

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: Final rule; General public interest waiver from Buy America requirements for small purchases.

SUMMARY: FTA is issuing a general public interest waiver from the Buy America requirements for "small purchases" made by FTA grantees with capital, planning, or operating assistance.

EFFECTIVE DATE: This waiver is effective July 24, 1995.

FOR FURTHER INFORMATION CONTACT: Gregory B. McBride, Deputy Chief Counsel, Office of Chief Counsel, (202) 366-4063.

SUPPLEMENTARY INFORMATION:

Background

On March 15, 1995, FTA issued a general public interest waiver, under 49 U.S.C. § 5323(j)(2)(A) and 49 CFR 661.7(b), from its Buy America requirements for purchases of \$2,500 or less (known as "micro-purchases") made with FTA financial assistance, including capital, planning, and operating assistance. 60 FR 14174 (March 15, 1995). FTA found this waiver to be in the public interest because it simplifies government procedures and streamlines government procurement requirements, consistent with the President's National Performance Review, Executive Order 12931 (Federal Procurement Reform), and the Federal Acquisition Streamlining Act of 1994 (FASA), Public Law 103-355, 108 Stat. 3243 (October 13, 1994).

Also on March 15, 1995, FTA proposed in a separate notice to issue a general public interest waiver under the same authority for "small purchases" made by its grantees with FTA financial assistance, including capital, planning, and operating assistance, and for all purchases by FTA grantees with operating assistance. After considering the comments received, FTA is hereby issuing a general public interest waiver for small purchases, as defined in the grants management common rule at 49 CFR 18.36(d), as recently amended by the Office of Management and Budget (60 FR 19639 (April 19, 1995)), made by

FTA grantees with capital, planning, or operating assistance. The recent amendment raised the threshold for a "small purchase" to \$100,000.

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. 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)).

The current Buy America requirement, recently codified at 49 U.S.C. § 5323(j), applies to purchases made with Federal transit and highway funds:

(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 occurred in the United States; or

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

FTA 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). In contrast, the regulation implementing the 1933 Buy American Act requires that manufactured products contain only a 51 percent domestic content.

These requirements have resulted in individual Buy America waiver requests from grantees for thousands of items. As a general rule, most grantees have many more procurements for small items than for large items. Many involve purchases of less than \$20, with unit prices under one dollar and often less than one cent. The volume of these waiver requests has resulted in significant delays in grantees' procurement processes. They consume an inordinate amount of grantee and FTA 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. FTA's triennial reviews reveal that many grantees have difficulty in complying with Buy America requirements with respect to their small procurements.

Analysis and Comments

During the comment period, FTA received 62 comments, most from transit authorities, state and local governments, manufacturers, and suppliers. The commenters, who were nearly unanimous in their support of the issuance of this public interest waiver, raised a number of key issues:

Cost savings. Most transit authorities indicated that one to eleven extra procurement staff are necessary to comply fully with Buy America requirements, at a cost of up to \$540,000 per grantee annually. In addition, transit authorities spend more than they need to because they are not able to buy supplies as needed, on a "just-in-time" basis. Instead, because purchasing is difficult under Buy America requirements, transit authorities are obliged to lump purchases together and maintain a larger inventory than is needed or practical.

Transit authorities noted that if Buy America requirements were waived, they would be able to realize further savings by purchasing more often

through cooperative state and local government purchasing agreements. In addition, several commenters believe that a greater number of vendors will participate in the bidding process if the vendors do not have to supply Buy America documentation. More vendors should mean more competition, which should lead to lower overall prices on purchases made by FTA grantees.

Administrative Burdens

Transit authorities noted that current Buy America requirements impose a significant administrative burden because each purchase requires its own Buy America waiver if the purchase involves a possible non-U.S. product. Several recent initiatives, including Executive Order 12931 of October 13, 1994, on Federal Procurement Reform (60 FR 52387 (April 19, 1995)), direct federal agencies to remove administrative burdens in procurement processes. In fact, section 1(e) of this Executive Order directs agency heads to "ensure that simplified acquisition procedures are used, to the maximum extent practicable, for procurements under the simplified acquisition threshold in order to reduce administrative burdens and more effectively support the accomplishment of agency missions." The Federal Highway Administration, the only other agency within the U.S. Department of Transportation with a regulation implementing section 165 of the STAA, already considers factors such as cost, administrative burden, and delay when it decides whether to issue a public interest waiver from Buy America requirements. 23 CFR 635.410(c)(7).

FTA's current Buy America regulation, as applied to purchases under the simplified acquisition threshold, does not effectively support the accomplishment of FTA's missions, since the regulation imposes a burden on small purchases without conferring a commensurate benefit.

Non-Availability of Domestic Products

As noted above, 49 CFR 661.5(d) provides that goods must be 100 percent "made in the U.S.A." to be considered domestic under this regulation.

This is a difficult and often impossible standard to meet, given the highly integrated, international nature of manufacturing today. Most products incorporate at least one foreign component or some overseas manufacturing. Nearly all FTA waivers are now granted because domestically produced goods, as defined in the regulations, are not available. These waivers are based on the determination that "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." 49 U.S.C. § 5323(j)(2)(B).

FTA has issued general public interest waivers in the past based on the difficulty of obtaining goods that are 100 percent made in the United States. Microcomputers and software were granted a general public interest waiver because many product components, particularly microchips, are still made and assembled abroad. FTA also recognized that the computer industry is becoming increasingly multinational in nature. Since it is unduly burdensome on transit operators to procure domestically produced microcomputers and software, FTA issued a general public interest waiver for these products. 51 FR 36126 (October 8, 1986).

Fifteen-passenger Chrysler vans and wagons were also given a general public interest waiver even though final assembly took place in Canada. Commenters pointed out that Ford would be the only entity able to supply vans and wagons under the Buy America regulation. FTA concluded that the public had an important interest in competition and issued the waiver. 49 FR 13944 (April 9, 1984).

Non-availability and public interest are related concepts. If a domestic product is nearly impossible to procure, it is not in the public interest to require grantees to give a justification each time they purchase a non-domestic product. This requirement results in excess cost, administrative burden, and delay. The consideration of non-availability in public interest waivers is demonstrated in two recent FHWA general public interest waivers—one for pig iron and processed, pelletized, and reduced iron ore (60 FR 15478 (March 24, 1995)), and the other for certain ferryboat equipment and machinery (59 FR 6080, February 9, 1994). In both cases, the basis for the nationwide waiver was that the waived product was not produced in the United States in sufficient and reasonably available quantities which are of a satisfactory quality. Therefore, FHWA reasoned, imposing Buy America requirements on these materials is not in the public interest.

The same reasoning may be applied to small purchases by FTA grantees that are subject to Buy America regulations. Since domestic goods (as defined in the Buy America regulations) are rarely available to FTA grantees making small purchases, it is not in the public interest to impose the Buy America requirements on them.

Clarification of the Term "Small Purchase"

Several commenters indicated that the definition of "small purchase" needs to be clarified, questioning whether the value of a small purchase should be determined by a "unit" price or a "contract" price. The Federal Acquisition Streamlining Act, in which the small purchase threshold is discussed (see 60 FR 19639), uses contract price to determine the value of small purchases; accordingly, for the purposes of this Buy America general public interest waiver, "contract price" will be the measure for determining whether a procurement is a "small purchase." Note, however, that grantees may not split procurements for requirements that exceed the threshold in order to avoid Buy America rules that would otherwise apply.

Purchases Over \$100,000 Made With Operating Assistance

Several commenters indicated that FTA went too far by proposing to waive purchases over \$100,000 made with operating assistance. They argued that such a waiver might lead to shifting funds between operating and capital budgets simply to circumvent Buy America requirements for purchases over \$100,000. After careful consideration, we agree that operating assistance should be treated the same as capital and planning assistance for this purpose.

Recent initiatives, including the Federal Procurement Reform (Executive Order 12931 dated October 13, 1994); the Federal Acquisition Streamlining Act of 1994; and OMB's final rule applying the \$100,000 simplified acquisition threshold for direct Federal purchases to purchases by Federal recipients of financial assistance under the common grant rule (60 FR 19639), indicate that streamlining small purchases is in the public interest. These initiatives, however, do not indicate that it is in the public interest to expedite larger, more significant procurements in the same way. In fact, the legislative history of Buy America indicates that Congress has traditionally been concerned about developing domestic sources for large procurements.

Complete Waiver of Buy America Requirements

We note that several suppliers of manufactured goods, primarily Canadian companies, argued that Buy America requirements should be waived for all transit purchases, since the transit supply industry in the United

States is highly integrated. However, as discussed above, Congress and the Executive Branch have indicated, via several legislative and regulatory initiatives, that streamlining small purchases is in the public interest. They have not yet indicated through legislative or regulatory initiatives that streamlining all transit purchases is in the public interest.

Concern About Unfairly Priced or Shoddy Foreign Goods

A few commenters (U.S. manufacturers) expressed concern that waiver of Buy America requirements for small purchases would result in a flood of unfairly priced or shoddily made foreign goods into the U.S. market. These concerns are better addressed by solutions other than the imposition of Buy America requirements. Determination of whether goods conform to the standards set out in individual contracts and enforcement of those contract provisions are best left to FTA grantees. Problems involving unfair trade practices or foreign government subsidies are addressed by import laws such as Title VII of the Tariff Act of 1930, as amended (19 U.S.C. §§ 1671 and 1673 (Imposition of Countervailing Duties and Antidumping Duties, respectively)). These problems are beyond the scope of what Buy America was intended to accomplish.

Impact Analysis

Executive Order 12866 requires that a regulatory impact analysis be prepared for significant rules, which are defined in the Order as rules that have an annual effect on the national economy of \$100 million or more, or certain other specified effects.

FTA does not believe that this action will have an annual impact of \$100 million or more or the other effects listed in the Order. For this reason, FTA has determined that this waiver would not create a major rule within the meaning of this order.

Regulatory Flexibility Act of 1980

The Regulatory Flexibility Act (5 U.S.C. § 605(b)) requires that, for each rule with a "significant economic impact on a substantial number of small entities," an analysis must be prepared describing the impact of the rule on small entities and identifying any significant alternatives to the rule that would minimize the economic impact on small entities.

FTA certifies that this waiver will not have a significant economic impact on a substantial number of small entities. Instead, it modifies and updates an administrative and procedural requirement in order to reduce burden on small entities.

Paperwork Reduction Act

FTA certifies that this action does not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act of 1980, 44 U.S.C. Chapter 35; in fact, it should reduce the paperwork required to procure goods.

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 hereby issues 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, or operating assistance.

List of Subjects in 49 CFR Part 661

Buy America, Grant programs—transportation, Mass Transportation, Reporting and recordkeeping requirements.

Amendment to 49 CFR Part 661

Accordingly, for the reasons described above, title 49, Code of Federal Regulations, part 661, is amended as follows:

PART 661—BUY AMERICA REQUIREMENTS—SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982, AS AMENDED

1. The authority citation for part 661 continues to read as follows:

Authority: 49 U.S.C. 5323(j) (Pub. L. No. 103-272); 49 CFR 1.51.

2. Appendix A to § 661.7 is amended by revising paragraph (e) to read as follows:

Appendix A to § 661.7—General Waivers

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(e) Under the provisions of § 661.7(b) of this part, a general public interest waiver from the Buy America requirements for "small purchases" (as defined in the "common grant rule," at 49 CFR 18.36(d)) made by FTA grantees with capital, planning, or operating assistance.

Issued on: July 19, 1995.

Gordon J. Linton,
Administrator.

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