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May 14, 2010

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

RE: Buy America

Dear Mr. Carter:

Thank you for your April 23, 2010 letter (the "Letter") to the Metropolitan Transit Authority of Harris County, Texas ("METRO") regarding METRO's compliance with Buy America requirements. METRO's board members and staff, as well as representatives of Houston Mayor Annise Parker, very much appreciated the opportunity to meet with you, Administrator Rogoff and FTA staff on April 29, 2010 to discuss your concerns in person. We are all fully committed to working with you and FTA to resolve this issue in a manner satisfactory to the FTA.

To summarize, for the reasons set forth below, and based on the exhibits to this letter, METRO respectfully believes that we are in compliance with the FTA's Buy America requirements. We appreciate your consideration of our position.

I. Buy America Compliance with Respect to the Vehicle Supply Contracts

a. Summary of METRO's position

We understand that the basis for FTA's review is its understanding "that METRO, through its contracts with its facility provider, Parsons Transportation Group ("Parsons"), and light rail vehicle ("LRV") manufacturer, Construcciones & Auxiliar de Ferrocarriles ("CAF"), may be planning to produce pilot LRVs in Spain for use on the federally funded North and Southeast Corridor projects." (Letter, p. 1). We appreciate the opportunity to

clear up this misunderstanding. Specifically, while METRO has contracted for two LRVs to be assembled at CAF's facility in Spain, METRO is paying for these two LRVs with purely local funds and they will not be used on the federally funded rail lines.

b. Relevant Background

i. METRO Issues an RFP for Rail Car Procurement

By way of background, on August 31, 2007, Washington Group Transit Management Company ("WGTMC"), METRO's original facility provider, issued a Request for Proposal ("RFP") for 103 LRVs, with an option to purchase 75 additional LRVs. (Ex. 1). Twenty-nine of the 103 cars were to be used on the North and Southeast corridor lines for which METRO is seeking federal funding. The RFP sought proposals for low floor vehicles that had "proven designs which require minimal modification to match the Houston environment, and which comply with the minimum requirements....," and stated that the contract would be awarded to the proposer who offered the best value to METRO. (Ex. 1, pp. 5-6).

The RFP specified a two-step proposal process. In Step 1, proposers were to submit a "technical proposal" with their proposed LRV designs and other technical information. (See Ex. 8, pp. 1-2). In Step 2, those proposers whose technical proposals met METRO's criteria would then be invited to submit a commercial proposal with pricing and other terms and conditions. (See Ex. 8, p. 2).

The RFP further 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, p. 5). In fact, Buy America requirements apply to the procurement of rail cars using federal transit funds. For the procurement of rail cars, Buy America requires that: (1) the cost of components produced in the United States must total more than 60% of the cost of all components of the rail cars; and (2) final assembly of the rail cars must occur in the United States. See 49 C.F.R. 661.11(a).

The RFP contained no mention of or requirement for pilot vehicles.

ii. CAF USA and Other Companies Submit Technical Proposals

CAF's United States affiliate, CAF USA, submitted its technical proposal to WGI on October 29, 2007 (Ex. 2). CAF USA proposed manufacturing two prototype vehicles in Spain, with all other manufacturing operations to take place in the U.S. (Ex. 3, p. 3). Other companies submitted technical proposals to WGI as well. Based on the technical proposals, METRO qualified certain suppliers, including CAF USA, to submit commercial proposals. (Ex. 5, p. 1).

iii. FTA Advises METRO that RFP Must Notify Proposers of Buy America Requirements

On December 4, 2007, FTA wrote METRO that "FTA cannot financially participate in vehicle procurements,....when the procurement departs from Federal procurement rules, including Buy America." (Ex. 4, p. 2). On March 6, 2008, FTA reiterated that the RFP needed to include "an appropriate notice of the Buy America requirements for any vehicles used in federally funded projects...." (Ex. 7, p. 2).

iv. FTA Approves Metro's Issuance of a Buy America Addendum to the RFP

METRO then proposed to the FTA that METRO cure the deficiency in its RFP by sending an addendum to Step 2 commercial proposers that made clear that compliance with Buy America was required. (Ex. 8, Ex. 9).

On April 8, 2008, FTA agreed with this approach, advising METRO that: "You may cure the deficiencies in the original RFP by issuing an addendum informing suppliers that this procurement will be subject to applicable Federal procurement requirements, including but not limited to Buy America" (Ex. 10, p. 2). That same day WGTMC sent the FTA-approved addendum to Step 2 bidders, including CAF USA. (Ex. 11).

CAF USA then sent METRO an April 18, 2008 letter confirming compliance with Buy America (Ex. 12), and later submitted a certificate of compliance (See Ex.13, attached "Exhibit B").

v. CAF USA and Others Submit Commercial Proposals; METRO selects CAF USA as Vehicle Supplier

On April 30, 2008 METRO opened the Step 2 commercial proposals from the five qualified proposers, including CAF USA. METRO staff evaluated the proposals. (Ex. 30). METRO also held individual workshops with each of the qualified proposers. Ultimately, the evaluation team determined that CAF USA's proposal offered the best value to METRO.

Accordingly, in the Summer of 2008, METRO began negotiations with CAF for a 103-car LRV contract (with option to purchase 75 more LRVs).

vi. At CAF's Request, METRO Seeks a Buy America Waiver from FTA with Respect to Assembly of 2 of the Rail Cars

CAF USA requested that METRO pursue a waiver of the Buy America final assembly requirement with respect to two of the 103 LRVs. (See CAF USA's March 6, 2009 letter attached to Ex.13). CAF did not seek a waiver of the Buy America component

requirement. Because CAF had not built 100% low floor vehicles for use in the United States before, for safety and quality reasons it wanted to assemble and test the first two LRVs on CAF's specially designed test track at its "Center of Excellence" in Beasain, Spain:

The proposed [LRV] is a 100% Low Floor Vehicle and will be for the first time delivered in the US, introducing significantly new technology. It is extremely important and critical that first two pilot vehicles should be designed, modified, and tested to comply with [the Americans with Disabilities Act], Buy America and safety requirements as well as Houston environmental conditions.

It is CAF's experience that the production of the vehicles at the same location as the engineering is the most efficient way to manage a project at its initial stages. CAF's main Engineering and its prime R&D center are located in Besain [sic], Spain, at the same site of its main production facility. Beasain will be the location for the design, testing, quality, safety; reliability and debugging of any design or performance issues including test runs...., before production is ready to be transferred to our factory in Elmira Heights, NY for the rest of the series. The closeness with Engineering will also ensure that the components and assemblies of the vehicles will interface properly and operate in accordance with its performance & design parameters.

Granting a waiver for the assembly of two pilot vehicles is in the public's interest, since it will expedite the manufacturing and delivery of the production vehicles from our Plant in NY to achieve Metro's revenue ready status.

(*Id.*)

METRO concurred with CAF's reasoning, and on March 23, 2009, METRO requested that FTA grant a "public interest" waiver from Buy America requirements with respect to assembly only (not components) of the first two LRVs. (Ex. 13). Seeking the Buy America waiver for the two vehicles was a good faith action by METRO based on FTA's past practices. Specifically, in the ten-year period prior to the METRO request, FTA had granted major transit agencies at least ten public interest waivers for prototype vehicles. See www.fta.dot.gov/law/legreg178.html.

vii. FTA Denies METRO's Waiver Request and METRO Enters Into 103-Car Contract

However, on April 14, 2009, FTA denied METRO's waiver request (Ex. 16). FTA explained, in part, that CAF had certified compliance with Buy America in its commercial response to the RFP, and was bound by its certification. (Ex. 16, pp. 3-4). Moreover,

while FTA acknowledged that it had granted public interest waivers for pilot vehicles in the past, it did not find grounds for a public interest waiver in this case. (Ex.16, p. 4).¹

Thus, on April 22, 2009, METRO entered into a contract for the purchase of 103 Buy America-compliant LRVs (the "103-Car Contract"). (Ex.19).² CAF's Buy America certification was made a part of the contract and CAF is bound to comply with Buy America requirements for each of the 103 vehicles. (See Ex. 20; see also Ex. 19, Appendix Q -1, p. 11). METRO conducted the required Buy America Pre-Award Audit with respect to the 103 vehicles. (Ex. 17).

viii. Metro Considers Purchasing, with Local Funds, 2 LRVs that Will be Built in Spain; Outside Counsel, in Conjunction with FTA, Says Approach Would Not Violate FTA's Buy America Requirements

METRO remained convinced that it would promote quality and safety for CAF to be able to build and assemble two railcars in Spain to be used as prototypes. Because the Buy America regulations apply only to federally funded projects, METRO considered whether it could obtain two such prototype railcars with purely local funds.

Specifically, while the March 23, 2009 waiver request was pending, METRO and its outside counsel communicated with FTA counsel regarding the possibility of METRO's leasing or purchasing, with local funds, two LRVs that would be manufactured in Spain. Outside counsel Ed Gill ("Gill") and Kent Woodman, of the law firm Thompson Coburn LLP, advised METRO that they believed such an approach would not violate FTA's Buy America requirements. On or about April 9, 2009, METRO sent a letter to the FTA Acting Chief Counsel Scott Biehl ("Biehl") describing METRO's idea of leasing two LRVs for testing purposes. (Ex. 14). Then on April 16, 2009, after denial of the waiver, Gill contacted Biehl by voicemail, soliciting his guidance, in part, on whether an outright purchase of the LRVs with purely local funds would reconcile with Buy America. In a reply voicemail on April 17, 2009, Biehl responded, in pertinent part:

Ed you nailed it. The answer is we don't care. FTA doesn't care and I'm sorry everybody has been a little disjointed about all this but in short, a couple of days ago I asked Eldridge Onco [FTA Regional Counsel in Fort

¹ METRO's files indicate that its general counsel may have e-mailed FTA asking it to reconsider the denial of the waiver. See Ex. 15, a draft e-mail letter from METRO's general counsel erroneously dated April 9, 2009. (The date cannot be correct as the body of the letter references the April 14, 2009 waiver denial.) METRO has been unable to determine that the e-mail was actually sent to FTA.

² The 103-Car Contract is between METRO and Parsons Transportation Group, Inc. ("Parsons"), METRO's current facility provider. Parsons assigned the contract to Houston LRV 100 LLC, which is owned 99% by CAF USA and 1% by Parsons.

Worth] to return a phone call from Pauline Higgins and Eldridge told Ms. Higgins that you know where you're doing that prototype acquisition with local funds only, FTA doesn't much care and we're not going to respond to her letter of a week ago [April 9, 2009], per se....

(Ex. 18).

ix. Metro Proceeds with 2-Car Contract

Thus, based on communications with FTA and advice of counsel, METRO believed that the procurement of the two LRVs with local funds would not implicate – and would certainly not violate -- Buy America requirements. On April 23, 2009, METRO's board authorized the President and CEO to negotiate a sole source contract with CAF for two LRVs. The Executive Decision Document stated that:

"METRO Operations proposes to purchase or lease with an option to purchase two (2) 100% low floor LRV's with terms most favorable to METRO. A separate purchase of the LRVs will allow METRO to undertake due diligence in terms of their quality assurance, reliability, operability, maintainability and safety issues. Additionally, it will help METRO in planning for LRVs' integration and verification of onboard systems design, manufacturing process control with Main Street wayside power, signaling and communications elements as well as for their field testing support, training and staffing activities. It is essential that these two (2) vehicles are identical in design, manufacture, assembly and testing aspects to the 103 vehicles being considered separately for METRO Solutions as a capital purchase.

(Ex.21). On June 25, 2009, METRO issued a notice to proceed with the two cars (Ex. 22) and on August 26, 2009, formally executed the 2-car Vehicle Supply Contract (the "2-Car Contract"). (Ex. 23).³

The 103-Car Contract remains in place. In connection with execution of the 2-Car Contract, METRO and CAF discussed removing two vehicles from the 103-Car contract and documents were drafted to reflect the change. (See reference to reduction in Ex. 24; see also Ex. 25, 29). Ultimately, however, METRO did not sign the amendments reducing its purchase obligation under the 103-Car Contract.

³ The Two-Car Contract is between METRO and Houston LRV 100 LLC.

c. Conclusion: METRO is in compliance with Buy America

For the foregoing reasons, METRO respectfully believes we are in compliance with Buy America. METRO will be purchasing 103 Buy-America compliant LRVs. The 2 LRVs that CAF plans to assemble in Spain are being paid for with local funds, and will not be used on federally funded lines.

2. Buy America Compliance on Facility Provider Contracts

In your letter you have also requested assurances that METRO otherwise complied with Buy America on its other contracts and subcontracts. As you know, METRO Solutions is a large and complex project. The other relevant contracts would be: (i) the Facility Provider contract with Parsons Transportation Group Inc. ("Parsons"); (ii) the Design-Build contract with Houston Rapid Transit JV ("HRT"), a joint venture consisting of Parsons, Granite Construction Company, Kiewit Texas Construction L.P., and Stacy and Witbeck Inc.; and (iii) the Operations and Maintenance contract with Houston Operations and Maintenance LLC ("HOM"), a joint venture between Veolia Transportation Services, Inc. and Parsons. (Ex. 26).

Parsons, as facility provider, is responsible for the management, coordination and integration of all of the work under these major contracts until five years after the date that Revenue Ready Status has been achieved. Parsons' work is "professional services" and does not include buying materials or equipment. Our understanding is that Buy America does not apply to the Facility Provider Contract and, as such, there is no Buy America certification for this contract. However, HRT, the Design-Builder, is required to comply with Buy America, and has submitted the attached certificate indicating its commitment to comply (Ex. 27). HOM is also required to comply with Buy America, although Buy America requirements would not apply to the current initial phase since it is for professional services only, and consists primarily of the development of training programs and operational plans in preparation for service delivery. Prior to the start of the subsequent operation and maintenance phase, HOM will submit its Buy America certificate. As previously stated, CAF has signed a Buy America certificate for the 103 vehicles and for the remaining option vehicles.

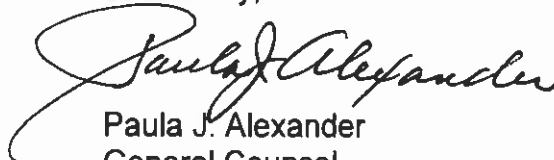
METRO has initiated a process for periodic audits of the major contractors, including the facility provider, to ensure that all federal requirements are met in their respective procurements. (See Ex. 28, a non-conformance log generated pursuant to METRO's quality control process. The log shows four instances in which non-Buy America-compliant materials were discovered and rejected.) These quality control results will be reviewed with the Project Management Oversight contractor in monthly and quarterly meetings.

3. Conclusion

In conclusion, METRO appreciates both the importance of Buy America and the FTA's vigilance in ensuring compliance. We hope the foregoing letter addresses FTA's concerns. We would very much appreciate the opportunity to schedule a meeting with you to discuss this letter and to seek your guidance as to how we can address any remaining issues on the North and Southeast corridor projects so that we can move forward with these important projects.

Thank you so much for your consideration.

Yours truly,



Paula J. Alexander
General Counsel

cc: Bob Patrick
Regional Administrator/FTA

Chairman Gilbert A. Garcia
METRO Board of Directors

George Greanias
Acting President & CEO of METRO

Houston Congressional Delegation