

Guidance on Procurements Following Rescission of the Buy America Waiver for Minivans

Federal Transit Administration

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Pursuant to a Buy America waiver published in 2010, the Federal Transit Administration (FTA) had allowed its grantees to purchase minivans that were assembled outside the United States. FTA rescinded the waiver on December 3, 2012. 77 FED. REG. 71673. As a result, any future procurement of minivans with FTA funds must purchase vehicles that are assembled in the United States, in accordance with the Buy America rules of 49 U.S.C. § 5323(j), as implemented at 49 C.F.R. Part 661.

Since FTA rescinded the waiver, many grantees have asked similar questions. The following is a list of frequently asked questions and answers. For questions not addressed below, FTA staff and grantees are encouraged to contact their Regional Counsel. FTA encourages its grantees to seek guidance before making any contractual commitments.

1. What is the impact on contracts that have already been awarded?

The rescission of the minivan waiver will not affect existing contracts, as that term is used in FTA Circular 4220.1F. The applicable Buy America requirements are those that were in place at the time of contract execution. This includes the exercising of options by the original parties to the contract.

NOTE: Purchasing schedules or similar purchasing agreements are not considered existing contracts. FTA Circular 4220.1F, Third Party Contracting Guidance, § V.7. Rather, each individual purchase made through a purchasing schedule or similar arrangement is considered a new procurement for which a contract is awarded. *See* FTA Circular 4220.1F, § V.4.b. Therefore, purchases made under or pursuant to a purchasing schedule or similar purchasing agreement prior to the rescission of the minivan waiver will not be affected by the rescission. In addition, the rescission will not affect future purchases made under or pursuant to a purchasing schedule or similar agreement for a period of one year from the date of the rescission (Dec. 3, 2012) as long as the purchasing schedule or similar agreement was in place before the date of the waiver rescission or the bid closing date for the State schedule or similar agreement occurred prior to the date of the rescission.

2. Under what circumstances may an FTA recipient exercise contract options acquired from another recipient, a practice commonly referred to as piggybacking?

FTA expects its recipients to limit procurements to the number of vehicles required to meet its reasonably expected needs. Thus, FTA prohibits recipients from adding excess capacity to contracts simply for the purpose of assigning contract rights at a later date. FTA has made a policy decision to allow piggybacking in most circumstances. However, in light of the policy purposes of Buy America, grantees may not assign, transfer, or

acquire options for contract rights to purchase vehicles that are not assembled in the United States when using FTA funds.

All procurements affected through the assignment of contract rights from another recipient must abide by the requirements of the Common Grant Rule, 49 C.F.R. Parts 18 and 19, and must follow the instructions outlined at FTA Circular 4220.1F, § V.7.

Before acquiring, transferring, assigning, or exercising optional contract rights for minivans, FTA recipients should contact their Regional Counsel for guidance.

3. What is the impact on procurements where bids have already been submitted, but a contract has not yet been awarded?

If the closing date for the submission of bids or proposals has passed, but the contract has not yet been awarded, then FTA recipients should consult with the FTA Regional Counsel of the region in which the recipient is located. The Regional Counsel will review the solicitation and provide guidance. Regional Counsel should consider the following:

If the closing date for the submission of bids or proposals was prior to the issuance of the Buy America rescission (Dec. 3, 2012), for both a base order and options under the contract, the recipient may award the contract and exercise any options under the contract based upon existing Buy America requirements at the time of the closing date for submission. The rescission does not affect the award or the exercise of any options. However, if a recipient is piggybacking off such an award described above, then FTA funds may not be used unless the contract is Buy America compliant after the issuance of the Buy America rescission of the minivan waiver.

NOTE: This rescission will not apply to contracts awarded through a purchasing schedule or similar purchasing agreement until one year from the date of the rescission (Dec. 3, 2012), as long as the purchasing schedule or similar agreement was in place before the date of the rescission or the bid closing date for the State schedule or similar agreement occurred prior to the date of the rescission.

4. What is the impact on procurements in cases where bids have not yet been submitted?

If the closing date has not yet passed to submit bids or proposals, then the rescission of the Buy America minivan and minivan chassis waiver applies to such procurements. FTA recipients are advised to amend the procurement documents to clarify that the Buy America waiver no longer applies and that all bids or offers must comply with FTA's Buy America rules.

NOTE: This will not apply to contracts awarded through a purchasing schedule or similar purchasing agreement until one year from the date of the rescission (Dec. 3, 2012), as long as the purchasing schedule or similar agreement was in place before the date of the rescission or the bid

closing date for the State schedule or similar agreement occurred prior to the date of the rescission.

5. Does the rescission, by itself, justify a sole source award?

No. FTA’s authorizing legislation, at 49 U.S.C. § 5325(a), and the Common Grant Rule, 49 C.F.R. §§ 18.36(c)(1) and 19.43, require that, generally, procurements be conducted in a manner that provides for “full and open competition.” Procurement by noncompetitive proposals, such as a sole-source award, is authorized only under certain conditions. A sole source award may be made only when “the recipient requires [products] . . . available from only one responsible source, and no other supplies or services will satisfy its requirements” or when an existing contract is amended beyond the scope of original contract and there is sufficient justification to amend that existing contract beyond its original scope. FTA Circular 4220.1F, § VI.3.i(1)(b).

The product is “available from one source” if (1) it is a unique or innovative concept, (2) available from only one source due to patent or data rights restrictions, (3) unrecoverable substantial duplication costs would result for a follow-on contract for the continued development or production of highly specialized equipment and major components of such equipment, or (4) unacceptable delay would occur in a situation described in (3).

In instances when the solicitation results in only a single bid or proposal, the recipient must determine whether competition was adequate. Competition is adequate when there are no unduly restrictive specifications, which are prohibited. *E.g.*, 49 C.F.R. § 18.36(c). If competition is adequate, then the procurement is a *valid competitive award*. FTA Circular 4220.1F, § VI.3.i(1)(b)2a. Competition is inadequate when resulting from conditions within the recipient’s control, such as specifications used. While solicitations may be tailored to fit the particular needs of a recipient and the specifications may be based upon performance or function, they may not be exclusionary or discriminatory, 49 U.S.C. § 5323(h)(2), or unduly restrictive of competition, *e.g.*, 49 C.F.R. § 18.36(c).

Finally, there are a number of instances when the use of other non-competitive proposals is authorized. More information can be found at FTA Circular 4220.1F, § VI.3.i. *Recipients are advised to consult with the appropriate FTA Regional Counsel prior to awards that will or will likely fall under the circumstances described above.*