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June 10, 2010

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Mr. Dorval R. Carter, Jr.
Chief Counsel
U. S. Dept. of Transportation, FTA
East Building, 5th Floor
1200 New Jersey Ave., S. E.
Washington, D. C. 20590

RE: Buy America

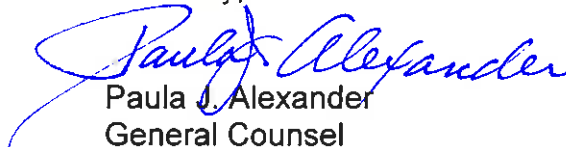
Dear Mr. Carter:

Thank you for your prompt review of our May 14, 2010 submission.

You will find, as Attachment A, additional information and documents in response to your May 27, 2010 and June 3, 2010 requests. We hope these materials completely address all of your questions. As previously stated by METRO's Board Chairman, METRO remains committed to Buy America and its positive impact on jobs in the United States. METRO has made every effort to meet all federal requirements while striving to make the best decisions to bring safe, reliable and efficient transit services to the greater Houston area. We are grateful for the assistance of your office in the implementation of METRO Solutions.

We would request an opportunity to visit with you to review any aspect of the information provided, and to assist you in bringing your investigation to conclusion so that we may move ahead with these critically needed transit projects.

Sincerely,


Paula J. Alexander
General Counsel

PJA/pd
Enclosures

Mr. Dorval R. Carter, Jr.
June 10, 2010
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cc: Robert Patrick
Regional VI Administrator/FTA

Chairman Gilbert A. Garcia
METRO Board of Directors

George Greanias
Acting President & CEO of METRO

Houston Congressional Delegation

ATTACHMENT A
TO METRO'S JUNE 10, 2010 LETTER
FROM PAULA ALEXANDER TO DORVAL CARTER

Thank you for your letters of May 27, 2010 and June 3, 2010. The information sought in the listed requests is contained in: (i) the narrative answers below; (ii) exhibits 1-46 submitted with this response (four notebooks, one containing Ex. 1, a second containing Ex. 2, a third containing Ex. 31, and a fourth containing Exs. 3-30 and 32-46); and (iii) exhibits 1-31 attached to the May 14, 2010 letter from Paula Alexander to Dorval Carter ("May 14, 2010 Letter"). Please note that Ex. 29 is a thumb drive containing numerous documents, including, in part, technical proposals, commercial proposals, other documents from the files concerning the procurement, and e-mails. The e-mails are in PST format and must be opened in Outlook.

We very much appreciate the FTA's consideration of these materials.

1. **Retention of Buy America records.** Please explain METRO's document retention policy and indicate whether METRO has in its possession all documents related to this investigation. Please describe any documents that are not in METRO's possession and identify the location of these records.

Answer:

On May 18, 2010, METRO's Board of Directors adopted a records management policy which, in part: (i) declares all documents received, maintained and used by METRO to be METRO's property; (ii) adopts the retention schedules as set forth by the Texas State Library and Archives Commission in Schedule GR (Records Common to All Local Governments) and Schedule PW (Records of Public Works and Services), except that e-mails are to be retained indefinitely; and (iii) designates a records management officer. (See Ex. 3).

Prior to May 18, 2010, METRO's policy was to require retention of documents for certain time periods – and with respect to some categories of documents, indefinitely. (Ex. 4). However, METRO's general practice was simply to retain all documents, even where the policy provided for the retention of a certain category of documents only to a certain point.

In August of 2009, an e-mail policy was implemented providing that individuals were to place, in managed folders, all work-related e-mails. E-mails in the folders were to be kept indefinitely. E-mails 30 days and older that were not placed in managed folders were deleted. However, the automatic deletion ceased on March 10, 2010 and, as noted above, e-mails are now to be kept indefinitely.

We are not aware of any documents that you might need for your investigation which METRO does not possess.

2. **Due diligence before contract award.** Please describe METRO's process for assessing the validity of Buy America certificates submitted to METRO in connection with federally funded contracts. Also, please explain whether METRO followed this process when it selected its facility providers and whether its facility providers followed this process before awarding contracts for the North and Southeast Corridor projects, including but not limited to the light rail vehicle ("LRV") contracts.

Answer:

In accordance with 49 U.S.C. 5323(m) and 49 CFR Part 663, Chapter 15.3 of the METRO Procurement Manual (Ex. 5, pp. 3-4) requires pre-award and post-delivery audits for compliance with Buy America for all vehicle procurements. The pre-award audit of CAF USA ("CAF"), which explains the procedures of the audit, is attached as Ex. 17 to the May 14, 2010 Letter.

There is no requirement for a pre-award audit for compliance with Buy America for non-vehicle procurements in FTA law or regulation or in METRO's Procurement Manual. METRO follows the FTA regulatory standard (49 CFR 661.15(a) that "[i]t is presumed that a bidder or offeror who has submitted [a] Buy America certificate is complying with the Buy America provision."

The requirement that the facility provider meet Buy America requirements was contained in the original solicitation for the facility provider issued on August 15, 2006. (Ex. 6, pp. 26 and B-15.) Buy America certifications were obtained from all three responding proposers. (Exs. 7, 8, 9, and 10.)¹ METRO entered into negotiations with Washington Group Transit management Group ("Washington Group"), as the number 1 ranked proposer, and awarded a Phase 1 Development Agreement to that firm in May, 2007. The Phase 1 Development Agreement contemplated ongoing negotiations with Washington Group, with the goal of reaching agreement on pricing and contract terms for final design and construction. However, METRO and Washington Group were unable to reach agreement on pricing and METRO terminated its agreement with the firm. This action

¹ The certifications were from Washington Group International, Parsons Transportation Group Inc. ("Parsons"), Manhattan Construction Company ("Manhattan"), and Bayou City Transit Team JV. At the time Parsons and Manhattan proposed as a joint venture, so Buy America certifications were received from each. (The joint venture was later dissolved).

was taken in accordance with Subchapter Q, Section 451.807, Texas Transportation Code, and the Phase 1 Development Agreement between METRO and Washington Group. Pursuant to Subchapter Q, Section 451, 807 of the Texas Transportation Code, METRO then began negotiations with the second ranked proposer, Parsons. These negotiations resulted in the development of a contractual structure in which Parsons would develop light rail facilities and provide for operation and maintenance through joint ventures, with a separate prime contract for supply of vehicles.

Ultimately, separate Facility Provider, Design-Build, Operations and Maintenance, and Vehicle Supply Contracts were executed. (Exs. 19 and 26 to May 14, 2010 Letter).² Under this structure, the separate Facility Provider contract is for professional services and does not include buying materials or equipment. However, the Design-Build Contract requires the builder to meet Buy America requirements. (Ex. 26 (CD), Design-Build Contract, App. 10-1, p. 9). Houston Rapid Transit JV ("HRT"), the design-builder, submitted a Buy America certificate. (Ex. 27 to May 14, 2010 Letter).³ Houston Operations and Maintenance LLC ("HOM")⁴ is also required to comply with Buy America. HOM has a 100% subcontract with Veolia Transportation Services, Inc. ("Veolia"), which has submitted a Buy America certificate. (Ex. 11).⁵

With respect to the process followed by the facility provider, Washington Group included Buy America requirements as part of Addendum No. 6 to the LRV RFP. (Ex. 1, Att. 9). In response to Addendum No. 6, all of the five offerors indicated that they understood that Buy America would apply. (Exs. 13-16).⁶ CAF signed and submitted its formal Buy America certification on June 10, 2008. (Attachment to Ex. 13 May 14, 2010 Letter).⁷

With regard to other procurements where Buy America requirements were applicable, HRT has included Buy America requirements in its subcontracts (Ex. 18), and has required its subcontractors to execute Buy America certificates. (Ex. 19). METRO conducts periodic audits to

² The title of the Facility Provider Contract is "Development Agreement".

³ The party to the Design-Build contract is Parsons. However, Parsons assigned the contract to HRT, a joint venture consisting of Parsons, Granite Construction Company, Kiewit Texas Construction L.P., and Stacy and Witbeck Inc.

⁴ HOM is a joint venture consisting of Parsons and Veolia Transportation Services, Inc.

⁵ HOM is a joint venture of Veolia (70%) and Parsons (30%).

⁶ In further discussions two of the proposers – Alstom and AlsaldoBreda -- amended this statement.

⁷ The certification is undated, but both CAF and METRO recall that it was signed by CAF during a June 10, 2008 METRO workshop in Houston.

ensure compliance with federal requirements, including Buy America. (See response to no. 4, below.)

HRT's quality control group inspects all materials delivered under its contracts to make sure they are in compliance with Buy America. For example, HRT checks to see that steel products are stamped that they are made in the United States. HRT also gets mill certificates from its subcontractors to verify compliance. Attached as Ex. 20 are HRT's "Quality Control Receiving Report" form and its inspection checklists, which all reference Buy America.

- 3. Facility Provider Contracts.** METRO selected the Washington Group Transit Management Company ("Washington Group") as its facility provider. Please address whether Buy America compliance was a factor in METRO's ultimate decision to use Parsons Transportation Group ("PTG") instead of Washington Group as the facility provider.

Answer:

Both Washington Group and Parsons certified that they would meet Buy America requirements. (Exs. 7, 8 and 9).⁸ Thus, Buy America was not a factor in METRO's decision to use Parsons as its facility provider instead of Washington Group.

- 4. Audits.** Your letter of May 14, 2010, states that "METRO has initiated a process for periodic audits of the major contractors, including the facility provider, to ensure that all federal requirements are met in their respective procurements." Please describe this process in detail, and please identify any findings that have resulted from this process.

Answer:

Since October 2006, METRO has had in place a comprehensive program of planned and periodic surveillances and audits to verify that applicable elements of both the facility provider's Quality Assurance Plan and work-in-progress are acceptable and have been developed, documented and effectively implemented in accordance with the requirements of METRO's FTA-required Quality Management Plan. (Ex. 21). METRO's quality assurance contractor, ATSER, Inc., conducts these surveillances and audits. Attachment B to the Quality Management Plan, *Work Flow*

⁸ Ex. 9 contains Buy America certificates of compliance from Manhattan Construction Company, which was a joint venture partner with Parsons at the time of its proposal.

Process Diagram, provides a detailed overview of this audit process. (Ex. 21, Att. B). A list of the findings from these audits is included with this response. (Ex. 22).

Parsons, as facility provider, is responsible for the management, coordination, and integration of all of the work under the four major METRO Solutions contracts, including adherence to the project's quality assurance requirements. Ex. 28 to the May 14, 2010 Letter documents the recording and resolution of non-conforming events identified by HRT/Parsons pursuant to METRO's quality assurance process.

Additionally, METRO's Procurement Department conducts periodic procurement systems reviews in accordance with the attached Procurement Process Compliance Review Procedure 109. (Ex. 23). These reviews are done to ensure that proper procurement and contract administration system procedures exist within the various contractors' organizations. To date, procurement systems reviews have been conducted as follows:

- HRT design/build contract, CT0800120, Feb 2010
- HRT design/build contract, CT0800120, May 2010
- HOM, operations and maintenance, CT0800137, May 2010
- Parsons, development agreement, RA0800021, May 2010

Reports related to these audits are attached. (Exs. 24-27). Please note that no significant deficiencies were found.

Finally, as part of METRO's response to FTA's letter of April 23, 2010, on May 19, 2010, METRO's Audit Department initiated an internal audit to determine if METRO had procedures and controls in place to adequately monitor compliance with Buy America requirements for METRO Solutions Phase 2 contracts currently in place. (Ex. 28). The Audit Department is expanding its coverage of METRO Solutions Phase 2 Quality Assurance activities to include periodic written reports to management and the Finance/Audit Committee of the Board. The Audit Department will also include a separate Workplan for METRO Solutions Phase 2 Quality Assurance audits in its FY2011 Audit Workplan which will be presented to the Finance/Audit Committee of the Board for approval in September/October of 2010.

5. **CAF's Technical Proposal.** In its technical proposal, Construcciones y Auxiliar de Ferrocarriles ("CAF") stated its intention to assemble two pilot cars in Spain: Specifically, the October 29, 2007, cover letter to CAF's Technical Proposal states that "CAF intends to manufacture the car shells,

trucks and first two pilot cars in Beasain, Spain," and section 1.1.13 of CAF's technical proposal states that "manufacturing operations will be performed in the US, except for the prototyping first two vehicles, which will be carried out in Spain." Given those statements, did METRO or its facility provider question at that time whether CAF could comply with the Buy America requirements? If not, why not? How did METRO rate CAF with respect to Buy America compliance? Please provide copies of, and documents and communications related to, the proposals submitted by all pre-qualified LRV suppliers.

Answer:

While CAF stated in its Technical Proposal that it intended to manufacture pilot cars in Spain, the RFP had not required Buy America compliance. As a result, METRO did not question CAF's compliance at that time. After FTA advised METRO that it must require Buy America compliance and METRO issued Addendum No. 6 notifying offerors of that requirement, CAF certified compliance with Buy America. As a result, when METRO evaluated CAF's proposal it rated CAF as complying with Buy America. (See Ex. 1, Att. 10).

Copies of the proposals submitted by the pre-qualified LRV suppliers, and documents and communications related to those proposals, are contained in the thumb drive submitted as Ex. 29.

6. **Selection of CAF.** Please describe the process METRO and its Facility Provider(s) followed for selecting an LRV supplier and for awarding contracts to CAF. Include in your response a description of, and all documents pertaining to, the Best Value Analysis performed by METRO, as well as documents and communications related to the workshops held with each proposer. Please identify any Buy America issues that were discussed. Also, please explain why METRO and Washington Group selected CAF.

Answer:

On July 17, 2007, METRO and Washington Group held a Light Rail Vehicle Industry Forum ("Forum")(Ex. 30), followed by one-on-one meetings with each firm that attended the forum. At that time, METRO had a contract with Washington Group to be its Facility Provider for METRO Solutions Phase 1. The Facility Provider contract was titled the "Development Agreement." The Development Agreement stipulated that at the end of Phase 1, if agreement was reached regarding Phase 2, the parties would enter into an amendment to the Development Agreement

covering, in part, vehicle procurement. Although Washington Group did not ultimately become the facility provider for Phase 2, Washington Group was originally involved with the 103-car vehicle procurement.

Alstom Transportation Inc. ("Alstom"), Bombardier Transportation, CAF, Kinkisharyo International, LLC ("Kinkisharyo"), and Siemens Transportation Systems, Inc. ("Siemens") attended the Industry Forum. METRO and Washington Group held a separate meeting with AnsaldoBreda Inc. ("AnsaldoBreda"), which could not attend the vehicle forum due to scheduling conflicts. These firms were informed about: the overall procurement approach; METRO's LRV needs, requirements, and schedules; and the contracting mechanisms.

Washington Group issued RFP82427.8-01, dated August 31, 2007, for Light Rail Vehicles. (Ex. 1, Att. 3). The RFP informed proposers that a vehicle contractor would be selected using a two step process. Step 1 would consist of a review of the technical proposals for responsiveness to the requirements identified in the RFP. (*Id.*, p. 5).

Those firms meeting the Step 1 requirements would be invited to participate in Step 2, which would involve the submission of pricing and the negotiation of full scope and terms and conditions. (*Id.*, p. 6.) The RFP stated that award of the vehicle procurement contract "will be based upon the Contractor that offers the 'best value' to the program." (*Id.*)

Addendum No. 1 to the RFP (Ex. 1, Att. 4), issued on September 21, 2007, revised RFP technical requirements, answered questions, and extended the technical proposal due date to October 29, 2007. Addendum No. 2 (Ex. 1, Att. 5), issued on October 4, 2007, answered questions, revised RFP general instructions, and requested information for upcoming visits to the proposer's plants and to the transit agencies where LRVs manufactured by the proposer were in operation.

On October 29, 2007, Alstom, AnsaldoBreda, CAF, Kinkisharyo, Siemens, and SKODA Electric ("SKODA")⁹ submitted technical proposals. From November 3 through November 13, 2007, METRO teams conducted due diligence at the factories of Alstom, AnsaldoBreda, CAF, Kinkisharyo, Siemens and SKODA, as well as at locations where the proposers' LRVs were in use. The teams investigated the performance of the proposer's vehicles, the capabilities and performance of manufacturing facilities (including response time, QA/QC, safety, workmanship, and the ability to timely deliver the fleet of vehicles), and the proposer's working

⁹ Bombardier dropped out of the process.

relationships with its clients. The findings resulting from these visits are compiled in the attached "Carbuilder Visits Trip Report" (Ex. 31).

The Step 1 proposals were evaluated on a pass/fail basis. The proposals of Alstom, AnsaldoBreda, CAF, Kinkisharyo and Siemens passed. On December 18, 2007, these five companies were notified that they had been selected to proceed to Step 2, were given Addendum No. 3 to the RFP (Ex. 1, Att. 6), and participated in breakout sessions at METRO in which they answered METRO's and Washington Group's questions. Addendum No. 3 addressed revisions to the RFP and contained exhibits illustrating what METRO expected in a Step 2 proposal. Ex. B to Addendum No. 3 set forth the evaluation criteria and described the evaluation process:

6.3 Step 2 Evaluation Criteria

[Washington Group] will institute a private sector approach to the evaluation process that considers responsiveness to the RFP requirements, initial capital cost, proposed value added benefits, life cycle costs, and the proposed financing package if provided to determine the ultimate best value to METRO.

6.4 Step 2 Evaluation Process

All proposals will be evaluated using the criteria identified in section 6.3 above. During the evaluation process [Washington Group] will forward evaluators' questions, if any, to Proposers and/or request additional information regarding their proposals. In addition to receiving written answers to their questions or requests for information, evaluators may request oral presentations. Based on evaluation of all factors, evaluators will determine the competitive rank before initiating negotiations.

Ex. B further stated:

[Washington Group] reserves the right to negotiate with one or more Proposers which may include a Best and Final offer (BAFO) process.

(Ex. 1, Att. 6, p. 4). Addendum No. 3 added several appendices to the RFP that further clarified the factors to be considered. Appendix D set forth "Sample Life Cycle Cost Elements." (*Id.*, p. 7). Appendix E set forth the elements of the "Price Proposal." (*Id.*, p. 8). Appendix F spelled out

the "Step 2 Proposal Format," including sections for Technical Details and a Value Added Proposal as well as a Price Proposal. (*Id.*, p. 9).

Addendum No. 4 (Ex. 1, Att. 7), issued on January 17, 2008, specified that additional requests for information/clarification had to be received by January 25, 2008.

Addendum No. 5 (Ex. 1, Att. 8), issued on February 7, 2008, extended the commercial proposal due date to February 29, 2008 and also clarified certain provisions, including that the Step 2 proposers should include "all necessary details from the Step 1 proposal that correspond with the price of the vehicle offered in the Step 2 Proposal." (*Id.*, p. 3).

In the meantime, on December 4, 2007, FTA had written METRO that it could not participate in a vehicle procurement that did not require compliance with Buy America. (Ex. 4 to May 14, 2010 Letter, p. 2). The original RFP had stated that "[t]here is no requirement that the manufacturer must abide by any 'North American' or Federal Transit Administration standards, e.g., Buy America..., to the extent allowed by law." (Ex. 1, Att. 3, p. 2). On March 6, 2008, the FTA reiterated that Buy America compliance was required. (Ex. 7 to May 14, 2010 Letter, p. 2).

On February 29, 2008, Alstom, AnsaldoBreda, CAF, Kinkisharyo and Siemens submitted commercial proposals. (Ex. 29). However, METRO kept the proposals unopened and under lock and key pending a resolution of its discussions with the FTA about how to cure the Buy America deficiency in the RFP. On March 19 and March 20, 2008, METRO's CEO and staff telephoned the five Step 2 proposers to notify them that "Buy America" and other federal clauses would need to be added into the RFP. On March 20, 2008, METRO proposed to the FTA that METRO cure the deficiency in its RFP by sending an addendum to the Step 2 commercial proposers that made clear that compliance with Buy America was required. (Ex. 8 to May 14, 2010 Letter). On April 8, 2008, the FTA agreed with this approach. (Ex. 10 to May 14, 2010 Letter). That same day Washington Group sent Addendum No. 6 (Ex. 1, Att. 9) formally incorporating Buy America and other federal clauses into the procurement, and directing proposers to revise, substitute or revalidate proposals by April 22, 2008 (taking into account the Buy America requirement). All five (5) firms responded. (Exs. 12-16). CAF confirmed it would comply with Buy America regulations and revalidated its Step 2 commercial proposal, as did Kinkisharyo and Siemens. (Exs. 13, 15, and 16). Alstom revalidated its Step 2 proposal, although Alstom mentioned that its facility in France would manufacture the first two LRVs. AnsaldoBreda also revalidated its Step 2 proposal.

On April 29, 2008, METRO announced that Parsons had replaced the Washington Group as facility provider.

On April 30, 2008, METRO opened the five Step 2 proposals. METRO and Parsons began to conduct their evaluation of all proposals in accordance with a Proposal Review and Evaluation Procedure. (Ex. 1, Att. 11).

On June 9, 10, and 11, 2008, METRO brought the Step 2 proposers back to METRO for workshops that addressed outstanding questions, technical information, value added features, financing, maintenance and warranties. At that time METRO received revised pricing from the proposers.

METRO developed an initial comparison matrix (Ex. 1, Att. 12), which ranked the proposers as follows:

- #1 CAF
- #2 AnsaldoBreda
- #3 Alstom
- #4 Siemens
- #5 Kinkisharyo

Six reviewers then completed an evaluation of each proposal and assigned scores of 1 (lowest) to 5 (highest) in five different categories, one of which was "Buy America and ADA Compliance." (See Ex. 1, Att. 10). The six reviewers' scores were then averaged for each category and added together for a total. Based on the total scores, the proposers were ranked as follows (with their average score totals in parentheses):

- #1 CAF (22)
- #2 Siemens (14)
- #3 Kinkisharyo (13)
- #4 Alstom (12)
- #5 AnsaldoBreda (10)

Having evaluated all factors and determining the competitive rank of the proposers, in accordance with Addendum 3 (Ex. 1, Att. 6, p. 4, sec. 6.4), METRO decided to begin negotiations with best-ranked CAF, with which it negotiated and held workshops during the summer and early fall of 2008. On October 2, 2008, METRO issued letters requesting vehicle suppliers to extend pricing through December 31, 2008. (Ex. 32).

After intensive review and analysis of all of the technical proposals, commercial proposals and value added offers, METRO decided not to request BAFOs. (Addendum No. 3 accorded METRO the right, but not the obligation, to request BAFOs. Ex. 1, Att. 6, p. 4). On November 6, 2008, METRO sent letters to all the proposers advising them that METRO had decided not to request BAFOs, but had started discussions with the top-value-ranked vehicle supplier. (Ex. 33). The letter stated that if those discussions failed, METRO would begin negotiations with the second-ranked supplier. (*Id.*).

The suppliers continued to express interest in BAFOs, however, citing changing market conditions and foreign exchange rates. Alstom wrote METRO that Alstom could offer more competitive figures than it had previously offered. (Ex. 34).

METRO thus decided to invite each vehicle supplier to come to Houston on January 20, 21, or 22, 2009 and give a half-day presentation explaining its reasoning in favor of or against BAFOs. (Exs. 35, 36, and 38). To accommodate this process, METRO requested an extension of the prior proposals through March 31, 2009. (Ex. 36). CAF responded with an objection to the procurement process remaining open, pointing out that CAF's price had already been made public -- having been given to FTA as part of its risk assessment in connection with the Full Funding Grant Agreement -- potentially giving unfair advantage to CAF's competitors should a BAFO invitation be issued. (Ex. 37).

The suppliers did come to Houston, and all except CAF favored BAFOs. However, only Alstom provided highlights of planned changes along with the price impact. (See Ex. 29, thumb drive, which contains Alstom's power-point presentation and recordings of the meetings). AnsaldoBreda, Kinkisharyo, and Siemens presented no new information and no enhancements or improvements to their previous offers.

METRO then provided the Step 2 suppliers one more opportunity to justify BAFOs, transmitting a questionnaire to Alstom, AnsaldoBreda, Kinkisharyo and Siemens asking for the best price offered for vehicle supply and vehicle maintenance and services at the present time. (Ex. 39). The questionnaire also required the suppliers to affirm compliance with Buy America. (*Id.*). The survey questionnaire was not sent to CAF, because CAF did not want to participate.

Based on the responses received (Ex. 40), METRO and Parsons determined that Alstom's proposal merited further clarification, and held a follow-up meeting with Alstom on February 3, 2009. METRO and Parsons

gave Alstom written questions requesting a more definitive technical clarification along with the fixed-price proposal. (Ex. 41). On February 16, 2009, METRO's Vehicle Committee met and decided to postpone the award decision until after hearing from Alstom. After having missed several deadlines, Alstom submitted revised information on February 18, 2009. (Ex. 42). Among other points, Alstom confirmed its compliance with Buy America. (Ex. 42, p. 1). A detailed explanation of Alstom's changes during January and February of 2008 is contained in Ex. 1, Att. 14, pp. 5-8.

On February 17, 2009 and Feb. 18, 2009, the vehicle committee met again. (See Ex. 1, Att. 13, the committee meeting minutes from both days). Its evaluation is described in detail in Ex. 1, Att. 14. As shown from the February 18, 2009 Vehicle Committee Meeting Notes (Att. 1, Ex. 13), Alstom's price was still approximately \$8 million higher than CAF's. CAF's vehicle supply cost was slightly lower than Alstom's, but the per vehicle maintenance cost comparisons added substantially to the differential. Alstom's per-vehicle maintenance cost for the first year was \$202,735, while CAF's was \$211,964. However, CAF's maintenance price was to be fixed for 8 years, whereas Alstom would only assume a 1% increase in inflation per year, with everything else beyond 1% to be billed to METRO. The risk-of-inflation benefit from CAF's proposal was calculated to be \$15 million. Overall, therefore, CAF's price was \$8 million cheaper than Alstom's.

On March 4, 2009, METRO's Vehicle Committee issued a Vehicle Procurement Report, which discussed Alstom's revised proposal, but concluded that CAF's proposal continued to offer the "best value," in part "by providing fixed pricing over the entire vehicle supply and vehicle maintenance periods. The offer reduces METRO's risk exposure to incur costs due to market and foreign exchange uncertainties over a long period." (Ex. 1, Att. 14, p. 9.) The "best value" determination was also based on the fact that CAF's proposal "[m]eets legal requirements including full compliance with BA and ADA." (*Id.*)

Also on March 4, 2009, METRO's Board of Directors held a special Board Meeting and authorized METRO to contract with CAF. (Ex. 1, Att. 15). The minutes noted that CAF "was committed to compliance with ... Buy America." (Ex. 1, Att. 15, p. 2).

On March 6, 2009, CAF requested that METRO pursue a waiver of the Buy America final assembly requirement (not the component requirement) with respect to two of the 103 LRVs, wanting to assemble them at its "Center of Excellence" in Beasain, Spain. (Ex. 13 to May 14, 2010 Letter).

METRO requested a "public interest" waiver with respect to assembly only of the first two LRVs. (Ex. 13 to May 14, 2010 Letter). However, on April 14, 2009, FTA denied METRO's waiver request (Ex. 16).¹⁰

METRO and CAF signed the LRV Supply Contract CT0800138 on April 22, 2009. (Ex. 19 to May 14, 2010 Letter). The LRV Supply Contract requires compliance with Buy America (Ex. 19 to May 14, 2010 Letter, Appendix Q-1, p. 9), and the supplier – Houston LRV 100, L.L.C.¹¹ -- has certified compliance. (See Ex. 17).

In addition to the exhibits referenced in the narrative, Ex. 29 (the thumb drive) includes documents pertaining to the Best Value Analysis performed by METRO, as well as documents and communications related to the workshops held with each proposer. Also, discussions and communications concerning CAF's request for a public interest waiver with respect to the first two cars are described in the May 14, 2010 Letter, pp. 3-5.

- 7. Certificate of Compliance submitted by CAF.** I find that the Buy America Certificate of Compliance submitted by CAF, and enclosed by METRO as Exhibit 13 to its May 14, 2010, letter to FTA, is undated. On what date did CAF sign this Certificate of Compliance? When did METRO receive CAF's Certificate of Compliance? What documents are available to confirm these facts?

Answer:

CAF signed the Buy America certificate of compliance at METRO in Houston while attending a June 10, 2008 workshop. (See Ex. 17, which references the workshop).

- 8. Buy America Certificates submitted by other LRV manufacturers.** Please submit copies of all Buy America certificates submitted by LRV manufacturers proposing to supply LRVs for the North and Southeast Corridor projects.

¹⁰ A fuller discussion of the request for a waiver is contained in the May 14, 2010 Letter. In the meantime, on March 25, 2009, METRO issued a letter to CAF asking for an extension of pricing for another three months (through June 30, 2009) during finalization of contract negotiations. (Ex. 43).

¹¹ The 103-Car Contract is between METRO and Parsons. Parsons assigned the contract to Houston LRV 100 LLC, owned 99% by CAF and 1% by Parsons.

Answer:

On April 8, 2008, Washington Group sent all Step 2 LRV proposers addendum No. 6 which set forth language addressing applicable Federal procurement requirements including, but not limited to Buy America compliance. In the letter transmitting the addendum, the proposers were specifically informed that they were required to execute and submit certain certifications addressing compliance with Federal requirements, but were informed that they were not required to submit a Buy America certification at that time. Kinkisharyo was the only proposer that submitted a certificate of compliance at that time. (Ex. 44). CAF submitted its certificate of compliance on June 10, 2008. (See attachment to Ex. 13 to May 14, 2010 Letter).

9. **METRO's due diligence.** Please indicate whether, and if so, when and how METRO and Washington Group assessed the ability of CAF and all other prequalified LRV suppliers to comply with the Buy America requirements. Please explain whether METRO identified any inconsistencies between the Buy America requirements, the Buy America certificates submitted by all pre-qualified LRV suppliers, and their technical and commercial proposals.

Answer:

In Addendum No. 6, METRO made clear to proposers that they would need to comply with Buy America. Alstom's response to Addendum No. 6 stated its intention to assemble the first two cars (out of the 103) in France, an inconsistency with Buy America. AnsaldoBreda's response to Addendum No. 6 did not address Buy America. During their subsequent presentations to METRO and Parsons on January 20, 2009, both Alstom and AnsaldoBreda stated their intention to build a certain number of vehicles outside of the United States (two vehicles, in the case of Alstom, and more vehicles, in the case of AnsaldoBreda. (See Ex. 29, the thumb drive, which contains a recording of the January 20, 2009 meeting. See also Ex. 45, a slide from Alstom's presentation to METRO.) While CAF had stated in its technical proposal that it intended to manufacture the first two vehicles in Spain, it subsequently communicated in writing that it would comply with Buy America after METRO clarified that Buy America requirements applied to the procurement. CAF later asked METRO to seek a waiver to build the first two cars in Spain, but METRO did not consider that request to be inconsistent with CAF's ability to comply with Buy America if the waiver were denied. CAF could -- and will -- build all the cars under the 103-car contract at its United States facility.

10. **CAF's request for Buy America waiver.** By letter dated March 6, 2009, CAF requested a Buy America waiver for the final assembly requirements of 49 CFR 661.11(a) for two pilot LRV's. Did other qualified LRV suppliers indicate a need for or request a waiver of the Buy America requirements? If so, please provide a copy of all such requests and METRO's responses.

Answer:

See answer to no. 9. See also Ex. 1, Att. 10 (certain evaluation sheets reference potential waivers for Alstom and AnsaldoBreda). No other qualified suppliers requested that METRO apply for a waiver.

11. **Communication and documents related to the production of pilot LRVs in Spain.** Please submit records of all communications, including but not limited to letters, meeting notes, video and audio recordings, electronic mail and voice messages, between METRO or its Facility Provider(s) and CAF regarding FTA's Buy America rules, the pilot LRVs, and plans to produce the pilot LRVs in Spain.

Answer:

Responsive records are being submitted.

12. **Board Resolution 2009-12.** Please submit copies of all documents and communications related to METRO Board Resolution 2009-12.

Answer:

METRO Resolution 2009-12 was passed on March 4, 2009 during a Special Meeting of the Board of Directors. It was passed by unanimous vote. A copy of the resolution, back-up materials and other documents related to the Board action are being submitted as part of Ex. 29.

13. **Fair and open competition.** Please explain whether METRO believes or has reason to believe that any party may have been prejudiced or excluded from supplying LRVs to METRO as a result of the subsequent, separate contract for the pilot LRVs.

Answer:

METRO does not believe, nor does it have reason to believe, that any party was prejudiced or excluded from supplying LRVs to METRO as a result of the separate contract for pilot vehicles. To the contrary, the procurement process was eminently fair. All proposers bid to supply 103

cars. All proposers had access to the same information for purposes of preparing their technical and price proposals. All responsive proposals were evaluated and ranked under the same evaluation criteria – including compliance with Buy America -- which were known to all parties. The decision regarding the two locally funded pilot LRVs was made long after the submittal of proposals in the base order procurement, after evaluation and ranking of those proposals, and after METRO and Parsons had decided to award the 103-vehicle contract to CAF. Thus, the separate, locally-funded 2-vehicle contract did not have any impact on the base order procurement or the fair and open nature of that procurement process.

Alstom's May 27, 2010 letter to Dorval Carter ("Alstom's Letter") rests on its inaccurate understanding that the 103-car contract has been split into two contracts. (Alstom's Letter, p. 2). There has been no change in the number of vehicles to be manufactured under the 103-car contract. CAF remains and will remain obligated to supply 103 Buy America-compliant LRVs. Thus, Alstom is mistaken in asserting that METRO "chang[ed] the criteria for final assembly after award,....," and that "METRO's post-award attempt to split the contract invites abuse." *Id.*

Alstom is further incorrect in surmising that "there were two sets of procurement requirements....," one for CAF and one for others. (*Id.*) The same procurement requirements for the 103-car contract applied to both CAF and Alstom.

The procurement process described above – including the extensive and careful evaluation process -- determined that CAF's proposal offered the best value to METRO. The procurement process assumed CAF's compliance with Buy America with respect to the 103-car contract.

For the reasons stated above, METRO believes that a fair and open process was conducted for the vehicle supply procurement.

14. **Third party communications.** Please indicate whether any party other than FTA has brought to METRO's attention, through oral or written communication, any issue related to FTA's Buy America or competitive procurement requirements.

Answer:

METRO has received several requests under the Texas Public Information Act for documents and information related to the acquisition of the LRVs. Five of these requests received since January 30, 2010 were submitted by

Paul Magaziner, a private citizen, in which he makes certain assertions regarding METRO's compliance with Buy America in the acquisition of the light rail vehicles. A schedule of these requests is attached as Ex. 46.

In conclusion, METRO remains firmly committed to Buy America, and believes its procurement process has been fair and open and in compliance with Buy America. Again, we appreciate your consideration of our response and submitted documents and materials.