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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Docket No. FTA-2016-0035

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

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice Buy America waiver.

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. A public interest waiver is needed because 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. 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 provided notice of the public interest waiver request and sought comment on whether to grant the request. FTA received one comment in support of the waiver, and no comments objecting to the waiver. Therefore, FTA is issuing a general public interest waiver for two PANYNJ Hurricane Sandy grants, NY-44-X005 and NY-44-X014. 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.

DATES: This waiver is effective immediately.

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 announce that FTA is granting 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, a 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.

On November 4, 2016, and in accordance with 49 U.S.C. 5323(j)(3)(A), FTA published a notice in the Federal Register announcing PANYNJ's Buy America waiver request (81 FR 76999) seeking public comment. The comment period closed on November 14, 2016, and FTA received one comment. The comment was provided by a private citizen who supports granting the waiver. The commenter noted that the WTC Hub is a critical connection for Lower Manhattan employers and New Jersey employees. The commenter also noted while projects that abide to the Buy America requirements promote domestic industry and the livelihoods or hard-working Americans, that occurrences like Hurricane Sandy demonstrate the need for flexibility to waive Buy America under certain circumstances.

Accordingly, because the original project was funded by FEMA and therefore, not subject to FTA's Buy America regulations, and the lack of any comments opposing the waiver, FTA is granting 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.

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