



DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA – 2015-0065]

Notice of Buy America Waiver

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

ACTION: Notice of Buy America waiver; request for comment.

SUMMARY: This notice provides NHTSA's finding that a public interest waiver of the Buy America requirements is appropriate for any manufactured product whose purchase price is \$5,000 or less, excluding a motor vehicle, when such product is purchased using Federal grant funds administered under Chapter 4 of Title 23 of the United States Code; and requests public comment.

DATES: The effective date of this waiver is **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Written comments regarding this notice may be submitted to NHTSA and must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Written comments may be submitted using any one of the following methods:

- **Mail:** Docket Management Facility, M-30, U.S. Department of Transportation, West Building, Ground Floor, Rm. W12-140, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590.
- **Fax:** Written comments may be faxed to (202) 493-2251.

- **Internet:** To submit comments electronically, go to the Federal regulations website at <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- **Hand Delivery:** West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, S.E., between 9 a.m. and 5 p.m. Eastern Time, Monday through Friday, except Federal holidays.

Instructions: All comments submitted concerning this notice must include the agency name and docket number. Please note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. You may also call the Docket at 202-366-9324.

FOR FURTHER INFORMATION CONTACT:

Andrew DiMarsico, Office of Chief Counsel, NHTSA (phone: 202-366-1834). You may send mail to Mr. DiMarsico at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590.

SUPPLEMENTARY INFORMATION:

Background

The statutory requirement (“Buy America”) states that the Secretary “shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or [title 23 of the United States Code] and administered by the Department of Transportation, unless steel, iron, and manufactured products used in such project are produced in the United States.” 23 U.S.C. 313(a). The Secretary of Transportation has delegated the authority to administer Buy America for NHTSA programs to the Administrator of NHTSA. 49 CFR 1.95; 49 CFR 501. Buy America provides that NHTSA may waive those requirements if “(1) their application would be inconsistent with the public interest; (2) such

materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) the inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent.” 23 U.S.C. 313(b).

Buy America establishes a preference for domestically produced goods for use in Federally sponsored projects. The first Buy America legislation conditioning the expenditure of Federal funds by NHTSA grant recipients was enacted in 1978 as part of the Surface Transportation Assistance Act of 1978. Pub. L. 95-599, 92 Stat. 2689. The focus of that Buy America provision was on large procurements, such as bridge replacement projects, and not on smaller, routine purchases.¹ The House of Representatives considered excluding up to \$5 million in project costs from the requirements of Buy America, but ultimately did not pursue a threshold.² The Senate bill sought to limit Buy America requirements to projects whose costs exceeded \$1 million to avoid imposing excessive requirements on small, routine projects. See H.R. Conf. Rep. 95-1797 (1978), 1978 U.S.C.C.A.N. 6693, 6754. Ultimately, the Senate’s proposed threshold was reduced in conference to \$500,000, and the provision became law, establishing a preference for “articles, materials, supplies mined, produced or manufactured” in the United States and costing more than \$500,000.

In 1983, Congress repealed that Buy America provision and substituted section 165 of the Surface Transportation Assistance Act of 1982. Pub. L. 97-424, 96 Stat. 2067.³ The 1982 enactment specified that the Buy America prohibition applied to “steel, cement and manufactured products” and eliminated the \$500,000 threshold.⁴ Although the threshold was

¹ H.R. Rep. No. 95-1485, 1978 U.S.C.C.A.N. 6575, 6644 (August 11, 1978).

² Id.

³ Section 165 was originally included as a note to section 23 U.S.C. 101 and codified in 2005 to current its section, 23 USC 131. See Pub. L. 109-509, 119 Stat. 1464.

⁴ Congress amended section 165 of the STAA of 1982 by removing “cement” in 1984, Pub. L. No. 98-229. 98 Stat. 55, and by adding “Iron” In 1991, Pub. L. 102-240, 105 Stat. 1914.

eliminated, Congress acknowledged circumstances where the prohibition would be difficult to apply and introduced exceptions under a waiver process that remains in place today. Pub. L. 97-424, 96 Stat. 2067. One of these exceptions is the public interest waiver. Id.

Agencies are permitted to waive the Buy America requirement when they determine that “it is inconsistent with the public interest.” 23 U.S.C. 313(b)(1). In consideration of this authority and consistent with the purposes of NHTSA’s grant programs to reduce accidents and resulting fatalities and injuries, the agency has determined that it is appropriate to issue a public interest waiver for small, routine purchases by States under the highway safety grant programs. In making this decision and arriving at a reasonable threshold for waiver, NHTSA remains mindful of the overarching purposes of Buy America, while evaluating all relevant facts, including administrative burden, delay and impact on the congressionally authorized State grant programs.

NHTSA Highway Safety Grant Programs

NHTSA’s mission is to reduce deaths, injuries and economic losses resulting from motor vehicle crashes. This is accomplished by setting and enforcing safety performance standards for motor vehicles and motor vehicle equipment, and through grants to States to enable them to conduct effective State and local highway safety programs. NHTSA’s State highway safety programs are codified in Chapter 4 of Title 23, United States Code. Chief among these programs is section 402, which provides formula grants to States to administer a comprehensive highway safety program designed to reduce traffic accidents and resulting deaths, injuries and property damage. 23 U.S.C. 402. Section 402 authorizes State programs related to speeding, occupant protection, impaired driving, accident prevention, school bus safety, unsafe driving behavior (aggressive, fatigued and distracted driving), traffic safety law enforcement, driver education,

pedestrian and bicycle safety, and traffic administration (record systems, accident investigation and emergency services). In addition to the core section 402 grants, NHTSA also administers other grants to the States, which Congress from time to time authorizes to address specific highway safety needs. Most recently, under the “Moving Ahead for Progress in the 21st Century Act” (Public Law 112-141), Congress authorized the “National Priority Safety Programs,” providing additional grants to States in the areas of occupant protection, State traffic safety information system improvements, distracted driving, motorcyclist safety, and State graduated driver licensing laws. See 23 U.S.C. 405.

In general, States may expend Federal section 402 or 405 funds for any item or service that is necessary and reasonable for proper and efficient performance and administration of their highway safety programs and activities, subject to the statutory requirements and implementing regulations. See 23 CFR 1200 et seq. Because of the broad reach of these Federally sponsored highway safety programs, States may expend grant funds on thousands of different items and activities. In the area of equipment, allowable purchases range from low cost items such as office supplies (DVDs, printers and ink cartridges), computers, cameras, child restraints, motorcycle helmets, and radar speed detection devices to higher cost items such as police cruisers. In recent years, NHTSA has seen an increase in waiver requests for purchases of these smaller commercial items, based on non-availability in the United States or availability only at a high price differential. Many of these items cost \$5,000 or less. See, e.g., 80 Fed. Reg. 9851 (Feb. 24, 2015) (printers); 79 Fed. Reg. 74811 (Dec. 16, 2014) (child restraints); 79 Fed. Reg. 74812 (Dec 16, 2014) (training motorcycles); and 79 Fed. Reg. 55529 (Sept. 16, 2014) (DVDs and motorcycle safety vests).

Non-Availability and High Cost Differential Waivers under Buy America

State grantees incur significant burdens when required to submit waivers for small, routine purchases of items that are increasingly not manufactured in the United States. As part of a waiver request, a State must demonstrate through a market analysis that the item for which it seeks a waiver is not available in the United States or will cost 25 percent more than a comparable non-domestic item. For each waiver request, the agency must, in the exercise of due diligence, perform an additional independent review and market analysis to confirm that the item meets either the non-availability exemption or the high cost differential exemption of Buy America. See 23 U.S.C. §§ 313(b)(2), (b)(3). This process substantially delays State grantees in obtaining the items needed to administer and implement important highway safety programs. It also consumes limited agency resources to administer the highway safety grants. Moreover, the staff time needed by a State to prepare individual waivers for many small purchases comes at the expense of time devoted to implementing these life-saving programs. This is especially concerning in an era of tight State budgets, where State highway safety offices administering these grants face increasingly serious staffing constraints.

It is important to consider these constraints and burdens in the historical context of Buy America. During the many years Buy America has been in place, a significant statutory focus has been on purchases of materials used in construction and large-scale fabrication. Its application to the grants of transportation agencies such as the Federal Highway Administration (for road and bridge building materials) and the Federal Transit Administration (for acquisition of rolling stock and manufactured end products) is plain, because those materials are of central importance to those grants. However, by statute, NHTSA grant funds may not be used for construction. 23 U.S.C. § 402(g)(1)(A). As a result, while steel and iron purchases are not implicated in NHTSA's grant programs, Buy America's reach to include the small amount of

manufactured products used in NHTSA's programs does not have any effect on the manufacturer of those items. Under NHTSA's State grant programs, purchases of small manufactured products that are largely ancillary rather than central to the purposes of the highway safety grants (e.g., laptops, printers, ink cartridges, DVDs, and other office products) are captured by the restriction. Whereas the core expenses under NHTSA's State grant programs are for reimbursing performance (estimated at more than 90 percent), such as police enforcement of State traffic safety laws, safety education, and the like, Buy America has the effect of restricting or delaying the States' ability to acquire ancillary support items necessary to successfully deploy these important highway safety programs. The result is that critical safety program delivery to the States, and from the States to their localities, suffers.

Public Interest Waiver

Based upon the foregoing discussion, NHTSA believes that a public interest waiver is appropriate to address these delays and burdens and thereby promote the success of State highway safety programs. NHTSA concludes that it is in the public interest to waive the Buy America requirements for a manufactured product whose purchase price is \$5,000 or less, with one exception—the purchase of a motor vehicle, as defined in 49 U.S.C. 30102.⁵ We do not believe that the purchase of motor vehicles can be reasonably viewed as ancillary in the context of these highway safety programs, and therefore decline to extend this public interest waiver to such purchases. The agency has selected this per-item threshold based on our determination that it is the level necessary to alleviate the burdens associated with purchases of low-priced commercially available items that are required for the successful implementation of the highway

⁵ Under that statutory provision, motor vehicle means “a vehicle driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line.” We recognize that the cost of most motor vehicles would fall above the threshold in today's notice. However, this exception from the waiver is included because the cost of some motor vehicles (for example, certain motorcycles), may fall below the threshold.

safety projects required under NHTSA grants. In selecting this conservative threshold, we sought to balance the goals of Buy America with the life-saving goals of the State highway safety grant programs.

A threshold of \$5,000 for this waiver is in step with government-wide requirements and procedures applicable to grantee purchases of equipment, where the Federal interest starts at the \$5,000 level. Under the Uniform Administrative Requirements, Cost principles, and Audit Requirements for Federal Awards, equipment is defined as an item having a per unit cost of \$5,000 or more. 2 CFR 200.33. At levels of \$5,000 and above, grantees are required to obtain prior approval and account for equipment purchases. See 2 CFR 200.313; 2 CFR 200.439. In contrast, at levels below \$5,000, Federal procedures governing purchase, administration, and disposition of items needed for performance of the grant do not apply. This treatment has also been codified in the NHTSA regulation implementing these programs, the Uniform Procedures for State Highway Safety Grant Programs. See 23 CFR 1200.31.

Moreover, NHTSA's chosen threshold is very conservative when compared to small purchase waivers or exclusions under Buy America within the jurisdiction of other operating modes of the U.S. Department of Transportation. For example, the Federal Transit Administration issued a general public interest waiver for small purchases, as defined in DOT's grants management common rule at 49 CFR 18.36(d).⁶ 60 Fed. Reg. 37930 et. seq. (July 24, 1995); 49 CFR 661.7, Appendix A(c). Also, Congress codified the public interest need for a small purchase waiver in the Buy America requirement applicable to the Federal Railroad Administration, setting the threshold at \$100,000. 49 U.S.C. 24405(a)(11).

⁶ The DOT Grants Management common rule, 49 CFR part 18, was repealed and replaced by 2 CFR Part 2. See 78 Fed. Reg. 78590 (December 26, 2013).

In light of the above discussion, and pursuant to 23 U.S.C. 313(b)(1), NHTSA finds that it is appropriate to waive Buy America requirements for a manufactured product, excluding a motor vehicle, whose cost per unit is \$5,000 or less. Therefore, in accordance with the provisions of Section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572), NHTSA is providing this notice of its finding that a waiver of the Buy America requirements is appropriate. Written comments on this finding may be submitted through any of the methods discussed above. This waiver is consistent with the general government initiatives that promote streamlined government contracting by Federal agencies and use of Federal funds by grantees to reduce administrative burdens and increase efficiency to accomplish agency missions. See E.O. 12931, 59 FR 52387 (October 13, 1994). It does not eliminate NHTSA's oversight of the State grantees' use of Federal grant funds. NHTSA's Regional Administrators will continue to ensure that Federal grantee purchases are necessary and reasonable for the purposes of the specific highway safety grant program. After the effective date, grantees must still request a waiver of Buy America requirements for purchases that exceed the threshold published in today's notice. The agency will monitor State purchases under the highway safety grant programs and under this waiver to ensure that the important policy goals and the spirit of Buy America are maintained.

Authority: 23 U.S.C. 313; Pub. L. 110-161.

Issued in Washington, DC on June 25, 2015 under authority delegated in 49 CFR part 1.95

Paul A. Hemmersbaugh,
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