

How Many U.S. Jobs Will Your Transit Procurement Create?

Jeffrey F. Boothe

*Holland & Knight, LLP, Partner
Washington, DC*



2012 ANNUAL MEETING



FTA Dear Colleague Letter

- Issued February 16, 2011
 - No waivers for projects funded under ARRA
 - FTA will scrutinize non-availability waivers to determine if there are “suitable” American-made alternatives
 - Scrutinize cost-differential waivers to determine if cost savings justify loss of American jobs
 - Expanded policy to all FTA funds



Girder Rail

- FTA announced in 2010 that it would no longer approve waivers for girder rail
 - Girder used by many LRT and streetcar systems for in-street systems
 - No US manufacturer due to lack of volume
- Met with FTA in February 2011 to discuss concerns with FTA policy
- Despite FTA outreach to US manufacturers, none would commit to roll girder rail
- Block rail used in downtown Portland despite no evidence of comparability/interoperability



Rail Car Invertors

- Sacramento Regional Transit 2004 rail cars experienced failure of invertors
 - Eight cars idled for a year to identify a US supplier
 - No US supplier identified or willing to bid after industry outreach
- Request for waiver was submitted to FTA but was ultimately withdrawn
 - Strongly encouraged to find non-federal monies even though eligible for preventive maintenance



Rehabs and Overhauls

- Proposed Policy Statement (77 Fed. Reg. 29953)(May 21, 2012)
- Delineate a “rebuild” from an “overhaul”
 - Overhauls are considered procurement of replacements parts and subject to 100% Buy America
 - Overhaul helps “achieve” useful life while an rebuild “extends” the useful life



Utility Relocation

- Spring 2012 FTA informed New Starts project sponsors that Buy America applied to utility relocation
 - Argued utility owners not third party contractors
 - FTA Circular 4220.1F (Third Party Contracting Guidance) states real property relocation beyond scope of circular
 - Further, utility relocation is property acquisition and not a procurement
 - Creating “binding obligation” requiring opportunity for industry comment
- FTA response (September 7, 2012)
 - Buy America always applied to entire project and is not a change of policy
 - Cited reduction of waivers from 42 in 2009 to 3 in 2012

MAP-21

- No substantial change to current law
- Before issuing a waiver, FTA must make written explanation of the determination publicly available
- Annual Report to Congress listing any waivers granted

