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Request for Comments

In accordance with 49 U.S.C. 31136(e) and 31315, FMCSA requests public comment from all interested persons on the exemption petitions described in this notice. The Agency will consider all comments received before the close of business August 8, 2011. Comments will be available for examination in the docket at the location listed under the **ADDRESSES** section of this notice. The Agency will file comments received after the comment closing date in the public docket, and will consider them to the extent practicable.

In addition to late comments, FMCSA will also continue to file, in the public docket, relevant information that becomes available after the comment closing date. Interested persons should monitor the public docket for new material.

Issued on: June 29, 2011.

Larry W. Minor,
Associate Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No. FTA-2011-0031]

Notice of Proposed Buy America Waiver To Allow Bidder To Certify Compliance

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of proposed Buy America waiver to allow bidder to certify compliance; Request for comment.

SUMMARY: The New York Metropolitan Transportation Authority (MTA) has asked the Federal Transit Administration (FTA) to waive its Buy America requirements on the basis of public interest to permit the low bidder for a contract to construct the 86th Street Station for the Second Avenue Subway project to certify compliance with Buy America. The bidder certified non-compliance based on a misunderstanding of how FTA would apply its rules to certain construction materials. In fact, the low bidder is willing and able to comply with the Buy America rules. Without a waiver, MTA may spend an additional \$32.9 million on the 86th Street Station without furthering the goals of Buy America. FTA seeks public comment before deciding whether to grant MTA's request. This Notice sets forth the

justification for a public interest waiver in this instance.

DATES: Comments must be received by July 15, 2011. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments by only one of the following means, identifying your submissions by docket number FTA-2011-0031. All electronic submissions must be made to the U.S. Government electronic site at <http://www.regulations.gov>. Commenters should follow the instructions below for mailed and hand-delivered comments.

(1) *Web site:* <http://www.regulations.gov>. Follow the instructions for submitting comments on the U.S. Government electronic docket site;
(2) *Fax:* (202) 493-2251;
(3) *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Docket Operations, M-30, Room W12-140, Washington, DC 20590-0001.

(4) *Hand Delivery:* Room W12-140 on the first floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must make reference to the "Federal Transit Administration" and include docket number FTA-2011-0031. Due to security procedures in effect since October 2001, mail received through the U.S. Postal Service may be subject to delays. Parties making submissions responsive to this notice should consider using an express mail form to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any personal information therein, will be posted without change or alteration to <http://www.regulations.gov>. For more information, you may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477), or visit <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Jayme L. Blakesley at (202) 366-0304 or jayme.blakesley@dot.gov.

SUPPLEMENTARY INFORMATION:

The purpose of this notice is to seek public comment on whether the Federal Transit Administration should waive its Buy America requirements of 49 CFR Part 661 to permit a low bidder to re-submit its Buy America certificate in connection with its bid to construct the 86th Street Station for the Second Avenue Subway project. If granted, this waiver would be limited to the

procedural aspects of the Buy America rule. The low bidder will need to certify compliance with Buy America and will be required to comply with all of the substantive Buy America requirements.

In February 2011, MTA received bids for a contract to construct the 86th Street Station for its Second Avenue Subway project, a \$4.8 billion project for 2.3 miles of new subway on the East Side of Manhattan. Five parties submitted bids, ranging from \$301,860,000 to \$460,443,000. The low bid of \$301,860,000, submitted by Skanska/Traylor JV, is \$32.9 million lower than the next lowest bidder and almost \$100 million lower than MTA's budget for the contract.

Skanska/Traylor JV signed and submitted a Certificate of Non-Compliance with its bid, based on its understanding that certain construction materials—shotcrete steel fibers and Polyvinyl Chloride (PVC) membrane—would need to be produced in the United States in order to comply with FTA's Buy America requirements.

Except for items made primarily of iron and steel, FTA treats the procurement of construction projects as the procurement of a manufactured end product subject to the requirements of 49 CFR 661.5. The main elements incorporated into the project at the job site are the components. As with all manufactured products, Buy America requires all of the manufacturing processes to take place in the United States and all of the components of the product to be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents. 49 CFR 661.5(d).

Skanska/Traylor JV certified non-compliance based on its understanding that shotcrete was subject to the steel and iron requirements of 49 CFR 661.5(b) and (c), not the manufactured product requirements of § 661.5(d), and PVC membrane would be considered a component. As such, Skanska/Traylor JV would have needed to obtain each item from a domestic source. According to Skanska/Traylor JV and MTA, neither shotcrete nor the type of PVC membrane called for in MTA's specification is produced in the United States.

FTA and MTA engineers examined the materials in question and determined that shotcrete is a manufactured product and that shotcrete steel fibers and PVC membrane are subcomponents of the waterproofing system that will be constructed around the tunnel for the 86th Street Station. As such, FTA's Buy America rules do not require shotcrete or PVC membrane to be produced in the

United States. This determination indicates that Skanska/Traylor JV certified non-compliance in error.

Notwithstanding the above interpretation and Skanska/Traylor JV's willingness and ability to comply with Buy America, the procedural portion of FTA's Buy America regulations prohibit Skanska/Traylor JV from modifying its Buy America certificate unless it submitted an incorrect certificate based on inadvertent or clerical error. 49 CFR 661.13(a)(1). In the case of a sealed bid procurement, a bidder or offeror is bound by its original certification. 49 CFR 661.13(c).

In this instance, FTA proposes to waive the restrictions of 49 CFR 661.13 to allow Skanska/Traylor JV to certify compliance with Buy America. Unlike other requests for public interest waivers, the granting of which enable an otherwise non-compliant bidder to purchase foreign products that the Buy America provisions would otherwise require to be produced in the United States, in this circumstance a waiver would allow MTA to award a contract to a low bidder that will perform wholly in compliance with the substantive Buy America requirements. Without a waiver, MTA may spend an additional \$32.9 million for the Second Avenue Subway project without furthering the goals of Buy America.

FTA may waive its rules if applying the Buy America requirements "would be inconsistent with the public interest." 49 U.S.C. 5323(j)(2)(A). Before granting such waiver, FTA must issue a detailed written statement justifying why the waiver is in the public interest, and must publish this justification in the **Federal Register**, providing the public with a reasonable time for notice and comment of not more than seven calendar days. 49 CFR 661.7(b). This notice satisfies the aforementioned requirement.

Before deciding whether to grant MTA's request, FTA seeks comment from all interested parties. In the interest of transparency, FTA has published copies of MTA's request to the docket. Interested parties may access

these materials by visiting the docket site at <http://www.regulations.gov>, docket number FTA-2011-0031. Please submit comments by July 15, 2011. Late-filed comments will be considered to the extent practicable.

Issued this 1st day of July 2011.

Dorval R. Carter, Jr.,
Chief Counsel.

[FR Doc. 2011-17182 Filed 7-7-11; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. EP 682 (Sub-No. 2)]

2010 Tax Information for Use in the Revenue Shortfall Allocation Method

AGENCY: Surface Transportation Board.

ACTION: Notice.

SUMMARY: The Board is publishing, and providing the public an opportunity to comment on, the 2010 weighted average state tax rates for each Class I railroad, as calculated by the Association of American Railroads (AAR), for use in the Revenue Shortfall Allocation Method (RSAM).

DATES: Comments are due by August 8, 2011. If any comment opposing AAR's calculations is filed, AAR's reply will be due August 29, 2011. If no comments are filed by the due date, AAR's calculation of the 2010 weighted average state tax rates will be automatically adopted by the Board, effective August 9, 2011.

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's Web site at <http://www.stb.dot.gov>. Any person submitting a filing in the traditional paper format should send an original and 10 copies referring to Docket No. EP 682 (Sub-No. 2) to: Surface Transportation Board, 395

E Street, SW., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT:

Valerie O. Quinn (202) 245-0382. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: The RSAM figure is one of three benchmarks that together are used to determine the reasonableness of a challenged rate under the Board's *Simplified Standards for Rail Rate Cases*, EP 646 (Sub-No. 1) (STB served Sept. 5, 2007),¹ as further revised in *Simplified Standards for Rail Rate Cases—Taxes in Revenue Shortfall Allocation Method*, EP 646 (Sub-No. 2) (STB served Nov. 21, 2008). RSAM is intended to measure the average markup that the railroad would need to collect from all of its "potentially captive traffic" (traffic with a revenue-to-variable-cost ratio above 180%) to earn adequate revenues as measured by the Board under 49 U.S.C. § 10704(a)(2) (*i.e.*, earn a return on investment equal to the railroad industry cost of capital). *Simplified Standards—Taxes in RSAM*, slip op. at 1. In *Simplified Standards—Taxes in RSAM*, slip op. at 3, 5, the Board modified its RSAM formula to account for taxes, as the prior formula mistakenly compared pre-tax and after-tax revenues. In that decision, the Board stated that it would institute a separate proceeding in which Class I railroads would be required to submit the annual tax information necessary for the Board's annual RSAM calculation. *Id.* at 5-6.

In *Annual Submission of Tax Information for Use in the Revenue Shortfall Allocation Method*, EP 682 (STB served Feb. 26, 2010), the Board adopted rules to require AAR—a national trade association—to annually calculate and submit to the Board the weighted average state tax rate for each Class I railroad. *See* 49 CFR 1135.2(a). On May 27, 2011, AAR filed its calculation of the weighted average state tax rates for 2010, listed below for each Class I railroad:

WEIGHTED AVERAGE STATE TAX RATES

[In percent]

Railroad	2010	2009	% Change
BNSF Railway Company	5.572	5.665	-0.093
CSX Transportation, Inc.	5.575	5.578	-0.003
Grand Trunk Corporation	7.634	7.590	0.044
The Kansas City Southern Railway	6.070	6.434	-0.364
Norfolk Southern Combined	5.819	5.803	0.016
Soo Line Corporation	7.305	8.651	-1.346

¹ *Aff'd sub nom. CSX Transp., Inc. v. STB*, 568 F.3d 236 (DC Cir. 2009), and vacated in part on

reh'g, CSX Transp., Inc. v. STB, 584 F.3d 1076 (DC Cir. 2009).