



Federal Aviation Administration

Finding and Waiver

49 U.S.C. §50101

Public Interest – Purchase Card Transactions Between \$10,000 and \$150,000

Under 49 U.S.C. §50101, “Buy American Preference” (BAP),¹ 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.² Per BAP, the Secretary of Transportation is permitted to waive this obligation when adherence to its principles would be inconsistent with the public interest. Although the BAP is considered a Federal acquisition law for which the FAA Administrator is the final authority in accordance with 49 USC §106(f)(2)(ii), to the extent the authority is vested in the Secretary of Transportation, that waiver authority was delegated to the FAA Administrator³ 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 all BAP requirements from purchase card transactions where the Total Estimated Potential Value (TEPV) is between \$10,000 and \$150,000.

Findings

- (1) This waiver is congruent and in accordance with FAA’s Acquisition Management System (AMS) Policy 3.1.1, “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 3.1.3 “Fundamental Principles” section (e), the FAA’s procurement system will “provide streamlined methods and initiate innovative processes to conduct timely and cost-effective procurements.”
- (2) This waiver is also congruent with AMS Purchase Card Guidance T.3.2.2.5, where “[t]he FAA purchase card (i.e., SmartPay Card) is an internationally accepted credit card...designed to streamline purchases and reduce procurement time and processing costs.” To maintain the “streamlined” nature of purchase card transactions, it is necessary to address the inefficiencies identified below.

The administration of BAP requires a sophisticated analysis of procurement and fiscal law. The process is implemented through various clauses, one of which is a certificate for the vendor to understand and submit with its bid. The procurement officials must be able to explain the process, the clauses, and the certification to the vendor.

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

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

³ 49 CFR §1.83(a)(11)

This process adds significant time to otherwise simplified procurement actions. In addition, vendors with whom the FAA utilizes the purchase card are often unfamiliar with the requirements, which increases the transactional time to inform the vendor and ensure compliance.

This is particularly impactful where the vendor is a distributor (which is more prevalent in purchase card transactions). Distributors often lack the knowledge of, nor can they be reasonably expected to know, whether the products were manufactured in the United States. Distributors often have to get certifications from manufacturers. This time-consuming practice reduces efficiency and increases administrative costs, frustrating the objectives of AMS.

- (3) 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.
- i. 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.
 - ii. 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.
 - iii. In the Fixing America’s Surface Transportation (FAST) Act, Congress signified its willingness to allow for waivers to domestic content requirements at rates higher than previously allowed by re-defining “small purchases” for purposes of public interest waivers to \$150,000 or less.⁴
- (4) This waiver is a necessary extension of the existing Buy American Preference waiver for acquisitions up to the micro-purchase threshold. On April 20, 2022, the FAA implemented a public interest waiver of the requirements of 49 U.S.C. §50101 to purchase domestically manufactured goods and steel for all contracts with a TEPV that is less than or equal to the micro-purchase threshold (\$10,000).

The FAA reviewed data and determined that increasing the threshold of this waiver is reasonable because the efficiencies gained outweighs the relatively insignificant number and value of supply purchases between \$10,000 and \$150,000. Specifically, from fiscal year 2021 through fiscal year 2023, the FAA as a whole made roughly 4,900 transactions in the approximate amount of \$137M for supplies between \$10,000 and \$150,000. The \$137M represents 0.86% of the total procurement dollars spent by the FAA during that period. To require for every low-cost procurement of steel and/or manufactured products in this range, 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 procure equipment and materials in a “more timely”⁵ manner.

⁴ FAST Act, 2015, Pub. L. No. 114-94, §3011.

⁵ Department of Transportation and Related Agencies Appropriations Act, 1996, Pub. L. No. 104-50, §348.

- (5) The shift in workload from the 1102 series to purchase card holders does not pose a significant risk to the FAA because of the low-dollar threshold. The purchase card program has also recently updated its guidance and strengthened its training regimen. The shift in workload also frees up 1102 resources for other, more risk-laden procurements. This is a more efficient use of the acquisition workforce.
- (6) The FAA has also determined that the shift in workload from the 1102 series to purchase card holders will not significantly impact the Agency in meeting its small business goals. From fiscal year 2021 to 2023 the FAA made only 1,370 non-purchase card supply transactions between \$10,000 and \$150,000 totaling roughly \$52.7M, an average of approximately 457 actions for \$17.5M per year. Future spending would likely be consistent with this pattern, which would not significantly detract from the FAA's roughly \$1.2B annual small business spend. Note, too, a majority of the purchase card vendors are small businesses; thus, although the FAA may not get credit towards its goals, it is still supporting the small business sector.

Waiver

The intent of the AMS is to afford the FAA flexibility in its acquisition practices that can address the Agency's 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 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 steel and manufactured products for all purchase card transactions with a TEPV that is between \$10,000 and \$150,000.

I do so with the authority delegated to me by the FAA Administrator through memorandum dated April 3, 2012.

This waiver is valid until expressly rescinded.

Nathan Tash

Deputy Assistant Administrator for Acquisition & Business
Services and FAA Acquisition Executive

Date