



# Federal Aviation Administration

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## Finding and Waiver

### 49 U.S.C. §50101

#### Public Interest – Contracts Less Than or Equal to the Micro-Purchase Threshold

Under 49 U.S.C. §50101, “Buy American Preference” (BAP),<sup>1</sup> specific to the Federal Aviation Administration (FAA), the FAA may not obligate any appropriated funds for any project unless the steel and manufactured products used in the project are produced in the United States.<sup>2</sup> Per BAP, the Secretary of Transportation is permitted to waive this obligation when adherence to its principles would be inconsistent with the public interest. This waiver authority was delegated by the Secretary of Transportation to the FAA Administrator<sup>3</sup> and further delegated by the FAA Administrator to the FAA Acquisition Executive (FAE) through memorandum dated April 3, 2012.

The intent of this public interest waiver is to eliminate probable procurement delays and unnecessary administrative costs to the FAA by waiving from BAP requirements all contracts where the Total Estimated Potential Value (TEPV) is less than or equal to the micro-purchase threshold (MPT).

## Findings

- (1) In Accordance with Policy section 3.1.1 of the FAA’s Acquisition Management System (AMS) “the goal of the Federal Aviation Administration procurement system is to obtain high quality products, services, construction, and real property in a timely, cost-effective manner, at prices that are fair and reasonable.” Further, in accordance with AMS Policy section 3.1.3 Fundamental Principles part (e), the FAA’s procurement system will “provide streamlined methods and initiate innovative processes to conduct timely and cost-effective procurements.”
- (2) From fiscal year 2019 through April of fiscal year 2022, the FAA has had more than 590,000 purchase transactions between \$0 and the micro-purchase threshold. To require for every low cost procurement of steel and or manufactured products that the FAA purchasing official obtain from the vendor a certification that the item was manufactured in the United States, or to require that the FAA make a case-by-case determination that the obligation of BAP should be waived, would materially impede the progress of an acquisition and its intended project effectively limiting the FAA’s ability to carry out Congress’ instruction to

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<sup>1</sup> 49 U.S.C. §50101 is also commonly referred to as “FAA Buy American” (*not to be confused with the Government-wide Buy American Act (41 U.S.C. §§8301-8305)*).

<sup>2</sup> Excepted from this requirement are projects funded by Research, Engineering and Development (*AMS Guidance T3.6.4.A.4.a*).

<sup>3</sup> 49 CFR §1.83(a)(11).

procure equipment and materials in a “more timely”<sup>4</sup> matter.

- (3) In certain instances, a vendor can be the distributor of, rather than the manufacturer of products. Subsequently such vendors may not have knowledge of, nor could they be reasonably expected to know, whether the products were manufactured in the United States. For these vendors compliance with the certification requirements has been problematic. Requiring a vendor who is solely the distributor of a good to certify that the good was manufactured in the United States results in distributors requesting certifications from the manufacturers. This time-consuming practice reduces efficiency and increases administrative costs associated with small dollar procurements consequently frustrating the objectives of the AMS.
- (4) Per AMS Guidance T3.2.6, “[t]he FAA purchase card is an internationally accepted credit card...designed to streamline purchases and reduce procurement time and processing cost.” All simplified purchases with a TEPV below the applicable MPT must be performed using purchase cards. Requiring at all times that purchase cardholders request certification of BAP compliance from vendors and compelling vendors to make such certifications results in a time-consuming process that runs contrary to the intent of the purchase card program.
- (5) Congress has supported agencies in their use of discretion to prioritize efficiency over the tenets of domestic content preference when such purchases are low in dollar amount. Similar to BAP, section 165 (49 U.S.C. §5323(j)) of the Surface Transportation Assistance Act of 1982, commonly referred to as “Buy America,” requires that no funds be given to a project related to ground transportation unless all of the incorporated iron, steel and manufactured products are produced in the United States. In 1995, the Federal Transit Administration (FTA) issued a general public interest waiver to exempt from its Buy America requirements all “small purchases,” defined as purchases of \$100,000 or less. In 2015, as part of the Fixing America’s Surface Transportation (FAST) Act, Congress re-defined these “small purchases” for purposes of public interest waivers to \$150,000 or less<sup>5</sup> thus signifying its willingness to allow for waivers to domestic content requirements at rates even exceeding the MPT.
- (6) Other agencies, in adhering to the Federal Acquisition Regulation (FAR) implementation of the Buy American Act (41 U.S.C. §§8301-8305), are exempted from the domestic preference requirements of Buy American for all contracts that are less than or equal to the MPT.<sup>6</sup>
- (7) The FAA has implemented an exception to Buy American Act applicable to purchases valued at the micro-purchase threshold or less in AMS Procurement Guidance section T3.6.4 Foreign Acquisition.

### **Waiver**

The intent of the AMS is to afford the FAA flexibility in its acquisition practices that are capable of addressing the agency’s unique need for efficient procurements. The findings above indicate that in cases such as the one discussed in this memorandum, the public interest calls for the waiving of domestic content preferences in certain

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<sup>4</sup> Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, §348.

<sup>5</sup> FAST Act, 2015, Pub. L. No. 114-94, §3011.

<sup>6</sup> FAR §25.100.

instances of low cost procurements. Therefore consistent with public interest, I waive the requirements of 49 U.S.C. §50101 to purchase United States-made manufactured for all contracts with a TEPV that is less than or equal to the micro-purchase threshold.

I do so with the authority granted to the Secretary of Transportation by 49 U.S.C. §50101(b) and delegated to me by the FAA Administrator through memorandum dated April 3, 2012.

This waiver is valid until expressly rescinded.

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and FAA Acquisition Executive (Acting)

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**Date**