



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Docket No. FTA-2016-0025

Notice of Proposed Buy America Waiver for Minivans.

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of Proposed Buy America waiver and request for comment.

SUMMARY: The Federal Transit Administration (FTA) received a formal request from the Pace Suburban Bus Division of the Regional Transportation Authority (Pace) for a Buy America non-availability waiver to purchase 188 Dodge Caravan minivans for its vanpool program. Minivans are considered rolling stock and are subject to the Buy America waiver set forth in 49 U.S.C. 5323(j)(2)(C), which requires that minivans (i) contain more than 60 percent domestic content, and (ii) final assembly of the vehicles occurs in the United States. Although initially Pace sought only a waiver of the requirement that final assembly take place in the United States, Pace now seeks a waiver of both requirements. Because FTA is aware of at least four manufacturers that can meet the final assembly requirement, however, FTA is proposing a waiver of only the domestic content requirement for non-ADA-accessible minivans. This waiver would apply to all procurements of non-ADA-accessible minivans by any FTA grantee and would be limited to contracts entered into before September 30, 2019 or until a fully compliant domestic source becomes available, whichever is earlier. In accordance with 49 U.S.C. 5323(j)(3)(A), FTA is providing notice of this proposed waiver and seeks public and industry comment on whether FTA should grant the waiver.

DATES: Comments must be received by [INSERT DATE 14 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-2016-0025:

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-2016-0025. 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: Laura Ames, FTA Attorney-Advisor, at (202) 366-2743 or Laura.Ames@dot.gov.

SUPPLEMENTARY INFORMATION:

By way of background, Pace operates a vanpool program in the Chicago suburban area with more than 785 vehicles in service. A vanpool vehicle is defined, in pertinent part, as a vehicle with a seating capacity of at least six adults (not including the driver). *See* 49 U.S.C. §5323(i)(2)(C)(ii).

In October 2014, Pace issued an invitation for bid (IFB) for a five-year contract for the purchase of seven-person minivans. The successful bidder, Napoleon Fleet, Inc., proposed providing Chrysler Dodge Caravan minivans, but certified that the vehicles were not compliant with the Buy America requirement that the vehicles be assembled in the United States. Chrysler manufactures its minivans in Windsor, Ontario, Canada. On April 15, 2015, Pace requested a Buy America non-availability waiver for the procurement of 188 Dodge Caravan minivans based on the final assembly requirement only. Pace believed that the vehicles it proposed to purchase met the domestic content requirement.

In August 2015 and November 2015, Pace conducted pre-award Buy America audits of the Dodge Caravan minivans and discovered that Chrysler did not meet the current domestic content requirement of more than 60%. Pace notified FTA that the audit showed a 57.4% domestic content for 2015 minivans and only 52% domestic content for 2016 minivans. Pace, therefore, is requesting a waiver on the grounds that a seven-person minivan that complies with Buy America's domestic content and final assembly requirements is not available.

In addition to the request from Pace, FTA has received inquiries from other grantees and manufacturers about the asserted non-availability of minivans for their vanpool fleet that meet both requirements of Buy America. Therefore, FTA proposes to grant a general Buy America waiver from the domestic content requirement for non-ADA-accessible minivans procured

pursuant to contracts entered into before September 30, 2019, or until a fully-compliant domestic source becomes available, whichever is earlier.

With certain exceptions, FTA's Buy America statute prevents 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). A manufactured product is considered produced in the United States if: (1) All of the manufacturing processes for the product must take place in the United States; and (2) All of the components of the product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents. 49 CFR 661.5(d). If, however, FTA determines that "the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality," then FTA may issue a waiver (non-availability waiver). 49 U.S.C. 5323(j)(2)(B); 49 CFR 661.7(c).

The requirement that manufactured goods be produced in the United State may be waived for rolling stock if (i) the cost of components and subcomponents produced in the United States for fiscal years 2016 and 2017 is more than 60 percent of the cost of all components of the rolling stock; and (ii) final assembly of the rolling stock occurs in the United States.¹ 49 U.S.C. § 5323(j)(2)(C).

FTA funds the procurement of between 2,500 and 3,000 minivans annually, including both ADA-accessible vans and non-ADA-accessible vans. The challenges associated with buying minivans that comply with FTA's Buy America statute and regulations have been well documented over the past six years. In 2010, El Dorado National, Kansas and Chrysler Group

¹ Under recent amendments to 49 U.S.C. 5323(j)(2)(C), if the minivans are delivered in FY2018 or FY2019, the domestic content will increase to more than 65 percent and if delivered in FY2020 or beyond, the domestic content will increase to more than 70 percent.

LLC petitioned FTA for a waiver of the Buy America final assembly requirement. In response to the request FTA published a notice in the Federal Register, seeking comment from all interested parties. Numerous parties responded to the notice expressing support for the waiver. One manufacturer, Honda, indicated that its minivans were in compliance with the Buy America regulations but would not provide the additional information needed to support its claims. Ultimately, on June 21, 2010, FTA issued a blanket waiver of the Buy America final assembly requirements for minivans and minivan chassis. *See* 75 FR 35123, (June 21, 2010).

On November 27, 2012, FTA rescinded the non-availability waiver for minivans, finding that the manufacturer of the MV-1 was a domestic manufacturer of eligible paratransit vehicles and could meet both the domestic content and the final assembly requirements for rolling stock under Buy America. *See* 75 FR 71676, (November 24, 2010). Although FTA acknowledged that the MV-1 minivan is a wheelchair-lift equipped minivan and does not provide the seating capacity needed for vanpool programs, FTA did not continue the blanket waiver for these vehicles, noting that it “prefers to consider waiver requests for limited circumstances and on procurement-by-procurement basis” *Id.*

On November 27, 2013, FTA issued a one-time, limited Buy America waiver of the final assembly requirement to the North Front Range Metropolitan Planning Organization (NFRMPO), for the purchase of 25 seven-passenger minivans, based upon non-availability. *See* 78 FR 71025, (November 27, 2013). FTA rejected comments suggesting that it reinstate the 2012 blanket waiver for seven-person minivans, and instead issued a waiver for final assembly for NFRMPO’s purchase of up to 25 minivans.

The market for non-ADA accessible minivans has changed since 2013. In 2013, the Chrysler minivan met the domestic content requirements but was not assembled in the United

States. FTA issued a non-availability waiver for final assembly because more than 60 percent of the minivan's components were produced in the United States. Today, Chrysler does not meet either Buy America requirements. However, there are at least four manufacturers – GMC, Ford, Honda and Toyota – that make non-ADA-accessible minivans that are assembled in the U.S.²

Because there are at least four minivans manufacturers who assemble their vehicles in the United States, FTA will not grant Pace a non-availability waiver for both final assembly and domestic content. Instead, in order to maintain U.S. jobs and obtain the benefits of the Buy America statute, FTA proposes to grant a general waiver of only the domestic content requirement for non-ADA-accessible minivans. This waiver would apply to all procurements of non-ADA-accessible minivans and is limited to contracts entered into before September 30, 2019 or until a fully-compliant domestic source becomes available, whichever is earlier. Because the non-ADA-accessible minivans are production line vehicles sold to the general public (i.e., they are not designed and manufactured specifically to be purchased using Federal funds), and those sales substantially outnumber purchases with Federal funds, manufacturers have been reluctant to subject their vehicles to the pre-award and post-delivery audit requirements in 49 CFR part 663 to verify their domestic content. FTA seeks comments on whether manufacturers would consider submitting to a pre-award and post-delivery audit process that was conducted by FTA on each new model year, as opposed to requiring audits for each individual procurement.

This waiver would not apply to ADA-accessible minivans because such vehicles are available that meet the Buy America requirements.

² This information is from the 2016 report submitted by car manufacturers to the National Highway Transportation Safety Administration (NHTSA) under the American Automobile Labeling Act. A copy of the report is posted on NHTSA's website at <http://www.nhtsa.gov>.

FTA is publishing this Notice to seek public and industry comment from all interested parties in accordance with 49 U.S.C. 5323(j)(3)(A). Such information and comments will help FTA understand completely the facts surrounding the request, including the merits of the request. A full copy of the request has been placed in docket number FTA-2016-0025.

Ellen Partridge
Chief Counsel

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