

STADLER

**Procurement and Contracting
Strategies in Rolling Stock Acquisitions
and Transit Infrastructure**

Manufacturing Perspective

APTA Legal Affairs 2026 | Lucy Andre | © Stadler

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Critical Issues in Vehicle Manufacture Contracts

- **Payment considerations – How we ensure financial stability**
- **Bonding and Insurance – How we allocate risk**
- **IP Protection – How we address who owns what**

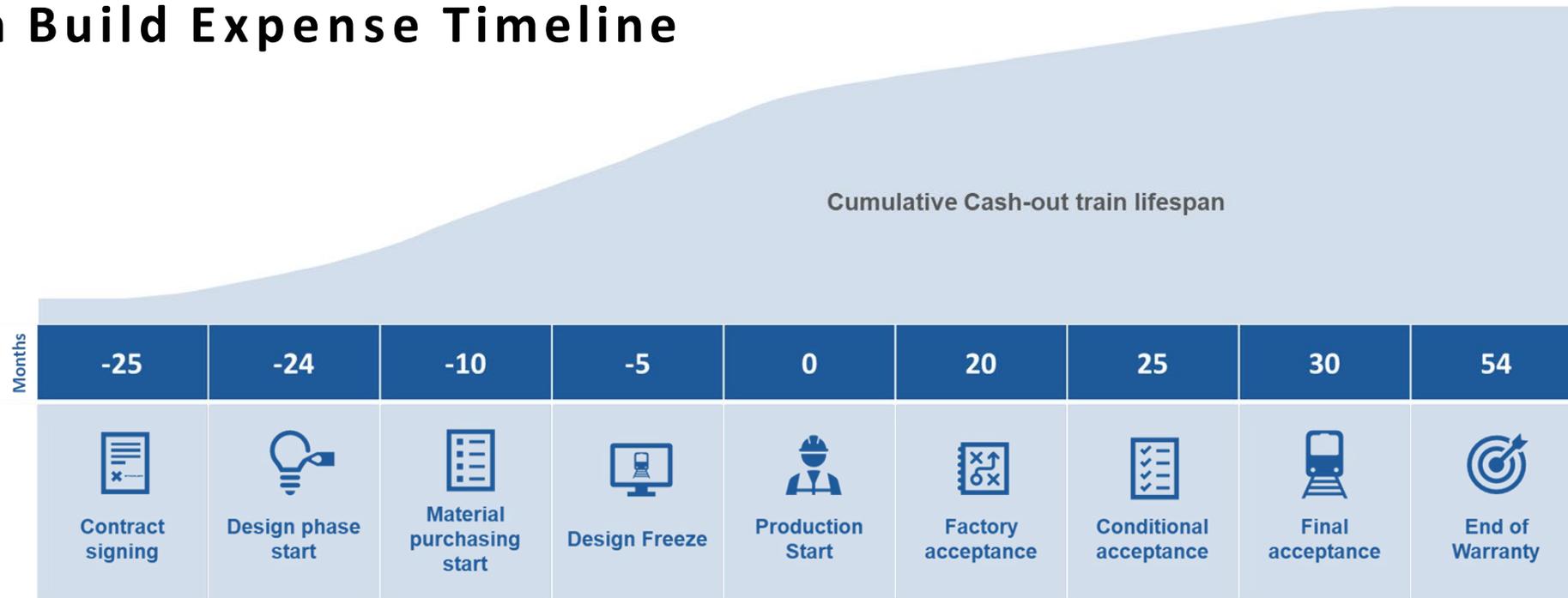
Payment Considerations

Contracts are generally written in a way that would require the OEM to carry the cost of the vehicle build. These financing costs often cannot be shared with suppliers or built into the price for the Agency

There are **three main contractual provisions** we try to include that appropriately share risk and reward:

- Cash positive milestone payment schedule tied to actual work
- Appropriate provisions for time and cost adjustment upon excusable delay
- Cost escalation for longer contracts (tied to indices / tariffs)

Train Build Expense Timeline



- Agencies are making milestone payment schedules increasingly more difficult for the OEMs
- In a typical timeline, a rail OEM has completed 85-90% of its work by the time the car is delivered to the Customer, but
- A typical milestone payment schedule has the OEM paid between 40-60% by the time the car is delivered, plus the contract often includes multiple bonds and retention amounts

_ Appropriate Provisions for Time and Cost Adjustment upon Excusable Delay

Time = Money

Issue: Excusable delays result in avoidance of LDs, but not additional payment. This is an issue because the cost of keeping a project alive can be significant.

Example: We bring the trains to the Agency's property, but are unable to get adequate track time to test them properly

Solution: Incorporate contract language that properly allocates the risk for delays

Suggested Contract Language

SP 3.3.3 Excusable Delay

The Contractor will not be assessed liquidated damages for late delivery and/or completion if the delay arises out of:

1. Failure to meet any of the requirements in SP 9.2 (Use of Agency Facilities)
2. Failure to conditionally accept vehicle within a reasonable time when the Contractor has met the requirements for Conditional Acceptance listed in SP 6.7.1
3. Failure to release any vehicle for shipment within 7 calendar days of Contractor's shipment authorization
4. Failure to conduct a post-shipment inspection for shipping damages within 7 calendar days of arrival of vehicle at the designated delivery place
5. Delays caused by damages in transit that are of a significant enough nature to preclude a car from either Conditional Acceptance or Final Acceptance. If the damage sustained is through no fault of the Contractor, then the Agency shall waive the LDs for a reasonable period of time to enable the Contractor to undertake the repairs.
6. Causes that were beyond the control and without the fault or negligence of the Contractor, and that could not have been avoided by exercise of due diligence and care by the Contractor. Such causes may include but are not restricted to Force Majeure events as outlined in General Conditions Section 9.5.

In the event of a delay by the Agency or its Authorized Representative of more than 30 days, the Contractor is entitled to request an equitable adjustment of the Contract Price.

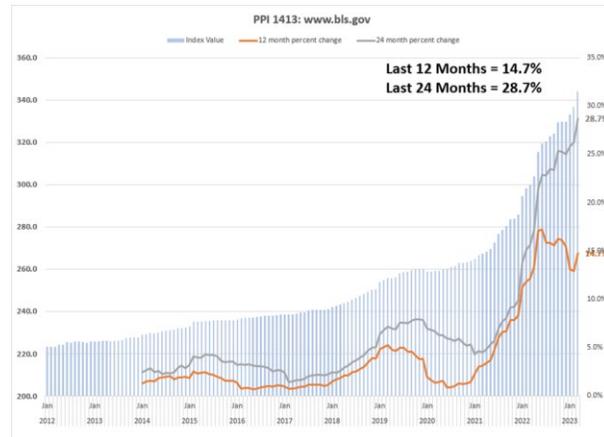
Cost Escalation for Longer Contracts (tied to Indices and Tariffs)

Allocating Risk and Reward for Uncertainty

Issue: Vehicle manufacturing contracts are multi-year (typically 7-10 year) contracts. Because of FFGA and internal requirements, they are also fixed-price contracts. Uncertainty in the economic and regulatory environments can result in an untenable increase in manufacturing prices

Examples:

- Hyperinflation
- Tariffs
 - Will be discussed in a separate breakout session



Solutions: Include contractual language with allowing periodic review and price increase or decrease based on indices or regulatory changes

Allocating Risk and Reward for Uncertainty

Suggested Contract Language (changes from APTA template):

GC 9.8 Changes of Law

Changes of law that become effective after the Proposal Due Date may result in changes that affect price. If a price adjustment is indicated, either upward or downward, then it shall be negotiated between the Agency and the Contractor, and the final Contract price will be adjusted upward or downward to reflect such changes in law. Such price adjustment may be audited, where required. For certainty, the parties agree that this Section GC 9.8 includes changes in tariffs, customs, duties and/or other taxes are imposed by any government after the Proposal Due Date that impact the goods and/or services provided hereunder.

Allocating Risk and Reward for Uncertainty

Suggested Contract Language:

SP 4.5 Economic Price Adjustment

The Base Price for the vehicles shall be subject to a periodic price adjustment.

1. Definitions:
 - a. Base Month as used in this section means month that the Notice to Proceed is issued.
 - b. Escalated Month as used in this section means month of shipment authorization of each production cars/trainset.
 - c. Base Price as used in this section means payment related to approval of each production car/trainset in the Milestone Schedule, specifically the amount as of Notice to Proceed.
 - d. Adjusted Price as used in this section means Base Price with the Economic Adjustment included via addition or subtraction.
2. The Base Price for each payment related to approval of each production car/trainset shall be escalated or de-escalated as follows:
 - a. 100% of the Streetcar Base Price shall be deemed to be subject to adjustment
 - b. Price can be adjusted up or down, but in no event shall the adjustment go below the Base Price
 - c. The adjustment is based on indices determined and reported monthly by the Bureau of Labor Statistics of the U.S. Department of Labor in the monthly Producer Prices and Price Indexes; PCU3365103365105.
 - d. The Contractor will submit invoices detailing the Base Price, Economic Adjustment, and Adjusted Price when invoicing for production car/trainset items.
 - e. The calculation for the Economic Adjustment can only be made when the final indices for the escalated month have been published. If invoices have been submitted prior to the finalization of indices, then the Contractor shall separately invoice for the Economic Adjustment appropriate to the previous invoices, including the relevant calculation detail.
 - f. In the event the US Department of Labor discontinues an index or indices cited in this Contract or alters its method of calculating an index or indices cited in this Contract (including a change in the base period), Caltrans, at its sole discretion, shall determine the appropriate substitute index or indices or adjustment for use in determining the price adjustments described in this Contract.
 - g. A true up of the PPI adjustments costs (additive or deductive) shall occur no less than on a quarterly basis or no more than on a yearly basis.
 - h. The calculation of the Economic Adjustment is as follows:

$$\text{Economic Adjustment} = \left(\frac{(\text{Index for Escalated Month}) - (\text{Index for Base Month})}{(\text{Index for Base Month})} \times (\text{Base Price}) \right)$$

— Cost Escalation for Longer Contracts (tied to Indices and Tariffs)

Suggested Indices

Indices will vary depending on the type of procurement

Rail Cars:

- PPI by Commodity - Metals and Metal Products (WPU10)
- PPI by Industry - Transportation Equipment Manufacturing (PCU336336)
- PPI by Industry - Total Manufacturing Industries (PCUOMFGOMFG)
- Average Hourly Earnings of Production and Nonsupervisory Employees, Manufacturing (CES3000000008)
- Consumer Price Index for All Urban Consumers: Energy in U.S. City Average (CPIENGSL)

Rail Systems:

- Labor: Total Compensation Index for Private Industry Professional, Scientific and Technical Services – Index Series: CIS20154000000001
- Labor: Average Hourly Earnings of Production and Nonsupervisory Employees, Manufacturing (CES3000000008)
- Producer Price Index by Industry: Truck Transportation (PCU484484)
- Producer Price Index by Commodity: Metals and Metal Products: Electronic Wire and Cable (WPU10260301)
- Producer Price Index by Industry: Fabricated Metal Product Manufacturing (PCU332332)
- Producer Price Index by Commodity: Machinery and Equipment: Construction Machinery and Equipment (WPU112)

Construction:

- National Highway Construction Cost Index (NHCCI)

Engineering:

- Total Compensation Index for Private Industry Professional, Scientific and Technical Services – Index Series: CIS20154000000001

FTA Perspective

<https://www.transit.dot.gov/funding/procurement/guidance-response-cost-and-payment-questions>

- We are all in this together
- Increases are allowed by FTA when fully documented and justified
 - Covered in Super Circular (Procurement Standards of the Uniform Administrative Requirements for Federal Awards ([2 CFR 200.317-200.327](#)))
- Include contract ceilings (Not To Exceed)
- Allow greater flexibility in choosing component manufacturers and other subcontractors
- Recipient procurement personnel must understand requirements for proper documentation of all contractual actions/use of indices
- OEMs and Agencies must agree on a process to provide supporting justification for price increases, i.e., bills of lading, work sheets, supplier/subcontract quotes, identification of off-shore only available parts or other materials

Bonding and Insurance

Issues:

- Contracts contain many provisions that provide security to the Agency: bonding, insurance, indemnification, liquidated damages, warranty, retention, etc.
- Insurance coverage is often under an umbrella contract, and sometimes requested provisions are duplicative or excessive (example: RRPL and auto policies)
- Bonding and insurance costs are always passed on to the Customer 1:1 with admin costs, therefore, over securing contracts will result in artificial price inflation
- Excessive bonding can also impact bonding capacity
- Important Caveat: some states have very specific statutory language surrounding bonding

The goal should be to ensure adequate allocation of risk and while ensuring that the Agency is protected

Important Considerations

- Contract provisions must ensure appropriate risk of loss continues even after title passes

Sample Language (APTA template):

GC 4.3 Risk of Loss

*Risk of loss and property damage to the LRV shall pass to the Agency upon (1) arrival of the LRV at Agency's location; (2) joint inspection by the parties; and (3) completion and execution by the parties of the Vehicle Delivery Notice and Receipt (see Section 10, Appendix F). However, the Agency shall not be responsible for, and Contractor shall retain all risk of loss or damage due to, equipment failure or failure due to design or workmanship deficiencies, as well as all damage caused by Contractor's negligence or willful misconduct. **In addition, Contractor shall be responsible for any loss directly incurred by and through work done on the vehicle after title and/or risk of loss has passed.***

- Parties can be creative when finding a solution that works to ensure adequate coverage, while not requiring extra cost

Sample Language:

G. Railroad Protective Liability

*Contractor shall procure and maintain Railroad Protective Liability with not less than \$5,000,000 per occurrence and \$10,000,000 aggregate. **In the alternative, Contractor may provide a master global general liability policy ("Master Global Policy") in equal (or greater) amounts than as set forth above; provided, such Master Global Policy do not exclude liability arising out of work performed on or near railroad tracks, facilities or rail yards.***

APTA Language

<https://www.apta.com/research-technical-resources/standards/procurement/apta-rt-lrt-gl-001-11/>

SP 5.1 Performance Security Requirements

NOTE: The Agency may increase or decrease the percentage amount of the security amounts outlined below. But it should be noted that while an increase in the amount will reduce the risk to the Agency, it will increase the cost of the procurement to the Agency.

The Contractor shall furnish, at its own expense, a performance guarantee in the form of one of the following:

- 1. A letter of credit in the amount of [up to 50 percent of the total Contract amount] in a form approved by the Agency. The security should be an irrevocable letter of credit issued by a bank with an underlying rating of AA- or better by Standard & Poor's or Aa3 or better by Moody's Investor Service.*
- 2. A performance bond from a surety duly licensed to do business in the State of [insert state name] having a financial rating from A.M. Best Company of "A VIII" or better, in the amount of [up to 50 percent of the total Contract amount].*
- 3. A parent company guarantee. The Agency may consider other Contractor-proposed alter-nates to the bonding requirements, such as a corporate guarantee, provided by a sufficiently large and financially stable parent company of the Contractor.*

APTA Language, Continued

<https://www.apta.com/research-technical-resources/standards/procurement/apta-rt-lrt-gl-001-11/>

The security shall cover all of the Contractor's obligations under the Contract, except for the warranty, and shall remain in force until said obligations have been fulfilled. The security amount may be reduced as follows:

- 1. To sixty-five (65) percent of the original amount when fifty (50) percent of the required number of cars are conditionally accepted;*
- 2. To thirty (30) percent of the original amount when seventy-five (75) percent of the required number of cars are conditionally accepted; and*
- 3. To zero (0) percent of the original amount when one hundred (100) percent of the required number of cars are conditionally accepted.*

When options in the Contract are exercised the Agency will require a Performance Security equal [up to 25 percent] of the total option Contract price. The Performance Security shall be reduced according to the schedule above.

In the case that a security guarantor becomes insolvent, its license is revoked or suspended, or its rating is downgraded, the Contractor shall notify the Agency promptly and shall substitute other and sufficient performance security. If the Contractor fails to do so, such failure may be an event of default at the sole discretion of the Agency.

The Contractor shall deliver the performance bond or Letter of Credit to the Agency within ten (10) days after it has been notified by the Agency of award.

Sample Redlines

SP 5.1 Performance Security Requirements

The Contractor shall furnish, at its own expense, a performance guarantee in the form of one of the following:

1. A letter of credit in the amount of 50 percent of the total Contract amount in a form approved by the Agency. The security should be an irrevocable letter of credit issued by a bank with an underlying rating of AA- or better by Standard & Poor's or Aa3 or better by Moody's Investor Service.
2. A performance bond from a surety duly licensed to do business in the State of Utah having a financial rating from A.M. Best Company of "A VIII" or better, in the amount of 50 percent of the total Base Order Contract amount, which shall increase and decrease as each of the following milestones are met:
 - a. 1% of the Total Contract Price at Notice to Proceed
 - b. Increase to 25% of the Total Contract Price at Preliminary Design Review
 - c. Increase to 50% of the Total Contract Price at Final Design Review
 - d. Decrease by 3.5% of Total Contract Price as each LRV reaches Conditional Acceptance for LRVs 1-12
 - e. Decrease by 3% of Total Contract Price as each LRV reaches Conditional Acceptance for LRV 13
 - f. Decrease to 0% of Total Contract Price after completion of warranty phase for all LRVs

When options in the Contract are exercised the Agency will require a Performance Security which follows the above schedule in half the values listed (increasing to a total of equal to 25 percent of the total option Contract price). The Performance Security shall be reduced pro rata according to the schedule above.

In the case that a security guarantor becomes insolvent, its license is revoked or suspended, or its rating is downgraded, the Contractor shall notify the Agency promptly and shall substitute other and sufficient performance security. If the Contractor fails to do so, such failure may be an event of default at the sole discretion of the Agency.

The Contractor shall deliver the performance bond or Letter of Credit to the Agency within ten (10) days after it has been notified by the Agency of award.

In the case that a security guarantor becomes insolvent, its license is revoked or suspended, or its rating is downgraded, the Contractor shall notify the Agency promptly and shall substitute other and sufficient performance security. If the Contractor fails to do so, such failure may be an event of default at the sole discretion of the Agency.

The Contractor shall deliver the performance bond or Letter of Credit to the Agency within ten (10) days after it has been notified by the Agency of award. The corresponding increase or decrease in bond shall also be accomplished within 10 days of approval of each milestone listed.

Important Considerations

- State law may require bonding at a prescribed level, particularly in construction contracts
 - Examples:
 - Illinois Public Construction Bond Act (30 ILCS 550/1 et seq.) requires public construction contracts to have both performance and payment bonds in the amount of 100% of the contract price.
 - Georgia Code § 36-91-70 requires payment and performance bonds “in the amount of at least the total amount payable by the terms of the contract” and further dictates that the amount “shall be increased as the contract amount is increased.”

Intellectual Property Protection

Issues:

1. During RFP and negotiations – License, not ownership with NDAs for third parties
2. Board Meetings – Keep disclosed information at highest level possible; propose redaction or closed session
3. Public Records Requests – We want the opportunity to defend our IP
4. Buy America Audits – We allow access and review but maintain control

Drafting IP Clauses during RFPs and Negotiations

Issue: Agency/Buyer wants to own the IP

“All documents and materials prepared or developed by the Vehicle Provider shall become the property of the agency.”

APTA language

GC 7.1 Proprietary Rights/Rights in Data

*The Contractor hereby grants to the Agency on the Contractor's behalf, and on behalf of its Subcontractors, Suppliers and Manufacturers (as to whom the Contractor represents and warrants that it has the power and authority to grant such sublicense), an **irrevocable, perpetual, royalty-free, nonexclusive license and sublicense (“Technology License”)** to use, itself or through its agents, for the approved purposes described in Article 1.2 below, without recourse to the original Contractor, Subcontractor, Supplier or Manufacturer all patented, copyrighted and unpatented technology, know-how, trade secrets and other proprietary rights, and documentation thereof (except manufacturing detailed drawings and software, which is separately defined at and licensed pursuant to Paragraph 2 below), which is included in the Material and/or Equipment, including but not limited to all systems, subsystems, assemblies, subassemblies, components and interface systems and controls which are necessary **for the operation, maintenance and repair, overhaul of the Material and/or Equipment, and for the manufacture of parts which are unavailable for purchase, as defined below, all of which shall be designated the “Licensed Technology.”***

Drafting IP Clauses during RFPs and Negotiations

2. Continued

1.2 Uses

The Agency's rights under this Technology License shall be limited to its use for the following:

1. Evaluation and qualification for the purposes of future Material and/or Equipment procurements of systems, subsystems and components of subsystems on the Material and/or Equipment to be delivered under the Contract;
2. Preparation of specifications for future [insert type of equipment] RFPs employing some or all of the Licensed Technology;
 3. Modifying or upgrading the [insert type of equipment];
 4. Maintenance and repair of the Material and/or Equipment;
 5. Overhaul of the Material and/or Equipment;
6. Manufacture of parts for the Material and/or Equipment that become unavailable for purchase. The term "unavailable for purchase" means that a part is no longer being manufactured; or an inventory of the part in sufficient quantities to meet the Agency's operational needs is not available for purchase ~~or no Supplier will sell a part to the Agency or cannot supply the part according to a delivery schedule that meets the Agency's needs; or that no Supplier will offer the part at a commercially reasonable price.~~

Notwithstanding the foregoing, Contractor may require that a third party (Subcontractor, Supplier, Manufacturer, agent or Sublicensee of the Agency) sign a non-disclosure agreement with Contractor prior to receiving of any Licensed Technology.

Protecting IP During Public Board Meetings

Ralph M. Brown Act (“Brown Act”), California Gov. Code §§54950, et seq.

1. Local agencies are required to have “open and public” meetings to deliberate and take actions. (“Meetings” include emails, teleconferences, and face to face when a *majority* of a legislative body discusses, deliberates or takes action on an item of business outside of a notice meeting)
2. Individuals can request the agenda packet be sent to the Board of Directors – many agencies just post
3. Criminal and civil penalties
4. Some allowance for closed sessions in limited circumstances
 - How does this impact the sharing of pricing from Vehicle Providers when seeking Board approval?
 - What is published to the public
 - Is redaction an option?
 - Is there an exemption for Trade Secrets?

Protecting IP During Public Records Requests

The California Public Records Act (CPRA), California Gov. Code §§ 7920.000 *et seq.*

1. Allows natural persons and business entities as members of the public to request the inspection or disclosure of government records to the public.
2. The agency must produce these documents promptly but may invoke *exemptions* to production such as personnel records, investigative records, drafts and material made confidential by *other state or federal statutes*. Gov. Code §§ 7922.525 - 7922.545. However, the agency is not required to invoke exemptions and may elect to produce records if the public interest in disclosure outweighs the public interest in non-disclosure. See *Uribe v. Howie*, 19 Cal.App.3d 194, 213 (1971).

Protecting IP During Public Records Requests (cont'd)

Under California law, a “trade secret” is “information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use;

Look to case law to protect technical, pricing and other confidential information to retain competitive edge and don't allow for undercutting.

and

(1) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” (Civ. Code, § 3426.1, subd. (d).)

- *Be vigilant in taking protective measures to keep the information secret.*
- *NDA's –can't circumvent CPRA with an NDA*
- *Limiting access to those who “need to know” - Internal protocols that regulate access to the information (e.g., access restrictions, confidentiality agreements, controlling plant access)*
- *Success to date – once it is public, it's no longer a trade secret*

Protecting IP During Public Records Requests (cont'd)

Sample Language:

Applicability of California Public Records Act. If the Agency receives a public records request under the California Public Records Act (Government Code §§ 7920 et seq.) for records related to the design, production and/or maintenance of the Trainsets, the Agency will promptly notify Manufacturer of said request and seek Manufacturer's assessment of which documents are exempt from disclosure under California Law or any other legal basis. If the Agency disagrees with Manufacturer's assessment, it will promptly notify Manufacturer, and the parties will meet and confer in an attempt to informally resolve the nature of the documents. If the parties are unable to agree as to what documents are to be disclosed, *the information will not be disclosed and if and an action is brought against the Agency under the California Public Records Act to compel production of such documents, Manufacturer will pay Agency's costs of defending such action, including but not limited to attorneys' fees.*

Protecting IP During Buy America Audits

The FTA has published comprehensive guidelines for Buy America Audits in its Buy America Handbook. This resource is found at: <https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/regulations-and-guidance/buy-america/58191/buy-america-handbook-rpt0106.pdf>

Section 2.2.2

With respect to protecting confidential information during a pre-award audit, the Handbook states as follows:

- “Manufacturers may have concerns about recipients’ review of cost data. The manufacturer and recipient may agree that the recipient will contract with an external auditor to conduct the manufacturer’s Buy America certification review—and assure the manufacturer that the cost data will be kept confidential.
- Alternatively, a recipient may be able to keep its Buy America audit function independent by using a “firewall” and assuring the manufacturer that those employees of the recipient performing the Buy America audit are prohibited from disclosing any of the manufacturer’s proprietary data.
- Further, the review of documents may occur at the manufacturer’s place of business; *there is no requirement that the recipient or its auditors obtain copies of the documents; they need simply to review them. Whether conducted by a contractor or the recipient’s employees, the manufacturer may require the auditor to sign a nondisclosure agreement prior to reviewing the documents.*” (emphasis added).

THANK YOU.

STADLER

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