



U.S. Department
Of Transportation
**Federal Transit
Administration**

Chief Counsel

1200 New Jersey Avenue S.E.
Washington DC 20590

AUG 3 2012

Ms. Virginia Verdeja
Vice President Sales
CAF USA, Inc.
1401 K Street, N.W.
Suite 1003
Washington, D.C. 20005

Re: Appeal of Los Angeles Metropolitan Transportation Authority's Protest Denial,
Request for Proposals for New Light Rail Vehicles, RFP No. P3010

Dear Ms. Verdeja:

This letter is the decision of the Federal Transit Administration (FTA) on the May 31, 2012 protest appeal filed by CAF USA, Inc. (CAF). CAF appealed the Los Angeles County Metropolitan Transportation Authority's (LACMTA) May 23, 2012 denial of its protest, which challenged LACMTA's decision to award a contract to Kinkisharyo International (KI) pursuant to a Request for Proposals (RFP) for New Light Rail Vehicles (LRVs), No. P3010. After careful consideration, FTA denies CAF's appeal for the reasons set forth below.

I. Issues Raised on Appeal

Through its appeal, CAF alleges that LACMTA violated two requirements applicable to federally funded procurements—(a) Buy America and (b) full and open competition. In addition, subsequent to its appeal, CAF questioned (c) whether LACMTA's policy and practice of deleting e-mail messages after 30 days may have hampered this protest appeal.

II. FTA Protest Appeal Authority

In considering a third party protest appeal, FTA applies its third party contracting requirements set forth in 49 U.S.C. § 5325, the "Common Grant Rule" set forth at 49 C.F.R. § 18.36, FTA's "Third Party Contracting Guidance" (Circular 4220.1F), and Section 15 of FTA's Master Agreement. Reviews of such protests by FTA are limited to (1) a recipient's failure to have or comply with its protest procedures, or its failure to

review a protest; or (2) violations of Federal law or regulations.¹ FTA will not consider every appeal of a recipient's protest decision, however, merely because a Federal law or regulation may be involved. Instead, FTA will exercise discretionary jurisdiction over those appeals involving issues important to FTA's overall public transportation program.²

III. Discussion

In its protest appeal, CAF does not allege LACMTA failed to have or comply with its protest procedures, or to review a protest. Instead, CAF alleges LACMTA violated requirements applicable to federally funded procurements: (a) Buy America; and (b) the "full and open competition" requirement applicable to all federally funded procurements. Additionally, subsequent to its appeal, CAF questioned LACMTA's policy and practice of deleting e-mail messages after 30 days.

As explained below, FTA declines to exercise jurisdiction over this protest and denies CAF's appeal because FTA has already addressed the alleged Buy America issue, some of the issues raised by CAF are either untimely or moot, and other allegations raised by CAF do not implicate significant Federal concerns and are best left to be resolved at the State or local level.

a. Alleged violations of Buy America Rules

CAF alleges that KI's proposal does not comply with the Buy America final assembly requirements because, according to CAF, the "pilot cars" would be assembled in Japan. FTA's Buy America rules require that final assembly for rail cars must be performed in the United States as outlined in Appendix D of 49 C.F.R. § 661.11.

Buy America is a top priority of the Obama Administration. Enforcement of this requirement is central to FTA's ability to create and retain jobs in manufacturing. To this end, FTA has raised the bar for Buy America waivers (resulting in a reduction of waivers from 42 in fiscal year 2009 to 3 in fiscal year 2012) and implemented new oversight protocol for reviewing Buy America compliance. Because of the importance FTA places on the Buy America requirements, it carefully considered CAF's allegations that LACMTA may have violated Buy America.

In fact, because of its concern for Buy America compliance, FTA previously reviewed KI's production plan for the limited purpose of determining whether it met the final assembly requirements. In a letter dated May 22, 2012 (enclosed), FTA determined that KI's manufacturing plan is consistent with Buy America. The test railcars to be

¹ 49 C.F.R. § 18.36(b)(12); Circular 4220.1F, § VII.1.b(2)(a)-(b) (Feb. 15, 2011).

² Circular 4220.1F, § VII.1.b(2)(b) (Feb. 15, 2011).

assembled in Japan are prototype railcars and not pilot railcars.³ Prototypes do not survive testing. With the exception of the car shells, no components of the prototype railcars will be incorporated into the pilot railcars and production vehicles. KI will assemble and perform in-plant testing in the United States on all pilot railcars and production vehicles. On this basis, FTA found that KI's plan is in compliance with the final assembly requirements at Appendix D of 49 C.F.R. § 661.11.

CAF has presented no additional facts to FTA that it did not know at the time of the original decision letter to LACMTA. As a result, FTA will not revisit this issue and declines to exercise any further jurisdiction over this subject of the protest.

CAF further alleges that climate room testing must be conducted in the United States in order to comply with the final assembly requirements at Appendix D of 49 C.F.R. § 661.11. FTA does not agree with this interpretation as there is nothing in the final assembly requirements at Appendix D of 49 C.F.R. § 661.11 that specifically require climate room testing to be performed in the United States as part of final assembly⁴ and, as long as all Federal requirements are met, the timing and location of this testing is a technical requirement determined by LACMTA.⁵

Finally, CAF alleges that LACMTA failed to conduct a pre-award audit as required by 49 C.F.R. Part 663, Subpart B. FTA requires that recipients of FTA funding conduct and complete, among other things, a pre-award audit when purchasing revenue service rolling stock prior to entering into a formal contract for the purchase of such rolling stock and certify compliance with Buy America as part of the pre-award audit requirement.⁶ As with all procurements of rolling stock funded with FTA funds, LACMTA must comply with all Federal requirements, including the pre-award (and post-award) audit requirements of 49 C.F.R. Part 663. On May 2, 2012, LACMTA, through an independent auditor, completed the pre-award audit required under 49 C.F.R. Part 663, Subpart B, and, on May 18, 2012, LACMTA certified compliance with this requirement. Therefore, at this time, LACMTA appears to be in compliance with this requirement and FTA considers this issue moot. I note, however, that FTA reserves the right to subject LACMTA's procurement to an independent review or audit by FTA to further validate Buy America compliance by its contractor. This decision should not be viewed as making any determination relative to any subsequent review or audit that FTA may choose to conduct on this procurement.

³ Letter from Dorval R. Carter, Chief Counsel, Federal Transit Administration, to G. Kent Woodman, Esq., Thompson Coburn LLP, Counsel to Los Angeles County Metropolitan Transportation Authority (May 22, 2012).

⁴ *See also id.*; Letter from Dorval R. Carter, Jr., Chief Counsel, Federal Transit Administration, to Ysela Llorca, Director, Miami-Dade Transit (April 2, 2012).

⁵ I note that § 17 of the Technical Specification for RFP No. P3010 seems to indicate that even design conformance tests, such as climate room testing, must be conducted on production vehicles. At the very least, the language is ambiguous. However, FTA believes that this is a matter of interpretation that is best resolved between the recipient and the offerors as part of the procurement process.

⁶ 49 C.F.R. §§ 663.21, 663.25.

b. Alleged Violations of Full and Open Competition Requirement

CAF alleges a number of violations of the full and open competition requirement with respect to LACMTA's U.S. Employment Program requirement in its RFP P3010, Amendment No. 19: (1) LACMTA's evaluation of the number of U.S. jobs created, but not the number of jobs retained; (2) LACMTA's acceptance of KI's U.S. Employment Plan; (3) LACMTA's "redoing [of] the US Employment Plan jobs numbers for presentation to the [LACMTA] Board in a way that favored KI and disfavored the other bidders"; and (4) LACMTA's requirement that bidders provide, in their U.S. Jobs Plan Labor Value Form, "the City and State where the work would take place because it indicated unlawful local preference. In addition, CAF alleges a violation of the full and open competition requirement because LACMTA requested that KI change its proposal after the deadline for submission of Best and Final Offers (BAFO) because a proposed subcontractor is on the Federal Excluded Parties List System (EPLS).

Section 5325(a) of 49 U.S.C. requires "full and open competition" for all federally funded procurements such as LACMTA's purchase of new LRVs under RFP No. P3010. However, CAF is alleging all such violations of the full and open competition requirement for the first time on appeal to FTA and FTA finds that CAF should have first raised them in its protest to LACMTA in order to give LACMTA the opportunity to respond and address CAF's allegations. Moreover, even if CAF had raised these issues appropriately, in a letter dated May 6, 2011, FTA previously found that LACMTA could evaluate the offerors' employment plans as they relate to job creation in the United States is permissible under Federal law and FTA finds it unnecessary to revisit the issue.⁷

Regarding LACMTA's evaluation of KI's proposal and request that KI use a different subcontractor that is not on the EPLS, FTA declines to exercise jurisdiction over CAF's allegations of violations because they merely indicate CAF's dissatisfaction with LACMTA's evaluations of the proposals and are best addressed as part of the state or local protest process. CAF provides little or no evidentiary explanation as to how the full and open competition requirement has been violated other than to state that LACMTA failed to comply with this Federal requirement. As long as LACMTA uses Federal funds in accordance with Federal requirements and there is no evidence to the contrary, FTA will not infringe upon what is otherwise LACMTA's discretionary authority to administer its procurement process.

c. LACMTA's Records Retention Policy

FTA acknowledges that it received your e-mail of July 31, 2012, relating to LACMTA's policy and practice of deleting e-mail messages after 30 days. Your e-mail suggests that FTA's preparation of a decision on CAF's protest appeal could be hindered as a result of such e-mail deletions by LACMTA. FTA finds, however, that LACMTA's potential failure to retain e-mail correspondence pertaining to the procurement is irrelevant in

⁷ Letter from Dorval R. Carter, Chief Counsel, Federal Transit Administration, to Arthur T. Leahy, Chief Executive Officer, Los Angeles County Metropolitan Transportation Authority (May 6, 2011).

Decision—Protest Appeal of CAF USA, Inc.

resolving the issues raised by CAF in this appeal. The appeal does not allege that LACMTA and the offerors exchanged unlawful e-mail or other communications. Accordingly, LACMTA e-mail messages were not relevant to our review of the issues raised by the protest appeal. Moreover, to the extent that LACMTA's policy conflicts with CAL. PUB. CONT. CODE § 20216, it is a matter of state law that should, at the least, be resolved at the state or local level first.⁸

IV. Conclusion

Based upon the foregoing, FTA declines to exercise jurisdiction over this protest. Therefore, CAF's protest appeal is denied. FTA notes that its determination to decline jurisdiction over the protest appeal is not necessarily an approval or agreement with a recipient's decision, and subsequent findings of violation of Federal requirements could still affect a recipient's eligibility for Federal funding. This determination is based upon the fact that CAF has raised allegations of violation of Federal requirements that have previously been addressed, are moot, or are not, in fact, concerns necessitating FTA involvement and are best left to be resolved at the State or local level.

If you have any questions regarding this matter, please contact Mary J. Lee at (202) 366-0985 or mary.j.lee@dot.gov.

Sincerely,



Dorval R. Carter, Jr.

Enclosure

Cc: Arthur T. Leahy, Chief Executive Officer, LACMTA

⁸ I note, however, that FTA will separately review this matter to determine potential implications on LACMTA's compliance with FTA's grant requirements.