



U.S. Department
of Transportation
**Federal Transit
Administration**

REGION IX
Arizona, California,
Hawaii, Nevada, Guam
American Samoa,
Northern Mariana Islands

201 Mission Street
Suite 1650
San Francisco, CA 94105-1839
415-744-3133
415-744-2726 (fax)

SEP 30 2015

Stephanie Wiggins
Deputy Chief Executive Officer
Los Angeles County Metropolitan
Transportation Authority
One Gateway Plaza
Los Angeles, CA90012-2952

Re: Application for Inclusion in
U.S. Department of Transportation's
Contracting Initiative Pilot Program

Dear Ms. *Stephanie Wiggins*:

Thank you for the application submitted by the Los Angeles County Metropolitan Transportation Authority (LACMTA) to the United States Department of Transportation (DOT) Contracting Initiative Pilot Program.¹ The Federal Transit Administration (FTA) accepts LACMTA's proposals for inclusion in the program with certain modifications, as described more fully below.

FTA understands that LACMTA has four contracting opportunities involving rolling stock that it would like to include in the Pilot Program. These contracting opportunities include contracts for (1) the purchase of 282 heavy rail vehicles; (2) the purchase of up to 600 new buses; (3) the mid-life overhaul of 74 heavy rail vehicles; and (4) the mid-life overhaul of 82 light rail vehicles. In support of its application, LACMTA submitted the following documents: April 13, 2015 Submittal to FTA for Admission into Local Hiring Pilot Program; Local Employment Program (Mandatory) & Local Employment Program (Voluntary); P3010 US Employment Value Summary Trade-off Analysis – Attachment 1; and May 8, 2015 Response to Supplemental Questions Regarding Application for Local Hiring Pilot Program.

LACMTA proposes a mandatory Local Employment Plan (LEP) for the heavy rail contract and voluntary LEPs for the bus purchase and overhaul contracts. The LEP in both circumstances would target new and existing jobs in Los Angeles County and would provide that at least 10 percent of the jobs be targeted at disadvantaged populations. The proposed mandatory LEP would make the inclusion of an LEP a requirement of responsiveness, and would constitute 10 percent of the total points available for all RFP evaluation factors. The proposed voluntary LEP would provide the bidder with additional "bonus" points that could be awarded if the bidder includes an LEP with its bid.

¹ The DOT Contracting Initiative is described in more detail in 80 FR 12257 (March 6, 2015).

In considering whether to approve a proposed contract requirement under the Pilot Program, FTA is guided by an August 2013 opinion of the Office of Legal Counsel (OLC) of the U.S. Department of Justice.² Under that opinion, FTA may approve a proposed contract requirement that is likely to have only an incidental effect on the pool of potential bidders, or that imposes reasonable requirements related to the performance of the necessary work. Or, if a proposed specification is likely to have more than an incidental effect on the pool of potential bidders and is unrelated to the work's performance, FTA still may approve the requirement if it "promotes the efficient and effective use of federal funds in the short or long run" or "safeguards the integrity of the competitive bidding process." The OLC decision leaves to FTA discretion the determination of what constitutes the "efficient and effective use of federal funds."

FTA is concerned that the proposed voluntary and involuntary programs both may have more than an incidental effect on the pool of potential bidders – at least with respect to the heavy rail car buy and the bus buy – because they could put at a disadvantage any manufacturer who does not already have a facility in the defined geographic area, and this competitive disadvantage is not relieved by the voluntary or involuntary nature of the program. However, an appropriate modification of LACMTA's proposed requirements will address our concerns.

Generally, FTA proposes modifications to the following provisions: the voluntary versus mandatory nature of the LEP requirement; credit given for new versus existing jobs; and the geographic area eligible for LEP participation. FTA is concerned with making the LEP mandatory, as well as awarding credit for existing jobs within Los Angeles County because both terms could give an undue advantage to potential bidders already located within Los Angeles County. Additionally, FTA examined the competitive markets within LACMTA's proposed geographic focus of Los Angeles County, and determined that for two of the contracts such a geographic limitation could afford an unfair competitive advantage.

FTA evaluated each proposed program and contracting opportunity and requests the following modifications.

Purchase of 282 Heavy Rail Vehicles (Estimated Contract Cost: \$1.0558B)

The LACMTA proposal is a mandatory LEP that includes as part of the bid evaluation criteria credit for new and existing jobs in Los Angeles County. The proposal also includes a requirement that 10% of the jobs be targeted for disadvantaged persons. The LEP would constitute 10% of the available points.

Currently, there is one rail vehicle manufacturer in Los Angeles County, Kinkisharyo. Limiting the LEP to Los Angeles County and including existing jobs could provide Kinkisharyo with an unfair competitive advantage and could be an exclusionary or discriminatory specification prohibited by 49 U.S.C. § 5334(h). FTA requests that LACMTA modify the LEP for the heavy rail vehicles to make it a voluntary program, expand the geographic market to the state of California, and provide credit only for new jobs created, with 10% of the jobs targeted for disadvantaged persons.

² See *Competitive Bidding Requirements Under The Federal-Aid Highway Program*, 23 U.S.C. § 112 (August 23, 2013). The 2013 opinion is available at <http://www.justice.gov/olc/opinions>.

Purchase of up to 600 new buses (Estimated Contract Cost: \$325M)

The LACMTA proposal is a voluntary LEP that provides supplemental points for any proposer who includes an LEP. Bidders would receive credit for new and existing jobs in Los Angeles County. The proposal also includes a requirement that 10% of the jobs be targeted for disadvantaged persons.

Currently, there only is one bus manufacturer with a facility in Los Angeles County -- New Flyer. Accordingly, an LEP limited to the county could provide an unfair competitive advantage for that manufacturer, even if the program is voluntary. FTA requests that LACMTA modify the LEP for the 600 bus buy to expand the geographic market to the state of California, and provide credit only for new jobs created, and 10% of the jobs targeted for disadvantaged persons.

Mid-life overhaul of 82 light rail vehicles (Contract Value \$100M) and mid-life overhaul of 74 heavy rail vehicles (Contract Value \$46M)

The LACMTA proposal for the two mid-life overhaul contracts is the same: a voluntary LEP giving credit for new and existing jobs in Los Angeles County, and a requirement that 10% of the jobs be targeted for disadvantaged persons.

For overhaul contracts, the original vehicle manufacturer has an advantage for doing mid-life overhauls of its own vehicles. The original manufacturers for the vehicles subject to the contracts are not located in Los Angeles County, resulting in all potential bidders being similarly situated. Under these circumstances, limiting the geographic market to Los Angeles County does not provide an unfair competitive advantage for any one bidder. As with the other contracts, FTA requests that this LEP be limited to new jobs created and provide that 10% of the jobs be targeted for disadvantaged persons.

With the above modifications to LACMTA's proposed LEPs, FTA believes that inclusion of the four contracting opportunities in the Pilot Program would likely better promote the efficient and effective use of federal funds and safeguard the integrity of the competitive bidding process. Please let us know whether LACMTA is interested in participating in the Pilot Program under the proposed terms. If you have any questions, please contact Deputy Chief Counsel Dana Nifosi at 202-366-1643 or Dana.Nifosi@dot.gov.

Sincerely,


Leslie T. Rogers
Regional Administration