email to Byrne and Haswell referring to Guerra's email asking whether this was just a meet and greet or whether there was a specific position for which he was being considered:

Either one of you wish to answer Mario's questions.

Peter

Thereafter, Haswell wrote to Schrum (no time indication):

It would be a meet and greet for possible future opportunities depending on how the meeting goes.

Craig

Following this internal communication, Schrum sent an email to Guerra, stating, in pertinent part:

It is more than a meet and greet. There is serious interest in you, more from a longer term type planning. We have a number of contracts coming up[] . . . for which the Services Maintenance will be front and center.

*There is also the element to succession planning. . . .
I will get you the org charts and such. New VP of services is Matt Byrne.
Brought over from the UK. . . .*

Peter

Schrum and Guerra confirmed by email that day (October 17) that they would meet in Toronto on November 24. Thereafter, Haswell initiated an internal meeting invitation to Matt Byrne. The subject of the invitation read: “Confidential Interview – At the Delta Hotel (Dixie and 401).” The meeting was set for 10:00 a.m. to 12:00 p.m. on Thursday, November 24, 2011. Craig Haswell was listed as the chair of the meeting.

Guerra’s Recusal from the Selection Committee

On the afternoon of October 20, 2011, following Guerra’s email to Plochochi recommending that ALSKAW’s request for an extension of time to file its BAFO be denied, Guerra informed Bianco that he had been contacted by Bombardier about setting up a meeting regarding possible employment in Canada and that he would like to pursue the opportunity. Guerra also told Bianco that as a result of his interest in Bombardier, he was recusing himself from his involvement in the R179 procurement and he was appointing Mike Wetherell to assume his role on the Selection Committee. According to Bianco, he was extremely upset about Guerra’s conduct.

On October 21, 2011, Guerra said he was directed to report to 2 Broadway to meet with Bianco. During the meeting, Bianco requested that Guerra write a letter requesting recusal from the R179 procurement Selection Committee, which Guerra did that same day. Guerra explained that he offered to cancel his meeting with Bombardier, but Bianco advised him that it was too late. Guerra also asked Bianco if he should resign from his position with NYC Transit; Bianco advised Guerra to wait pending further developments. Although Guerra received a copy of the MTA Code of Ethics, consistent with NYC Transit policy, when he began employment with NYC Transit, during their discussion Bianco supplied Guerra with an additional copy

We asked Guerra why he waited until October 20th to inform Bianco of the meeting with Bombardier. Guerra explained that the meeting with Bombardier was not confirmed until the 17th and he did not want to tell Bianco until it was definite. Asked why he did not tell him on the

17th – as soon as the meeting was confirmed – Guerra stated he decided to wait until the 20th because that was the day of his next scheduled meeting with Bianco.⁶

⁶ Guerra's office is located in Brooklyn and Bianco's is located at 2 Broadway in Manhattan.

OIG INTERVIEWS OF BOMBARDIER PERSONNEL

Peter Schrum Interviews

OIG investigators interviewed Schrum on October 28, 2011 by telephone, on December 6, 2011 at the Inspector General's office in New York City, and again by telephone on December 15. Schrum, who as noted is the Director, Business Development and Sales for Ontario, joined Bombardier in 2000. From 2005 to 2009, Schrum was the project director for the Toronto Rocket Subway project for the Toronto Transit Commission. In 2009, Schrum assumed his current role and is not involved in the R179 procurement.

Schrum first met Guerra in 2007 or 2008 while working on the Toronto Rocket Subway project. The two became acquainted on a personal level through participation in golf outings in Toronto and an October 2009 eight-person golf trip to Myrtle Beach, SC. This was a private trip, unaffiliated with a company or transit organization and each attendee paid his own way.

Schrum described himself as well-connected within the Canadian transit market. He frequently learns of employment opportunities before they are publicly advertised and other transit organizations often ask him for candidate recommendations for open positions. He stated Guerra knows he is well connected.

According to Schrum, he saw Guerra at the golf outing in Toronto on June 23, 2011. Schrum said that later in the day, Guerra informed Schrum that the move to New York City had put a strain on his family and that he was contemplating a return to the Greater Toronto Area by the end of the year. The tenor of the conversation was a general request that Schrum inform Guerra of any opportunities at any organization he might learn of in the GTA, without specific mention of Bombardier.

Shortly after the golf outing, Schrum forwarded Guerra a job posting for a position with Metrolinx-Go Transit in Toronto. Schrum stated that he did not take any further action on Guerra's behalf until August 2011. Schrum told the OIG that as he was making preparations for a golf outing scheduled for August 28, 2011, sponsored by Go Transit,⁷ he was reminded of the conversation with Guerra from the June golf outing. This memory prompted Schrum to send the August 18, 2011 text message to Matt Byrne regarding Guerra's interest in relocating to the GTA.

Schrum maintained that he was not aware that Guerra was involved in the R179 procurement until Guerra informed him in a telephone conversation on October 28, 2011. When asked why he directed Byrne to keep Guerra's candidacy for a position with Bombardier "very hush due to R175 [sic]" if he didn't know of Guerra's involvement, Schrum said he was aware of the procurement but not that Guerra was involved.⁸ Further, as previously noted, he explained that Guerra's candidacy had to be kept quiet because it could negatively affect Bombardier's R179

⁷ Guerra was not present at this golf outing.

⁸ Schrum stated he learned of the procurement from trade journals.

procurement bid if Bombardier was seen as attempting to lure away a high level employee from NYC Transit while simultaneously trying to sell them subway cars. He said that this type of sensitivity to the timing of career moves is necessary in an “intimate,” “incestuous” transportation market and that these types of matters are always considered when passing on information about open positions to individuals considering moving from their current positions. He referred to this as trying to avoid the “piss-off” factor, meaning not upsetting a potential customer by stealing away an employee while a sale is pending. And avoiding this factor, according to Schrum, was why he asked Byrne to keep the interest in Guerra “very hush.”

Schrum further said that it did not dawn on him that Guerra might be involved in the procurement because Guerra’s role at NYC Transit was to maintain the existing fleet which is similar to his former role at TTC, where Guerra was never involved in new car procurements. Schrum said that he and Byrne had no further communications regarding Guerra’s candidacy for employment until October 2011.

As previously noted, OIG investigators also asked Schrum what prompted him to reinitiate discussions of Guerra’s candidacy on October 12. Schrum stated that shortly before he sent Guerra the October text message, he was visiting a TTC office – which he does frequently – when some TTC employees made mention of Guerra’s desire to return to Toronto.

Schrum further explained that after his visit to TTC he had a conversation with Byrne about several upcoming procurements on which Bombardier had bid that had maintenance options. Schrum asked Byrne whether, if Bombardier were awarded these other procurement contracts, Byrne believed that his present staff had sufficient experience to service the contracts. According to Schrum, Byrne responded that he did not have the depth he needed in his existing employees. That, said Schrum, is when he mentioned Guerra’s name to Byrne. By Schrum’s account, it was this conversation that prompted the events that led to the scheduling of the November 24, 2011 meeting with Guerra.

Schrum stated he then received a call from Craig Haswell informing him that Byrne was interested in speaking with Guerra. There was no specific position for which Guerra was being considered; rather the meeting was to see if Guerra would be a good “fit” with Bombardier. Schrum stated that his text message to Guerra about Bombardier’s interest in him followed the telephone call from Haswell.

Matthew Byrne Interview

OIG investigators interviewed Matthew Byrne, Vice President, Services of Business Unit, North America, on December 6, 2011. Byrne joined Bombardier in March 2000 in the United Kingdom. On January 9, 2011, Byrne assumed his current role and relocated to Canada. Byrne’s role focuses on after-sale service and maintenance.

One of Byrne’s projects in Canada is to implement a new maintenance strategy that would more aggressively market after-delivery service and parts options similar to Bombardier’s European model. Byrne did not have a direct role in the R179 procurement; however, he was involved to

the extent that he gave two presentations to NYC Transit. The first was at Bombardier's oral presentation on April 4, 2011, which was his first opportunity to pitch the new maintenance strategy with the hope of interesting NYC Transit. Byrne characterized the presentation as a generic one, giving general information rather than a specific proposal to NYC Transit.

Byrne stated that he has never met Guerra, at the April presentation or otherwise,⁹ though he does remember meeting other Transit representatives in April, including Plochochi, Marian Murray, and an NYC Transit consultant from Louis T. Klauder and Associates (LTK). Byrne stated they had a working lunch on the day of the presentation and that each group went into their respective "huddles." After the oral presentation, Bombardier representatives met at the hotel where they were staying before flying back to Canada. At this post-presentation internal review, the consensus amongst the Bombardier team was that Byrne's presentation was well received and that it may be worth pursuing a service strategy specific to NYC Transit.

Byrne's second presentation to NYC Transit took place during a technical negotiation session on July 20, 2011. In attendance, to Byrne's recollection, were about ten representatives from NYC Transit, the LTK representative and a member of another NYC Transit consultant team. Byrne was unsure whether Guerra attended the presentation because he did not know what Guerra looked like.¹⁰ Thereafter, it became evident to the Bombardier team that NYC Transit was not interested in pursuing any service agreements with Bombardier and Byrne's involvement in the procurement ended.¹¹

Byrne was originally slated to attend the May 9 to 20, 2011 trip to China for NYC Transit personnel involved in the procurement to visit Bombardier's supplier's manufacturing facilities. Byrne explained that it was during arrangements for the trip that he first heard Guerra's name as Guerra was part of the NYC Transit team traveling to China. However, according to Byrne, he did not learn that Guerra was a member of the Selection Committee. Byrne ultimately did not attend that or any of the other inspection trips and never met Guerra in person.

In response to OIG questioning, Byrne described his relationship with Schrum as a close friendship. He stated that he and Schrum have some business dealings though they do not regularly work together. As to Guerra, Byrne stated that a lot of people have recommended candidates to him but that this was the first time Schrum had done so.

OIG then questioned Byrne about his text message exchange with Schrum on August 18, 2011 discussing Guerra's candidacy. The following is the exchange, with Byrne's explanation inserted after each line in question:

⁹ Although Guerra does not specifically recall Byrne or his presentation, Guerra recalls attending all of the presentations on April 4. Guerra's recollection is consistent with the sign-in sheets for that day, which reflect that 13 Bombardier employees and 25 NYC Transit representatives were in attendance.

¹⁰ Interviews with NYC Transit staff and the sign-in sheet confirm that Guerra was not present for this technical negotiation.

¹¹ Marian Murray confirmed in an OIG interview that Byrne's involvement in the procurement ended with the July 2011 meeting.

Schrum: *I have a guy, former General Superintendent [sic] @ TTC, now with NYCT who wants to move back to Toronto. Knows ops, maintenance, etc as he was responsible for all Rail cars and Shops for TTC. (Not busses [sic] or surface tracks.) Interested in having a chat with him. He is looking at early next year.*

Byrne: *What about Ottawa or Chicago? Would he be interested in those areas?*

- Byrne stated he asked if the candidate would be interested in Ottawa or Chicago because Byrne had projects in each of those cities that may have had available positions.

Schrum: *I can ask.*

Byrne: *Is it Mario?*

- Byrne stated that he received the text messages from Schrum while walking down the hall at Bombardier's office with Robert (Bob) Young, North America General Manager for Maintenance. Byrne described Young as someone upon whom he relied to learn the identities of Bombardier employees and others in the industry when he first joined the North America office from the United Kingdom. He stated that upon receiving the first text message from Schrum describing a possible candidate, but without listing the name, he turned to Young and asked if Young knew whom Schrum was describing based on the candidate's qualifications. Young stated it was Mario Guerra. According to Byrne, he did not know how to spell "Guerra;" instead he sent a text message to Schrum and asked if it was "Mario." (During a telephonic interview with OIG, Young confirmed that Byrne had read this text message to him. However, Young's recollection was that he could not remember Guerra's last name and said to Byrne, "Oh, it's probably that Mario guy").

Schrum: *Yes*

Schrum: *But very hush due to R175*

- Byrne explained that he interpreted Schrum's message that the candidate was Guerra as "very hush" out of sensitivity to Guerra, since Guerra's employer did not know at the time that he was looking to leave NYC Transit. Byrne described the transportation industry as very small and incestuous implying that if others in the industry learned that Guerra was communicating with Bombardier about potential future employment, the information could transfer to his employer very quickly.

Byrne: *Jesus, he is a big name.*

- Byrne stated he made this statement to Schrum because Bob Young informed him that Guerra essentially "ran TTC" when he was there. Learning that Guerra was at a very

senior level, he realized that the opportunities in Ottawa and Chicago would be too junior for Guerra's experience.

Byrne: R179 in fact

- ➔ Byrne corrected Schrum as to the number of the procurement. As to this issue, Byrne explained that although he knew of the procurement and Guerra's participation, he did not know Guerra was on the Selection Committee, how the committee worked, its evaluation criteria, or Guerra's specific role in relation to the procurement.

According to Byrne, at the end of this August text message exchange he was left with the belief that Guerra was too senior for the positions Byrne would need to fill within the Services unit, and that Guerra's return to the GTA was too far in the future and speculative. Byrne further stated to the OIG that his mindset at the time was that if Guerra did move back in the future, then he would be happy to meet with Guerra for a "chat" but not for serious employment discussions. Byrne asserted that his interest in meeting with Guerra had no relation to the R179 procurement.

Approximately two months later, in October 2011, Byrne understood from Schrum that Guerra was definitely returning to GTA in the near future and Schrum asked if Byrne would like to meet with Guerra. Byrne explained to OIG that he still did not have any opportunities available for Guerra and Byrne envisioned there would still be some delay in Guerra's availability due to Byrne's experience in the United Kingdom where there is a three to six month industry standard for employer notification before leaving one's job. Nonetheless, Bombardier had some open bids on projects that could use someone with Guerra's experience should they win the contract. Therefore, said Byrne, he decided it was worthwhile to meet with Guerra.

Byrne stated that it was his further understanding that Guerra had reached out to Bombardier, leading him to presume that Guerra was permitted to pursue opportunities with the company. Byrne viewed the meeting with Guerra as a non-event: that is, as an opportunity to sit down with Guerra to get to know him, not as a formal interview for a defined position. However, Byrne stated that in hindsight he should have questioned someone about the fact that Guerra was involved in the R179 procurement, but failed to do so. Further, Byrne could not recall informing Schrum or Haswell about Guerra's involvement in the R179 procurement.

When questioned by the OIG about his receipt and knowledge of the Vendor Code of Ethics, Byrne stated he was shown a copy of the Code for the first time the day prior to his interview with the OIG.

Craig Haswell Interview

OIG investigators interviewed Craig Haswell, Bombardier's Service Division Human Resources manager on December 6, 2011. He told OIG that Byrne left him a voicemail regarding setting up a meeting with Guerra. Haswell said he asked for Guerra's resume and set up the meeting.

OIG investigators asked Haswell about his use of the term “confidential” to label the meeting appointment. Haswell explained that when they are meeting someone who is in preliminary discussions and not being interviewed for a specific job, they usually do the interviews off-site and consider them confidential. The reason for this is that it is a small industry and usually the person with whom they are meeting would prefer that their interest in leaving their current employer be kept confidential. Thus, Haswell explained, the fact that Guerra’s interview was at a hotel and was considered confidential was not unusual.

Haswell stated that he had no knowledge of the R179 procurement or even that Guerra worked for NYC Transit. He explained that Byrne never mentioned that fact and said that while he received his resume in an email attachment, he opened the document only to confirm that it was a resume and did not actually read it for its content. Haswell said that it is his practice to review the resume of a potential employee just prior to the interview rather than in advance. Haswell stated that Byrne subsequently informed him that there was an “issue regarding the candidate” and they will not be meeting. Thereafter, Haswell took it upon himself to cancel the meeting.

Robert Furniss Interview

On December 19, 2011, OIG investigators interviewed Robert Furniss, Vice President of Sales, Bombardier. In his position, Furniss is responsible for the United States market for rolling stock, locomotives and high speed rail. He joined Bombardier in 1994 and has worked with MTA agencies on other procurements. Furniss is the single point of contact for the R179 procurement as mandated by the New York State lobbying laws. As such, all communication from Bombardier to NYC Transit regarding a pending procurement must pass through Furniss, as similar communications involving all other vendors must pass through a designated single point of contact.

Furniss first met Guerra at the April 4, 2011 oral presentations. Because they both had worked in the Toronto market, they spoke during a coffee break and traded names of mutual acquaintances. Furniss did not see or hear Byrne having any direct conversation with Guerra at the oral presentations. Furniss next saw Guerra on the Plattsburgh and China site visits.

Furniss said he learned of the communications between Bombardier and Guerra about employment opportunities with Bombardier in a phone call on November 1, 2011 with Julie Turgeon, Esq., Senior Director, Contracts and Legal Affairs and Anne McDonald, Vice President, Business Development and Sales Canada, who is Peter Schrum’s supervisor. Furniss told OIG that he was very upset and disappointed to learn of the contact. He said he never had conversations with Guerra about working for Bombardier nor was he previously aware of anyone else who did.

OIG investigators asked Furniss about Bombardier’s protocol regarding the distribution of the MTA Vendor Code of Ethics to all vendor employees involved in the procurement. Because Furniss was not responsible for distribution of the MTA Vendor Code of Ethics, he referred OIG to Bombardier’s Bid Manager.

Patrice Hebert Interview

Patrice Hebert, Bombardier's R179 Bid Manager, explained to OIG that at Bombardier's "kick off meeting" for the R179 procurement, all of the bid team members were directed to an electronic common folder containing all the bid documents, including the R179 RFP. Members were asked to read the RFP and seek clarification from Hebert if they had any questions. Hebert explained to OIG that the RFP document included the address on the MTA website of the MTA Vendor Code of Ethics. However, Hebert acknowledged that the members were not specifically directed to that portion of the RFP that contained the web address of the Vendor Code, nor was that Code specifically discussed or mentioned to the bid team.

Hebert stated that in December 2011, he electronically "forwarded" the MTA Vendor Code of Ethics as a "pdf" (meaning an electronic file format for documents) to the approximately 40 Bombardier employees who had direct contact with NYC Transit staff during the course of the procurement, and asked them to reply affirmatively that they had received it and understood its terms.

Regarding Matthew Byrne, Hebert explained that when Byrne joined the R179 procurement team he "had access" to the same electronic common folder where the RFP was stored but was not specifically directed to the MTA Vendor Code of Ethics.

INTEGRITY OF THE R179 PROCUREMENT

The MTA Code of Ethics declares that all MTA employees are entrusted with a duty to provide a high standard of service. Similarly, the MTA Vendor Code of Ethics declares that the MTA is committed to a procurement process that fosters fair and open competition, is conducted under the highest ethical standards and enjoys the complete confidence of the public. Consequently, the main focus of the Office of the MTA Inspector General has been the integrity of the R179 procurement.

As part of our investigation, OIG conducted numerous interviews of NYC Transit employees involved in the procurement process, including each member of the Selection Committee and the co-chairs of the Technical Advisory Committee. These individuals testified that they saw no indication by Guerra of favoritism or bias toward Bombardier, either in his conduct as a member of the Selection Committee or otherwise. None believed that Guerra was less than consistently neutral throughout the process. At no point in the process did any NYC Transit personnel participating in or managing the procurement detect, either in the statements or actions of Guerra or through the questions or submissions of either bidder, any indication that anyone provided or obtained confidential information.

Further, we interviewed the Bombardier employees involved in communications regarding the proposed future employment, as well as those involved in the procurement itself, and we reviewed all relevant emails, text messages, and telephone records, involving communications among Bombardier employees and Guerra. Again, OIG found no evidence or reason to believe that any of these communications evinced any intent to influence the outcome of this procurement. Rather, our review and analysis supported the statements made by Guerra, Schrum and Byrne that their communications had nothing at all to do with the R179 procurement.

Additionally, we examined the procurement file itself. More specifically, we analyzed forms completed by committee members, with particular focus on the evaluations of the bidders in defined categories, as part of our effort to detect evidence of favoritism to Bombardier or of bias against the other proposer. We also analyzed both the Technical Committee reports, which provided the basis for the March 16, 2011 conclusion that both bidders were technically qualified, and the Selection Committee's preliminary rating sheets that formed the basis of the July 23, 2011 recommendation to move forward with both bidders to the final stage of negotiations. After reviewing each evaluation on its own terms and in relation to each other, and considering the recommendations of the committee members individually and of the committee as a whole, OIG found no indication whatever that Guerra's ratings were inconsistent with others, or displayed favoritism or bias, for or against, Bombardier or the other proposer. Finally, following his review at our request and applying his own perspective, Stephen Plochochi, the NYC Transit VP, Materiel, informed us that he found no irregularity in the file.

In conclusion, after extensive review and analysis, OIG found no evidence or reason to believe that Guerra or any Bombardier employee, by their communications, corrupted or impacted the procurement in any way or attempted to do so.

ANALYSIS OF ETHICAL RULES APPLICABLE TO GUERRA AND BOMBARDIER

As an employee of NYC Transit, an affiliate of the Metropolitan Transportation Authority, Mario Guerra is subject to both the Code of Ethics enacted as part of the New York State Public Officers Law (POL Code of Ethics) and the MTA All-Agency Code of Ethics (MTA Code of Ethics), which embodies and expands upon the provisions of the Public Officers Law. Moreover, Guerra is subject to investigation and enforcement by the New York State Joint Commission on Public Ethics. In accordance with MTA policy, Guerra received a copy of the MTA Code of Ethics upon the commencement of his employment, along with information about the Public Officers Law and the then Commission on Public Integrity.

As a vendor involved in the procurement process of the MTA and its affiliate NYC Transit, Bombardier is subject to the MTA Vendor Code of Ethics (Vendor Code). As part of the R179 Request for Proposals and the MTA Vendor Code, Bombardier is required to comply with that Code and distribute it to all of its employees involved in the procurement.

As previously noted, investigation by the Office of the MTA Inspector General revealed no evidence or reason to believe the Guerra or Bombardier corrupted the R179 procurement or attempted to do so. However, for the reasons to follow, we find that each failed to act in accordance with the obligations established respectively by the MTA Code of Ethics and the MTA Vendor Code of Ethics regarding future employment. We also find that Bombardier failed to act in accordance with its obligation to properly distribute the MTA Vendor Code. Additionally, we find that Guerra violated provisions of the MTA Code of Ethics applicable to conflict of interest and public trust, and may have violated related provisions of the POL Code of Ethics.

GUERRA

MTA Code of Ethics

The Introduction to the MTA Code of Ethics provides in pertinent part:

The Metropolitan Transportation Authority provides services to more than eight million customers a day, each one of whom expects a high standard of service. As employees of the MTA, you are entrusted with the duty to provide this high standard of service. The ability to provide a high standard of service is grounded in a strong work ethic, clear corporate policies, and the dedication of a creative work force. The adherence to a strict code of ethics is central to gaining and keeping the trust of our customers. . .

There is only one Code of Ethics for the entire MTA. You are expected to become familiar with this Code, and the various applicable statutes, regulations, professional codes of ethics, and disciplinary rules.

You are expected to read this Code immediately upon receipt. (Emphasis in original.)

Section 5.03 Negotiations for Future Employment

(a) Solicited

Employees are prohibited from soliciting an employment opportunity with a non-governmental individual or entity that has a specific pending matter before the employee.

Those employees seeking employment outside of government with an entity or individual that has a specific pending matter before the employee may only solicit an employment opportunity with the non-governmental individual or entity after waiting:

- (i) 30 days from the time the matter before the employee is closed, or*
- ii) 30 days from the time the employee has no further involvement with the matter because of recusal or reassignment.*

(b) Unsolicited

Employees who receive an unsolicited post-government employment-related communication from a non-governmental individual or entity that has a

specific pending matter before the employee cannot pursue employment with the non-governmental entity or individual unless the following occurs:

- (i) they recuse themselves from the matter and any further official contact with the entity or individual and*
- (ii) they wait 30 days from such recusal to enter into post-government employment communications with the entity or individual.*

(c) Notification

Employees must promptly notify their supervisor and agency ethics officer of such outside employment related communications whether or not they intend to pursue the post-government employment opportunity.

In the event of such notification of a solicitation and employee's desire to pursue the solicitation, the employee's supervisor is obligated to advise such supervisor's superiors, in writing, up to and including the department head, of the employee's desire to pursue the solicitation and the managers intention to establish recusal procedures, if practical, to reassign the individual or to refuse reassignment.

(d) Recusal

Recusal procedures shall be applied only if practical and in the best interests of the applicable MTA Agency. Reassignment shall be refused when the manager determines that reassignment would be impractical or inappropriate. The manager may not take action with respect to notifying the employee of such manager's decision until approved by the department head. If recusal procedures are not practical and in the best interests of the applicable MTA Agency or if reassignment is refused, the employee is prohibited from pursuing the solicitation.

OIG Analysis

It could be argued that Guerra's comments to Schrum at the June 2011 golf outing in Toronto about moving back to the Greater Toronto Area was a form of solicitation of future employment. The contrary view, though, is that his vague remarks regarding his interest in returning to Toronto at some indefinite point in the future do not rise to the level of a solicitation. Based on the record before us, we are persuaded of the latter view and conclude that Guerra was simply giving vent to personal stress and concern that he consider his eventual need to return to Canada for the sake of his family.

That said, however, the totality of circumstances and common sense clearly indicate that Guerra's remarks to Schrum set in motion the chain of events that culminated some five months later in the repeated communications and scheduled meeting with Bombardier regarding employment. Even accepting that Guerra's receipt of Schrum's October 12, text message

constituted an “unsolicited” communication to Guerra, he was obligated to strictly comply with the provisions of MTA Code of Ethics §503(b-d) regarding notification and recusal. We conclude that he failed to do so.

To begin, because Guerra was on the Selection Committee for the R179 procurement, for which Bombardier had submitted a proposal, Bombardier had a “specific pending matter” before Guerra (§5.03[b]) at the time of Schrum’s communication regarding employment. Therefore, whether or not Guerra intended to proceed with employment discussions following Schrum’s text message, Guerra’s first obligation was “promptly notifying” his supervisor, Bianco (§5.03[c]).

Instead, *before* notifying Bianco and purporting to recuse himself on October 20, Guerra exchanged text messages with Schrum on October 12; communicated with him over the next two days to schedule a time to meet; sent Schrum a copy of Guerra’s “resume by email, along with a couple of questions” on October 17; confirmed their meeting date of November 24 in Toronto; and sent an email on October 20 to Stephen Plochochi, V.P., Materiel, asking him to deny a request by the other R179 proposer for a one week extension of time to file its BAFO. Therefore, regardless of whether Guerra’s delay in notification is deemed the full eight days beginning with the text message on October 12, or three days from October 17 when Guerra confirmed the meeting date in Toronto, in our view the notification to Bianco was certainly not “prompt.”

Further, Guerra’s purported recusal was also untimely, coming as it did after repeated communications with Schrum; Guerra’s “official action” by email to Plochochi; and Guerra’s delayed notification to Bianco (§503[b(i-ii)][c]). Indeed, far from being a unilateral process, the MTA Code of Ethics specifies that recusal be preceded by notification, which it was not, and is subject to “the managers intention to establish recusal procedures, if practical, to reassign the individual or to refuse reassignment” (§503[c]). Additionally, “Recusal procedures shall be applied only if practical and in the best interests of the applicable MTA Agency” (§503[d]).

In addition to its rules regarding negotiation for future employment, the MTA Code of Ethics contains rules regarding conflicts of interest (§4.01) and public trust (§4.02[(a)(c)]). Similarly, the POL Code of Ethics contains a rule regarding conflicts of interest and standards for applying it (§74[2][3(f)(h)]). Given their essential similarity we have grouped and analyzed these provisions together below.

MTA Code of Ethics §4.01 Conflicts of Interest

Employees shall not have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is or may be in conflict with the proper discharge of his or her duties. Employees must notify their ethics committee regarding any possible conflict of interest.

MTA Code of Ethics §4.02 Public Trust

(a) Employees shall not engage in a course of conduct that will raise suspicion among the public that they are likely to be engaged in acts that are in violation of the public trust. Employees shall avoid even the appearance that they can be improperly (1) influenced in the performance of their official duties or (2) induced to violate the public trust or impair their independence of judgment in the exercise of their official duties.

(c) Employees shall not by their conduct give reasonable basis for the impression that any person can improperly influence them or unduly enjoy their favor in the performance of their official duties, or that they are affected by the kinship, rank, position, or influence of any party or person.

Public Officers Law Code of Ethics §74

(2) Rule with respect to conflicts of interest. No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

(3) Standards.

(f) An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

(h) An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

OIG Analysis

As previously noted, our investigation did not reveal any evidence or reason to believe that Guerra could be or actually was influenced in the performance of his duties by Bombardier; that he even contemplated transmitting, let alone actually transmitted, sensitive or valuable information to Bombardier; or that Bombardier asked for or intended to use its meeting with Guerra as an opportunity to influence Guerra or to obtain confidential information. However, we stress that as a Selection Committee member for the R179 procurement, Guerra had access to highly sensitive and valuable information, such as pricing and specifications for subway car models. Given his public trust, it was incumbent upon him to avoid even the *appearance* of impropriety. He did not do that.

Guerra's communication with Bombardier, a participant in the same procurement process, regarding possible future employment, without complying with section 503(b-d), impermissibly created a "reasonable basis for the impression" that a Bombardier representative could have improperly influenced Guerra. MTA Code of Ethics §4.02(c); POL Code of Ethics §74(2)(3)(f). Similarly, those communications constituted conduct that could have impermissibly "raise[d] suspicion among the public that [Guerra] is likely to be engaged in acts that are in violation of his trust." MTA Code of Ethics §4.02(a); POL Code of Ethics §74(2)(3)(h). By the same token, Guerra's contact with Bombardier to meet for prospective future employment constituted professional activity that was in conflict with his duties as a member of the Selection Committee. MTA Code of Ethics §4.01. Such negative impressions and suspicions, as well as concern about conflicts of interest, could only be heightened by Guerra's email to Plochochi – before Guerra even attempted his own recusal – requesting that Plochochi deny the other proposer's request for a one week extension of time to submit its BAFO.

BOMBARDIER

MTA Vendor Code of Ethics

The Introduction to the MTA Vendor Code of Ethics provides in pertinent part:

The MTA is committed to a procurement process that fosters fair and open competition, is conducted under the highest ethical standards and enjoys the complete confidence of the public. To achieve these important public purposes, the MTA adopts this Vendor Code of Ethics, which may impose upon its procurement process standards that exceed those now applicable under New York law.

Chapter 5: Negotiations for Future Employment

Section 5.01 General

MTA Employees are subject to the restrictions set forth below in connection with negotiations for future employment with vendors. It is expected that vendors will approach any such solicitation or negotiation with knowledge and understanding of these restrictions and will conduct themselves accordingly.

Section 5.02 Restrictions

Lists verbatim the restrictions from the MTA Code of Ethics Section 5.03 above.

OIG Analysis

Simply put, sections 5.01 and 5.02 inform vendors of the restrictions on MTA employees regarding negotiation for future employment and require those vendors to act in accordance with those restrictions. We conclude that Bombardier failed to do so. At the least, Byrne knew that Guerra was involved with the R179 procurement. Even viewing their communications with Guerra as occurring under an assumption that Guerra was free to speak, any such assumption was at Bombardier's peril. In the last analysis, Bombardier's representatives should have taken care to verify that Bombardier and Guerra complied with the obligations imposed upon each by their respective ethical codes. By not doing so, Bombardier failed, by and through its employees, to act in accordance with sections 5.01 and 5.02 of the MTA Vendor Code of Ethics.

Chapter 8: Certification

Section 8.02 Distribution of Vendor Code of Ethics

. . . . [A]s a condition of being considered for the award of any contract above the MTA's small purchase threshold, the primary contracting party will be required to submit with its bid or proposal and include in its contract a further certification executed by an officer of that party. This

certification must attest that the primary contracting party and all officers and personnel who may interact or have interacted with the MTA during the course of the procurement or contract have been provided with a copy of this Vendor Code of Ethics.

OIG Analysis

Bombardier submitted with its proposal for the R179 procurement dated November 12, 2010, a certification attesting that it complied with all of the terms of the RFP. Section II, Paragraph 26 of the RFP informs all vendors that they are subject to the MTA Vendor Code of Ethics and requires the proposers to “certify compliance with the Code.” The Vendor Code of Ethics requires certification at the time of the submission of the bid or proposal that a copy of that Vendor Code “[has] been provided” to all officers and personnel who may interact or have interacted with the MTA. Underlying this obligation to certify is a more fundamental obligation: to actually provide a copy of the Vendor Code. Bombardier did not do this.

Bombardier directed the bid team members to the electronic common folder containing all of the bid documents, including the R179 RFP. Members were asked to read the RFP – a 347 page document – that listed the web address of the Vendor Code of Ethics. Bombardier bid team members were not specifically directed to the portion of the RFP that contained the web address; the Vendor Code was not specifically discussed or mentioned; nor was a copy of that Code actually distributed until December 13, 2011 by electronic document (the “pdf”), long after Bombardier submitted its certification in November 2010. Thus, Bombardier, by and through the conduct of its employees, did not fulfill its obligations pursuant to section 8.02 to distribute the Code and to make proper certification regarding that distribution.

Further, during his interview with the OIG on December 6, 2011, Matthew Byrne testified that he had not received a copy of the Vendor Code until the day prior to the interview, despite the fact that he gave two presentations before NYC Transit representatives in connection with the procurement. Byrne had no involvement with the R179 procurement or Guerra at the time that Bombardier submitted its proposal and accompanying certification. However, before Byrne became connected to the procurement, as he did by making his two presentations, Bombardier had an obligation to actually provide him with a copy of the MTA Vendor Code of Ethics. Because Bombardier did not do that, by and through the conduct of its employees, it failed to fulfill its obligation to distribute the MTA Vendor Code.

Chapter 9: Penalties

Section 9.01 Responsibility Determination

For violation of any provision of this Vendor Code of Ethics, the MTA may avail itself of every remedy in law or equity, or as agreed to by parties in any contract, including but not limited to declaring the Vendor non-responsible, debarred or in material breach of the contract.

OIG Analysis

Under applicable procurement rules, a contract of the type involved here may only be awarded to a “responsible” proposer. Specifically, the NYC Transit Materiel Policy/Instruction Manual provides in pertinent part that:

*It is the policy of Transit to award contract and purchase orders to bidders who are responsible. The award of a contract based on price alone is improper. A bidder has the obligation to demonstrate its responsibility and Transit must affirmatively find a bidder responsible in order to justify a contract award.*¹²

(The term “bidder” includes “proposer”).¹³

A determination of “responsibility” depends on several factors: a vendor’s integrity, financial capacity and ability to perform the contract and complete it in timely fashion. NYC Transit has informed OIG that it intends to conduct a responsibility hearing regarding Bombardier in any event. We agree that this is the appropriate forum and mechanism by which to assess Bombardier’s suitability to perform this contract, should it be awarded, given the failure of Bombardier to properly distribute the MTA Vendor Code of Ethics and, more significantly, the actions of its employees in communicating with Guerra about future employment.

¹² Chapter IV (Procurement Actions); Section A (General Considerations); Sub-Section 12 (Responsibility); § 3.0 (Policy); subd. 3.1.

¹³ Id. at § 1.0 (Purpose); subd. 1.1.

CONCLUSION

The Office of the MTA Inspector General finds no evidence or reason to believe that NYC Transit employee Mario Guerra or any employee of Bombardier, Inc. corrupted or otherwise impaired the integrity of the R179 procurement itself or attempted to do so.

Based on our investigation, we do find that Guerra failed to act in accordance with his obligations established by the MTA Code of Ethics regarding future employment. We also find that Guerra violated provisions of the MTA Code of Ethics applicable to conflict of interest and public trust, and may have violated related provisions established by the Public Officers Law. We understand that Guerra resigned from NYC Transit effective January 27, 2012. Nevertheless, we are referring this report containing our findings to the New York State Joint Commission on Public Ethics for such action as it may deem appropriate.

Further based on our investigation, we find that Bombardier, through the actions of its employees in their communications with Guerra, failed to act in accordance with its obligations established by the MTA Vendor Code of Ethics regarding future employment. We also find that Bombardier failed to act in accordance with its obligation to properly distribute the MTA Vendor Code.

It is our understanding that NYC Transit intends to conduct a responsibility hearing regarding Bombardier and we concur with this intention.

Finally based on our investigation, the Office of the MTA Inspector General intends to submit under separate cover its recommendations to address issues raised by this report regarding the distribution and certification of compliance with the MTA Vendor Code of Ethics.