Hot Topics in Procurement: Buy America Waiver, A Car Builder's Perspective

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Buy America Requirement

- Buy America requirements for rolling stock:

  1) Domestic Content: The cost of components manufactured in the US exceeds 60% of the cost of all components.

  2) Final Assembly: The final assembly of each rail car must take place in U.S.

  3) Beyond the scope of presentation to delve into measurement of component cost and definition of manufacture.
Waiver

FTA can grant waivers for Buy America provisions under the following:

- General waivers (no application is necessary - Appendix A to 49 CFR 661.7A)
- Other exceptions such as
  1) Public interest
  2) Non-availability
  3) Price differential waivers
March 26, 2004 from FTA to the Valley Metro Rail: request to design and test two initial test vehicles in its primary facility in Osaka, Japan. The manufacturer asserted that “it is essential” that the vehicles “be properly designed and tested to ensure that the components and assemblies of the vehicles will interface properly and operate in accordance with its performance parameters,” which “is best accomplished in [the manufacturer’s] primary facility, with the accompanying expertise, in Osaka, Japan.”

FTA granted the public interest waiver on basis of several factors, including that “prototype vehicles are used to define design, component interface, specification compliance, and performance testing, . . . [and t]herefore, it is a good industry practice to do this first article work near the engineering, materials, and quality assurance teams to allow good project management and control of the initial phases of these complex projects.” The FTA also stated that its decision to grant the waiver was “[c]onsistent with recent decisions granting public interest waivers for prototype vehicles.”
Public Interest Waivers Granted
Continued

- **December 16, 2003 letter from FTA to SEPTA** approving assembly of prototype cars at a foreign facility noted that “public safety requires that all reasonable efforts be made to ensure rail vehicles are properly designed and tested, and therefore the successful offerer should be permitted to assemble and test the prototypes using its primary facility, whether that is in the U.S. or not.”

- **May 6, 2004 FTA letter to Sound Transit**, the FTA granted a public interest waiver of two prototype vehicles in the manufacturer’s “primary facility” in Osaka, Japan. The FTA cited “the public’s interest in riding and paying for properly tested trains” in granting the waiver for assembly of the prototypes at the respective manufacturer’s foreign facility.
Public Interest Waivers Denied

FTA letter to Massachusetts Bay Transportation Authority November 14, 2008: FTA stated it “requires a clear nexus between the item requested and the beneficial impact on the public.”

- Specifically, FTA stated that it will grant waivers to:
  
  - Allow for “delivery of new technology without disrupting the schedule,” (May 6, 2004 letter to Sound Transit) or, if “schedule delays would result in negative impact the riding public” (February 1, 2001 Port Authority of Allegheny County)
  
  - “Absent of factors like safety” (December 16, 2003 letter to Southeastern Pennsylvania Transportation Authority) not granted
Public Interest Waivers Denied
Continued

FTA to Houston Metro April 14, 2009: FTA stated that “waiving FTA Buy America requirements for reason of convenience alone is not in the public interest”, and “METRO has not stated how the waiver would benefit the traveling public.”
Modified Assembly Plan

FTA letter to WMATA July 23, 2010

➢ Initially Kawasaki had sought a Public Interest Waiver to build prototype cars in Japan but FTA denied
➢ Kawasaki submitted a modified Assembly plan to built prototypes in Japan but re-assemble the prototype cars in the United States:

• Kawasaki will comply with the 60% domestic content and final assembly requirement
• 4 prototype cars will be built in Japan for purpose of Design Qualification Testing (DQ)
• After successful DQ testing, the cars will be disassembled with minimum components (only shells and piping) shipped to US
• The 4 cars will be assembled in US using new components identified in Appendix D 49 CFR 661.11
• Kawasaki will perform all final assembly activities and testing as per Appendix D
Public Interest Waiver Basis for Prototype Cars

1) Public interest in having prototype cars built near technology and engineering center of carbuilder; better assures testing and reliability requirements are met and are met in an efficient way.

2) Increased cost and risk resulting from prototype assembly in the US is ultimately passed on to the end user (fixed capital budgets, increase cost of building cars) means that limited capital funds are not available for other purposes. These costs and risks are not related to the assembly itself, which is about the same where ever it takes place, but rather the costs and risks of being far away from engineering support and test facilities.

3) Potential delay to project that ultimately effects the riding public (and public interest) by delaying entry of new cars into service.
Public Interest Waiver Should Have Been Granted

- Long history and precedent on granting public interest waiver for pilot cars, relied upon by manufacturers in developing their American facilities
- Public interest served by granting the waiver, cost, technology and schedule
- No material impact to U.S. jobs
- The number of pilot cars produced (minimal) compared to order size of 748
- Kawasaki appreciates that the WMATA waiver issue came up in the midst of jobs crisis following the financial difficulties in 2008, and appreciates the FTA perspective, but thinks the current position should be reevaluated with industry and transit agency input