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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Docket No. FTA-2016-0035

Notice of Proposed Buy America Public Interest Waiver for Hurricane Sandy Emergency Relief Work Performed for the World Trade Center

AGENCY: Federal Transit Administration, DOT.

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

SUMMARY: The Federal Transit Administration (FTA) received a request from the Port Authority of New York and New Jersey (PANYNJ) for a Buy America public interest waiver for the procurement of equipment to replace what was damaged at the World Trade Center Transportation Hub (WTC Hub) project during Hurricane Sandy. PANYNJ seeks a public interest Buy America waiver for the replacement of equipment previously purchased for the WTC Hub. Hurricane Sandy damaged an existing construction site that receives federal funds but is not subject to FTA's Buy America requirements and the only option PANYNJ had to implement Sandy recovery work was to replace the damaged equipment with the same equipment previously acquired for the project. 49 U.S.C. 5323(j)(2)(A) and 49 CFR 661.7(b). In accordance with 49 U.S.C. 5323(j)(3)(A), FTA is providing notice of the public interest waiver request and seeks public comment before deciding whether to grant the request. If granted, the waiver would only apply to replacement of equipment damaged by Hurricane Sandy at the WTC Hub project and would not apply to any other PANYNJ resiliency projects for which FTA has provided funding.

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-2016-0035.

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-2016-0035. 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, FTA Assistant Chief Counsel, (202) 366-2217 or Cecelia.comito@dot.gov.

SUPPLEMENTARY INFORMATION: The purpose of this notice is to provide notice and seek public comment on whether the FTA should grant a public interest waiver to the Port Authority of New York and New Jersey (PANYNJ) for the procurement of replacement equipment damaged by Hurricane Sandy at the World Trade Center Transportation Hub (WTC Hub) project.

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). If, however, FTA finds that the application of this requirement would be inconsistent with the public interest, it may waive this requirement. 49 U.S.C. 5323 (j)(2)(A). In determining whether the conditions exist to grant a public interest waiver, FTA will consider all appropriate factors on a case-by-case basis, unless a general exception is specifically set out in this part. 49 U.S.C. 5323(j)(2)(A); 49 CFR 661.7(b).

On May 13, 2015, PANYNJ requested a Buy America waiver for the replacement or repair of equipment damaged by Hurricane Sandy at the WTC Hub because the WTC Hub project is being constructed pursuant to a grant awarded in 2003, it is not feasible to replace the damaged equipment with equipment that is different than that used in the original project and it is in the public's interest to repair the damage at the WTC Hub as quickly as possible. 49 U.S.C. 5323(j)(2)(A); 49 CFR 661.7(b). Additionally, the underlying project is not subject to FTA's Buy America requirements.

The September 11, 2001 terrorist attacks on the World Trade Center resulted in extensive damage to the WTC Hub. In August 2002, the Federal Emergency Management Agency (FEMA) entered into a memorandum of agreement with the U.S. Department of Transportation

under which FEMA agreed to provide \$2.75 billion to cover expenses incurred in repairing or rebuilding public transportation facilities and systems damaged by the September 11, 2001 terrorist attacks. Under the agreement, FTA would serve as the lead agency to oversee the grant and the construction of the project. In December 2003, FTA entered into a grant agreement with PANYNJ to rebuild the WTC Hub. Because the WTC Hub project was funded with FEMA grant funds, FTA's Buy America requirements did not apply to the project.

In October 2012, the WTC Hub project was an active construction site, with an estimated project completion date of December 2015. Hurricane Sandy caused extensive damage to the construction site, resulting in more than \$214 million in damage to the construction site. FTA awarded PANYNJ two grants – NY-44-X005 for \$54.24 million and NY-44-X014 for \$159.72 million – in Hurricane Sandy recovery funds to be used for recovery and emergency repair work for the WTC Hub project. Because the repair work was for an ongoing construction project, PANYNJ was required to use existing contracts that were originally procured in accordance with the requirements for the FEMA-funded WTC Hub project. To apply FTA's Buy America requirements to replace or repair equipment installed on an ongoing construction project would result in significant delay to completion of the project, impact contracts awarded under the FEMA funds, and potentially impact previously provided warranties. Moreover, if granted, the public interest waiver would maintain overall consistency of administration, oversight and implementation of both the ongoing WTC Hub project and the WTC Hurricane Sandy recovery work.

Accordingly, because the original project was funded by FEMA and therefore, not subject to FTA's Buy America regulations, FTA proposes a general public interest waiver of FTA's Buy America requirements for the two grants, NY-44-X005 for \$54.24 million and NY-

44-X014 for \$159.72 million – awarded to PANYNJ. This public interest waiver is limited to the Hurricane Sandy recovery projects at the WTC Hub only, and does not apply to separately funded resiliency projects. 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.

Ellen Partridge
Chief Counsel

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