

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 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 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