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December 7, 2016

Molly J. Moran
Acting General Counsel
United States Department of Transportation
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

Re: Effect of U.S. Employment Plan on Competitive Bidding

Dear Ms. Moran:

I have been asked by Jobs to Move America to express an opinion on whether, in undertaking federally funded rolling stock procurement transactions, local transit agencies using the U.S. Employment Plan (USEP) have met the legal requirements for “full and open competition.” I write this opinion as a law professor at the UCLA School of Law, where I have spent the past fifteen years teaching about and studying law as it relates to federal, state, and local economic development. This opinion is completely my own and in no way reflects the viewpoint of my institution; and I have received no compensation for it. My bottom line conclusion is that, with respect to the specific local transit agencies for which I have data, there is no evidence that the USEP has unduly inhibited competition in relation to either of the two central elements of competitive bidding: the pool of potential bidders or the ultimate contract price.

My opinion in this regard is based on a review of federal statutes, regulations, case law, and other relevant authority (including memoranda of the Office of Legal Counsel) related to competitive bidding in federal contracting. The legal standard for competitive bidding derived from that review was used to analyze data on railcar procurement from 2002 to 2016 (with and without USEP jobs language) provided by four large transit agencies: Chicago Transit Authority (CTA), Los Angeles Metropolitan Transit Authority (LA Metro), Massachusetts Bay Transportation Authority (MBTA), and the New York Metropolitan Transit Authority (NY MTA).¹ In essence, I applied the relevant law on full and open competition to the supplied rolling stock procurement facts in order to render a judgment about whether that procurement met the competitive bidding requirements.

The focal point of that analysis is the agencies’ use of the USEP, which seeks to promote domestic employment by creating incentives for rolling stock manufacturers to create good

¹ The raw data is attached to this letter as a Data Appendix.

American manufacturing jobs as part of their contract obligations. A model version of the USEP was developed by a team of economists and academics working with the Brookings Institution, in coordination with a legal task force appointed by then Deputy Secretary John Porcari to evaluate the matter. Although the specific language that local agencies use varies,² in general, they require rolling stock bidders to describe their plans to create jobs in the United States (both directly and through their suppliers); the expected wages, benefits, and qualifications for those jobs; plans for recruitment of disadvantaged, minority, and women workers; and plans for the provision of training and apprenticeship opportunities related to those jobs.

The primary legal question is whether, by evaluating bids based on USEP criteria, local transit agencies comply with federal contracting requirements that mandate full and open competition. These requirements apply to rolling stock procurement by local transit agencies by virtue of the fact that they are “recipients” of federal funds from the Department of Transportation (DOT) for that procurement. The general rule governing transit project contracting by DOT funding recipients is set forth in 49 U.S.C. § 5325, which provides that such recipients “shall conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary.” Federal regulations governing federally funded grant procurement similarly stress that procurement transactions “must be conducted in a manner providing full and open competition consistent with the standards of this section.” 2 C.F.R. § 200.319(a). Although these “common grant rule” provisions do not define “full and open competition,” they do provide a nonexhaustive list of “situations considered to be restrictive of competition,” which include “[p]lacing unreasonable requirements on firms in order for them to qualify to do business.” 2 C.F.R. § 200.319(a)(1).

As a preliminary matter, it is important to clarify aspects of the USEP. As used by agencies to date, the USEP results in the award of a price adjustment or additional points in a rating system in favor of bidders who submit the information encompassed by the Plan on a voluntary basis. The USEP does not impose any pre-bid requirement on bidders or disqualify any potential bidder in ways that might run afoul of the regulatory prohibition against “unreasonable requirements on firms in order for them to qualify to do business.” In addition, the use of USEP clearly informs potential bidders how jobs criteria will be used in the award of the contract, consistent with the regulatory mandate that local agencies have “a written method for conducting technical evaluations of the proposals received and for selecting recipients.” 2 C.F.R. § 200.320(d)(3).

I also take note that in February 2016, DOT Secretary Foxx sent a letter to stakeholders encouraging transit agencies purchasing rolling stock equipment with federal funds to consider using the USEP language.³ This letter was based on the fact that a number of grantee transit agencies had requested DOT approval to incorporate the USEP into the bidding and selection process for the purchase of rolling stock. In each instance, the DOT approved use of the USEP considerations.

Although the legal materials I reviewed provide no clear test for determining what constitutes “full and open competition” in the context of rolling stock procurement, they

² For some examples of USEP language, see Jobs to Move America, U.S. Employment Plan Resources, *at* <http://jobstomoveamerica.org/resources/u-s-employment-plan-resources-2/>.

³ Letter from Anthony R. Foxx, U.S. Secretary of Transportation, to Transportation Stakeholders (Feb. 18, 2016), *available at* <https://www.transit.dot.gov/funding/procurement/procurement>.

generally focus on two aspects of the bidding process that are particularly relevant to my analysis: the amount of the winning bid price (i.e., the ultimate cost of the rolling stock) and the size of the bidding pool.

First, full and open competition requires a bidding process in which competition ultimately yields a contract that provides the best value to the contracting agency. Although the lowest bid price is an important factor in this analysis, transportation contracting rules make clear that a “recipient may award a procurement contract . . . to other than the lowest bidder if the award furthers an objective consistent with the purpose of this chapter, including improved long-term operating efficiency and lower long-term costs.” 49 U.S.C. § 5325(c). Even without a showing of long-term efficiency or cost reduction, a local agency acquiring rolling stock may enter a contract through a competitive procurement process based on “performance, standardization, life cycle costs, and other factors.” 49 U.S.C § 5325(f)(1)(b). In such a process, the agency is required to award contracts “to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered.” 2 C.F.R § 200.320(d)(4). Thus, in evaluating whether a local requirement, like the USEP, unduly impedes competition, its impact on bid pricing is a significant factor, though it is not decisive insofar as full and fair competition is satisfied by rolling stock procurement decisions based on a mix of value-based criteria. Significant price impacts may undercut the competitive process, but how much impact on bid price is too much is nowhere clearly defined.

Second, full and open competition requires a strong pool of bidders vying for contracts because it is only through that type of competition that a local agency can be sure that it is getting the best value. For this reason, the Office of Legal Counsel (OLC), in interpreting a similar (though not identical) federal highway procurement statute (23 U.S.C § 112) concluded that competitive bidding requirements are violated when a state or local agency imposes requirements that “unduly limit the pool of potential bidders.”⁴ As the OLC stated: “A state or local requirement that has only an incidental effect on the pool of potential bidders or that imposes reasonable requirements related to the performance of the necessary work would not unduly limit competition. But a requirement that has more than an incidental effect on the pool of potential bidders and does not relate to the work’s performance would unduly limit competition unless it promotes the efficient and effective use of federal funds.”⁵

In light of this analysis, I evaluate the data on the use of USEP by four large transit agencies in relation to the following two questions:

1. Does the use of USEP language have more than an “incidental effect” that “unduly limits” the pool of potential bidders?

⁴ U.S. DEP’T OF JUSTICE, MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL, DEP’T OF TRANSPORTATION, COMPETITIVE BIDDING REQUIREMENTS UNDER THE FEDERAL-AID HIGHWAY PROGRAM 2 (Aug. 23, 2013) [hereinafter OLC MEMO 2013], *available at* https://www.justice.gov/sites/default/files/olc/opinions/2013/08/31/comp-bidding-reqs_0.pdf.

⁵ OLC MEMO 2013, at 2-3. The OLC further stated that “we do not believe that the statute’s competitive bidding requirement precludes any and all state or local bidding or contractual restrictions that have the effect of reducing the pool of potential bidders for reasons unrelated to the performance of the necessary work.” OLC MEMO 2013, at 2. Instead, the OLC concluded that the agency administrator has discretion to determine if a requirement “unduly limits competition” by assessing whether it promotes “the efficient and effective use of federal funds in the long run or protects the integrity of the competitive bidding process.” OLC MEMO 2013, at 2-3.

2. Does the use of USEP language have a significant impact on the price of rolling stock bids and the ultimate contract cost?⁶

To answer these questions, I asked the UCLA Empirical Research Group, directed by Dr. Benjamin Nyblade, to analyze data on bidding for 16 large transit authority contracts for four authorities (CTA, LA Metro, MBTA, and NY MTA) between 2002 and 2016. This data included information on the nature of the project, the number and identity of bidders, the bid amounts, and the winning bid for each project. In addition, for each project, the data indicated whether the individual bids included USEP language or not. For three of the four transit authorities (CTA, LA Metro, and MBTA), an independent cost estimate (ICE) was provided. The NY MTA data is qualitatively different from the other three in two important respects. First, the NY MTA did not provide an ICE for its projects, which prevented constructing bid-to-ICE ratios; second, the jobs language inserted by the NY MTA, though similar to that of the USEP, came from a jobs preference incentive available in state law. Because of these differences, we created two aggregate measures: Combined All (which includes NY MTA) and Combined w/o NY. Basic descriptive information about the bidding on contracts with USEP jobs standards language (wl) and with no jobs standards (nol) language is set forth below in Table 1.

Table 1: Analysis of Bidding Pool and Price of Rolling Stock Contracts in Four Transit Authorities with USEP, 2002-2016

Authority	Contracts (wl)	Contracts (nol)	Average # of Bidders (wl)	Average # of Bidders (nol)	Average Ratio Winning Bid to ICE (wl)	Average Ratio Winning Bid to ICE (nol)	Average Ratio All Bids to ICE (wl)	Average Ratio All Bids to ICE (nol)
MBTA	2	4	4.5	2.75	.86	1.02	1.02	1.29
CTA	1	1	2	3	.76	.69	0.83	0.79
LA Metro	3	1	2.33	3	1.04	.87	1.05	0.91
NY MTA	3	1	2.33	3	n/a	n/a	n/a	n/a
Combined All	9	7	2.77	2.86	0.93	0.94	1	1.13
Combined w/o NY	6	6	3.00	2.83	0.93	0.94	1	1.13

To assess whether the inclusion of jobs language affected the pool of bidders, Table 1 breaks down the average number of bidders with and without jobs language by transit authority. Of the 16 contract bidding processes there is data for, 9 included jobs standards language, and 7 did not, with each transit authority including at least one example of each type. For each of the contracts there were 2-6 bidders, with 14 of the 16 cases having 2 or 3 bidders. In terms of overall averages, the Combined All average number of bidders with jobs

⁶ Note that with respect to both questions, I do not presume that an affirmative answer means that the use of USEP language is necessarily incompatible with “full and open competition” requirements since it might be possible to make a case that a significant impact on the bid price or pool would nonetheless be justified by other value factors or long-term efficiency and process integrity considerations. However, I am not analyzing the relation between the USEP and such other factors here.

language (2.77) and without (2.86) were essentially the same, as were the Combined w/o NY averages (3.00 with jobs language and 2.83 without). Thus, in terms of the number of bidders, there is no significant variation in this data, nor is there any statistically significant distinction between the number of bidders by jobs standards language.

To assess whether the inclusion of jobs language affected the price of the winning bid, Table 1 sets out the ratio of the winning bid price to the ICE with and without jobs language, and compares that to the ratio of all bids to the ICE. The ratio of bids to ICE are more variable, although again on average there is little difference between the cases in which there are and are not jobs language. Both CTA projects we have data on, for example, had every single bid come in below the ICE, whereas for LA Metro, there was one project in which both bids came in dramatically lower than the ICE (ratios of 0.54 and 0.56), and another in which both bids came in dramatically higher (ratios of 1.67 and 1.89) (and both of these included USEP jobs language). On average, the bids to ICE ratio for bidding on contracts with the language is slightly lower than for those without the language (both for winning bids and all bids) but this difference is small and not statistically significant given the large variability in bid to ICE ratios.

This analysis supports the conclusion that the procurement data available provides no evidence that jobs standards language is significantly associated with the level of competition in bidding for large transit authority contracts in terms of either the number of bids submitted or the ratio of those bids to independent cost estimates. From a statistical standpoint, given the relatively small number of cases being examined, it is not surprising to find no statistically significant relationship in this data. The small number of cases means that the statistical evidence is likely to be weak in any direction. It is fair to say that what we have here is primarily an absence of evidence showing an effect of the USEP job standards language, rather than strong evidence of the absence of any effect.

This absence of evidence, nonetheless, is important for assessing the legal validity of the USEP at this stage in its development. Based on the data above, I can conclude that there is no evidence that inclusion of USEP language by the local agencies under consideration has had more than an “incidental effect” that “unduly limits” the bidding pool; nor has it had a significant impact either on the average price of all bids submitted or the winning bids in these projects. As the USEP plan is adopted in more projects, we will have a greater store of data with which to conduct more analysis. Until then, I conclude that the present use of the USEP in the jurisdictions for which we have procurement information appears to be consistent with the federal requirement that procurement transactions operate in a manner that provides full and open competition.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Cummings', with a large, stylized flourish at the end.

Scott L. Cummings
Robert Henigson Professor of Legal Ethics
UCLA School of Law

SLC

Data Appendix Attached

CC: Vincent White, Acting Assistant Secretary for Policy
Judith S. Kaleta, Deputy General Counsel
Terence W. Carlson, Assistant General Counsel for General Law
Michael W. Harkins, Deputy Assistant General Counsel for General Law

Data Appendix

A	B	C	D	E	F	G	H	I	J	K
Chicago Transit Authority (Awarded Bid is Bolded)										
1										
2	Contract Number and Description	Date Awarded	RFP or IFB	Company Names (all bidders)	Description	Independent Cost Estimate	Bid Amounts	Job Standards Language (y/n)	Awarded Bid Citation	Citation
3				Bombardier	714 LRV	\$1.236 billion -- \$1.377 billion	\$901,355,876.00	No	Yes	Info on Train Roster
4	Contract C04F100110620			Alstom Transportation	714 LRV	\$1,196,783,784.00	No	No	No	
5	for 714 Light Rail Vehicles	May 2006	RFP	Kawasaki	714 LRV	\$996,814,200.00	No	No	No	
6	Purchase Order A-5 for			CSR Cifang America	846 LRV	\$1.86 billion	\$1,407,928,068.00	Yes	Yes	7000 Series Train Roster
7	846 Light Rail Vehicles.	March 9, 2016	RFP	Bombardier	846 LRV	\$1.86 billion	\$1,646,976,866.00	Yes	No	

A	B	C	D	E	F	G	H	I	J	K	
Los Angeles Metro (Awarded Bid is Bolded)											
1											
2	Contract Name and Description	Date Awarded	Request for Proposals (RFP) or Invitation for Bids (IFB)	Company Names (all bidders)	Description	Average cost of vehicle in 2013/2014 multiplied by number of vehicles procured	Independent Cost Estimate (Base+Options)	Bid Amounts Excluding Job Investment Bonus (Base+Option \$)	Job Standards Language (y/n)	Awarded Bid	Citation
3	P2550 for 150 Light Rail Vehicles	April 24, 2003	IFB	Ansaldo Breda Kinkisharyo Bombardier	150 Light Rail Vehicles 150 LRV 150 LRV	\$495,000,000.00 \$495,000,000.00 \$495,000,000.00	\$458,225,774.00 \$458,225,774.00 \$458,225,774.00	\$397,140,072.00 \$431,562,330.00 withdrew	No No No	Yes No No	Operations Committee Memo Operations Committee Memo Operations Committee Memo
6				Kinkisharyo	236 LRV	\$778,800,000.00	\$976,737,929.00	\$891,371,272.00	Yes	Yes	Source Committee Award Recommendation
7	P3010 for 236 Light Rail Vehicles	April 2012	RFP	Seimens	236 LRV	\$778,800,000.00	\$976,737,929.00	\$940,636,114.00	Yes	No	Source Committee Award Recommendation
8	Refurbishment of 74 LRV originally made by Breda	September 26, 2016	RFP	CAF USA	236 LRV	\$778,800,000.00	\$976,737,929.00	\$785,632,250.00	Yes	No	Source Committee Award Recommendation
9				Talgo	Refurbishment of 74 LRV	\$244,200,000.00	\$43,764,550.00	\$72,970,493.00	Yes	Yes	Article in Railway Age
10				Transportation	Refurbishment of 74 LRV	\$244,200,000.00	\$43,764,550.00	\$82,874,817.00	Yes	No	Files on Contract
11				CRRG MA Corporation	282 HRV	\$496,001,340.00	\$1,199,987,085.00	\$646,995,869.00	Yes	Yes	Contract Summary
12	282 Heavy Rail Vehicles	November 18, 2016	RFP	Hyundai Motors	282 HRV	\$496,001,340.00	\$1,199,987,085.00	\$670,065,708.00	Yes	No	

A	B	C	D	E	F	G	H	I	J
1			MBTA (Awarded Bid is Bolded)						
2	Contract Number and Description	Date Awarded	Company Names (all bidders)	Description	Independent Cost Estimate	Bid Amounts	Job Standards Language (y/n)	Awarded Bid	Citation
3	4 75 New Bi-Level Commuter Rail Coaches	March 18, 2008 RFP	Hyundai Rotem	74 New Bi-Level Coaches	\$179,000,000	\$178,500,128	No	Yes	See HRU Contract Award
4	75 New Bi-Level Commuter Rail Coaches	March 18, 2008 RFP	Kawasaki Rail Car	74 New Bi-Level Coaches	\$179,000,000	\$219,799,380	No	No	
5	39 Diesel Electric Passenger Locomotives	August 27, 2010 RFP	Motive Power	39 Locomotives	\$199,728,108	\$215,400,000	No	Yes	See MPI Contract Award
6	39 Diesel Electric Passenger Locomotives	August 27, 2010 RFP	Vossloh	39 Locomotives		Withdraw	No	No	
7			Alstom	86 LRV Overhaul	\$102,915,661	\$104,393,982	No	Yes	
8			Bombardier	86 LRV Overhaul	\$102,915,661	\$125,234,672	No	No	
9			Siemens	86 LRV Overhaul	\$102,915,661	\$133,251,930	No	No	
10	86 LRV Green Line Type 7 Selective Systems		CAF USA	86 LRV Overhaul	\$102,915,661	\$210,125,054	No	No	
11	Overhaul	July 10, 2012 RFP	RELCO	86 LRV Overhaul	\$102,915,661	Non-compliant	No	No	
12			Alstom Transportation, Inc.	Overhaul of 74 Bi-Level Coaches	\$163,091,244	\$160,153,271	No	Yes	Operations Committee Memo
13	74 Kawasaki Bi-Level Mid-Life Overhaul	October 22, 2012 RFP	Kawasaki Rail Car, Inc.	Overhaul of 74 Bi-Level Coaches	\$163,091,244	\$291,155,455	No	No	Operations Committee Memo
14			CAF USA, Inc.	24 70% low floor Light Rail Vehicles	\$212,505,953	\$220,000,000	Yes	Yes	Transit Staff Summary Sheet
15	24 New Green Line "Type 9" 70% low floor Light Rail Vehicles		Kinkishanyo	24 70% low floor Light Rail Vehicles	\$212,505,953	\$254,900,000	Yes	Withdraw	Transit Staff Summary Sheet
16	24 New Green Line "Type 9" 70% low floor Light Rail Vehicles	September 4, 2014 RFP	Ansaldo Breda	24 70% low floor Light Rail Vehicles	\$212,505,953	Withdraw	Yes	Withdraw	Transit Staff Summary Sheet
17			CNR MA	283 Heavy Rail Vehicles	\$852,000,000	\$566,600,000	Yes	Yes	
18			CAF	283 Heavy Rail Vehicles	\$852,000,000	Not Evaluated	Yes	Withdraw	
19			Bombardier	283 Heavy Rail Vehicles	\$852,000,000	\$1,080,100,000	Yes	No	
20			CSR	283 Heavy Rail Vehicles	\$852,000,000	Unacceptable/Not E	Yes	Withdraw	
21	283 Heavy Rail Vehicles New Orange and Red Line Vehicles	November 19, 2014 RFP	Hyundai Rotem	283 Heavy Rail Vehicles	\$852,000,000	\$720,600,000	Yes	No	
22	Red Line Vehicles		Kawasaki Rail Car	283 Heavy Rail Vehicles	\$852,000,000	\$904,900,000	Yes	No	



**U.S. Department
of Transportation**

Office of the Secretary
of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
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January 19, 2017

Via e-mail

Scott L. Cummings (Cummings@law.ucla.edu)
Robert Henigson Professor of Legal Ethics
UCLA School of Law
405 Hilgard Avenue
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Re: Acknowledgement of Your Correspondence of December 7, 2016

Dear Professor Cummings:

I am writing to acknowledge your correspondence of December 7, 2016 to the U.S. Department of Transportation (DOT), whereby you shared an analysis of railcar procurement data collected from four state or local transportation agencies, the Los Angeles Metropolitan Transportation Agency, the Chicago Transit Authority, the Massachusetts Bay Transportation Authority and the New York Metropolitan Transportation Authority. In your correspondence, you presented railcar procurement data from the agencies and then expressed your opinion as to whether the inclusion of language creating incentives for firms to create good U.S jobs unduly impacted full and open competition.

Information, such as this, is a helpful and necessary step in the consideration of this issue, which is the subject of DOT Secretary Anthony Foxx's 2016 letter to transportation stakeholders as well as a memorandum from the Office of Legal Counsel (OLC) dated August 23, 2013, entitled Competitive Bidding Requirements Under the Federal-Aid Highway Program 2 [hereinafter OLC Memo].

In the OLC Memo, the Department of Justice clarified that state and local grantees conducting procurement with federal funds can use criteria in their competitive bidding process intended to encourage creation of good jobs, so long as that language has no more than an "incidental impact" on full and open competition. You expressed your opinion that, based on the relevant statutes, regulations and case law, the analysis of the impact of language like the U.S. Employment Plan on competition should be assessed by considering two questions: whether the language (1) has more than an incidental effect on the pool of potential bidders and 2) has a significant impact on bid price or the ultimate contract cost.

We appreciate your sharing of this information, which we will consider as we continue to evaluate the impacts of tools, such as the U.S. Employment Plan, on competition in Federally funded procurements.

Sincerely,

A handwritten signature in black ink, appearing to read 'Molly J. Moran', with a long horizontal flourish extending to the right.

Molly J. Moran
Acting General Counsel

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