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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Docket No. FTA-2016-0020

Notice of Proposed Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurements In Limited Circumstances

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of proposed general public interest waiver and request for comments.

SUMMARY: The purpose of this notice is to articulate the Federal Transit

Administration's (FTA) justification for waiving its Buy America requirements for rolling stock under certain limited circumstances because application of the increased domestic content requirements is inconsistent with public policy. The Fixing America's Surface Transportation (FAST) Act amended FTA's Buy America statute to include a phased increase in domestic content for rolling stock. The FAST Act was signed into law on December 4, 2015, but included an effective date of October 1, 2015. FTA proposes a public interest waiver for the following categories of contracts: (1) for contracts entered into between the FAST Act's effective date and date of enactment (i.e., between October 1, 2015 and December 4, 2015), the increased domestic content requirements for FY2018 and beyond will not apply, regardless of when the vehicles are delivered; and (2) for contracts entered into after December 4, 2015 as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015, the increased domestic content requirements for FY2018 and beyond will not apply, regardless of when

the vehicles are delivered. FTA is providing notice of this public interest waiver and seeks public comment. After consideration of the comments, FTA will issue a second Federal Register notice responding to comments and issuing final public interest waivers.

DATES: Comments must be received by [INSERT DATE 7 DAYS AFTER PUBLICATION]. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments by one of the following means, identifying your submissions by docket number FTA-2016-0020:

1. Web site: <http://www.regulations.gov>. Follow the instructions for submitting comments on the U.S. Government electronic docket site.
2. Fax: (202) 493-2251.
3. Mail: U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
4. Hand Delivery: U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must make reference to the “Federal Transit Administration” and include docket number FTA-2016-0020. Due to the security procedures in effect since October 2011, mail received through the U.S. Postal Service may be subject to delays. Parties making submissions responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any

personal information therein, will be posted without change or alteration to <http://www.regulations.gov>. For more information, you may review DOT's complete Privacy Act Statement in the Federal Register published April 11, 2000 (65 FR 19477), or you may visit <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Cecelia Comito, Assistant Chief Counsel, Office of the Chief Counsel, , phone: (202) 366-2217 or email, Cecelia.Comito@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The FAST Act, FTA's current authorizing legislation, amended the rolling stock waiver in 49 U.S.C. 5323(j)(2)(C) to provide for a phased increase in the domestic content for rolling stock for FY2018-FY2019 and FY2020 and beyond. As amended by the FAST Act, the domestic content for rolling stock increases over time from the current rate of "more than 60 percent" to "more than 70 percent" in FY2020 and beyond:

(j) Buy America.

(1) In general. The Secretary 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) Waiver. The Secretary may waive paragraph (1) of this subsection if the Secretary finds that:

* * *

(C) when procuring rolling stock (including train control, communication, traction power equipment, and rolling stock prototypes) under this chapter

(i) the cost of components and subcomponents produced in the United States

(I) for fiscal years 2016 and 2017, is more than 60 percent of the cost of all components of the rolling stock;

(II) for fiscal years 2018 and 2019, is more than 65 percent of the cost of all components of the rolling stock; and

(III) for fiscal years 2020 and each fiscal year thereafter, is more than 70 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...

In a separate notice published in today's Federal Register, FTA is seeking comment on its proposed statement of policy regarding the implementation of the phased increase in domestic content for rolling stock under the FAST Act. FTA interprets the language in the FAST Act to require that if the date a recipient enters into a contract for rolling stock occurs after the effective date of the FAST Act, i.e., October 1, 2015, then the new FAST Act provisions for rolling stock apply. Thus, contracts entered into after October 1, 2015 must provide that vehicles delivered in FY2018 and FY2019 have a

domestic content of more than 65 percent, and that vehicles delivered in FY2020 and beyond must have a domestic content of more than 70 percent. These delivery provisions apply to contracts signed after the effective date of the FAST Act, i.e., October 1, 2015, unless a waiver is granted.

II. Proposed Public Interest Waiver

With certain exceptions, FTA's "Buy America" requirements prevent FTA from obligating an amount that may be appropriated to carry out its program for a project unless "the steel, iron, and manufactured goods used in the project are produced in the United States." 49 U.S.C. 5323(j)(1). One such exception is where applying the Buy America requirements "would be inconsistent with the public interest." 49 U.S.C. 5323(j)(2)(A). After considering all appropriate factors on a case-by-case basis, 49 CFR 661.7(b), if FTA determines that the conditions exist to grant a public interest waiver, FTA will issue a detailed written statement justifying why the waiver is in the public interest, and will publish this justification in the Federal Register, providing the public with a reasonable time for notice and comment of not more than seven calendar days. 49 CFR 661.7(b).

Recipients who entered into rolling stock contracts prior to December 4, 2015, were required under existing Buy America law to procure vehicles with a domestic content of more than 60 percent, regardless of when the vehicle was delivered. Because rolling stock frequently cannot be delivered in a short time frame, recipients may enter into multi-year contracts for rolling stock, allowing for contracts up to five years for buses and up to seven years for railcars. 49 U.S.C. 5325(e). Thus, under existing law at

the time of contracting, recipients were not prohibited from entering into contracts for vehicles that would be delivered in FY2018 and beyond.

Although the FAST Act was signed into law on December 4, 2015, Congress included an effective date of October 1, 2015. Application of the FAST Act's retroactive effective date to rolling stock contracts entered into between October 1, 2015 and December 4, 2015, would result in rendering those contracts ineligible for FTA funds for vehicles delivered in FY2018 and beyond. Without a waiver, recipients most likely would be required to cancel those contracts, and start the procurement process again.

“The inquiry into whether a statute operates retroactively demands a “commonsense, functional judgment about ‘whether the new provision attaches new legal consequences to events completed before its enactment.’” INS v. St. Cyr., 533 U.S. 289, 312 (2001) (quoting Martin v. Hadix, 527 U.S. 343, 357–358 (1999)). Additionally, “the mere promulgation of an effective date for a statute does not provide sufficient assurance that Congress specifically considered the potential unfairness that retroactive application would produce.” St. Cyr., 533 U.S. at 317. Thus, the decision to apply a statute retroactive should be guided by considerations of fair notice, reasonable reliance, and settled expectations.

Retroactive application of the FAST Act's increase in domestic content to contracts entered into between October 1, 2015 and December 4, 2015 would be inconsistent with the public interest. As noted in the FTA's Best Practices Procurement Manual, the procurement process for buses and railcars can be several years from drafting detailed specifications to contract award. Rail vehicle procurements are planned seven to ten years in advance of needed completion because several interdependent contracts may

have to be awarded in order to accomplish the project. Bus procurements generally require at least three years of advance planning.

Depending on the complexity of the procurement, the time intervals typically required to accomplish rolling stock contract awards might include:

- One year advance planning before Request for Proposals (RFP) for the engineering services;
- Four months from RFP to award of the engineering services;
- Two years to prepare technical specifications;
- Three months from completion of specifications to system RFP;
- Six months from system RFP to award; and
- Three years for system construction.

The planning and design processes can change this schedule significantly.

All of this planning and work by the recipient is at tremendous cost to the recipient, and therefore, to the public, both in terms of money and the delayed acquisition of new transit vehicles. Additionally, preparation of a proposal or bid in response to a solicitation for vehicles is both time-consuming and costly for the manufacturers.

Application of the FAST Act's increased domestic content requirements to rolling stock procurements for which recipients have advertised solicitations for bids or requests for proposals prior to December 4, 2015 will be particularly burdensome for both the recipient and the manufacturer. FTA proposes a public interest waiver under these circumstances. These procurements are underway and a change in the domestic content will require recipients to amend their solicitations and specifications in order to include the FAST Act's increased domestic content requirements, which would result in

substantial delay and increased costs, particularly for those recipients who are about to enter into contracts.

Accordingly, FTA proposes a public interest waiver for the following categories of contracts: (1) for contracts entered into between the FAST Act's effective date and date of enactment (i.e., between October 1, 2015 and December 4, 2015), the increased domestic content requirements for FY2018 and beyond will not apply, regardless of when the vehicles are delivered; and (2) for contracts entered into after December 4, 2015 as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015, the increased domestic content requirements for FY2018 and beyond will not apply, regardless of when the vehicles are delivered.

This public interest waiver is limited to the parties to the contract only. Recipients who are not direct parties to the contract, however, may not exercise options (a/k/a "piggybacking") on such contracts and take advantage of the lower domestic content requirement. The assignment of options to a third party results in the third party and the vendor entering into a new contract after the effective date of the FAST Act, and therefore, the increased domestic content requirements for FY2018 and beyond will apply to vehicles delivered in those years.

Recipients or vendors may apply to FTA for individual public interest waivers for contracts entered into after December 4, 2015, and others that do not fall within the scope of this general public interest waiver. A request for a public interest waiver should set forth the detailed justification for the proposed waiver, including information about the history of the procurement and the burden on the recipient and/or the industry in complying with the FAST Act. Public interest waivers should be narrowly tailored and

FTA will not generally look favorably on waivers that provide for contracts that include the exercise of options for vehicles that will be delivered beyond FY2020. FTA will act expeditiously on public interest waiver requests that provide the information requested.

FTA seeks comment from all interested parties on the above public interest waiver. After consideration of the comments, FTA will publish a second notice in the Federal Register with a response to comments and noting any changes made to the public interest waiver as a result of the comments received.

Therese McMillan

Acting Administrator

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