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**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**[Docket No. FRA-2023-0099]**

# Notice of Nonavailability Waiver of Buy America Requirements for the Nevada Department of Transportation to Purchase Certain High-Speed Rail Components

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

**ACTION:** Notice.

**SUMMARY:** The Federal Railroad Administration (FRA) is issuing a waiver of its Buy America requirements to the Nevada Department of Transportation (NDOT) for high-speed rail components that are not produced in the United States for use in the Brightline West High-Speed Intercity Passenger Rail System between Las Vegas, NV and Rancho Cucamonga, CA (Project). FRA selected the Project for funding under the Federal-State Partnership for Intercity Passenger Rail Program (FSP Program), and therefore FRA's Buy America requirements apply to the Project. FRA's Buy America requirements include: FRA's statutory requirements, which require 100 percent of the manufactured products, steel, and iron used in an FRA-funded project to be produced in the United States; and the Build America, Buy America Act (BABA), which requires all construction materials used in the FRA-funded project to be produced in the United States. FRA is not waiving the applicable BABA requirements for construction materials, and therefore this waiver does not apply to the construction materials used in the Project. Brightline West, the project sponsor, has selected Siemens as its preferred rolling stock vendor, and requested that FRA proceed with finalizing the Buy America waiver request for the Siemens trains and other components as included in the previously submitted documentation. Therefore, FRA is waiving its requirements for the first two Siemens trainsets, car shells, signal systems, high-speed rail turnout, and fire alarm systems based on the domestic nonavailability of these components, as described in the proposed waiver. NDOT and Brightline West estimate that more

than 95 percent of the total direct dollar expenditures for the Project will be spent on domestically sourced products and labor, including 100 percent of the civil infrastructure costs.

**DATES:** This waiver is effective [**INSERT DATE 5 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***].

**ADDRESSES:** Please submit all comments electronically to the Federal eRulemaking Portal. Go to https://www.regulations.gov and follow the instructions for submitting comments. *Instructions*: All submissions must refer to the Federal Railroad Administration and the docket number in this notice (FRA-2023-0099). Note that all submissions received, including any personal information provided, will be posted without change and will be available to the public on https://www.regulations.gov. You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000 (65 FR 19477), or at https://www.transportation.gov/privacy.

**FOR FURTHER INFORMATION CONTACT:** For questions about this notice, please contact Ryan Arbuckle, Chief, Program Coordination and Strategy, Office of Railroad Development, FRA, telephone: (202) 617-0212, email: Ryan.Arbuckle@dot.gov. For legal questions, please contact Faris Mohammed, Attorney-Adviser, Office of the Chief Counsel, FRA, telephone: (202) 763-3230, email: Faris.Mohammed@dot.gov.

**SUPPLEMENTARY INFORMATION:**

I. Project History and Background

On December 7, 2022, FRA published a Notice of Funding Opportunity (NOFO) announcing application requirements and procedures to obtain grant funding under the FSP Program for projects not located on the Northeast Corridor (NEC) for Fiscal Year 2022. The FSP Program provides a federal funding opportunity to improve American passenger rail assets to expand or establish new intercity passenger rail service, including privately operated intercity passenger rail service if an eligible applicant is involved, reduce the state of good repair backlog, improve performance, and enhance rail safety. On February 3, 2023, FRA published a notice

adding funding and extending the application period for the FSP Program NOFO. On March 22, 2023, FRA published a notice (March Notice) inviting high-speed rail project sponsors to voluntarily submit, in advance of being selected to receive FRA funding, their domestic sourcing and workforce plans (DSWP) to demonstrate how they will maximize the use of domestic goods, products, and materials consistent with FRA's Buy America requirements.[1]

NDOT submitted an application for FSP Program funding that expressed NDOT's intent to partner with Brightline West, a privately-owned railroad, to advance a high-speed passenger rail system between Las Vegas, NV and Rancho Cucamonga, CA (Project). Brightline West, under the supervision and oversight of NDOT, would construct the Project, which would consist of a fully grade separated high-speed train system largely within the I-15 right-of-way with stations in Rancho Cucamonga, Hesperia, and Victor Valley, CA, and Las Vegas, NV. Brightline West would then operate and maintain the system.

Consistent with FRA's March Notice, NDOT and Brightline West submitted a DSWP,[2] which included a request for a waiver of FRA's Buy America requirements[3] for certain components of the high-speed rail system that the applicant indicated are not produced in the United States. FRA reviewed the DSWP, including Brightline West's market research and consideration of qualifying alternate items, products, or materials.

On December 8, 2023, FRA selected the Project to receive up to $3,000,000,000 in funding under the FSP Program. On December 26, 2023, FRA published a proposed waiver for the Project based on the domestic nonavailability of certain components, which was made available with a 30-day public comment period. FRA received 619 unique comments, which are discussed below. In addition, FRA consulted with the National Institute of Standards and

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[1] Advancing High-Speed Rail Projects Intended for Operations Over 160 Miles Per Hour Through Domestic Sourcing Plans and Buy America Compliance, 88 Fed. Reg. 17289 (March 22, 2023).
[2] The DSWP contains proprietary information that FRA has determined is confidential business information. As such, FRA is not making the DSWP available to the public at this time; however, pertinent non-proprietary information provided in the DSWP is discussed in this notice.
[3] For FRA's Buy America requirements, see section II.

Technology Manufacturing Extension Partnership (NIST-MEP) through its supplier scouting program to research whether any domestic manufacturers produce the identified components.

This notice summarizes FRA's Buy America requirements, NDOT and Brightline West's request for a waiver, discussion of public comments received on FRA's proposed waiver, a summary of consultation with NIST-MEP, and FRA's final waiver.

## II. FRA's Buy America Requirements and Policy

Projects that receive funding under the FSP Program are subject to FRA's Buy America requirements. FRA's Buy America requirements include both: (A) FRA's statutory requirements for steel, iron, and manufactured goods at 49 U.S.C. 22905(a); and (B) requirements under the BABA and 2 CFR 184.6 for construction materials. This means that FRA can fund a project only if the steel, iron, and manufactured goods used in the project are produced in the United States. 49 U.S.C. 22905(a). In addition, FRA-funded projects must also comply with the relevant provisions of BABA, including the requirement that all construction materials used in the project must also be produced in the United States. Pub. L. 117-58, 70914(a); 2 CFR 184.6.

FRA strictly enforces compliance with its Buy America requirements to ensure that FRA-funded projects maximize the use of materials produced in the United States. FRA expects recipients to work with suppliers to conduct thorough market research and adequately consider, where appropriate, qualifying alternate items, products, or materials. Compliance with FRA's Buy America requirement supports domestic industry and good-paying jobs.

## III. FRA's Authority to Waive Buy America Requirements

There are limited circumstances in which FRA can waive its Buy America requirements under section 22905(a) and BABA. FRA will grant a waiver request that is consistent with the statutory criteria for a waiver and where a project sponsor has adequately justified the need for a waiver.

FRA may waive its Buy America requirements if FRA determines that: (A) applying the Buy America requirements would be inconsistent with the public interest; (B) 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; (C) rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time; or (D) including domestic material will increase the cost of the overall project by more than 25 percent. 49 U.S.C. 22905(a)(2); *see also* Pub. L. 117-58, Sec.70914(b) (prescribing similar, but not identical, statutory conditions for waivers); and 2 CFR 184.7 (doing the same).

## IV. Summary of the Proposed Waiver

On December 26, 2023, FRA issued a Notice of Proposed Nonavailability Waiver of Buy America Requirements for NDOT to Purchase Certain High-Speed Rail Components, at 88 Fed. Reg. 89015. At the time of the proposed waiver, Brightline West had not selected its preferred vender for rolling stock. Therefore, FRA included components from the two proposals that Brightline West received from Siemens and Alstom in the proposed waiver.

In the proposed waiver, for the Siemens proposal, FRA concluded that the following components were not available in the United States:

- First Two Complete Trainsets; and
- Car Shells for All 10 Trainsets (shell structure, frame, vehicle paintwork).

For the Alstom proposal, FRA concluded the following components were not available in the United States:

- Car Shells (shell structure, frame, vehicle paintwork); and
- Brake Control Units.[4]

In addition, based on information provided by Brightline West, FRA concluded that the following components were not available in the United States regardless of the selected rolling stock vendor:

[4] After publication of the proposed waiver, Alstom commented on the proposed waiver stating that it would be able to produce the brake control units in the United States. Comment letter from Alstom (FRA-2023-0099-0026), dated January 24, 2024. As such, FRA would not have included these components in the final waiver if Brightline West had selected Alstom.

- Eurobalises and Euroloops;
- Counting Heads and Axle Counter Sensors;
- Truck Press (test stand);
- Turnout Systems including Derailers; and
- Fire Alarm Systems.

## V. Summary of Changes in the Final Waiver

FRA is not making significant changes from the proposed waiver but notes that the final waiver reflects the needs for the project given Brightline West's decision to select Siemens as its preferred rolling stock vendor. The project sponsor notified FRA of this selection and requested to finalize the Buy America waiver for the Siemens trains and components as included in the previously submitted documentation. As this is a project-specific waiver, FRA is therefore publishing a final waiver for the vendor selected to deliver rolling stock and other components for the Brightline West project. However, FRA notes that the Alstom proposal also meets the statutory criteria for a waiver based on domestic nonavailability. Neither vendor would be capable of delivering the rolling stock for the FRA-funded project without a waiver based on domestic nonavailability.

## VI. Discussion of Public Comments

Comments on the waiver were due January 25, 2024. As of January 29, 2024, FRA received a total of 619 unique comments on the proposed waiver, with 104 of those comments being received after the end of the comment period. Comments submitted after January 25 were received late but are discussed below. Due to the volume of comments, FRA did not consider comments received after January 30, 2024. FRA received 567 comments that generally supported the proposed waiver, and 52 comments that generally opposed the proposed waiver. The waiver facilitated a broad range of interest and input from the public and other stakeholders, and FRA greatly appreciates the robust feedback from members of the public. This section

discusses the general themes raised in the comments. The comments are available on the docket, at regulations.gov, Docket (FRA-2023-0099).

A. Domestic Availability of Components, Alternate Products, and Domestic Capacity.

Three commenters (the Aluminum Extruders Council, ANTA Electric, and Westinghouse Air Brake Technologies Corporation (Wabtec)) stated that specific components in the proposed waiver could be manufactured domestically. In addition, 12 commenters (members of the U.S. House of Representatives;[5] New York State Assembly members;[6] New York State Senators;[7] Mayor John J. Buckley, City of Hornell, NY; Robert Duffy of the Greater Rochester Chamber of Commerce; the International Association of Machinists and Aerospace Workers; and the Steuben County Industrial Development Agency) opposed the proposed waiver, citing to the domestic production capabilities in New York, specifically Alstom's existing manufacturing facilities that have produced the Acela trainsets used by Amtrak and a new facility in Hornell, NY that will produce new streetcars for the Southeastern Pennsylvania Transportation Authority.

*FRA Response*: FRA appreciates these comments and consulted with Brightline West to ensure that alternate products were considered in Brightline West's domestic sourcing analysis and market research. FRA confirmed that Brightline West engaged with Wabtec and ANTA Electric and determined the components described in the comment letters did not meet Project requirements. FRA notes that Wabtec identified itself as a domestic supplier of the Interoperable Electronic Train Management System (I-ETMS), a Positive Train Control (PTC) system certified and approved by FRA for operation on all Class I railroad required track segments and many passenger railroad operations. I-ETMS has been successfully deployed in the United States and is approved for speeds up to 125 mph. Brightline West proposes to use the European Rail Traffic

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[5] *See* Comment Letter (FRA-2023-0099-0062) signed jointly by U.S. Representatives: Nicholas Langworthy [NY-23], Anthony D'Esposito [NY-04], Nicole Malliotakis [NY-11], Dan Meuser [PA-09], Marcus Molinaro [NY-19], Joseph Morelle [NY-25], and Elise Stefanik [NY-21].

[6] *See* Comment Letters from New York Assemblymembers: Billy Jones (FRA-2023-0099-0020), William Magnarelli (FRA-2023-0099-0018), and Philip Palmesano (FRA-2023-0099-0009).

[7] *See* Comment Letters from New York Senators: Jeremy Cooney (FRA-2023-0099-0015), Tim Kennedy (FRA-2023-0099-0011), Thomas O'Mara (FRA-2023-0099-0016), and Daniel Stec (FRA-2023-0099-0010).

Management System (ERTMS), which is service proven in Europe at speeds in excess of 125 mph under a different regulatory system from that in the United States. Brightline West selected ERTMS because it is service proven at higher speeds in Europe, and Brightline West states that ERTMS is designed to perform the same functions required for operation in the United States.[8] Since ERTMS uses Eurobalises and Euroloops, these components are required for the Project. Brightline West did not identify a domestic manufacturer that could produce Eurobalises and Euroloops. As a result, FRA concluded that these components are not produced in the United States. Similarly, FRA notes that ANTA Electric identified itself as a domestic supplier of fire suppressions systems, specifically the assembly of electronic components. However, this is different from the fire alarm system needed for the Project.

In addition, FRA did not identify any domestic location that can produce aluminum car body shells that meet the safety standards required for high-speed passenger rail operations. Both Siemens and Alstom sought domestic facilities for the car body shells through NIST-MEP's supplier scouting program but did not locate any domestic sources.

Furthermore, FRA recognizes that Alstom's facilities in New York are capable of producing domestic rolling stock and trainset components for conventional rail and transit systems. However, there are currently no domestic manufacturers of high-speed trainsets (i.e., trainsets that are service proven at speeds in excess of 125 mph). Although Alstom does not currently manufacture high-speed rail trainsets at its facilities in New York, Alstom represented that it would be able to manufacture and deliver the trainsets within Brightline West's project schedule. Alstom has represented that it would be able to manufacture its proposed Avelia trainsets, which it will adapt for high speed (i.e., in excess of 125 mph), in its New York facilities, with the exception of the car body shell, which is not available in the United States.

[8] ERTMS has not yet been tested, certified, and approved for operation in the United States. Design documentation, testing, and submission of a PTC Safety Plan and associated HSR-125 document will be required to obtain PTC certification and approval to operate. The operational experience of ERTMS across the European high-speed rail network will provide operational safety and reliability data to support the PTC Safety Plan and HSR-125 document.

Similarly, there is no domestic manufacturing capacity for Siemens' Velaro NOVO Electric-Multiple-Unit (EMU) trainsets. Siemens has represented that it would be able to manufacture 8 of the 10 trainsets at a planned facility in the United States, but the first 2 trainsets would need to be manufactured in Germany to ensure quality control, as well as be tested and commissioned in Germany. As more high-speed rail technology is deployed in the United States, FRA expects domestic capacity will ramp up to meet demand, similar to the way that manufacturing facilities in New York have grown and developed.[9]

B. Importance of Buy America Requirements and Need for a Narrow Waiver Scope.

Three commenters, (Bradley Supply, Inc.; U.S. Senator Charles E. Schumer [D-NY]; and the Transportation Trades Department, AFL-CIO) emphasized the need to limit the issuance of Buy America waivers to situations in which domestic manufacturing does not currently exist, and to ensure a clear justification is provided. The commenters stated that limiting the use of the waivers and establishing clear justification for needing waivers helps reinforce the importance of Buy America requirements, including BABA. Finally, one of the commenters stated that Buy America requirements are important to small businesses and that issuing Buy America waivers undermines small business activities.

*FRA Response*: FRA appreciates comments that address the importance of limiting waivers to only those situations in which domestic manufacturing does not currently exist. FRA notes that the proposed waiver does not waive the applicable BABA requirements and does not apply to construction materials used in the Project. In addition, FRA requested that high-speed rail project sponsors provide a domestic sourcing and workforce plan in waiver requests to ensure that FRA could tailor waivers to include only those components that are not produced in the United States. The proposed waiver reflects approximately five percent of the total direct expenditures for the Project and notably does not include any construction materials. The waiver

[9] *See i.e.*, Comment letter (FRA-2023-0099-0013) from Mayor John J. Buckley, City of Hornell (explaining how increased demand for rolling stock has led to job creation and growth in the city).

is narrowly tailored to safety-critical, specialized high-speed rail components that are not produced in the United States, as established through Brightline West's market research, FRA's expertise in high-speed rail, supplier scouting through NIST-MEP, and robust public engagement. In addition, the waiver applies only to the Project and does not apply to other projects or project sponsors.

FRA received several comments related to the Siemens proposal, specifically regarding the first two trainsets that would be manufactured in Germany. Twenty-six commenters[10] supported the proposed components waiver and manufacturing the first two trainsets in Germany. Generally, commenters stated that the development of the first two trainsets abroad would ensure that the technology is transferred in a safe and efficient manner while also allowing for the domestic ramp-up to be established for the remaining trainsets.

Three commenters (Alstom; LB Steel; and Transitair Systems, LLC) supported the waiver but opposed Siemens' proposal to manufacture the first two trainsets in Germany. The commenters stated that the manufacturing of the first two trainsets overseas would not follow Buy America requirements as there is domestic manufacturing capability for high-speed trainsets. Furthermore, the commenters stated that the issuance of a partial waiver, when domestic manufacturing of those components is available, can undermine domestic investment and create unfair advantages to those entities that receive such waivers.

One commenter (Alliance for American Manufacturing) opposed the waiver, including Siemens' proposal to manufacture the first two trainsets overseas. The commenter urged FRA and NDOT to consider whether the Siemens proposal could be modified to align with the Alstom proposal and specifically require that the first two Siemens trainsets also be manufactured

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[10] Acro Industries, Inc.; Baker Bellfield; Bentech, Div. PPBCo; Clerprem USA Corp.; EuropTec, USA, LLC; Flinchbaugh Engineering, Inc.; GST Manufacturing; HOPPECKE Batteries, Inc.; Jarmu Zrt.; Knorr-Bremse Espana, S.A.U.; Knorr-Bremse / EVAC GmbH; Mannington Commercial; Mid-States Aluminum Corp.; Milwaukee Composites, Inc.; Siemens Energy, Inc.; Siemens Mobility; SKF USA, Inc.; Stahl Bahnkuchen Technik GmbH; Teknoware; Televic US, Inc., The Timken Company; Trelleborg Industrial Products USA, Inc.; UKM Transit Products; Ultimate Europe Transportation Equipment GmbH; United Mechanical and Metal Fabricators, Inc.; and UTCRAS.

domestically. Furthermore, the commenter encouraged the development of consultation processes that can identify potential domestic manufacturing and could help facilitate the domestic manufacturing ramp up, such as with the NIST-MEP.

*FRA Response*: FRA appreciates these comments and clarifies that the two proposals from Siemens and Alstom, as described in the proposed waiver, are for two distinct trainset designs and technology. Siemens proposed to introduce the next generation Velaro NOVO EMU for the Project. Alstom proposed to adapt the Avelia technology planned for deployment on the NEC for use in the Project by increasing power capacity and traction to achieve the speed and performance capability required by Brightline West, which would be consistent with performance achieved by Alstom's TGV trains in Europe. As these trainsets involve different technologies, the domestic availability of trainset components varies by technology.

Amtrak and Alstom received Buy America waivers in 2014 and 2015 for final assembly of two prototype Avelia Liberty trainsets and eight components for use on the Northeast Corridor. Since that time, Alstom has established a robust domestic manufacturing base for its Avelia Liberty trainsets. Alstom's facilities in New York have capacity to manufacture the Avelia Liberty trainsets in the United States. In contrast, Siemens does not currently have a domestic facility equipped to manufacture the Siemens Velaro NOVO EMU trainsets. As such, the first two Velaro NOVO EMU trainsets would have to be manufactured in Germany.

High-speed rail trainsets are highly specialized and require highly skilled labor and specific equipment, manufacturing, testing, and commissioning facilities to ensure safe and efficient operations. As more high-speed rail technology is deployed in the United States, FRA expects domestic capacity will ramp up to meet demand, similar to the way that manufacturing facilities in New York have grown and developed. FRA has concluded that both proposals meet the criteria for a waiver of FRA's Buy America requirements based on domestic nonavailability, and limiting the Siemens proposal to only the first two trainsets is consistent with the Biden-

Harris Administration's efforts to maximize the use of available domestic content and build capacity for future demand. *See* 49 U.S.C. 22905(a)(2)(B).

C. Impact of the Waiver on Domestic Jobs.

Five commenters (Associated General Contractors of America, Brotherhood of Railroad Signalmen, High Speed Rail Alliance, Rail Passengers Association, and United Steelworkers) favored the issuance of the waiver, stating that the Project will create domestic jobs and facilitate the domestic market for the safety-critical high-speed rail components that are not currently manufactured domestically. Furthermore, the commenters generally stated that the proposed waiver and completion of the Project would facilitate increased demand for the high-speed rail technology, which could result in increased domestic manufacturing capacity to meet the demand for high-speed rail components.

*FRA Response*: FRA appreciates these comments. The creation of good-paying jobs is a priority for FRA, the U.S. Department of Transportation, and the Biden-Harris Administration. In the proposed waiver, FRA explained that the Project is expected to support approximately 35,000 domestic jobs across the construction period and includes a project labor agreement. As noted in the proposed waiver, Brightline West has reached an agreement with rail labor which may result in ongoing operations and maintenance work being performed by union labor.[11]

D. Comments Generally Supporting or Opposing the Proposed Waiver.

FRA received 527 comments from the public generally in favor of the issuance of the waiver. Additionally, several commenters noted that the completion of a high-speed rail project could increase domestic manufacturing and help reduce the need for waivers in the future. FRA received 29 comments from the public generally opposing the proposed waiver and emphasizing the need to develop domestic manufacturing in the high-speed rail industry.

[11] In March 2023, 13 rail unions representing more than 160,000 workers signed a Memorandum of Understanding with Brightline West, establishing a commitment for the use of highly skilled union labor required to operate and maintain the System.

*FRA Response*: FRA appreciates these comments and expects that the successful deployment of high-speed rail technology in the United States will facilitate and encourage domestic manufacturing capacity to meet increased demand. FRA further clarifies that the proposed waiver was narrowly tailored and limited to include only those components that are not produced in the United States, and the waiver is limited only to the Project and does not apply to other projects or project sponsors.

## VII. NIST-MEP Supplier Scouting Results.

Consistent with section 70916(c) of BABA, FRA requested that the project sponsor, Brightline West, engage with the NIST-MEP through the NIST-MEP's supplier scouting program. The NIST-MEP supplier scouting opportunity allows agencies, manufacturers, and project sponsors to identify potential manufacturers from across the Nation to assist in market research on domestic availability. Brightline West was not able to identify a domestic manufacturer for the components listed in the proposed waiver through the NIST-MEP supplier scouting program. This further supports FRA's conclusion that the components listed in the proposed waiver are not produced in the United States.

## VIII. Final Waiver

Based on its review of the waiver request and DSWP, and in consideration of comments received on the proposed waiver, FRA is waiving its Buy America requirements for the following components:

- First Two Complete Trainsets; and
- Car Shells for All 10 Trainsets (shell structure, frame, vehicle paintwork).
- Eurobalises and Euroloops;
- Counting Heads and Axle Counter Sensors;
- Truck Press (test stand);
- Turnout Systems including Derailers; and
- Fire Alarm Systems.

The waiver applies only to components listed above for use in the Project. However, FRA concludes that Alstom's proposal would have also met the criteria for a waiver if Brightline West had selected Alstom. FRA is not waiving any applicable requirements under BABA, and the waiver does not apply to any construction materials used in the Project. The waiver does not apply to other FRA recipients or to other grants that might be made to NDOT or Brightline West for other projects (including any future phases related to the Project). This waiver will expire upon the end of the period of performance and closeout of the grant agreement for the Project.

Issued in Washington D.C.

**Amitabha Bose,**

*Administrator.*

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