



4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

Notice of Decision to Grant Buy America Waiver to Washington Department of Transportation to purchase Vossloh 101-LV Concrete Rail Ties

AGENCY: Federal Railroad Administration (FRA), United States Department of Transportation (DOT).

ACTION: Notice of decision to grant Buy America waiver.

SUMMARY: FRA is issuing this notice to advise the public that it has granted the Washington Department of Transportation's (WSDOT) waiver request from the FRA Passenger Rail Investment and Improvement Act (PRIIA) Buy America requirement for the use of Vossloh 101-LV concrete ties in the Pacific Northwest Rail Corridor high-speed intercity passenger rail program funded by FRA grants. The waiver also covers three other high-speed intercity passenger rail projects being undertaken on BNSF Railway Company (BNSF) owned infrastructure in California, Texas and Illinois. The Vossloh 101-VL concrete rail ties are made in the United States but contain two components (dowel inserts and SKL-30 tension clamps) that are not manufactured in the United States. FRA has granted the waiver because dowel inserts and SKL-30 tension clamps that meet the BNSF's operational and safety needs are not produced in the United States. This waiver is conditioned on BNSF's good faith efforts to find a domestic source for the components and is time limited to two years after the effective date of this waiver or until Vossloh begins manufacturing the components in the United States, whichever occurs first.

DATES: Written comments on FRA’s determination to grant WSDOT’s Buy America waiver request should be provided to the FRA on or before [INSERT DATE 3 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Comments: Comments related to Docket No. FRA-2012-0033 may be submitted by any of the following methods:

(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, Room W12-140, Washington, DC, 20590-0001; or

(4) Hand Delivery: Room W12-140 on the first floor of the West Building, 1200 New Jersey Avenue, SE, Washington, DC, 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must make reference to the “Federal Railroad Administration” and include docket number FRA-2012-0033. 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 on April 11, 2000 (65 FR 19477), or visit <http://www.regulations.gov>.

Docket: For access to the docket to read comments received, go to <http://www.regulations.gov> at any time, or to the Docket Management Facility, U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New

Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. Follow the online instructions for accessing the dockets.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Chris Van Nostrand, Attorney-Advisor, FRA Office of Chief Counsel, Mail Stop 10, West Building 3rd Floor, Room W31-208, 1200 New Jersey Avenue, SE. Washington, DC 20590 (telephone 202-493-6058) or via e-mail at christopher.vannostrand@dot.gov.

SUPPLEMENTARY INFORMATION: FRA has granted the waiver pursuant to 49 U.S.C. Section 24405(a)(2)(B). On April 10, 2012, FRA published a Notice in the *Federal Register* advising the public of its receipt of WSDOT's waiver request and seeking comments from all interested parties regarding the availability of suitable domestically manufactured products, any public interest concerns, or the potential decision to grant the Buy America waiver. FRA did not receive any comments in response to the April 10th notice during a fifteen day public comment period. FRA also conducted its own independent evaluation of the availability of domestically manufactured products and did not identify a domestic source. Pursuant to 49 U.S.C. 24405(a)(4), the agency is required to publish in the Federal Register a detailed written justification as to why the waiver is needed and to provide the public with an opportunity to comment for a period not to exceed 15 days. For the reasons described in the letter provided in full below, FRA is granting WSDOT's waiver request. Since FRA received no comments about the request during the April 10th fifteen day public comment period, FRA is providing a short comment period pursuant to 49 U.S.C. 24405(a)(4) and this

decision to grant the waiver request will become effective three days after this Notice is published in the *Federal Register*.

The waiver decision letter provided in full below applies to the WSDOT projects receiving grant funds under FRA's High-Speed Intercity Passenger Rail (HSIPR) Program, as well as projects receiving HSIPR grant funds advanced by the California Department of Transportation, the Texas Department of Transportation, and the Illinois Department of Transportation.

Mr. David Smelser

Washington State Department of Transportation

310 Maple Park Ave SE

Olympia, WA 98504-7300

Dear Mr. Smelser:

This letter is in response to your March 19, 2012, request that the Washington State Department of Transportation (WSDOT) be granted a waiver from the Federal Railroad Administration's (FRA) Buy America provision, at 49 U.S.C. § 24405(a). Your waiver request contained a justification letter from the BNSF Railway Company (BNSF) which owns the infrastructure WSDOT intends to improve as part of the Pacific Northwest Rail Corridor program funded by an FRA grant. Such a waiver would permit WSDOT to purchase and have installed American-made Vossloh 101-VL concrete rail ties which contain two components that are not manufactured in the United States.

The FRA also received the BNSF justification letter from the California Department of Transportation (Caltrans), the Texas Department of Transportation

(TxDOT), the Illinois Department of Transportation (IDOT) (with WSDOT, collectively “grantees”) all of whom received grant funding under FRA’s High-Speed Intercity Passenger Rail (HSIPR) Program. The BNSF justification letter covers the following projects: the Pacific Northwest Rail Corridor Program, the Amtrak Quad Cities to Chicago Service Initiation Project, the Tower 55 At-Grade Improvement Project Section, and the Los Angeles to Fullerton Triple Track – Segment 7 Project.¹

Section 24405(a) authorizes the Secretary of Transportation to obligate certain grant funds only if the steel, iron, and manufactured goods used in the project are produced in the United States. The Secretary (delegated to the FRA Administrator) may waive the Buy America requirement only if he or she finds that: (A) applying it would be inconsistent with the public interest; (B) the steel, iron, and goods manufactured in the United States are not produced in sufficient and reasonably available amount or are not of a satisfactory quality; (C) rolling stock or power train equipment cannot be bought or delivered to the United States within a reasonable time; (D) or including domestic material will increase the cost of the overall project by more than 25 percent. 49 U.S.C. § 24405(a)(2)(A)-(D). In its justification letter BNSF asserts that two components of the Vossloh 101-L concrete ties—a dowel insert and SKL-30 tension clamps—are not produced in the United States in sufficient and reasonably available amounts and are not of a satisfactory quality and that therefore a waiver is warranted under 49 U.S.C. § 24405(a)(2)(B).

For the following reasons, I am granting WSDOT’s request. According to the justification letter, since it began installing concrete ties in the 1970’s, BNSF has worked

¹ This decision on WSDOT’s Buy America waiver request will also apply to the HSIPR projects advanced by IDOT, TXDOT, and Caltrans on BNSF infrastructure using the Vossloh 101-VL concrete rail tie.

closely with manufacturers to evaluate and test various concrete tie products and technologies. As described in its justification letter, as concrete tie technology advanced and became a more viable alternative to wooden ties, BNSF intensified its efforts to test all available products in an effort to establish a standard for use across its system. As a result, BNSF selected the Vossloh 101-LV tie as the standard concrete tie for use on BNSF's network in 2008. The Vossloh 101-LV concrete tie was selected as BNSF's standard for the following reasons:

- Vossloh concrete ties meet or exceed the technical standards of the American Railway Engineering and Maintenance-of-Way Association (“AREMA”);
- BNSF's performance testing of the Vossloh concrete tie system demonstrated excellent results across all measured criteria, including longitudinal restraint, maintenance of gage, freedom of motion, thermal expansion and failure rates;
- Vossloh concrete ties feature several unique design elements, such as the lack of a shoulder and a field side angle guide plate that matches the width of the tie, which result in reduced wear, reduced maintenance costs and longer product life; and
- Installation and maintenance of Vossloh concrete ties can be largely automated compared to other concrete tie systems, which improves safety and efficiency while reducing overall maintenance time and cost.

As stated in its justification letter, BNSF has searched for domestically manufactured dowel inserts and SKL-30 clamps that are compatible with the American-made Vossloh 101-LV concrete tie system. In addition, while there are alternative concrete tie systems available in the market, they do not meet BNSF's specific operational and maintenance needs.

Through its justification letter and during conversations with FRA staff, BNSF maintains that the selection of the Vossloh concrete tie system as the standardized concrete tie system used on BNSF infrastructure was based on the criteria above and occurred in 2008 prior to the obligation of FRA grant funding. Additionally, BNSF suggests that installing different products would pose potentially insurmountable technical complications. For example, alternative rail ties if used in the FRA-funded projects would not be consistent with BNSF's existing concrete tie system or corresponding maintenance and installation equipment and procedures employed by BNSF. Requiring BNSF to procure and install such alternative concrete ties would require BNSF to purchase specialized installation and maintenance equipment at a substantial cost, as BNSF's current equipment is designed for the installation and maintenance of the Vossloh tie and would not be compatible with alternative rail ties. As such, while there are other concrete tie systems available, such systems are not compatible with BNSF's existing infrastructure and for that reason are not of satisfactory quality for installation in the FRA-funded projects.

Furthermore, the selection of the Vossloh 101-LV concrete tie system was made on technical, safety, and economic considerations rooted in BNSF's long experience installing and maintaining rail tie systems for use by both freight and intercity passenger trains. The FRA therefore finds that BNSF has made an adequate showing that the manufactured products meeting BNSF's appropriate specifications are not produced in a sufficient and reasonably available amount.

The FRA also solicited public comments on the waiver request for a period of 15 days. The waiver request was made available for public review on FRA's website and

through a notice published in the Federal Register. The Federal Register notice requested the public's views on the waiver request and for any information regarding the availability of suitable domestically manufactured products. FRA did not receive any comments on the waiver request or any information regarding the availability of suitable domestically manufactured products.

The WSDOT and BNSF began discussions with FRA concerning the Vossloh concrete tie in late 2011. Since then, WSDOT and BNSF have consulted with FRA's legal and technical staff in determining how FRA's Buy America requirements apply to the Vossloh concrete tie and to other FRA investments on BNSF infrastructure. As part of this consultation, BNSF participated in calls with the U.S. Department of Commerce, National Institute of Standards and Technology, Hollins Manufacturing Extension Program (NIST-MEP), an agency that helps encourage the development of a domestic supply base to support intermodal transportation in the United States, including rail infrastructure. These conversations led to BNSF's commitment to help facilitate conversations between NIST-MEP and Vossloh.

The FRA understands that BNSF is one of the largest users of concrete ties in North America with over 11 million concrete ties currently in track. Consequently, FRA acknowledges that BNSF has a substantial interest in ensuring that the concrete ties installed on its system meet BNSF's specific needs in terms of performance, durability and cost efficiency. However, as demonstrated in the waiver request, BNSF also recognizes that as a "large supplier of rail infrastructure and construction materials it is uniquely situated to encourage American manufacturing of those products." The FRA appreciates that BNSF has committed to working with Vossloh to explore the feasibility

of having the foreign components made in the United States and to continue an ongoing dialog with FRA and NIST-MEP. Further, FRA is encouraged to hear that Vossloh has separately begun the process to identify potential suitable locations on which to construct a manufacturing facility for the dowels and SKL-30 tension clamps.

For the foregoing reasons, FRA is granting WSDOT's Buy America waiver request.² The waiver is conditioned on BNSF's good faith efforts to facilitate conversations between NIST-MEP, FRA and Vossloh in order to explore the feasibility of having the dowel and SKL-30 tension clamps made in the United States. Pursuant to 49 U.S.C. § 24405(a)(4), FRA will publish a detailed written justification in the Federal Register and provide notice of such finding and an opportunity for public comment after which this waiver will become effective. This waiver is granted only because of the specific facts of these projects; any future requests for a waiver regarding this product will not be granted without a specific showing that domestic products for that particular project also are not reasonably available at that time. Additionally, unless otherwise approved by FRA in writing, this waiver is time limited to two years after the effective date of this waiver or until Vossloh begins manufacturing the components in the United States, whichever occurs first.

Sincerely,

Joseph C. Szabo

Administrator

² This waiver applies to the SKL-30 tension clamp and the dowel insert manufactured in Germany and does not apply to any other component of the Vossloh 101-LV concrete rail tie that might be available from both foreign and domestic sources.

Issued in Washington, DC on June 25, 2012.

Melissa Porter
Chief Counsel

[FR Doc. 2012-15865 Filed 06/26/2012 at 8:45 am; Publication Date: 06/27/2012]