April 11, 2013

Robert S. Rivkin
General Counsel
United States Department of Transportation
1200 New Jersey Ave., SE
Washington, DC 20590

RE: Proposed U.S. Employment Plan's Conformance with Federal Law

Dear Mr. Rivkin:

We are writing on behalf of a consortium of nonprofit and academic institutions to discuss why a proposed Model Request for Proposals creating incentives for U.S. employment (the "U.S. Employment Plan") fully and clearly conforms to federal statutes and regulations governing federally funded Rolling Stock procurements. In fact, we believe that the U.S. Employment Plan can ultimately become a tool to enhance competition around Rolling Stock procurement **and** help the Department of Transportation (the "Department") achieve important objectives articulated by Congress, the President and the Secretary of Transportation.

BACKGROUND ON PROJECT:

In the wake of stubbornly high rates of unemployment and poverty in the United States as well as growing state and regional investment in public transit expansion, the partners in this project came together in 2012 with support from several major U.S. foundations to develop a tool for use by U.S. public agencies to increase and enhance the quality and quantity of, and access to, U.S. jobs created by the federally funded purchase of Rolling Stock.

In the development of the U.S. Employment Plan documents, the team was led by two nonprofit institutions and two universities: the Los Angeles Alliance for a New Economy (LAANE) and the Brookings Institution, both recognized 501(c)(3) nonprofit organizations, and the University of Southern California, Program for Environmental and Regional Equity (PERE) and the University of Massachusetts, Amherst, Political Economy Research Institute (PERI). In addition, in order to provide further economic analysis of the proposal, the Brookings Institution convened three other experts to carefully analyze the project, both in advance of and during a full day retreat at the Brookings Institution in December, 2012. These additional experts came from the University of Illinois, Chicago, the University of Missouri, St. Louis and Duke University. The curriculum vitae for all of the experts involved are attached.

The expert team was supplemented by a legal team to thoroughly review all of the proposed language for conformance with federal and state law. This legal team was led by Madeline Janis, from LAANE, and included experts from the Community Benefits Law Center, based in Oakland, and specific legal experts brought in to advise on matters of particular legal concern,

such as disability law and antidiscrimination law as those areas became relevant in the drafting process.

Throughout the past nine months, the expert team obtained extensive input from staff at six regional transit agencies, representatives from six bus and rail car manufacturers, numerous representatives from the American Public Transportation Association, the Manufacturing Extension Partnership of the Department of Commerce and dozens of community, labor and workforce groups around the country. This extensive input was solicited and incorporated to ensure that the U.S. Employment Plan could both assist in the achievement of employment objectives as well as enhance competition, in particular, increasing the bidding opportunities of companies that have invested more heavily in the United States. As you know, the team also worked closely with representatives from the Department assigned by Deputy Secretary Porcari to provide input during the development of the documents.

LEGAL ISSUES:

Introduction:

In crafting the U.S. Employment Plan, the team carefully worked to meet the standards established by federal statutes and regulations, including 49 U.S.C. § 5325 and 49 CFR 18.36, which require federally funded transportation procurements to be conducted in a manner guaranteeing full and open competition. In particular, the team paid careful attention to the following requirements of 49 CFR 18.36:

> All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of section 18.36. Some of the situations considered to be restrictive of competition include but are not limited to: (i) placing unreasonable requirements on firms in order for them to qualify to do business . . . .(49 CFR 18.36(c)(1));
>
> Grantees and sub grantees will conduct procurement in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals . . .(49 CFR 18.36(c)(2)).

The U.S. Employment Plan has been designed without preferences based on local or state geography. All standards and measures used in the documents apply equally throughout the U.S. and the expert team has presented extensive documentation to the Department that any and all special categories, such as the definition of “areas of concentrated poverty” used in the disadvantaged worker credit, are based on circumstances that exist in all parts of the country.

Primary Question:

The primary question remaining is whether the U.S. Employment Plan, as drafted, complies with the requirements for full and open competition as articulated in 49 USC § 5325 and 49 CFR 18.36. The balance of this letter sets forth the reasons why we strongly believe that it does.

We are cognizant of the guidance provided by the Office of Legal Counsel (OLC) in its 1986 opinion entitled "Compatibility of New York City Local Law 19 with Federal Highway Act Competitive Bidding Requirements" (the "OLC Opinion"), which focused on Section 112 of the Federal Aid Highway Act ("Section 112"). **Importantly, Section 112 does not apply to federally funded Rolling Stock purchases, and differs in material ways** from the statutes and regulations that do apply to such purchases. Specifically, Section 112 states:

> Projects…shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

In contrast, 49 USC §5325(a) states:

> Recipients of assistance under this chapter shall conduct all procurement transactions in a manner that provides full and open competition **as determined by the Secretary**. (Emphasis added.)

"Full and open competition" is a concept used throughout the federal system, including in the Competition in Contracting Act, Pub.L. No. 98–369, 98 Stat. 1175 (codified as amended in scattered sections of Titles 10, 31, and 41 of the U.S. Code.). Unlike the statutory language in Section 112, the phrase "full and open competition" has been interpreted to be much more permissive with respect to the bidding method and factors that can be considered in awarding contracts. *See* Kate M. Manuel, Competition in Federal Contracting: An Overview of the Legal Requirements (Congressional Research Service 2011).

However, we recognize that Section 112 and the OLC Opinion inform the Department's approach to full and open competition, which Departmental agencies have applied to their funding agreements over the past nearly 30 years. Accordingly, while reserving the right to question the soundness and continued viability of the OLC Opinion, we have endeavored to distill and apply in the analysis below those principles of the OLC Opinion applicable in the Rolling Stock procurement context.

Summary of Arguments:

For numerous reasons articulated in this letter, we strongly believe that the U.S. Employment Plan is fully consistent with all applicable federal statutes and regulations requiring federally funded Rolling Stock procurement to be conducted in a manner guaranteeing full and open competition. Our principal legal arguments are as follows:

1. The U.S. Employment Plan has been developed for a **best value Rolling Stock procurement** utilizing a request for proposal (RFP) methodology in which cost does not have to be the most important factor. This methodology is specifically authorized in 49 U.S.C. §5325 (f) and 49 CFR 1836 (d) (3) and is distinct from the lowest responsible bidder methodology analyzed in the OLC Opinion.

2. The U.S. Employment Plan will help to **implement a strong federal policy** as articulated by Congress in 49 U.S.C. § 5322, which gives the Secretary of Transportation the authority to undertake programs that encourage employment training programs, outreach programs to increase minority and female employment in public transportation activities, research on public transportation personnel and training needs, and training and assistance for minority business opportunities.

3. The U.S. Employment Plan promotes competitive bidding by utilizing a **voluntary price adjustment** to encourage greater investment in U.S. jobs. The Plan does not include any conditions precedent or pre-bid prerequisites that would inhibit bidding on any particular contract.

4. The U.S. Employment Plan includes a **very precise methodology** for evaluating proposals that gives bidders on Rolling Stock procurement certainty and clarity as to the factors by which the winning bidder will be selected. This certainty enhances competition, unlike the vague New York City law found to be anticompetitive in the OLC Opinion.

5. The U.S. Employment Plan has been developed for use in Rolling Stock procurement, which is governed by 49 CFR 18.36 (also known as the "Common Grant Rule"). The **federal government intended grant recipients to have flexibility and discretion** in application of the Common Grant Rule to purchases made with federal dollars.

ARGUMENT:

1. **The U.S. Employment Plan Is Intended for Use Only with Best Value Procurement where Cost Is Not the Only Consideration. This Type of Procurement Is Clearly Permitted Under Federal Law for the Purchase of Rolling Stock with Federal Funds**.

The OLC Opinion interpreted a statute (Section 112) that required federally funded highway projects to use a lowest responsible bidder methodology in which cost is the only deciding

factor in awarding a contract amongst bidders deemed responsible. The OLC understood that, "[t]he legislative report accompanying the[1982] amendment [to section 112] reflects the concern of Congress that cost-effectiveness be the only criterion by which to award contracts to responsible bidders for highway projects funded by the federal government." 10 Op. OLC 133 at *5 (1986).

In contrast to this reading of Section 112, statutes and regulations governing procurement of Rolling Stock with federal funds expressly permit agencies to consider factors other than cost in their purchasing decisions.

49 U.S.C. §5325, which sets forth contracting requirements for recipients of federal funds for public transportation under 49 U.S.C. §5301, *et seq*., provides, in relevant part:

> (c) Efficient Procurement. – A recipient may award a procurement contract under this chapter 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" (Emphasis added); and
>
> (f) Acquiring Rolling Stock. – A recipient of financial assistance under this chapter may enter into a contract to expend that assistance to acquire Rolling Stock –
>
> (1) based on –……(B) performance, standardization, lifecycle costs, **and other factors . . .** (Emphasis added)

Moreover, in the implementing regulations, the Secretary has specifically permitted recipients of federal funds to use a competitive, negotiated procurement, a so-called "best value" methodology that incorporates factors other than cost into the procurement of Rolling Stock.

49 CFR 18.36 (d) provides that, as a part of this methodology, RFPs will identify "all evaluation factors and their relative importance" and awards will be "made to the responsible firm whose **proposal is most advantageous to the program, with price and other factors considered** . . ." (Emphasis added).

In direct contrast to what the OLC Opinion understood as Congress's approach under Section 112, Congress and the Secretary have explicitly permitted procuring agencies to consider factors in addition to cost in their federally funded Rolling Stock procurement, **and**, as noted in the above-quoted sections, have given agencies significant latitude to identify the additional factors to be considered in procurement and to determine which of those factors are most advantageous to their program.

Federal courts have also found that "[d]uring negotiated procurement, in contrast to sealed bidding, agency contracting officers are permitted to make trade-offs among cost or price and non- cost factors and accept a proposal other than the lowest price proposal." *See, e.g*.,

Carahsoft Technology Corporation v. U.S., 86 Fed.Cl. 325, 336 (2009) (internal citations omitted). "In sum, contracting officers engage in an inherently judgmental process when seeking best value for the government during a negotiated procurement." *Id. at 332.* (*citing Galen Med. Assocs., Inc. v. U.S.,* 369 F.3d 1324, 1330 (Fed. Cir. 2004)).

Notably, the contracting approach under 49 CFR 18.36 still provides federal agencies with ample authority to protect competitive bidding by withdrawing support for contracts that they deem non-competitive. *See, e.g., New Orleans v. DOT*, 745 F. Supp. 1195, 1198 (E.D. La. 1990) (upholding FAA decision to withdraw federal funds when contract awarded to other than most qualified competitor).

2. The U.S. Employment Plan Promotes Congress's Objectives for Transportation Programs by Encouraging Employment Training Programs, Outreach Programs to Increase Minority and Female Employment in Public Transportation Activities, Research on Personnel and Training Needs and Training and Assistance for Minority Business.

The OLC found that the New York City anti-apartheid law "distort[ed] the process of competitive bidding in order to advance a local objective." 10 Op. OLC 133 at *5 .
As such, the OLC opined, the New York law frustrated the "manifest congressional mandate reflected in the statute and its legislative history to make the most cost-effective use of federal highway funds." *Id*.

In contrast, the core components of the U.S. Employment Plan *advance* the congressional objective of encouraging the creation of good U.S. manufacturing jobs as well as access to and training for those jobs.

49 USC §5322, which governs programs undertaken by the Department relating to public transportation, provides, in relevant part:

> (a) In General. – The Secretary of Transportation may undertake, or make grants and contracts for, programs that address human resource needs as they apply to public transportation activities. A program may include –
>
> (1) an employment training program;
> (2) an outreach program to increase minority and female employment in public transportation activities;
> (3) research on public transportation personnel and training needs; and
> (4) training and assistance for minority business opportunities.

The legislative history of this section, which was originally included in the 1978 amendment to Section 20 of the Urban Mass Transit Act of 1964, is instructive. The report of the Senate

Committee on Banking, Housing and Urban Affairs, which recommended Senate action on the provision, states in part:

> There is a need to not only increase the total number of minority and female employees in the public transportation field, but through outreach, training and management development, to increase the quality of opportunities. There is also need to improve the ability of minority business enterprises to participate in the transit program. The committee believes that these activities constitute an important use of these program resources, and encourage UMTA [now the Federal Transit Administration] to effectively implement this section." (quoted in UMTA C 4715.1A (1988) at I-1.)

As described in previous communication to the DOT, the U.S. Employment Plan promotes and encourages training and outreach programs to increase employment of disadvantaged workers in the manufacture of Rolling Stock. The Plan also gives explicit encouragement and instructions to likely bidders on Rolling Stock purchases on the most effective methods to recruit potential minority and women owned small business sub suppliers.

In addition, despite the expenditure of billions of federal dollars on the purchase of buses and trains in the United States, the expert team has found that neither the DOT nor funded transit agencies have access to any significant information or credible research on the numbers of jobs created by federally funded Rolling Stock purchases or the personnel and training needs of the U.S. workforce employed to manufacture Rolling Stock. The current structure of Rolling Stock procurements in the U.S. does not permit the capture of this information and the few attempts to analyze this sector have not focused on workforce development needs or available outreach, recruitment or training infrastructure for the workforce employed in the manufacture of Rolling Stock.

One indirect but very concrete additional benefit of the U.S. Employment Plan will be to give public agencies and the DOT access to comprehensive information – provided voluntarily by bidders for federally funded contracts – about the numbers of people employed in the manufacture and assembly of Rolling Stock as well as the original equipment manufacturers' investments in outreach to and training of their workforces and in the recruitment of disadvantaged business enterprises as sub suppliers. Thus the proposed methodology for capture of employment information from bidders on federally funded contracts will further a need for research on the industry that clearly advances Congressional objective behind 42 U.S.C. §5322(a).

Thus, in contrast to the New York law analyzed in the 1986 OLC opinion, the U.S. Employment Plan will directly promote a federal objective clearly articulated by Congress.

3. **The U.S. Employment Plan Utilizes a *Voluntary* Price Adjustment to Encourage Greater Investment in U.S. Jobs and Includes No Pre-bid Prerequisites that Might Inhibit Bidding on Any Particular Procurement.**

As noted above, 49 CFR 18.36 provides that among the "situation[s] considered to be restrictive of competition" are procurement standards that place an "**unreasonable <u>requirement</u> on firms in order for them to qualify** to do business . . ." 49 CFR 18.36(c)(1)(i) (emphasis added).

Under this regulation, even in a best value procurement context, any unreasonable pre-bid requirement or condition precedent to the submission of a proposal that potentially limits the number of bidders or applicants could be considered restrictive of full and open competition.

For this reason, the team designing the U.S. Employment Plan, building on the work of the LA County Metropolitan Transportation Authority together with the Office of the Chief Counsel of the Federal Transit Administration, created a **voluntary price adjustment** to help encourage the creation of more opportunities for disadvantaged workers, the creation of more and better U.S. manufacturing jobs and improvement in training for workers manufacturing and assembling federally funded Rolling Stock.

Throughout the model RFP, potential bidders are informed that the completion of the U.S. Employment Plan Workbook and the inclusion of a price adjustment are completely voluntary. The Model RFP language states that proposals that do not include the U.S. Employment Plan Workbook or the price adjustment will be considered both responsive and within the "competitive range" so long as all other RFP requirements have been met.

The most important element of the U.S. Employment Plan, therefore, is voluntary for bidders. The price adjustment is incorporated into the RFP as an incentive and therefore is neither a condition precedent to submitting a response to an RFP, nor a requirement (reasonable or not) for firms to qualify to do business with an agency. Therefore, the U.S. Employment Plan cannot be said to impose an unreasonable requirement on potential bidders for purposes of 49 CFR 18.36.

4. **The U.S. Employment Plan's Precise Methodology for Evaluating Proposals Gives Bidders Certainty and Clarity as to the Factors by which the Winning Bidder Will Be Selected, thereby Protecting Competition in Accordance with the Principles of the OLC Opinion.**

In designing the U.S. Employment Plan, the team was cognizant of the requirements in 49 CFR 18.36 (d) (3) (iii), which states that "[g]rantees and sub grantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees . . . " The team also observed the OLC Opinion's principle that certainty and clarity protect full and open competition and cost efficiency. The OLC maintained that adherence to the competitive bidding approach required under Section 112 encouraged qualified bidders to bid by providing certainty that if the bidder met established criteria (there, the lowest price), she or he would

win the contract. 10 Op. OLC 133, at *15 . That is, the OLC saw the elimination of vagueness, arbitrariness and subjectivity in bid evaluation as one essential virtue of the Highway Act bidding requirements.

Accordingly, the OLC expressed concern over the wide latitude granted under the subject New York City law to award contracts based on "the public interest." *Id.* at *4. The inherent lack of clarity and certainty in the New York approach, the OLC reasoned, harmed competition by discouraging qualified bidders from bidding. *Id.* at *15 ("a contractor's knowledge that he may submit the low bid and yet not win the contract would deter him from entering the bidding process and incurring bid preparation costs"). Further, the OLC noted, the resulting possibility that discretion could be exercised in selecting the winning bidder encouraged lobbying, the cost of which will be built into bids. *Id.* at *15, n. 15.

Federal courts have also has emphasized the importance of providing certainty and clarity to bidders in protecting full and open competition. In *Tennessee Asphalt Co. v Farris*, the Sixth Circuit U.S. Court of Appeals determined that a set of supplemental "illustrative factors" to be considered in evaluating "good faith efforts" by bidders "*diminish[ed] the subjectivity* associated with . . . [the] determination and thereby assist[ed] bidders in understanding what [was] required of them in order to submit a 'responsive' bid." 942 F.2d 969, 976 (6th Cir. 1991) (emphasis added). The court relied on this determination to conclude that the factors were consistent with the competitive bidding requirements of Section 112(b). *Id.; C.f. Owen of Georgia, Inc. v. Shelby County,* 648 F.2d 1084, 1091 (6th Cir. Tenn. 1981) (County's arbitrary bid selection based on broad reading of "good cause" standard inconsistent with primary objective of competitive bidding statute); See also *Superior Oil Co. v. Udall,* 409 F.2d 1115, 1119 (D.C. Cir. 1969) ("bidders and the public have a substantial interest in certainty" in context of competitive bidding for public lands).

Initially, the team considered creating a U.S. Employment Plan proposal that could be scored on a more subjective basis, in order to promote the more intangible goals of creating opportunity for historically disadvantaged populations and people suffering long-term unemployment. However, in order to strictly comply with the spirit and letter of federal full and open competition requirements, the team instead designed a methodology for calculating the proposed U.S. Employment Plan price adjustment that is precisely measurable, objective and transparent. Every bidder on a Rolling Stock procurement contract that incorporates the U.S. Employment Plan will be able to know in advance exactly how much credit she or he will be given in the evaluation of her or his proposal. In comparison, qualified firms considering bidding on projects governed by the New York City law at issue in the OLC Opinion would have had to wonder how the City would award a contract under the vague and permissive "public interest" standard.

After careful consideration, the experts believe that the utilization of the kind of precise methodology used in the U.S. Employment Plan will enhance competition and encourage more bidders to submit proposals for the provision of Rolling Stock to transit agencies by allowing

potential bidders to fairly assess the advantages and disadvantages of taking the price adjustment prior to submitting a proposal.

We therefore believe that the U.S. Employment Plan not only complies with the competitive bidding standards applicable to Rolling Stock procurements, but protects the competitiveness of such procurements in accordance with the guidance of OLC Opinion.

5. **The U.S. Employment Plan Is Designed for Use with Rolling Stock Procurement, which Is Governed by the Common Grant Rule that the Executive Branch Intended Be Applied So As to Give Recipients Maximum Flexibility and Discretion.**

The OLC Opinion found that any local law or regulation that interfered with the cost-effectiveness of federally funded highway construction procurement was a violation of Section 112. Specifically, the OLC opined:

> Section 112 clearly reflects a congressional judgment that the **efficient use of Federal funds** afforded by competitive bidding is to be the **overriding objective** of all procurement rules for federally funded **highway projects**, superseding any local interest in using federal funds to advance a local objective, however laudable, at the expense of efficiency.

10 Op. OLC 133, at *3 (emphasis added).

In contrast to Section 112, 49 C.F.R. 18.36 was promulgated specifically to give recipients of covered funds broader discretion. 18.36 is among the "common rules" adopted in 1988 as part of a standardization of the requirements for using federal grant funds. The "common rule" was adopted not only by the Department but also by almost every other federal agency (e.g., Department of Energy, Small Business Admin., Department of Commerce, Department of State, etc.). *See* Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments, 53 FR 8034-01 (1988).

The Final Rule, published in the Federal Register, states that a primary basis for the development of the common rule was to "reflect developments consistent with our Federalism policies and State and local regulatory relief objectives." (53 FR 8034-01.) The Final Rule points to Executive Order 12612, issued the preceding year, as articulating the Federalism principles underlying the common rule, and summarizes the principles of the Executive Order applicable to the Rule as follows:

> States possess unique constitutional authority, resources and competence. Under Federalism, States should be given the maximum administrative discretion possible with respect to national programs they administer. Intrusive, Federal oversight is neither necessary nor desirable. Federal agencies should

> refrain from establishing uniform, national standards, and, where possible, defer to the States to establish them. (53 FR 8034-01.)

In explaining the adoption and standardization of this regulation, OMB Director James C. Miller stated,

> Under Section ____.36 of the common rule, Procurement, when States procure goods and services under grant programs, they will not be subject to Federal standards which would preempt State law and procedures. This means that Federal funds in a State will be subject to the same procurement requirements as State funds in that State, including State geographic preferences, if any. This result is consistent with our Federalism policy which permits diversity in the public policies adopted by States, and refrains from the Federal Government's restricting the policy-making discretion of the States.

A-G-E Corp. v. U.S. By & Through Office of Mgmt. & Budget, 753 F. Supp. 836, 851, n. 10 (D.S.D. 1990).

Therefore, the President intended to give recipients of funds governed by 49 CFR 18.36 significant latitude in developing and applying their own rules to federally funded procurement.

CONCLUSION:

The U.S. Employment Plan is fully consistent with federal law and local and state agencies wishing to include it in their Rolling Stock procurement should be permitted by the DOT to do so.

Respectfully submitted,

Benjamin Beach, Esq.
Director
Community Benefits Law Center
bbeach@forworkingfamilies.org

Craig Becker, Esq.
General Counsel
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
cbecker@aflcio.org

Professor Scott Cummings
UCLA Law School
Cummings@ucla.edu

Madeline Janis, Esq.
National Policy Director

Los Angeles Alliance for a New Economy (LAANE)
mjanis@laane.org

Larry Willis, Esq.
Secretary-Treasurer
Transportation Trades Department, AFL-CIO
larryw@ttd.org

cc: Deputy Secretary John Porcari
Deputy General Counsel James Cole
Assistant General Counsel Amy Tovar
FTA Administrator Peter Rogoff
Deputy FRA Administrator Karen Hedlund
FTA Chief Counsel Dorval Carter
FRA Chief Counsel Melissa Porter
Hector Huezo, Esq.
Bryna Helfer
Vincent White
Richard Chastang, Los Angeles County Counsel
Robert Puentes, Brookings Institution
Dr. Manuel Pastor, University of Southern California
Dr. Jeannette Wicks-Slim, University of Massachusetts, Amherst
Dr. Todd Swanstrom, University of Missouri, St. Louis
Dean Michael Pagano, University of Illinois, Chicago
Dr. Marcy Lowe
Margo Feinberg, Esq.
Victoria Bor, Esq.
Phaedra Ellis Lamkins

Attachments: curricula vitae