



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

Chief Counsel

1200 New Jersey Avenue S.E.
Washington DC 20590

OCT 1 2010

James J. Maiwurm, Esq.
Shanker A. Singham, Esq.
Squire, Sanders & Dempsey, L.L.P.
Suite 500
1201 Pennsylvania Avenue, NW
Washington, DC 20004

Subject: Request for Reconsideration—Buy America & Procurement Investigation

Dear Messrs. Maiwurm and Singham:

I write in response to the Request for Reconsideration you delivered to the Federal Transit Administration (FTA) on September 17, 2010, on behalf of your client CAF USA, Inc., a subsidiary of Construcciones y Auxiliar de Ferrocarriles, S.A. (CAF),¹ when we met in person, and your subsequent letters to me and FTA Administrator Peter Rogoff dated September 20, 2010. For the reasons described below, and inasmuch as you have presented no new matters of fact or points of law that were not known or available to you during the investigation, I must deny your request. This letter upholds FTA's September 7, 2010 decision finding that the Metropolitan Transit Authority of Harris County, Texas (Houston METRO) violated FTA's procurement rules, and that Houston METRO and CAF violated FTA's Buy America requirements.

¹ In the Request for Reconsideration you ask FTA to use the name CAF USA, not CAF, when referring to your client. It is my understanding that CAF USA, Inc. (CAF USA) is a wholly owned subsidiary of Construcciones y Auxiliar de Ferrocarriles, S.A. (CAF), a Spanish Corporation, and that Houston LRV 100 LLC, the special purpose company formed for purposes of entering into a contract with Houston METRO, is 99% owned by CAF USA. I also note that your client often referred to itself as CAF during the LRV procurement, and frequently corresponded with Houston METRO and its agents on letterhead bearing the name of the parent company. See, for example, the letter your client submitted to Houston METRO on February 29, 2008, along with its Proposal. That letter was written on CAF letterhead. In it, Virginia Verdeja refers to your client as CAF twenty six times. The only mention of the subsidiary CAF USA is in the address line on the final page of the letter. See also, the Step 1 and Step 2 Proposals submitted by your client (both were printed on CAF letterhead and referred to the company as CAF throughout); and the Organizational Chart submitted by CAF with its Step 2 Proposal (it identifies 30 CAF employees that would work on the project. Of those 30, 21 are identified as "Based in Spain." Nine are identified as "Based in the U.S.").

Therefore, for sake of simplicity, and similar to the manner in which FTA used the term Houston METRO to refer to the Metropolitan Transit Authority of Harris County and all other entities acting on its behalf throughout the LRV procurement, I will use the term CAF to refer to Construcciones y Auxiliar de Ferrocarriles, S.A. and its subsidiaries and agents, including CAF USA and Houston LRV 100 LLC.

Background

On April 23, 2010, FTA initiated an investigation to determine whether Houston METRO complied with FTA's Buy America and procurement rules when it entered into contracts with CAF to purchase Light Rail Vehicles (LRVs) for several federally funded projects. Over the course of four months, FTA gathered, reviewed, and analyzed more than 14.2 Gigabytes of information (including more than 13,000 e-mail messages and more than 1,100 documents) provided by Houston METRO. At the conclusion of its investigation, FTA Administrator Peter Rogoff and FTA Chief Counsel Dorval R. Carter, Jr. communicated FTA's findings to Houston METRO in person on September 8, 2010.

FTA found three substantial violations of FTA's Buy America and procurement rules:

- a. METRO and CAF violated FTA's Buy America requirements. This began with METRO's release of a Request for Proposals (RFP) that stated FTA's Buy America requirements did not apply to the procurement; continued with METRO's unsupported evaluation of the various offeror's Buy America compliance, including the Certificate of Compliance submitted by CAF; and culminated with METRO's decision not to require CAF to meet its contractually mandated Buy America obligations and to circumvent the Buy America requirements by entering into a separate, locally funded contract with CAF for the pilot vehicles;
- b. METRO violated FTA's competitive procurement rules when it chose to negotiate with one of the offerors, CAF, to the exclusion of all other offerors, and allowed that offeror to continue revising its price while refusing to allow other offerors the opportunity to present their Best and Final Offers (BAFOs); and
- c. METRO's LRV procurement was flawed due to the sum of many failures, including the lack of an adequate procurement plan, the lack of an adequate source selection evaluation plan, METRO's failure to disclose all evaluation factors in the solicitation, METRO's failure to inform potential offerors of the relative importance of those factors that were disclosed in the evaluation, METRO's use of undisclosed changes in evaluation factors, and METRO's failure to perform a complete best value analysis.

FTA's decision included two letters to Houston METRO dated September 7, 2010, and a Report of Investigation dated September 3, 2010. The Report of Investigation set out the basis for FTA's findings. The letter from FTA Chief Counsel Dorval R. Carter, Jr. described the investigation process and summarized the findings. The letter from FTA Administrator Peter Rogoff explained the consequences of FTA's findings and suggested a course for Houston METRO to follow if its North and Southeast Corridor projects and the LRV procurement were to remain eligible for FTA funding. That course required METRO to terminate its existing contracts with CAF and to re-procure LRVs in a manner that complies with FTA rules.

By letter dated September 9, 2010, Houston METRO indicated that it “agrees with the findings of the investigation,” and outlined the actions it took upon receipt of FTA’s decision, including the issuance of a stop work notification to CAF, the decision to terminate its contracts with CAF, and the development of a process for re-procuring LRVs in accordance with Federal rules.

On September 17, 2010, FTA hosted an in-person meeting with you and other representatives from CAF. During that meeting you delivered to FTA a formal Request for Reconsideration. You followed that request with two letters, both of which were dated September 20, 2010. In these communications you claimed to have identified new matters of fact and points of law that were not known to CAF at the time of the investigation. Despite this claim, your Request for Reconsideration included only one new document—a contract modification entered into by CAF and Houston METRO on August 4, 2010.

Legal Standard

FTA will only reconsider a decision if the party requesting reconsideration has submitted new matters of fact or points of law that were not known or available to the party during the investigation.²

Discussion

- I. *CAF has submitted no new matters of fact or points of law that were not known or available to it during the investigation.*

CAF’s Request for Reconsideration includes no new matters of fact or points of law that were unknown or unavailable to CAF or Houston METRO during the investigation. The only new information submitted by CAF—a contract modification dated August 4, 2010—was not executed by CAF and METRO until after FTA had concluded the document gathering phase of its investigation. Moreover, even if the contract modification fell within the scope of FTA’s investigation, it would not have changed FTA’s findings regarding Buy America and competitive procurement requirements. CAF presented the contract modification to FTA as evidence of its willingness to comply with Federal requirements. Its weight as evidence of CAF’s good faith is negligible because the contract modification occurred more than one year after the events that were central to FTA’s findings that Houston METRO and CAF violated FTA’s Buy America regulations and that Houston METRO violated FTA’s procurement rules.

² 49 C.F.R. § 661.15(o).

II. Guidance offered in response to CAF's arguments

In addition to the information discussed above, you presented a number of arguments about the investigation and FTA's decision. In many cases, your arguments contain errors that, if left unanswered, could lead to confusion about FTA's Buy America requirements, including its decision in the instant investigation and the manner in which FTA considers requests for Buy America waivers, conducts investigations, and enforces violations of the law. For purposes of clarity, I offer the following guidance.

- a. FTA's Buy America requirements encompass more than individual contracts. If a project includes FTA funds, then the Buy America requirements apply to the entire project. FTA grantees may not split contracts or add locally funded contracts to a project for purposes of avoiding Federal Buy America requirements.*

You argue that CAF did not violate the Buy America requirements when it entered into a separate, subsequent, sole-source contract with Houston METRO for two LRVs because the Buy America requirements do not apply to locally funded contracts, and, according to CAF, CAF did not need the subsequent contract to fulfill the first. You are mistaken in this view. The Buy America requirements apply to entire projects, regardless of how many contracts may be needed to complete the project. Moreover, the record indicates that the subsequent contract for two LRVs was unnecessary but for the prior contract and FTA's decision denying the request for a public interest waiver.

Federal law clearly states that Buy America rules apply at the project level. According to the express terms of FTA's authorizing legislation, FTA "may obligate an amount . . . for a project only if the steel, iron, and manufactured goods used in the project are produced in the United States."³ FTA regulations restate the same: "No funds may be obligated by FTA for a grantee project unless all iron, steel, and manufactured products used in the project are produced in the United States."⁴

CAF attempts to support its interpretation by referencing a Frequently Asked Question from FTA's website.

Question: If there are no federal funds involved in the project, do federal Buy America regulations apply?

Answer: No.

The mistake in CAF's analysis was to equate the terms "project" and "contract." The FAQ is correct. If there are no FTA funds in a project, then the Buy America requirements do not apply. However, if there are FTA funds in a project, then the Buy America requirements apply to all contracts needed to complete the project.

³ 49 U.S.C. § 5323(j)(1) (emphasis added).

⁴ 49 C.F.R. § 661.5(a) (emphasis added).

Never is this rule more important than in the context of New Starts projects like Houston METRO's North and Southeast Corridor projects. For this reason, FTA cautioned Houston METRO on many occasions about the importance of applying the Buy America rules to the LRV procurement.

The record indicates that CAF and Houston METRO would not have entered into the subsequent contract but for their plan to produce pilot LRVs in Spain for use on the Federal projects and FTA's denial of their request for a public interest waiver. The facts described in the Report of Investigation support this conclusion. METRO and CAF started working towards a separate, subsequent, sole-source contract only after learning that FTA would deny their request for a public interest waiver. CAF provided METRO with details about how it had entered into a similar contract with another transit agency after FTA had denied that agency's request for a waiver. In addition, the METRO Board resolution that authorized the subsequent contract noted that it was needed to "conduct due diligence . . . in advance of the purchase of additional vehicles."⁵ The additional vehicles were those that CAF intended to supply METRO for use on the North and Southeast Corridor projects.

Thus, CAF violated FTA's Buy America requirements when it entered into a separate, subsequent, sole-source contract with Houston METRO for two LRVs because the two LRV contract would not have been necessary but for the prior contract to provide LRVs for two federally funded projects and FTA's decision denying your request for a Buy America waiver.

- b. *FTA will not routinely grant public interest waivers for prototype or pilot vehicles.*

It is FTA's expectation and desire that all rolling stock manufacturers comply with all Buy America requirements. In its Request for Reconsideration, CAF refers to the "common practice" of requesting and obtaining public interest waivers from FTA to assemble pilot or prototype vehicles outside of the United States. Although FTA has granted public interest waivers for pilot and prototype vehicles in the past, FTA's longstanding position has been and will continue to be "that Congress intended that the public interest waiver provision . . . be utilized in extremely limited situations."⁶ Thus, FTA will only grant public interest waivers in exceptional circumstances, and has no intention of routinely granting waivers for prototype or pilot vehicles in the future.

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users,⁷ enacted on August 10, 2005, raised the bar by adding a provision to the law that requires FTA to publish a written justification in the Federal Register and to allow for public comment before it may grant a public interest waiver.⁸ FTA applied this provision in November 2008 when it denied a request from the Massachusetts Bay Transportation

⁵ Houston METRO Board Resolution No. 2009-21 (April 23, 2009).

⁶ 53 Fed. Reg. 22,418, 22, 419 (1988).

⁷ Pub. L. 109-59.

⁸ 49 U.S.C. § 5323(j)(3).

Authority for a waiver that would have allowed Vossloh España S.A. to assemble two pilot locomotives in Spain. In its decision letter, FTA outlined the criteria it would use for determining whether to grant public interest waivers for prototype and pilot vehicles:

- FTA requires a clear nexus between the waiver requested and the beneficial impact on the public;
- FTA will consider all factors on a case-by-case basis;
- FTA will implement Buy America in a manner that takes into account the realities of the industry and the practical necessities of foreign assembly of prototype vehicles in appropriate circumstances;
- FTA will deny requests that do not include factors like safety or the introduction of significant new technology; and
- FTA will deny requests predicated on a cost saving of less than 25 percent.

FTA restated these criteria in its April 14, 2009 letter to Houston METRO.

Based on these communications and FTA's longstanding position, CAF and other rolling stock manufacturers were on notice of FTA's position. FTA will only grant public interest waivers in exceptional circumstances, and has no intention of routinely granting waivers for prototype or pilot vehicles.

c. In appropriate circumstances, FTA will work with a grantee to develop a manufacturing plan that ensures compliance with Buy America.

CAF's Request for Reconsideration questions whether FTA treated Houston METRO and CAF differently than it treated the Washington Metropolitan Area Transit Authority (WMATA). You argue that FTA met with Kawasaki in person to discuss its manufacturing plan and did not meet with CAF in person; and that Kawasaki's manufacturing plan that FTA approved is identical to CAF's plan that FTA denied.

Your argument is based on several factual misunderstandings. Here is a summary of the facts as described in FTA's July 23, 2010 letter to WMATA, and contrasted with the facts surrounding Houston METRO's 2009 request for a public interest waiver:

- Similar to Houston METRO's request for a public interest waiver to permit CAF to assemble two pilot LRVs in Spain, WMATA requested a public interest waiver to permit Kawasaki to assemble eight pilot railcars in Japan.⁹

⁹ Letter from Donald A. Laffert, Associate General Counsel, WMATA, to Letitia A. Thompson, Regional Administrator, FTA (June 10, 2010).

- Unlike CAF, Kawasaki certified non-compliance with FTA's Buy America requirements.
- Unlike Houston METRO, WMATA withdrew its request after learning that FTA's policy is to take a very strict view of the Buy America requirements, and that FTA would only grant public interest waivers under the most extreme circumstances.¹⁰
- FTA hosted two in-person meetings with WMATA staff to discuss the manufacturing plan developed by Kawasaki. Note: FTA did not meet with Kawasaki as you allege in your Request for Reconsideration.
- Unlike CAF's plan to assemble two pilot LRVs in Spain and deliver the entire LRV to Houston METRO, Kawasaki's plan is to assemble four railcars in Japan for the limited purpose of Design Qualification Testing, to disassemble the prototype railcars, and to ship only the car shells to the United States where the car shells will be assembled with new components. All railcars produced by Kawasaki for WMATA will comply with the final assembly requirement and the 60% domestic content requirement.¹¹

As you can see, there are significant differences between the approaches taken by WMATA-Kawasaki and Houston METRO-CAF. Kawasaki certified non-compliance with Buy America; CAF certified compliance. WMATA withdrew its request for a Buy America waiver and asked FTA to determine whether Kawasaki would comply with the Buy America requirements if it followed a manufacturing plan that WMATA presented to FTA. Any grantee or manufacturer can request a similar determination from FTA if it has questions about whether its final assembly processes comply with the minimum requirements outlined at Appendix D to 49 C.F.R. § 661.11. Houston METRO and CAF could have, but did not, make a similar request.

- d. *FTA will not publish waiver requests on its website or in the Federal Register if the requesting party is ineligible for a waiver as a matter of law. A bidder or offeror is ineligible to request a waiver in connection with a bid or offer for which it has signed and submitted a Certificate of Compliance.*

You argue that FTA should have notified the public of Houston METRO's 2009 waiver request by posting it on FTA's website in accordance with the process FTA outlined in a rulemaking document dated September 20, 2007.¹² FTA only posts notices that are eligible for a waiver as a matter of law.

¹⁰ Letter from Donald A. Laffert, Associate General Counsel, WMATA, to Dorval R. Carter, Jr., Chief Counsel, FTA (July 1, 2010).

¹¹ Letter from Dorval R. Carter, Jr., Chief Counsel, FTA, to Carol B. O'Keefe, General Counsel, WMATA (July 23, 2010).

¹² 72 Fed. Reg. 53,688 (Sept. 20, 2007).

In most instances, you are correct. FTA stated that it will publish incoming requests for public interest waivers on its website. However, FTA will not publish waiver requests on its website if the requesting party is ineligible for a waiver as a matter of law, as was the case with Houston METRO and CAF because CAF had signed and submitted a Certificate of Compliance. A manufacturer is ineligible for a waiver if it has signed a Certificate of Compliance.

- e. *In the context of a Buy America investigation, FTA's legal relationship is with the grantee, not with the bidder or offeror. For this reason, the bidder or offeror may not communicate with FTA directly unless the grantee so authorizes it in writing.*

CAF states that Houston METRO did not permit it to communicate directly with FTA while FTA conducted its investigation, although CAF was permitted to provide documents and information to METRO. This was METRO's decision about how best to respond to FTA's investigation. Because FTA's grant agreements are with Houston METRO and not CAF, the Buy America investigation procedures at 49 C.F.R. § 661.15 allow a manufacturer to correspond directly with FTA during the course of an investigation "if it informs the grantee [Houston METRO] that it intends to do so, and if the grantee agrees to such action in writing."¹³ Apparently, Houston METRO chose not to authorize CAF to correspond directly with FTA.

- f. *FTA's authority to initiate a Buy America investigation and to review its Grantees' contracts are independent of the rules requiring a party to exhaust its administrative remedies before it may ask FTA to intervene in an open procurement.*

You argue that FTA's findings are improper because no party filed a timely bid protest with Houston METRO. FTA believes you are referring to the restriction found at 49 C.F.R. § 18.36(b)(12) that requires a protester to "exhaust all administrative remedies with the grantee . . . before pursuing a protest with the Federal agency." This restriction does not apply here because FTA initiated the investigation on its own accord pursuant to authority contained at 49 C.F.R. § 661.15 and 49 U.S.C. § 5325(g). Alstom Transportation, Inc. (Alstom) did, in fact, send a letter to FTA identifying irregularities with METRO's procurement process. You are mistaken, however, in thinking that FTA initiated its investigation based on Alstom's request. Alstom sent its letter on May 27, 2010, more than one month after FTA initiated its investigation. Moreover, Alstom did not style its letter as a bid protest.¹⁴ Thus, FTA initiated the investigation before it received any communication from Alstom, and based on authority that does not depend on a complaint from a competitor or that requires a party to exhaust all administrative remedies.

¹³ 49 C.F.R. § 661.15(e).

¹⁴ Allegations that FTA acted on the concerns raised by Alstom without doing its own independent analysis are absurd. FTA reviewed more than 14.2 Gigabytes of information.

- g. Buy America violations and procurement violations require different remedies. Because procurement rules seek good commercial outcomes and fairness through full and open competition, re-procurement is the only remedy available to Houston METRO.*

You argue that the remedy imposed in this investigation differs from that imposed in another recent investigation. FTA is requiring Houston METRO to terminate its contracts with CAF and to re-procure LRVs in a manner consistent with Federal rules if it wishes for its North and Southeast corridor projects to remain eligible for FTA funding. In another recent investigation involving the Milwaukee County Transit System (MCTS) and the Midwest Bus Corporation (Midwest Bus), a manufacturer of bus-mounted bicycle racks, FTA is allowing MCTS and Midwest bus to work with FTA to develop a detailed plan for coming into compliance. You ask why FTA has allowed Midwest Bus to develop a plan for coming into compliance but has asked Houston METRO to re-procure LRVs. The difference is because MCTS and Midwest Bus violated the Buy America rules, only. Houston METRO violated Buy America and procurement rules.

FTA regulations outline the steps a successful bidder or offeror must follow if FTA finds that it has not complied with its Buy America certification:

If a successful bidder or offeror fails to demonstrate that it is in compliance with its certification, it will be required to take the necessary steps in order to achieve compliance. If a bidder or offeror takes these necessary steps, it will not be allowed to change its original bid price or the price of its final offer.

This is the process FTA followed with MCTS and Midwest Bus when it found that Midwest Bus did not comply with the Buy America rules.

However, because FTA found procurement and Buy America violations in the instant investigation, the remedies are more restrictive. As FTA stated in the Report of Investigation, the requirement of full and open competition not only advances the goal that the public's money should be spent in a way that maximizes competition, thereby resulting in the best value for taxpayer dollars, but also that the procedures used to conduct the procurement are fair, transparent, and consistently applied. The only way to address the unfairness that resulted from Houston METRO's failure to properly conduct the LRV procurement is to cancel the contracts that resulted from the flawed procurement and to reopen the process to all interested parties. The remedy for failure to allow full and open competition must be one that does not disadvantage the parties that were not given a full and open opportunity to compete in the first place.

In addition to arguing that FTA treated CAF differently than Midwest Bus, you argue that the FTA should not require Houston METRO to cancel its contracts with CAF and re-procure the LRVs because the contracts entered into between CAF and Houston METRO represent a good commercial outcome. In other words, you ask FTA to allow Houston METRO to keep the contract in place because it got a good deal on LRVs from CAF. For the reasons of fairness outlined above, FTA cannot overlook violations of its

procurement requirements simply because two parties reached what CAF believes to be a good commercial outcome.

The reasons for FTA's procurement rules are to obtain good value for taxpayer dollars and to ensure that the procedures used to conduct federally funded procurements are fair, transparent, and consistently applied. Thus, even if METRO and CAF arrived at a good value, the contracts must be cancelled and Houston METRO must re-procure LRVs to ensure that all manufacturers have an opportunity to compete for the contract in a manner that is fair, transparent, and consistent.

III. CAF and METRO violated FTA's Buy America requirements. Houston METRO violated FTA's procurement rules.

Finally, in light of the confusion that could result from inaccurate statements and conclusions in your Request for Reconsideration, I conclude this letter by restating the findings from FTA's investigation: CAF and METRO violated FTA's Buy America requirements. Houston METRO violated FTA's procurement rules.

CAF and METRO violated FTA's Buy America requirements when CAF signed and submitted a Certificate of Compliance to Houston METRO despite its stated intention and plan to produce two LRVs in Spain; Houston METRO failed to properly evaluate the proposers' ability to comply with Buy America when LRV manufacturers, including CAF, signed and submitted Certificates of Compliance despite stating their intention and plan to produce LRVs outside of the United States; and CAF and METRO together developed and executed a means for circumventing the Buy America requirements by entering into a separate, locally funded, sole-source contract for two LRVs after FTA denied a request for a public interest waiver for the same. These actions were inconsistent with both the letter and spirit of FTA's Buy America regulations.

I note, however, that inasmuch as the scope of FTA's investigation was limited to CAF's dealings with Houston METRO, the violations and remedies are limited too. FTA did not investigate any other procurements involving CAF, nor has any evidence indicated wrongdoing by CAF in any other setting. Thus, CAF remains eligible to participate in any and all FTA funded contracts, including future contracts with Houston METRO, as long as it complies with all federal requirements, including Buy America.

Letter to James J. Maiwurm and Shanker A. Singham

Conclusion

In view of the foregoing, FTA finds that you have presented no evidence of new facts or points of law warranting a reversal of the September 7, 2010, decision. Therefore, I hereby deny your Request for Reconsideration and reaffirm FTA's initial decision. This letter constitutes the final administrative action on this matter.

If you have questions, please contact Jayme Blakesley at jayme.blakesley@dot.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Dorval R. Carter, Jr.", with a stylized flourish at the end.

Dorval R. Carter, Jr.
Chief Counsel

cc: Paula J. Alexander, Esq., General Counsel, Houston METRO