

**DEPARTMENT OF TRANSPORTATION****Federal Transit Administration****49 CFR Part 661**

[Docket No. 94-A]

RIN 2132-AA42

**Buy America Requirements****AGENCY:** Federal Transit Administration (FTA), DOT.**ACTION:** Notice of proposed waiver from Buy America requirements for small purchases and for purchases with operating assistance.**SUMMARY:** FTA proposes to issue a public interest waiver from the Buy America requirements for "small purchases" (as defined in the "common grant rule") by FTA grantees and made with capital and planning assistance and for all purchases by FTA grantees made with operating assistance.**DATES:** Comments must be received by May 15, 1995.**ADDRESSES:** Comments should be addressed to: Federal Transit Administration, Office of Chief Counsel, Docket No. 94-A, Room 9316, 400 Seventh Street, S.W., Washington, D.C. 20590. Comments will be available for review by the public at this address from 9:00 a.m. to 5:00 p.m., Monday through Friday.**FOR FURTHER INFORMATION CONTACT:** Gregory B. McBride, Deputy Chief Counsel, Office of Chief Counsel, (202) 366-4063.**SUPPLEMENTARY INFORMATION:** Elsewhere in today's **Federal Register**, FTA provides notice of its issuance of a public interest waiver for micro-purchases (i.e., those purchases where the cost is \$2,500 or less) by FTA grantees. In this notice, to further serve the same purposes, FTA proposes to issue a public interest waiver from the Buy America requirements for "small purchases" (as defined in the "common grant rule") by FTA grantees made with capital and planning assistance and for all purchases by FTA grantees made with operating assistance.

The Buy American Act of 1933, 41 U.S.C. 10a-d, established a preference for domestically produced goods in direct federal procurements. The first Buy America legislation applicable to the expenditure of federal funds by recipients under FTA and Federal Highway Administration (FHWA) grant programs was enacted in 1978: section 401 of the Surface Transportation Assistance Act of 1978 (Pub. L. 95-599, 92 Stat. 2689) established a domestic preference for "articles, materials,

supplies mined, produced, or manufactured" in the United States and costing more than \$500,000.

In January 1983, Congress repealed section 401 and substituted section 165 of the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097. This action, among other things, eliminated the \$500,000 threshold. Congress prohibited the expenditure of FTA or FHWA funds on steel, cement, and "manufactured products," but as discussed below, included four exceptions permitting the statute to be waived. In 1984, Congress removed cement from section 165, and in 1991 added iron (see section 337 of the Surface Transportation Assistance and Uniform Relocation Act of 1987 (Pub. L. 100-17, 101 Stat. 32) and section 1048 of the Intermodal Surface Transportation Efficiency Act of 1991 (Pub. L. 102-204, 105 Stat. 1914)).

Now codified at 49 U.S.C. 5323(j), the Buy America requirement that applies to purchases made with Federal transit and highway funds provides as follows:

(j) BUY AMERICA.—(1) The Secretary of Transportation may obligate an amount that may be appropriated to carry out this chapter for a project only if the steel, iron, and manufactured goods used in the project are produced in the United States.

(2) The Secretary of Transportation may waive paragraph (1) of this subsection if the Secretary finds that—

(A) Applying paragraph (1) 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) When procuring rolling stock (including train control, communication, and traction power equipment) under this chapter—

(i) The cost of components and subcomponents produced in the United States is more than 60 percent of the cost of all components of the rolling stock; and

(ii) Final assembly of the rolling stock has occurred in the United States; or

(D) Including domestic material will increase the cost of the overall project by more than 25 percent.

FTA has issued regulations implementing this provision at 49 CFR Part 661. These regulations specify that "for a manufactured product to be considered produced in the United States: (1) All of the manufacturing processes for the product must take place in the United States; and (2) all items or material used in the product must be of United States origin." 49 CFR 661.5(d). This definition is different from the regulation implementing the 1933 Buy American Act which requires that manufactured products contain only a 51 percent domestic content.

In this global economy, it is nearly impossible to find manufactured products that are entirely domestic. Consequently, FTA receives Buy America waiver requests for thousands of items, the great majority for reasons of nonavailability under section (j)(2)(B), with a few based on price differential under section (j)(2)(D). (In Appendix A to 49 CFR 661.7, FTA adopted the waivers granted under the Buy American Act of 1933 (41 U.S.C. 10a-d) and included public interest waivers under section (j)(2)(A) for microcomputer equipment, certain Chrysler vehicles assembled in Canada, and spare parts when purchased as part of a rolling stock procurement.) As a general rule, most grantees have many more procurements for small items than for large items. Thus, most waivers granted by FTA are based on the nonavailability of items such as office supplies (e.g., pens, paperclips) and maintenance items (e.g., screws, bearings, small vehicle replacement parts, consumables). Many involve purchases of less than \$20, with unit prices under one dollar and often less than one cent. These types of things are generally purchased with Federal and local operating assistance funds.

The volume of these waiver requests has resulted in significant delays in grantees' procurement processes. They consume an inordinate amount of grantee staff time, since documentation for each waiver request must be developed and submitted to FTA, where it is reviewed and acted on. Large grantees handle thousands of individual procurements each year. Several grantees state that in order to comply with the FTA Buy America requirements, procurement staffs have been increased.

One mid-sized grantee has written that it processes more than 1,000 purchase orders each month. Such procurements, if subjected to Buy America scrutiny, could theoretically result in the generation of more than 12,000 internal documents annually and an estimated 1,500 requests for waivers. To fully comply with the requirement (for procurements of less than \$10,000), this grantee estimated that its purchasing department staff would have to be increased by 2-3 persons, increasing staff costs in excess of \$100,000; two fax machines with phone lines would have to be procured, with a one-time cost in excess of \$2,000 and annual telephone costs in excess of \$1,200; and its computerized stock order system would have to be revised to recognize and track each order to make sure it meets the requirement, at a cost in excess of \$10,000. Modifying

its purchase procedures to meet the requirement would require reducing the number of purchase orders by ordering larger quantities. However, the grantee explained, good business practice dictates that inventories be kept at the lowest level possible for several reasons, including loss prevention control, minimizing cash in inventory, maintaining purchasing flexibility to take advantage of product changes and improvements, space restrictions for storage, and shelf life. The grantee also noted that buying all items in large quantities also can work against good faith attempts to include disadvantaged business participation in the bidding process.

Grantees have cited other reasons for their assertion that compliance with FTA's current Buy America rule is unduly difficult and burdensome:

- *Small Purchase Procedures.*

Grantees do not routinely accumulate the documentation necessary to justify a waiver of the Buy America requirements when procuring goods in accordance with their small purchase procedures, as allowed by 49 CFR Part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (known as the "common grant rule"). These small purchase procedures were meant to reduce paperwork and facilitate grantees' effective and efficient procurement of goods. Because documentation needed to request a waiver is usually not required or compatible with such procedures, the requirement to request a waiver is often overlooked. Strict compliance with the FTA rule would necessitate creation of documentation not normally needed for business reasons, preclude the use of oral quotes where normally appropriate, and make the use of purchase orders difficult. Moreover, since the rule precludes granting a waiver until after receipt of bids, grantees are forced to repeat written waiver requests for the same item, even when it is evident that a domestic product will not be offered.

- *State or Local Purchasing Procedures.* Since many small to mid-size transit properties and most states are required to use a local or state purchasing department for purchasing supplies, they have little control over the procedures used. To comply with the FTA Buy America requirements, they must create duplicative local procurement procedures, thereby incurring delays and increasing the cost of their procurements. Ironically, one State has reported that it cannot take advantage of the State Highway Department purchasing office since the State Highway Department complies

with the FHWA rule, 23 CFR 635.410, which is inconsistent with the FTA rule.

- *Vendor Problems.* Compliance with the FTA Buy America requirements has also been a problem for vendors who supply the small items grantees need for their routine operations. In many instances, such vendors are distributors and suppliers rather than manufacturers; accordingly, they cannot reasonably be expected to know whether the items being procured are produced in the United States or not. However, under the FTA rule, all vendors must execute a certification of either compliance or noncompliance; for this purpose, some grantees have included a compliance certification on all purchase orders. If a vendor declines to sign the certification, the grantee will not do business with that vendor. This approach protects the grantee, but puts a vendor at risk. Many vendors refuse to certify compliance with the Buy America rule when they do not know the content of the products they are supplying. Some even refuse to deal with the FTA grantee, thus reducing competition. In any case, if the vendor does not certify compliance, the grantee is obliged to consider the product non-domestic and to seek a waiver from FTA for its purchase.

- *Confusion with 1933 Buy American Act.* Grantees also report that some vendors certify compliance with the Buy America requirement believing it to be the same as the 1933 Buy American Act, which requires manufactured products to be 51 percent domestic in content. This is contrary to the FTA regulation, which requires a 100 percent domestic content. Indeed, there are instances where grantees themselves do not know that the FTA regulation requires 100 percent domestic content for a manufactured product to be domestic. Until or unless there is a complaint, the grantee will not look behind the certification to verify that the person who signed it understood the requirement. Thus, one is not always certain that a Buy America certification is correct or that the bids are being judged by the same standard.

Today's action is consistent with and responsive to President Clinton's initiative to reinvent government, known as the National Performance Review, and three recent actions designed to simplify government procedures, especially as to small purchases. The first is Executive Order 12931 of October 13, 1994, Federal Procurement Reform, which requires that Federal agencies review their procurement requirements with a view to streamlining them. The second is the Federal Acquisition Streamlining Act of

1994 (FASA), enacted October 13, 1994, which has as two of its major streamlining features the creation of a Simplified Acquisition Threshold of \$100,000 to replace the existing \$25,000 small purchase threshold and the exemption of "micro-purchases" (purchases valued at \$2,500 or less) from the provisions of the 1933 Buy American Act. On December 15, 1994, the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration issued an interim rule implementing FASA (59 FR 64786, December 15, 1994). The third is a proposal by the Office of Management and Budget (OMB) to apply the \$100,000 Simplified Acquisition Threshold for direct Federal purchases to purchases by Federal recipients of financial assistance under the common grant rule at 49 CFR Part 18.36 (59 FR 53705, October 5, 1994). FTA also notes that the Federal Highway Administration (FHWA), in administering the same statute as FTA, already provides a general waiver if the cost of foreign materials does not exceed \$2,500.

#### Public Interest Waiver

In light of these considerations, FTA believes that application of its Buy America rule to small purchases is not consistent with the public interest; accordingly, FTA proposes to issue a general public interest waiver under 49 U.S.C. § 5323(j)(2)(A) and 49 CFR § 661.7(b) to exempt from its Buy America requirements all "small purchases" (as defined in the common grant rule, 49 CFR 18.36(d)) made by its grantees with FTA financial assistance, including capital, planning, and operating assistance and all purchases by FTA grantees with operating assistance. This exemption would cover many small purchases made by FTA grantees. The goal of this public interest waiver is to eliminate some of the procurement delays, "red tape," and paperwork from FTA grantees' procurement processes.

#### Request for Comments

FTA requests comment on this proposal to grant a general public interest waiver. After consideration of all comments, FTA will publish notice in the **Federal Register** of its action.

Issued on: March 10, 1995.

**Gordon J. Linton,**  
Administrator.

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