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This document is scheduled to be published in the Federal Register on 03/15/2024 and available online at

<https://federalregister.gov/d/2024-05533>, and on <https://govinfo.gov> 910-22-P]

## **Federal Highway Administration**

### **Buy America Waiver Notification**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice.

**SUMMARY:** This notice provides information regarding FHWA's finding that it is appropriate to grant a Buy America waiver to the City of Mount Vernon, Washington, for procurement of non-domestic iron and steel products and components, used in construction of the Mount Vernon Library Commons Project (Project) in the City of Mount Vernon, Washington. The waiver relates specifically to manufactured products that are part of the elevator equipment; mechanical, electrical, and plumbing systems; and architectural elements of the Project.

**DATES:** The effective date of the waiver is [INSERT DATE ONE DAY AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** For questions about this notice, please contact Mr. Brian Hogge, FHWA Office of Infrastructure, 202-366-1562, or via e-mail at [Brian.Hogge@dot.gov](mailto:Brian.Hogge@dot.gov). For legal questions, please contact Mr. David Serody, FHWA Office of the Chief Counsel, 202-366-1345, or via e-mail at [David.Serody@dot.gov](mailto:David.Serody@dot.gov). Office hours for FHWA are from 8 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

## **SUPPLEMENTARY INFORMATION:**

### **Electronic Access**

An electronic copy of this document may be downloaded from the Federal Register's home page at: [www.FederalRegister.gov](http://www.FederalRegister.gov) and the Government Publishing Office's database at: [www.GovInfo.gov](http://www.GovInfo.gov).

### **Background**

The FHWA's Buy America requirements for steel and iron are set forth at 23 U.S.C. 313 and 23 CFR 635.410 and require that all steel and iron that are permanently incorporated into a Federal-aid project must be produced in the United States unless a waiver is granted, including predominantly steel and iron components of a manufactured product.<sup>1</sup> Under these requirements, all manufacturing processes, including the application of a coating, must occur in the United States.<sup>2</sup>

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<sup>1</sup> Under 23 U.S.C. 313, FHWA has a Buy America requirement for manufactured products; however, FHWA has a standing waiver under 23 U.S.C. 313(b), known as the Manufactured Products General Waiver, which covers manufactured products that are not predominantly steel and iron. *See* 48 FR 53099 (Nov. 25, 1983).

<sup>2</sup> While the Build America, Buy America Act (BABA), included in the Infrastructure Investment and Jobs Act (also known as the "Bipartisan Infrastructure Law" (BIL)) (Pub. L. 117-58), sets out Buy America preferences for steel, iron, manufactured products, and construction materials, these preferences only apply to the extent that a domestic content procurement preference, as described in section 70914 of BABA, does not already apply to iron, steel, manufactured products, and construction materials. BIL section 70917(a)-(b). As FHWA has existing domestic content preferences for steel, iron, and manufactured products at 23 U.S.C. 313, the requirements under 23 U.S.C. 313 apply to steel, iron, and manufactured products instead

Under 23 U.S.C. 313(b) and 23 CFR 635.410(c), FHWA may waive the application of its Buy America requirement for steel and iron if the application would be inconsistent with the public interest; or when products are not produced in the United States in sufficient and reasonably available quantities of a satisfactory quality. This notice provides information regarding FHWA’s finding that it is appropriate to grant the City of Mount Vernon a Buy America waiver for procurement of non-domestic iron and steel products that are part of the elevator equipment; mechanical, electrical, and plumbing systems; and architectural elements of the Project. The “specified products” include: (i) elevator conveying equipment; (ii) elevator sump pump; (iii) HVAC controls; (iv) hydronic pumps; (v) energy recovery ventilators; (vi) split system A/C; (vii) coalescing style air and sediment separator; (viii) air source water heat pumps; (ix) fan coil units Nailor; (x) fan coil units Daikin; (xi) switchboards; (xii) panelboards; (xiii) an intercom system; (xiv) an AV system wall rack; (xv) heat pump water heaters; (xvi) a backflow preventer; (xvii) metal wall and roof panel fasteners; (xviii) terracotta fasteners; (xix) a retractable acoustic wall; (xx) a folding glass panel partition; (xxi) electric bike charging lockers; (xxii) uni-strut fasteners; and (xxiii) a fire alarm system (collectively “waiver items”).

***Background on the Project:*** The Project is a multi-story structure that includes multiple civic elements including a public parking garage, public library, community center, meeting rooms, commercial kitchen, public restrooms, STEM center, and public computing area. The project also incorporates electric vehicle charging infrastructure.

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of the requirements under BABA. As FHWA’s existing Buy America requirement does not specifically cover construction materials, the Buy America preference under section 70914 of BABA applies for construction materials.

The notice of waiver request stated that the City of Mount Vernon had not received FHWA financial assistance to that point but was applying for funding under the Charging and Fueling Infrastructure Discretionary Grant Program (CFI Program) and Transportation Infrastructure Finance and Innovation Act program (TIFIA). Since the notice of waiver request was published, FHWA recently awarded the City \$12,500,000 in funding under the CFI Program;<sup>3</sup> the City continues to seek additional credit assistance under TIFIA.

***Background on Waiver Request:*** The City of Mount Vernon and its contractor contacted numerous manufacturers regarding Buy America-compliant versions of the waiver items. The city and its consultants also conducted an independent search for Buy America-compliant versions of the waiver items with distributors and manufacturers and by contacting smaller but reputable manufacturers with whom they have previously worked. The City of Mount Vernon, the city's contractor, and the city's consultants were unable to locate any domestic manufacturers or fabricators of the waiver items that were able to provide Buy America-compliant products that satisfy the Project's design needs prior to requesting a waiver.

In accordance with section 123 of Division A of the Consolidated Appropriations Act, 2010 (Pub. L. 111-117), section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244), and 23 U.S.C. 313(g), FHWA posted a notice of the waiver request on its website on September 13, 2023, soliciting public comment on the intent to issue a waiver of the waiver items for a 15-day period.<sup>4</sup>

### **Waiver Justification Summary**

<sup>3</sup> Under 23 U.S.C. 313(h), FHWA's Buy America requirement applies to the entire scope of the project, as defined in the applicable finding, determination, or decision under the National Environmental Policy Act, when Federal funds are used in any part of the project regardless of whether Federal funds are used in the actual component that is subject to the waiver.

<sup>4</sup> <https://www.fhwa.dot.gov/construction/contracts/waivers.cfm?id=176>.

**Comments to the Notice of Waiver Request:** The FHWA received 25 comments in response to the notice of the waiver request. Twenty-three commenters supported the waiver and two opposed it. One of the commenters opposing the waiver merely stated that the commenter did not support the waiver because the commenter does not support the use of FHWA funds for the Project. This commenter did not offer any specific information on the availability of Buy America-compliant waiver items, nor did the commenter suggest specific, additional actions that the City of Mount Vernon could take to maximize its use of goods, products, and materials produced in the United States.

The other commenter, who represented a manufacturer, indicated they can make many of the waiver items domestically. In subsequent discussions between FHWA, the City of Mount Vernon, and the manufacturer, the company stated that the only Buy America-compliant waiver item that it might be able to provide domestically would be the hydronic pumps. On October 18, 2023, the city provided the manufacturer with the timeline for when each hydronic pump would be needed on site based on the project schedule. The city also requested a response that included a commitment to provide the hydronic pumps by November 21, 2023. On November 27, 2023, the City of Mount Vernon notified FHWA that the city had received no further reply. Thus, the city did not receive any new information indicating that any of the waiver items could be produced by domestic manufacturers from any of the commenters opposing the waiver.

Accordingly, FHWA believes that the city has made substantial efforts to find suitable Buy America-compliant waiver items for the Library Commons project. The FHWA reviewed the market research conducted by the city and, in consultation with the National Institute of Standards and Technology Manufacturing Extension Partnership, determined that further supplier scouting would not be warranted. The waiver items include iron and steel components of manufactured products of unknown origin, and FHWA does not believe that additional supplier scouting would uncover items where all

iron and steel components could be shown to be domestically produced or manufacturers who wish to modify their manufacturing processes to incorporate such domestically produced components.

**Timing and Need for a Waiver:** The waiver items are essential to the Project. Further, the City of Mount Vernon maintains that approval of a Buy America waiver for use of the waiver items in the Project is critical to maintain the schedule of ongoing construction on the Project. The City explained that the Project is scheduled to be substantially complete in March 2024 and that it is now at a juncture where delays in the approval of the Buy America waiver may delay completion of construction with commensurate additional payments to the contractor.

In addition, the City of Mount Vernon has not located any domestic manufacturers for the waiver items, nor has any domestic manufacturer identified the ability to produce Buy America-compliant waiver items through the public comment process. These waiver items include many small iron and steel components of unknown origin incorporated into manufactured products that under FHWA's Buy America requirements must be domestically manufactured.<sup>5</sup> Due to the nature of the Project and

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<sup>5</sup> FHWA's Buy America requirements differ from requirements applicable to other Federal Agencies under BABA in that predominantly iron and steel components of manufactured products must be Buy America-compliant. Under BABA, manufactured products must be manufactured in the United States and the cost of the manufactured product's components that are mined, produced, or manufactured in the United States must be greater than 55 percent of the total cost of all components of the manufactured product; however, BABA does not specifically mandate that iron and steel components in particular must be domestically manufactured. *See* BABA section 70912(6)(B).

the waiver items, however, many of the waiver items are not commonly used on FHWA-funded projects.

**Executive Order 14005:** Executive Order (E.O.) 14005, entitled “Ensuring the Future is Made in All of America by All of America’s Workers,” provides that Federal Agencies should, consistent with applicable law, maximize the use of goods, products, and materials produced in, and services offered in, the United States. 86 FR 7475 (Jan. 28, 2021). Based on the information contained in the waiver request from the City of Mount Vernon and the lack of responsive comments to the notice of waiver request, FHWA concludes that issuing a waiver is not inconsistent with E.O. 14005.

### **Finding and Request for Comments**

Based on all the information available to the Agency, FHWA concludes that, with respect to the specified products, there are no Buy America-compliant items and is waiving its Buy America requirements for steel and iron set forth at 23 U.S.C. 313 and 23 CFR 635.410 for recipient purchases of the following produces used in the Mount Vernon Library Commons Project (“specified products”): (i) elevator conveying equipment; (ii) elevator sump pump; (iii) HVAC controls; (iv) hydronic pumps; (v) energy recovery ventilators; (vi) split system A/C; (vii) coalescing style air and sediment separator; (viii) air source water heat pumps; (ix) fan coil units Nailor; (x) fan coil units Daikin; (xi) switchboards; (xii) panelboards; (xiii) an intercom system; (xiv) an AV system wall rack; (xv) heat pump water heaters; (xvi) a backflow preventer; (xvii) metal wall and roof panel fasteners; (xviii) terracotta fasteners; (xix) a retractable acoustic wall; (xx) a folding glass panel partition; (xxi) electric bike charging lockers; (xxii) uni-strut fasteners; and (xxiii) a fire alarm system. This finding only includes components identified in the waiver request and supporting documents included on FHWA’s Website.

The waiver applies to the specified products used in the Project that are subject to Buy America as a result of obligations of Federal financial assistance made by FHWA for the Project. FHWA will obligate award funds following the effective date of this waiver. The City of Mount Vernon and its contractors and subcontractors involved in the procurement of the relevant components are reminded of the need to comply with the Cargo Preference Act in 46 CFR part 38, if applicable.

The OMB Memorandum M-24-02 provides that, before granting a waiver in the public interest, to the extent permitted by law, Federal Agencies shall assess whether a significant portion of any cost advantage of a foreign-sourced product is “the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products.”<sup>6</sup> However, because the waiver that FHWA is finalizing in this notice is not based on consideration of the cost advantage of any foreign-sourced steel, iron, or manufactured products, there is not a specific cost advantage for FHWA to now consider.

In accordance with the provisions of section 117 of the SAFETEA-LU Technical Corrections Act of 2008, FHWA is providing this notice as its finding that a waiver of its Buy America requirements for steel and iron is appropriate. The FHWA invites public comment on this finding for an additional five days following the effective date of the finding. Comments may be submitted to FHWA’s Website via the link provided to the waiver page noted above.

Authority: 23 U.S.C. 313; Pub. L. 110-161; 23 CFR 635.410.

**Shailen P. Bhatt,**

*Administrator,*

*Federal Highway Administration.*

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<sup>6</sup> <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>.

