

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

[Docket No. FTA-99-5709]

RIN 2132-AA68

**Buy America Requirements;
Permanent Waiver for Microcomputers****AGENCY:** Federal Transit Administration (FTA), DOT.**ACTION:** Withdrawal of proposed rulemaking.

SUMMARY: This document withdraws the Federal Transit Administration's (FTA) October 8, 1999, advanced notice of proposed rulemaking (ANPRM) in which it sought public comment on whether the permanent waiver of the Buy America requirements for microcomputers should be retained, revoked, or modified. Based on a review of the comments to the ANPRM, FTA has concluded that a change is not warranted. Accordingly, FTA hereby withdraws the rulemaking.

FOR FURTHER INFORMATION CONTACT: Meghan G. Ludtke, Office of Chief Counsel, Department of Transportation, Federal Transit Administration, Room 9316, 400 Seventh Street, SW., Washington, DC 20590, 202-366-1936 (telephone) or 202-366-3809 (fax).

ADDRESSES: All documents pertaining to this regulatory action, including the comments to the ANPRM, may be viewed and copied at the Docket Management Facility, U.S. DOT Dockets, Room PL-401, Department of Transportation, 400 7th St., SW., Washington, DC 20590-0001 between 10 a.m. and 5 p.m., E.S.T., Monday through Friday, except Federal holidays. An electronic version of this document, and all documents entered into this docket, are available on the World Wide Web at <http://dms.dot.gov>. To read the comments on the Internet, take the following steps: Go to the Docket Management System ("DMS") Web page of the Department of Transportation (<http://dms.dot.gov>). On that page, click on "search." On the next page (<http://dms.dot.gov/search>), type in the four-digit docket number. The docket number for this rulemaking is 5709. After typing the docket number, click on "search." On the next page, which contains docket summary information for the docket you selected, click on the desired comments. You may download the comments. Electronic access to this proposed rule and other Buy America guidance material is located at <http://www.fta.dot.gov/library/legal/buyamer/>.

SUPPLEMENTARY INFORMATION:**I. Background**

FTA's Buy America regulations, which can be found at 49 CFR part 661, apply to all federally-assisted procurements using funds authorized by the Federal transit laws, 49 U.S.C. Chapter 53. Under those regulations, all manufactured products procured for projects funded under the Federal transit laws must be manufactured in the United States.

In 1985, in response to a request from the American Association of State Highway and Transportation Officials, FTA solicited public comment and subsequently amended its Buy America rule to grant a one-year waiver of the requirements for the purchase of microcomputers. 50 FR 1156 (Jan. 9, 1985). In 1986, FTA granted a permanent waiver for microcomputer equipment of foreign origin and software of foreign origin. 51 FR 36126 (Oct. 8, 1986). FTA noted that many product components were still made and assembled abroad, and it would be difficult to determine when, if ever, microcomputer manufacturing would be relocated to the United States. The definition for Microcomputers follows:

A computer system whose processing unit is a microprocessor. A basic microcomputer includes a microprocessor, storage, and input/output facility, which may or may not be on one chip.

The same source defines computer system as: A functional unit consisting of one or more computers and associated software, that uses common storage for all or part of a program and also for all or part of the data necessary for the execution of the program; executes user-written or user-designated programs; performs user-designated data manipulation, including arithmetic operations and logic operations; and that can execute programs that modify themselves during their executions. A computer system may be a stand-alone unit or may consist of several interconnected units. Synonymous with ADP system, computing system.

50 FR 18760 (May 2, 1985).

FTA received a request from Prima Facie, Inc. (petitioner) to re-examine the permanent waiver for microcomputers. Prima Facie requested that FTA determine whether the basis for the waiver still existed, and if not, whether it would be appropriate for FTA to revoke the general waiver. In addition, petitioner asked that FTA seek comment on whether the waiver should be modified to include only certain types of microcomputer equipment and whether the inclusion of a microcomputer in a manufactured product should result in the entire product being considered a microcomputer.

In response, FTA issued an ANPRM, which can be found at 64 FR 54855 (Oct. 8, 1999). FTA invited public comment on the issues raised by petitioner.

II. Summary of Comments

FTA received nine written comments in response to its ANPRM. There were three responses from transit authorities; one from the American Public Transit Association (APTA); four from private companies, including the transportation systems and software industries; and one from a professional engineer.

A majority of the commenters, six of the nine, supported retention of the microcomputer waiver. They overwhelmingly emphasized that the waiver should remain in place because microcomputer equipment is still manufactured primarily in non-U.S. markets. They explained that while the technology marketplace has changed over the last fifteen years, there does not appear to have been a change in manufacturing location. According to the commenters, the situation that necessitated the regulation—*i.e.*, the lack of microprocessor suppliers in the U.S.—is still present. They explained that the majority of microchips and other necessary components are still manufactured overseas and unavailable from U.S. sources.

Two commenters also addressed the original intent of the waiver. They explained that with the waiver revoked and only foreign sources available, buyers would be forced to request individual waivers from FTA for each related procurement. This, in turn, would generate a steady stream of waiver requests from grantees. The 1986 regulation was promulgated to prevent such a burden on our grantees.

Of those commenters in favor of the waiver, two did indicate that some modifications of the waiver might be warranted. One commenter noted that there is "some confusion about the scope of the waiver," further stating that it is unclear whether the waiver applies to final manufactured products which contain a microprocessor as only an incidental part. Another commenter advocated a reevaluation of the definition of "minicomputer." The commenter explained that the 1986 definition of minicomputer was intended to facilitate the easier procurement of desktop computers. Today, however, that definition has become inadequate because it does not address the many modern procurements that are filled with microchips and control chips (*e.g.*, fare collection equipment, bus destination signs).

Of the nine responses to the ANPRM, three commenters were opposed to the waiver as it currently exists. Those comments came from the petitioner, a software company, and a professional engineer. All three argued that the current waiver is out-of-date. Petitioner explained that the waiver is out-of-date because the non-availability problems of 1985–86 no longer exist. Petitioner believes that if there is a permanent waiver, it should be extremely limited in scope, and not be extended to equipment simply because the equipment contains a microprocessor.

Another commenter, the software company, requested that “software” not be included in the waiver because the term is far too broad, and its inclusion does not support the original intent of the Buy America requirement. The waiver was intended to support American software businesses, which were few in number in the technology marketplace of 1985–86. Today, according to the company, there are several American software companies that develop and sell the software needed by transit properties and at a price affordable to transit properties, even smaller ones. As a result, the waiver, in effect, “opens the U.S. applications software market to competition from some very large and well-established foreign firms who market enterprise wide, fully integrated software packages.”

Finally, the professional engineer agreed with petitioner’s position but raised several other issues. He suggested that several additional topics should be opened up for comment, such as the interplay between public safety and microcomputers, the replacement and maintenance problems that arise when components come from foreign sources, the negative economic consequences of a blanket waiver, and the problem of

obsolescence in the domestic market with regards to microcomputers.

III. Analysis

At petitioner’s request, FTA issued this ANPRM and opened the record. Based on the record developed from this ANPRM, FTA has determined that the permanent waiver for microcomputers should not be revised.

FTA received only nine comments, one of which came from petitioner. That is a particularly small number of comments, especially for an issue that has such broad implications. In addition, the three responses in favor of revoking the waiver, as a whole, did not provide a sufficiently substantive discussion of petitioner’s questions. While some of the comments mention or address some of petitioner’s issues, the comments did not provide thorough discussions of petitioner’s four questions.

Moreover, the majority of comments did not support petitioner’s position; specifically, only two commenters shared petitioner’s position. Most of the commenters who support the current waiver strongly agreed that the U.S. technology marketplace has not changed enough to warrant a change. Notably, APTA, which consists of over 1,250 member organizations, took that position. Based on the responses from its members, APTA wrote that “it would seem that the U.S. marketplace has not changed that significantly since 1986.” If this is, in fact, the case (*i.e.*, that the technology marketplace has not changed), then there is no basis to alter the existing rule. Altering the rule would only create the problems discussed by other commenters, for example, generating a steady stream of waiver requests to FTA, decreasing choices available to transit systems, and increasing costs for transit systems.

Finally, the absence of responses from the U.S. microprocessor industry is notable. Presumably, that industry would have emphatically responded in support of the revocation of the waiver. The waiver greatly impacts their industry, as it opens them up to a great deal of foreign competition, at least with respect to government transit contracts. However, as FTA lacks information from the U.S. microprocessor industry, FTA is left with little basis upon which to support a change in the existing rule.

Given the small number of responses, the lack of support of the public, and the lack of substantive grounding, FTA has decided to withdraw the ANPRM.

IV. Conclusion

FTA will not revoke or modify the microcomputer waiver as it is set forth in Appendix A of 49 CFR 661.7. However, it should be noted that FTA does not apply the waiver to an entire product because it contains a microcomputer. The parameters of the waiver as it currently exists are that if the end product is itself a microcomputer or software as defined above, Buy America is waived. If, however, the end product contains a microcomputer (*e.g.*, a farecard system), that microcomputer is exempt from the requirements of Buy America, but the rest of the end product must be in compliance. Due to the small number of responses to the ANPRM, the lack of public support for the proposed change, and the lack of substantive arguments to justify the change, FTA has concluded that a change is not warranted at this time.

Issued on: February 21, 2003.

Jennifer L. Dorn,
Administrator.

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