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BEFORE
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COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

BUY AMERICA IMPLEMENTATION

April 24, 2007

Good afternoon, Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee. Thank you for this opportunity to testify today regarding the Federal Transit Administration's (FTA) implementation of Buy America and program changes initiated by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). This is my first appearance before this Subcommittee since taking office on August 10, 2006, and it is a great honor for me.

FTA has worked hard to implement SAFETEA-LU amendments to the Buy America provisions consistent with Congressional intent. On November 28, 2005, shortly after SAFETEA-LU was signed into law, FTA issued a Notice of Proposed Rulemaking (NPRM). This NPRM proposed to add language on microprocessor waivers, remove two general waiver categories, allow for post-award waivers, require greater detail for public interest waivers, and specify that final decisions by FTA are subject to judicial review. In addition, the NPRM proposed to clarify the definitions of end product, negotiated procurement, and contractor, and provide a list representative of end products. The NPRM also proposed addressing the procurement of systems under the definition of end product, negotiated procurement, and contractor to ensure that major system procurements are not used to circumvent the Buy America requirements. Finally, the NPRM proposed a minor clarification to pre-award and post-delivery review of rolling stock purchases.

Due to the complexity of many of the Buy America issues addressed in the NPRM, the divergence of opinion on important areas, and the potential for "unintended consequences" to affected industries and grantees, FTA decided to split its rulemaking into two parts—one part to address routine matters and the second part to address the more complex issues that deserved careful consideration and further public comment.

To address routine matters in an expeditious manner, FTA issued a Final Rule on March 21, 2006. This Final Rule implemented several SAFETEA-LU mandates. The Final Rule--

- Removed the general waiver for Canadian-made Chrysler 15 passenger vans and wagons, as mandated in SAFETEA-LU.

- Defined a “negotiated procurement” as a contract awarded using other than sealed bidding procedures, a definition consistent with the Federal Acquisition Regulations.
- Stated that for negotiated procurements, compliance with the Buy America requirements shall be determined on the basis of the certification submitted with the final offer or final revised proposal. However, where a grantee awards on the basis of initial proposals without discussion, the certification submitted with the initial proposal shall control.
- Defined a “contractor” to mean any party to a third party government contract other than the grantee," a definition that is consistent with the Contract Disputes Act.
- Made FTA’s Buy America decisions subject to administrative and judicial review.
- Allowed procurements of up to 20 vehicles for transit agencies in non-urbanized areas and urbanized areas with populations of 200,000 or less to meet contract specifications without resident factory inspection.

To address the more complex issues that received the most stakeholder comments during the initial rulemaking comment period, FTA issued a second NPRM on November 30, 2006. Proposals in this second NPRM involve:

- Establishing a process whereby FTA would publish justifications for public interest waivers in the Federal Register and providing notice and opportunity for comment.
- Clarifying that any waiver of the Buy America requirements for a microprocessor, computer, or microcomputer applies only to a device used solely for the purpose of processing or storing data and does not extend to the product or device containing a microprocessor, computer or microcomputer.
- Providing a process that would allow grantees to request a non-availability waiver after contract award when a bidder or offeror had originally certified compliance with Buy America requirements in good faith, but can no longer comply with its certification and contractual obligations due to commercial impossibility or impracticability.
- Defining the term “end product” with regard to components and subcomponents.
- Determining when and whether a system can be an “end product.”
- Developing a representative list of “end products.”

- Clarifying “final assembly” requirements for rolling stock and a list of representative examples of rolling stock.
- Expanding FTA’s list of eligible communications, train control, and traction power equipment.

When issuing the second NPRM, FTA strived to address concerns raised by Chairman Oberstar, Representatives Young and LaTourette on behalf of transit stakeholders in their February 7, 2006 letter. That letter emphasized the need for the Buy America rulemaking to achieve two objectives: (1) develop a clearer and more consistent definition of end product; and (2) ensure that major system procurements are not used to circumvent Buy America requirements. Stakeholder concerns with respect to an end product focused on its shifting nature. Under the shifting methodology, the same item can be an end product under one procurement contract, but a component, or even a subcomponent under the terms of another contract. Stakeholders want a non-shift approach. They want the characterization of an item as an end product, component, or subcomponent to consistently remain with the item, rather than being changeable. FTA designed its proposals to meet that objective as well as the objective related to major system procurements.

FTA relied on Congressional concerns and public comment from the first NPRM to develop the proposed definitions for “end product” and “system” in the second NPRM. That being said, with infrastructure projects that are made primarily of steel and iron such as track-work or a steel bridge, there would be absolutely no change in the Buy America requirements between the current "shift" approach and the proposed "non-shift" methodology. In either case, the requirements for infrastructure projects are clear: "all steel and iron manufacturing processes must take place in the United States," whether the item is an end product, a component, or a subcomponent.

Furthermore, when procuring end products such as rail cars or buses, there would be little or no difference in the Buy America requirements under a "non-shift" approach from the current "shift" method. Under FTA's Buy America requirements for rolling stock, sixty percent of all components, by cost, must be of U.S. origin and final assembly of the vehicle must take place in the United States.

In fact, any change between the "non-shift" and "shift" approaches to the end product analysis would occur primarily in the procurement of replacement parts. Under FTA's current Buy America methodology, if a grantee procures a replacement part for a bus, rail car, or other rolling stock end product, then the general requirements for manufactured products apply. In that case, the replacement part component, such as a bus engine, "shifts" to become an end product and all manufacturing processes for the engine must take place in the United States. All of the components of the engine must be manufactured domestically, regardless of the origin of the subcomponents. Alternatively, FTA’s proposed “non-shift” methodology for replacement parts, in this example a bus engine, would always remain a component instead of shifting to an end product. This would mean that the replacement part component, *i.e.*, the bus engine, would have to be manufactured in the United States, but its subcomponents could be foreign-sourced.

FTA believes a "non-shift" approach to end product analysis will achieve the goals of enhancing consistency, stability, and favorable price structures in the transit industry with minimal disruption to current practices while still maintaining the legislative intent of Buy America. However, the task to shape a workable definition of end product still remains as FTA considers comments received as a result of its second NPRM.

Regarding the definition of "system," FTA agreed with a majority of comments received on the first NPRM that FTA should continue its longstanding practice of including a system as a definable end product. FTA also agreed with comments on the first NPRM urging FTA to develop a rule to "ensure that major system procurements are not used to circumvent the Buy America requirements," and that Congress did not intend to expressly prohibit the designation of a system as an end product. In response to those comments, FTA's second NPRM proposed to define a "system" as the minimum set of components and interconnections needed to perform all of the functions specified by the grantee in its procurement.

To address concerns expressed in comments that an end product system could be so large, and incorporate so many different levels of equipment such as stations, track, vehicles, fare collection equipment, etc., so as to circumvent the requirements of Buy America, FTA will continue to carefully review system procurements in Buy America cases to determine whether an integrated system actually exists, and, if so, which items of equipment constitute the system. This review process will serve to further avoid the problem of "super systems" and thwart any potential abuses.

Although the initial comment period for the second NPRM was scheduled to close on January 29, 2007, FTA extended the comment period to February 28, 2007, providing a full three months for stakeholders to review the agency's proposal and to submit their views. In addition, FTA conducted a public meeting in February of this year at which the second NPRM was discussed and questions from the audience addressed. Now that the comment period has closed, FTA is in the process of considering comments received and will address them in the Final Rule.

In conclusion, FTA occupies a central role in implementing the Buy America requirements for public transportation facilities and equipment. On the one hand, we understand the law's purpose of protecting our domestic manufacturing base. On the other hand, we recognize the need of the transit industry to purchase vehicles and equipment that are cost-efficient, technologically-advanced, and worthy of the taxpayer dollar. Our challenge in the Buy America process is to develop a rule that meets all of these goals, while at the same time meets the needs of the transit-riding public.

Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee, FTA has, and is, using all of the resources and capabilities it has available to administer the Buy America requirements in a way that best reflects legislative intent, while at the same time protecting American jobs and ensuring the best use of American tax dollars. I look forward to continuing to work with Congress to carry out this vital mission and I would be pleased to respond to your questions.