Lillian Valenti  
Chief Procurement Officer  
Port Authority of New York and New Jersey  
4 World Trade Center  
150 Greenwich Street  
21st Floor, NY 10007

Re: Petition to Investigate Compliance of Successful Bidder in Accordance with 49 C.F.R. § 661.15 Track Inspection Vehicle Purchase Order No. 4500066700, FTA Grant No. NJ-44-X004-02

Dear Ms. Valenti:

This is the final decision of the Federal Transit Administration ("FTA") in the above-captioned matter. For the reasons stated below, FTA has determined that ENSCO Rail, Inc. ("ENSCO") has met its burden of proving that it is compliant with its FTA Buy America Certificate, submitted with its bid to the Port Authority of New York and New Jersey (PATH) for the procurement of a track inspection vehicle, pursuant to Purchase Order No. 4500066700, FTA Grant No. NJ-44-X004-02.

Background

On November 22, 2016, MERMEC, Inc. ("MERMEC") requested that FTA investigate the award of the track inspection vehicle, Purchase Order No. 4500066700, FTA Grant No. NJ-44-X004-02, to ENSCO. PATH awarded the contract to ENSCO on March 28, 2016, as a result of a solicitation for bids advertised on September 18, 2015. This procurement is an FTA-funded project, and therefore, subject to Federal requirements, including Buy America requirements for rolling stock procurements.

On June 20, 2016, MERMEC learned via an email from PATH's Procurement Contracts Manager that PATH awarded the contract for a track inspection vehicle to the lowest responsible bidder. However, this email did not contain the name of the bidder to whom the contract was awarded. On July 19, 2016, MERMEC inquired with PATH as to the status of the bid but did not receive a response about the successful bidder. On September 13, 2016, MERMEC submitted a request for information through the PATH's Public Records Access form requesting ENSCO's bid documents, evaluation documents, and correspondence between PATH and ENSCO regarding the procurement. PATH provided the requested documents to MERMEC on
October 12, 2016. However, the documents did not contain ENSCO’s certification of Buy America compliance.

On November 22, 2016, MERMEC petitioned FTA to open an investigation into PATH’s award of Bid No. 43810 to ENSCO because ENSCO did not provide a Buy America certificate. Also, since ENSCO and its vehicle supplier Plasser American Corporation ("PLASSER") could not meet Buy America requirements on a similar vehicle procurement for another transit agency in 2015, MERMEC questioned whether ENSCO was now able to meet FTA’s Buy America requirements for the 2016 PATH solicitation for the track inspection vehicle. On November 25, 2016, FTA requested that PATH provide copies of the Buy America certificates submitted by the three bidders, ENSCO, PLASSER, and MERMEC. On November 28, 2016, PATH provided FTA with the Buy America certificates.

However, it was not clear from the information that PATH and ENSCO submitted whether the track inspection vehicle met the Buy America requirements in 49 U.S.C. § 5323(j)(2)(C), i.e., that the cost of components and subcomponents produced in the United States is more than 60 percent of the cost of all components of the vehicle and final assembly of the vehicle will occur in the United States.

Pursuant to 49 C.F.R. § 661.15, FTA presumes that a bidder or offeror that submits a certificate of Buy America compliance with its bid or offer is, in fact, complying with FTA’s Buy America requirements. While PATH produced ENSCO’s Buy America compliance certificate, based upon MERMEC’s petition and all supporting documentation, FTA determined that the presumption of compliance was overcome. On February 17, 2017, FTA initiated an investigation into ENSCO’s Buy America compliance. On March 9, 2017, PATH notified FTA that it authorized ENSCO to respond directly to FTA regarding the investigation.

To assist with the investigation, FTA hired a contractor to conduct the equivalent of a pre-award audit to determine whether ENSCO could establish that the track inspection vehicle it proposed for PATH complied with FTA’s Buy America regulation. A pre-award Buy America audit is required for the purchase of rolling stock to carry passengers in revenue service (see 49 CFR § 663.21), but is not required for non-revenue service rolling stock vehicles. On May 2, 2017 and May 4, 2017, FTA’s contractor conducted a desk audit of ENSCO’s documentation at ENSCO’s offices and manufacturing facility in Springfield, Virginia. On May 3, 2017, FTA’s contractor visited PLASSER’s manufacturing facility in Chesapeake, Virginia, and also reviewed PLASSER’s documentation. In addition, ENSCO provided information for FTA’s review from its supplier of an Ultrasonic Rail Flaw Inspection System (URFIS), Nordco Rail Services & Inspection Technologies (NORDCO), verifying the domestic content percentage and confidential cost information of the URFIS. The FTA and its contractor reviewed the following documents:

- ENSCO’s Buy America Certification for PATH’s Track Inspection Vehicle Procurement;
- Buy America Certifications from Component Manufacturers;
- Track Inspection Vehicle (TIV) Complete Bill of Materials (including a list of components and associated major subcomponents);
- Contact information for all component and subcomponent suppliers;
Basis of assumptions included in ENSCO's Bid Price to PATH, including quantities of components and/or subcomponents and the methodology used in determining domestic content;

- Calculation of the cost to verify domestic content percentage per § 661.11;
- Source of cost information from component and subcomponent suppliers to verify the proposed cost;
- ENSCO's Final Assembly Plan for production of the track inspection vehicle;
- Final assembly plans for all component manufacturers; and
- Shipping costs in U.S. dollars for any foreign component or subcomponent.

**Legal Framework for Buy America**

Pursuant to FTA's authorizing statute at 49 U.S.C. § 5323(j)(2)(C), when procuring rolling stock, which includes support vehicles, the cost of components and subcomponents produced in the United States must be more than 60 percent of the cost of all components and final assembly must take place in the United States. A component is defined as "any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an end product at the final assembly location." 49 CFR § 661.11(c). Moreover, when federal funds are used to purchase rolling stock, the supplier must sign a Certificate of Compliance with FTA's Buy America requirements. 49 CFR § 661.12.

As a condition of receiving FTA funds for the project, PATH agreed to be bound by these requirements through FTA's Master Agreement.

**Decision**

Based upon the foregoing, I find that ENSCO has demonstrated that it will comply with Buy America requirements for the PATH track inspection vehicle. Based on the information ENSCO provided, FTA, through its contractor, was able to independently verify that the cost of components and subcomponents produced in the United States will be more than 60 percent of the cost of all components of the vehicle and finally assembly will occur in the United States. 49 U.S.C. §5323(j)(2)(C)(i) & (ii).

The FTA's contractor verified ENSCO's domestic content percentage by examining the domestic content calculations in the Domestic Content Calculations worksheet provided by both PLASSER and NORDCO. Specifically, the contractor reviewed PLASSER's Domestic Content Calculation worksheet which detailed the names of components and subcomponents, part numbers, supplier names (foreign or domestic), Buy America certifications, unit price cost information and quantity, component and subcomponent material costs, and the component percentage of vehicle material costs. For NORDCO, the contractor examined a domestic content analysis worksheet which detailed the list of domestic and foreign subcomponents that would be used, including a description of parts, quantity, domestic content percentages, supplier locations, and component percentage of vehicle material costs.

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1 See 49 CFR § 661.3 ("Rolling stock means transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services.").
From this information, the contractor was able to verify that the domestic content for the track inspection vehicle is more than 60 percent, and that final assembly will occur in the U.S.

To independently confirm pricing information, the FTA contractor verified quotes from a large sample of major and minor domestic component suppliers. From his examination, the FTA contractor found that these figures closely aligned with those on ENSCO’s, PLASSER’s, and NORDCO’s domestic content calculation worksheets. For those domestic suppliers who either did not submit Buy America certifications or whose certifications were incomplete, the FTA contractor assumed a conservative approach and considered these components or subcomponents as foreign-sourced. From all of this information, the FTA contractor was able to conclude that ENSCO, PLASSER, and NORDCO provided sufficient information and documentation to support the Certification of Buy America Compliance at the pre-award stage. See Buy America Pre-Award Desk Review at 5-6.

In addition, ENSCO, PLASSER, and NORDCO provided documentation to the FTA contractor to demonstrate that final assembly of the track inspection vehicle will take place in the United States. On May 3, 2017, the FTA contractor toured PLASSER’s manufacturing facility in Chesapeake, Virginia. During this tour, the FTA contractor confirmed that the track inspection vehicle’s car body will be manufactured at this location. On May 2, 2017, the FTA contractor also toured ENSCO’s manufacturing facility in Springfield, Virginia, and confirmed that ENSCO’s Zero Speed Track Geometry Measurement System, Rail Profile Measurement System, Drive View Imaging System, Thermal Imaging System, Tunnel Wall Imaging System, and Rail Surface Imaging System will be manufactured at this location. Ultimately, ENSCO, PLASSER, and NORDCO provided sufficient information for the FTA contractor to determine that the final assembly plan was reasonable. 49 CFR § 661.11; see Buy America Pre-Award Desk Review at 5.

FTA recommends that PATH conduct interim audits during the manufacturing process to ensure that the final vehicle delivered pursuant to the contract contains more than 60 percent domestic contact and is assembled in the United States.

Pursuant to 49 C.F.R. § 661.15(o), a party involved in this matter may request FTA’s reconsideration, based on matters of fact or points of law that were not known or available to the party during the investigation, within ten (10) business days after the date of this decision.

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2 A copy of the June 14, 2017 Buy America Pre-Award Desk Review is enclosed.
Thank you for your cooperation in this matter. If you have any questions or concerns, please do not hesitate to contact Laura Ames, by telephone at (202) 366-2743 or by electronic mail at Laura.Ames@dot.gov.

Sincerely,

[Signature]

Dana Nifosi
Acting Chief Counsel

Enclosure

cc (Via Electronic Mail):

Luca Ebreo, MERMEC
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