

**Statement of
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Federal Highway Administration
United States Department of Transportation
Hearing on Buy America Requirements in Federal Highway and Transit Programs
Before the
Committee on Transportation and Infrastructure
Subcommittee on Highways and Transit
United States House of Representatives
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Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee, thank you for the opportunity to testify today on the Federal Highway Administration's (FHWA) application of Buy America requirements in the Federal-aid highway program. FHWA supports Buy America's goal of ensuring that investments of Federal funds in infrastructure strengthen the national economy and benefit American workers and industry.

BACKGROUND

Federal domestic procurement requirements have been in existence since 1933. The original requirements, commonly referred to as the "Buy American" requirements, are found in sections 10a-10d of title 41, United States Code (U.S.C.), and apply only to direct Federal procurement activities. A direct Federal procurement occurs when a Federal government agency makes the purchase or awards a contract. Construction contracts done under the Federal Lands Highways program are examples of Federal direct procurements.

Section 401 of the Surface Transportation Assistance Act (STAA) of 1978 (Public Law 95-599) expanded domestic procurement coverage to the Federal-aid highway program by establishing "Buy America" requirements.

The current Buy America requirement is based on section 165 of the STAA of 1982 (Public Law 97-424), as amended. Section 165 initially covered cement, steel, and manufactured products. Due to concerns about an inadequate domestic supply of cement, section 165 was amended in 1983 to limit the coverage to steel materials and products only. Subsequently, section 1048(a) of the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 (Public Law 102-240) amended section 165 to include iron. Further, section 1041(a) of ISTEA defined the action of applying a coating to a covered material and products (i.e., steel or iron) as a manufacturing process subject to Buy America requirements.

In August 2005, section 1903 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Public Law 109-59) codified the Buy America requirements as section 313 of title 23, U.S.C., but made no substantive changes to the requirements. FHWA's regulation implementing Buy America is found in 23 CFR 635.410. It applies to any construction contract that uses Federal-aid

highway funds, including projects located on highways classified as local roads and rural minor collectors, transportation enhancement projects, and non-highway construction.

FHWA has issued two nationwide waivers of Buy America requirements: the first, in February of 1994, covered a list of specific ferryboat parts; and the second, in March of 1995, covered pig iron, scrap, raw alloy materials, and processed, pelletized, or reduced iron ore. These waivers are still in effect.

FHWA IMPLEMENTATION OF BUY AMERICA

Buy America requires that all steel or iron products that are permanently incorporated into a Federal-aid funded highway construction project be domestically manufactured.

Waivers of Buy America

Section 313(b) of title 23, U.S.C., provides that Buy America shall not apply: (1) if its application would be inconsistent with the public interest; (2) when such steel and iron materials or products are not produced in the United States in sufficient and reasonably available quantities, which are of a satisfactory quality; or (3) if inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent. FHWA implements this subsection with its waiver provision at 23 CFR 635.410(c).

Only under very limited circumstances will materials delivery delay be considered as grounds for a waiver. The cost differential between domestic and foreign products is also generally not grounds for a waiver. However, use of foreign steel or iron may be justified if an alternative bidding procedure, where the project is bid using one alternative based on foreign source products and one on domestic products, produces a domestic product bid 25 percent higher than the foreign product based bid. The 25 percent differential applies to the entire bid for the contract, not just the price differential of the steel.

The Buy America waiver process is initiated by the contracting agency--usually a State Department of Transportation (DOT). The State DOT submits a waiver request with supporting information to the FHWA Division Administrator sufficiently in advance of need (preferably during the preliminary engineering stage). For contract items greater than \$50,000, FHWA Headquarters' concurrence is necessary, prior to the Division Administrator's approval. For contract items less than \$50,000, the Division Administrator may approve the waiver without Headquarters' prior concurrence. The waiver request must include project number, project description, project cost, waiver item description, item cost, country of origin for the product, and reason for the waiver. It must also include an analysis of re-design of the project using alternate or approved equal domestic product.

FHWA review of any waiver request based on availability involves coordination with the appropriate industry associations to verify the non-availability of domestic suppliers for a given product. Depending on the product required, this could involve email or telephone coordination with several industry associations including the National Steel Bridge Alliance, the American Iron and Steel Institute, and the American Institute

of Steel Construction. If the coordination with the industry associations confirms the State DOT's contention that there are no domestic suppliers for that material, FHWA Headquarters will provide informal concurrence in the waiver request to the Division Office, and the Division Administrator may grant the waiver. This informal system has allowed FHWA to verify or disprove the information provided by State DOTs in a timely and effective manner, without adverse effect on the delivery of Federal-aid construction projects.

The number of documented waiver requests is relatively small for the size of the Federal-aid highway program. For the period of January 2001 through February 2007, we processed an average of seven formal Buy America waiver requests per year. However, we receive numerous questions and correspondence on Buy America issues prior to a State's submittal of a formal request. In some cases our review process reveals a domestic supplier that a particular State may not have contacted, and we refer the State to that supplier. Where the need for a formal Buy America waiver request is resolved, informal requests are not officially tracked.

In recent years, the United States steel industry has gotten stronger. Thus, we anticipate that the number of Buy America waivers will decrease, as domestic manufacturers will be better able to meet a greater variety of specialized needs for steel.

Application of Buy America

Buy America requirements apply on a contract-by-contract basis, based on requirements in title 23, U.S.C., governing the Federal-aid obligation process. "Project" is defined in title 23 as "[a]n undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed or any other undertaking eligible for assistance under [title 23, United States Code]." Federal funds are obligated to a project through the execution of a specific project agreement. Once a project agreement is executed, the State will then proceed to award a construction contract for the project work covered by the project agreement through competitive bidding. Thus, for purposes of obligating Federal funds to a project under the Federal-aid highway program, the terms "project" and "contract" are synonymous. For each Federal-aid contract that is let by the State, there is a corresponding project agreement describing the work and scope of the project being constructed. As a result, some projects, in a general sense of the word "project," may be comprised of multiple contracts. For example, a bridge replacement project may have different contracts for the different components of the structure, such as the substructure, superstructure, and deck. Each of these individual contracts, for purposes of the Federal-aid highway program, is considered to be an individual project.

The Buy America statute, now codified at 23 U.S.C. 313, is specifically tailored to the project obligation requirements of the Federal-aid highway program. Section 313 provides:

Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation,

unless steel, iron, and manufactured products used in such project are produced in the United States (emphasis added).

Since each Federal-aid contract is considered to be an individual project under the Federal-aid process, the application of Buy America is also on a contract-by-contract basis depending on whether Federal funds are to be used in the contract. Buy America only applies when the State uses Federal funds in a construction contract. When there is no Federal-aid assistance in a particular contract, FHWA's Buy America requirements do not apply, nor do other similar, project-specific, Federal requirements. Even if Federal funds are used in one project that constitutes a component of a series of projects, that does not mean every project in the series is subject to Federal requirements.

Moreover, section 145 of title 23 provides for the sovereign rights of a State to decide which projects will be Federally financed. The State DOTs have the discretion to develop transportation projects and programs, including decisions regarding contract scope and contract size, and State DOTs have always had the discretion of funding a given construction contract with or without Federal-aid.

States have many reasons to divide a project into a number of contracts. The decision may be determined by the amount of funding currently available for use, or the State may want to insure the availability of contracts suitable in size for a small business to carry out.

If a law were enacted to require the application of Buy America requirements to all contracts of, for example, a large bridge project (even if only one of the contracts was Federally funded), this would result in the imposition of FHWA contracting requirements on State-funded contracts, and invoke Federal involvement and oversight of State-funded contracts, no matter how little Federal funding was actually used. This would also create a conflict with the sovereign rights principles in title 23, mentioned above.

SECTION 1928(1) OF SAFETEA-LU

FHWA has been asked whether section 1928(1) of SAFETEA-LU requires the Agency to change its implementation of Buy America requirements. Section 1928(1) of SAFETEA-LU, provides that

[i]t is the sense of Congress that – (1) the Buy America test required by section 165 of the Surface Transportation Assistance Act of 1982 (23 U.S.C. 101 note) needs to be applied to an entire bridge project and not only to the component parts of such project.

My counsel informs me that a "sense of Congress" provision is often used to provide guidance or direction to an Executive Branch agency for the agency to consider as it carries out the law. In this case, as in many others, the sense of Congress provision must be read in conjunction with the underlying Buy America provision, 23 U.S.C. 313.

It is significant that section 313 is clear on its face, and has been interpreted consistently for many years. In our view, the words of section 313 require us to apply the Buy America requirement on a contract-by-contract basis. Inasmuch as section 1928(1)

expresses a sense of Congress that is contrary to section 313, we are compelled to follow the requirements of section 313.

FHWA is very respectful of Congressional direction, but the form in which the language in section 1928(1) was adopted is significant. According to my legal counsel, the case law is clear that a "sense of Congress" provision in enacted legislation is guidance and not positive, enforceable law. If Congress wanted section 1928(1) to be mandatory, it could have chosen to adopt a statute but, instead, chose not to do so. In section 1903 of SAFETEA-LU, Congress codified the Buy America requirements without any substantive change and without acknowledging the "sense of Congress" provision under section 1928(1). The "sense of Congress" provision does not amend the actual statutory text and so does not provide a basis for FHWA to change its long-standing practices in implementing the Buy America requirements and, indeed, application of all Federal requirements to Federal-aid highway funded projects.

If enacted as positive, enforceable law, this section would require a major departure from FHWA's long-standing application of Buy America. Section 1928 would require the application of Buy America requirements to bridge contracts involving no Federal funds merely because the State chose to use Federal funds in another contract involved in the construction of the bridge.

CONCLUSION

Since Buy America was enacted, FHWA has consistently ensured that the States apply its provisions whenever Federal-aid funds are obligated on a project contract. FHWA strongly supports the aims of the Buy America requirements for strengthening the national economy.

Mr. Chairman, members, thank you for this opportunity to testify. I will be pleased to answer any questions you may have.