

notice and seek public comment on whether the FTA should grant a Buy America non-availability waiver for the Detroit Transportation Corporation (DTC) for the procurement of replacement special trackwork turnout switch components. On July 13, 2015, DTC requested a Buy America waiver for the switch because it is not produced in the United States in sufficiently and reasonably available quantities or of a satisfactory quality. 49 U.S.C. 5323(j)(2)(A); 49 CFR 661.7(c).

By way of background, DTC is the owner and operator of the Detroit People Mover, which is the largest municipal rail system in Michigan. It is a fully automated light rail system that operates twelve (12) rail cars between thirteen (13) passenger stations on an elevated single track in a 2.9 mile loop in Detroit's central business district. In March 2015, DTC solicited bids to procure special trackwork switch point for Turnout 3, which is located adjacent to the Maintenance Facility Building and provides access to the building. The special trackwork of concern was originally procured from Germany (by Krupp Stahl AG) and is of European standards, using AREMA 115RE rail throughout the turnout with special 60E1A1 (formerly Zu-160) track point section. The project includes replacing stock rails that connect the switch point section to the original running rails, as well as rubber pads; both the rails and pads will be sourced domestically. The waiver only applies to the switch component of the project.

DTC issued the first RFP in March 2015 to thirteen (13) companies: Atlantic Track & Turnout Co.; LB Foster Co.; Cleveland Track Materials (Vossloh); Progress Rail Services Corp.; Unitrac Railroad Materials, Inc.; London Trackwork, Inc.; Skelton; Voestalpine Nortrak, Inc.; RailWorks Projects, Inc.; All American Track; Construction Data Company; IntegriCo Composites; and Delta Railroad Construction, Inc. DTC received no responses. It contacted all the companies, and reissued the RFP in May 2015 to six (6) firms that expressed an interest in the project. From this RFP, DTC only received one proposal, from Delta Railroad Construction, Inc. (Delta). Delta, however, cannot comply with Buy America requirements because the only manufacturer of the switch is a German company. To change the manufacturer, Delta would need to re-engineer the switch and modify the "frog" section and guideway elements; this design would need to be certified. Delta would then need to locate a domestic source to manufacture the re-engineered switch. Upon installation, the proprietary software designer of the

automated control train system would need to certify the switch's performance in order to ensure it could be safely used with the existing guideway switch machines. Moreover, DTC believes there is inadequate competition for the project and needs to move forward with this important maintenance project. Thus, DTC is seeking a Buy America non-availability waiver under 49 CFR 661.7(c)(1) for the switch.

With certain exceptions, FTA's Buy America requirements prevent FTA from obligating an amount that may be appropriated to carry out its program for a project unless "the steel, iron, and manufactured goods used in the project are produced in the United States." 49 U.S.C. 5323(j)(1). A manufactured product is considered produced in the United States if: (1) All of the manufacturing processes for the product take place in the United States; and (2) all of the components of the product are of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents. 49 CFR 661.5(d). If, however, FTA determines that "the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality," then FTA may issue a waiver (non-availability waiver). 49 U.S.C. 5323(j)(2)(B); 49 CFR 661.7(c). Under 49 CFR 661.7(c)(1), "It will be presumed that the conditions exist to grant this non-availability waiver if no responsive and responsible bid is received offering an item produced in the United States." In addition, "If the Secretary denies an application for a waiver . . . the Secretary shall provide to the applicant a written certification that—the steel, iron, or manufactured goods, as applicable, (referred to in this subparagraph as the 'item') is produced in the United States in a sufficient and reasonably available amount; (i) the item produced in the United States is of a satisfactory quality; and (ii) includes a list of known manufacturers in the United States from which the item can be obtained." 49 U.S.C. 5323(j)(6).

The purpose of this notice is to publish DTC's request and seek public comment from all interested parties in accordance with 49 U.S.C. 5323(j)(3)(A). Comments will help FTA understand completely the facts surrounding the request, including the merits of the request. A full copy of the request has been placed in docket number FTA-2016-0005.

Issued on March 16, 2016.

**Dana Nifosi,**

*Deputy Chief Counsel.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

[Docket No. FTA-2016-0006]

#### Notice of Proposed Buy America Waiver for Steel Excavator With a Continuous Wield Platform

**AGENCY:** Federal Transit Administration, DOT.

**ACTION:** Notice of proposed Buy America waiver and request for comment.

**SUMMARY:** The Federal Transit Administration (FTA) received a request from the Metro North Railroad (MNR) for a Buy America non-availability waiver for the procurement of a steel excavator with a continuous wield platform (CWP). MNR seeks to procure a CWP to clear the right-of-way after storms and thereby enabling the timely resumption of passenger train service. MNR seeks a waiver for the requirement that final assembly take place in the United States because there is no domestic manufacturer available to produce the equipment. 49 U.S.C. 5323(j)(2) and 49 CFR 661.7(c)(2). In accordance with 49 U.S.C. 5323(j)(3)(A), FTA is providing notice of the non-availability waiver request and seeks public comment before deciding whether to grant the request. If granted, the waiver would apply to a one-time procurement only for the specific equipment identified in the waiver request.

**DATES:** Comments must be received by March 29, 2016. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** Please submit your comments by one of the following means, identifying your submissions by docket number FTA-2016-0006:

1. *Web site:* <http://www.regulations.gov>. Follow the instructions for submitting comments on the U.S. Government electronic docket site.
2. *Fax:* (202) 493-2251.
3. *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., Docket Operations, M-30,

West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

*Instructions:* All submissions must make reference to the "Federal Transit Administration" and include docket number FTA-2016-0006. Due to the security procedures in effect since October 2011, mail received through the U.S. Postal Service may be subject to delays. Parties making submissions responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any personal information therein, will be posted without change or alteration to <http://www.regulations.gov>. For more information, you may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000 (65 FR 19477), or you may visit <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Laura Ames, FTA Attorney-Advisor, at (202) 366-2743 or [laura.ames@dot.gov](mailto:laura.ames@dot.gov).

**SUPPLEMENTARY INFORMATION:** The purpose of this notice is to provide notice and seek public comment on whether the FTA should grant a non-availability waiver to the Metro North Railroad (MNR) for the procurement of a steel excavator with a continuous wield platform (CWP). On May 13, 2015, Metro requested a Buy America waiver for the CWP because the only responsive bidder to its solicitation was a Canadian manufacturer. While 77% of the content of the material would be domestic origin, the CWP would be assembled in Canada. 49 U.S.C. 5323(j)(2)(A); 49 CFR 661.7(c).

By way of background, MNR operates commuter rail service spanning 787 track miles. Metro North has a large length of track along the shore line and flooding along the line can occur regularly at many of these locations. The risk of flooding can be reduced by keeping drainage infrastructure, clear of debris. Specialized equipment such as the CWP can quickly clear the right of way after storms enabling the resumption of passenger train service. After Hurricane Sandy, MNR leased a CWP, but given limited availability as well as the higher cost of leasing, MNR believes that purchase of the CWP is necessary to ensure that it will be available to expedite service restoration and was provided funding to purchase such equipment from FTA through the Section 5324 Emergency Relief Funds allocated for Superstorm Sandy.

A CWP is a train that consists of several platform suitable for holding/hauling and picking up or distributing a variety of materials, such as rocks, riprap, dirt or debris. The equipment is similar to an excavator which has an articulated arm, with the main difference being that it rides on rails and sits on a connected platform where it can dump or pick up material from in order to perform its functions. The main tasks the MNR uses the CWP for is shoreline stabilization/restoration and for removing debris from the right-of-way after storms.

MNR prepared and advertised a solicitation for the CWP on January 9, 2015. Bids were due and opened on February 5, 2015. The solicitation was advertised in local newspapers, the New York State Contract Report and the MTA Metro-North Web site. A single bid was submitted by BRRI, a Canadian firm. BRRI submitted a Certificate of Non-Compliance because the final assembly of the equipment would take place in Canada, although content of the material used would be 77% domestic origin. The total gross sum of the bid submitted is \$3,930,000.00.

MNR states that it received "No Bid" response forms from seven vendors and that MNR contacted the vendors to determine why they did not submit bids. The responses from the vendors varied from "not interested in selling" to "could not meet the requested bid due date." MNR then performed an internet search to for American made excavators with no results. MNR states that it then reached out to Herzog Railroad Services, Inc. and Dymax Rail and was told by both that they do not have the CWP in their fleet. Finally, MNR also contacted the National Institute of Statistics and Technology (NIST) to determine if there had been any research performed to identify U.S. manufacturers for this equipment. To date NIST has not conducted any supplier scouting or analyses for the item.

On August 15, 2015, FTA contacted MNR, noting that one of the No-Reponse bidders, Mecfor Inc. (Mecfor), stated that it could not meet the request bid due date but that it was not clear if Mecfor could meet FTA's Buy America requirements since it is a Canadian Firm. FTA asked MNR to contact Mecfor to confirm whether it had the CWP that would meet FTA's Buy America requirements. On August 25, 2015, MNR provided FTA Mecfor's response. Mecfor stated that more than 60% of the main components would be American made and that assembly of the CWP would be sub-contracted in the USA; however, Mecfor also declined for the

second time an invitation to re-bid stating that the company's workload was overbooked. Due to the fact that MNR did not receive a responsive bid for a CWP produced in the U.S. nor could it identify any potential bidders through research and outreach, MNR seeks a non-availability waiver of the Buy America requirements for final assembly pursuant to 49 U.S.C. 5323(j)(2)(B).

With certain exceptions, FTA's Buy America requirements prevent FTA from obligating an amount that may be appropriated to carry out its program for a project unless "the steel, iron, and manufactured goods used in the project are produced in the United States." 49 U.S.C. 5323(j)(1). A manufactured product is considered produced in the United States if: (1) All of the manufacturing processes for the product take place in the United States; and (2) all of the components of the product are of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents. 49 CFR 661.5(d). If, however, FTA determines that "the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality," then FTA may issue a waiver (non-availability waiver). 49 U.S.C. 5323(j)(2)(B); 49 CFR 661.7(c).

MNR is requesting a Buy America non-availability waiver for the requirement that final assembly occur in the United States in order to procure a CWP for its shoreline stabilization/restoration and for removing debris from the right-of-way after storms.

The purpose of this notice is to publish MNR's request and seek public comment from all interested parties in accordance with 49 U.S.C. 5323(j)(3)(A). Comments will help FTA understand completely the facts surrounding the request, including the merits of the request. A full copy of the request has been placed in docket number FTA-2016-0006.

Issued on March 16, 2016.

**Dana Nifosi,**

*Deputy Chief Counsel.*

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