



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA-2013-0038]

Notice of Buy America Waiver for the Pad and Rubber Boot of a Concrete Block For a Low Vibration Track System

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of Buy America Waiver.

SUMMARY: In response to the MTA Capital Construction Company's (MTACC) request for a Buy America waiver for the pad and rubber boot of a concrete block for the Low Vibration Track (LVT) system that it is constructing on behalf of New York Metropolitan Transportation Authority's (MTA) operating agency, New York City Transit (NYCT), the Federal Transit Administration (FTA) hereby waives its Buy America requirements on the basis of non-availability for the pad and rubber boot—components of the concrete blocks used in MTA's LVT system. This waiver is limited to Phase 1 of the Second Avenue Subway Project and is valid only for the pads and rubber boots already procured for this project.

DATES: This waiver is effective immediately.

FOR FURTHER INFORMATION CONTACT: Mary J. Lee, FTA Attorney-Advisor, at (202) 366-0985 or mary.j.lee@dot.gov.

SUPPLEMENTARY INFORMATION: The purpose of this notice is to announce that FTA is granting a non-availability waiver for the procurement of pads and rubber boots that are a part of the concrete blocks used for NYCT's LVT system. This LVT system currently is under

construction as part of Phase 1 of the Second Avenue Subway Project, which is an FTA-funded project. This waiver is limited to Phase 1 of the Second Avenue Subway Project and is valid only for the pads and boots already procured for use in this project.

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).

On September 11, 2013, MTACC formally requested a Buy America waiver for the pad and rubber boot. This request came after FTA issued a June 20, 2013 decision that the pad and rubber boot were components of the concrete block—the manufactured end product. According to MTACC, the LVT system for which the two components would be used to address operational noise and vibration issues, which had been identified as significant adverse impacts in the Final Environmental Impact Statement and Record of Decision for the Second Avenue Subway Project. In addition, among other things, the LVT system is designed to meet National Fire Protection Association requirements and the vertical and horizontal gap tolerances between the platform and the train floor required to comply with the Americans with Disabilities Act.

Furthermore, according to MTA, the LVT system has a proven performance history, an expected useful life in excess of 60 years, and would meet the performance requirements of MTA-NYCT's standard specifications.

In its September 11, 2013 request, MTACC also stated that it had, at the time of the procurement, believed that the pad and rubber boot were subcomponents and that they could be foreign-sourced while remaining in compliance with FTA's Buy America requirements. Notwithstanding FTA's caution and this pending waiver request, MTACC has continued to proceed with construction of its LVT system.

On December 17, 2013, FTA published a Federal Register notice requesting comment on MTACC's waiver request. 78 FR 76402. No comments were received to the docket.

Concurrently, FTA is working with the U.S. Department of Commerce, National Institute for Standards and Technology (NIST), to determine if there are U.S. manufacturers that may be willing and able to manufacture the pad and rubber boot.

Notwithstanding FTA's research and the possibility that there may be a pad and rubber boot domestically manufactured in the future, because testing of any new product for MTA's LVT system likely would halt the Second Avenue Subway project and could cause an additional delay of over one year, FTA is hereby granting a non-availability waiver for the pad and rubber boot. As stated above, this waiver is limited to Phase 1 of the Second Avenue Subway Project and is valid only for the pads and boots already procured for use in this project.

For any potential Buy America waiver requests that MTA and its operating administrations may decide to make in the future regarding the pad and the rubber boot (or other materials), FTA expects that such requests will be made prior to contract award. While MTACC originally procured the pad and the rubber boot based upon its belief that those items were

subcomponents, MTA is now aware that the pad and rubber boot are components of the concrete block. Therefore, FTA will carefully scrutinize any future waiver requests per 49 CFR 661.7(c) and such waiver requests are unlikely to be granted if FTA determines that MTA has not continued its good faith efforts to seek U.S.-manufactured pads and rubber boots. FTA views good faith efforts to include, among other things, engaging U.S. manufacturers in an effort to develop components that are made in the United States, or seeking technical assistance from FTA.

Dana Nifosi
Deputy Chief Counsel