



Board Report

File #: 2023-0773, File Type: Informational Report

Agenda Number: 8.

FINANCE, BUDGET, AND AUDIT COMMITTEE JANUARY 17, 2024

SUBJECT: BUILD AMERICA, BUY AMERICA ACT

ACTION: RECEIVE AND FILE

RECOMMENDATION

RECEIVE AND FILE a report on the Build America, Buy America Act.

ISSUE

At its October 2023 meeting, the Board approved Motion 10 by Directors Horvath, Bass, Butts, Yaroslavsky, and Najarian (Attachment A), instructing the Chief Executive Officer to report back with an evaluation of the applicable provisions of the Build America, Buy America Act (BABA), provisions contained in the Infrastructure Investment and Jobs Act and related federal guidance (49 U.S.C. § 5323(j)), and any impact the Act may have on the feasibility of transit projects seeking a Full-Funding Grant Agreement with the FTA.

This report evaluates BABA's applicability to Metro's capital projects seeking Full Funding Grant Agreements with the Federal Transit Administration. These requirements may result in increasing schedule and cost tension on projects funded under the FTA's Capital Investment Grant ("CIG") program. While the specific impacts of these increased domestic preference requirements are yet to be quantified, manufacturers and suppliers are taking steps to ensure their full compliance with these policies.

BACKGROUND

In 2021, Congress adopted, and President Biden subsequently signed into law, the Infrastructure Investment and Jobs Act (P.L. 117-58), better known as the Bipartisan Infrastructure Law (BIL). One key policy initiative in the BIL is the BABA expands domestic preference requirements for projects that are federally funded.

As noted by the White House on the day the President signed the measure into law, the BIL was crafted to "rebuild America's roads, bridges, and rails, expand access to clean drinking water, ensure every American has access to high-speed internet, tackle the climate crisis, advance environmental justice, and invest in communities that have too often been left behind. The legislation will help ease

inflationary pressures and strengthen supply chains by making long overdue improvements for our nation's ports, airports, rail, and roads. It will create good-paying union jobs and grow the economy sustainably and equitably so that everyone gets ahead for decades to come. Combined with the President's Build Back Framework, it will add on average 1.5 million jobs per year for the next ten years."

The White House and bi-partisan proponents of the BIL have hailed the new law as a landmark investment in our nation's infrastructure. The BIL provides over \$1 trillion in needed investment spurring economic growth across America's transportation, water, and broadband infrastructure. The BIL seeks to create and sustain good-paying jobs and, in the process, bolstering the middle class by providing a sustainable future for families across Los Angeles County that would not otherwise have been possible.

Designated CIG projects

The CIG Program has three different categories: New Starts, Small Starts, and Expedited Project Delivery (EPD). At its April 2021 meeting, the Board approved, in priority order, West Santa Ana Branch Line and Sepulveda Pass Transit Corridor for the New Starts category, and East San Fernando Valley Light Rail for the EPD category. In 2022, the Board added the Eastside Extension to Whittier and the Vermont BRT for the Small Starts category to the CIG Program as well.

Supporting Local Manufacturing

Finally, Metro has a robust, world-class Manufacturing Careers Policy (MCP) designed to combine and establish the internal guidelines for the United States Employment Program (USEP) and Local Employment Program (LEP). The objective of the MCP is to maximize the economic co-benefits from investments in transit equipment, infrastructure, and related services.

The adoption of the MCP serves as a mechanism for Metro to leverage investments in the manufacturing of Rolling Stock. In this regard, Metro continues to work with both the County of Los Angeles and the City of Los Angeles to advance the Center for Transportation Technology Excellence. Consistent with the intent and goals of the BABA provisions embedded into the BIL, the Center for Transportation Technology Excellence would return full-scale manufacturing of bus and rail rolling stock to the United States and, more specifically, to Los Angeles County. The Center would also include the presence of suppliers of rail and bus parts, a rail test track, and a climate-controlled facility for testing purposes.

This manufacturing facility is critical to job creation across Los Angeles County, given that the market for new bus and rail cars across the Western United States is anticipated to exceed 29,000 vehicles (13,000 rail cars and 16,000 buses) over the next two decades.

DISCUSSION

As noted above, one of the key policy initiatives in the BIL is the BABA, which expands domestic preference requirements for projects that are federally funded. For purposes of projects that receive

Federal Transit Administration (FTA) funds, BABA added a Buy America requirement for construction materials. FTA's existing Buy America requirements applicable to steel, iron, and manufactured products continue to apply, as does the statutory requirement applicable to rolling stock (See 49 U.S.C. §5323(j)). Metro, as required by law, has consistently advanced its projects in compliance with these longstanding federal requirements.

These requirements may result in increasing schedule and cost tension on projects funded under the FTA's Capital Investment Grant ("CIG") program. While the specific impacts of these increased domestic preference requirements are yet to be quantified, there are manufacturers and suppliers that are fully compliant with these policies. Metro already benefits from these reforms as the agency partners with the federal government in implementing these policies on Metro's capital projects.

Sections 70901 through 70927 of the BIL, BABA expanded federal domestic preference requirements. Under BABA, for public infrastructure projects that receive federal support, all iron, steel, manufactured products, and construction materials used in the project must be produced in the United States.

Even before BABA was enacted, FTA had implemented regulation-specific Buy America statutory requirements, including for rolling stock acquired with FTA assistance (49 CFR Part 661, Buy America Requirements). Specifically, the domestic content requirement for transit rolling stock procurements for railcars and buses was "phased up" to require that more than 70 percent of the cost of all components and subcomponents be produced in the United States, and final assembly of the vehicle must occur in the United States (§5323(j)(2)(C)(i) and (ii)). This requirement has existed since the Fixing America's Surface Transportation Act (FAST Act) was enacted in 2015. Metro is obligated to and consistently has complied with these requirements in purchasing vehicles with FTA funds.

FTA's regulation at 49 CFR §661.7 provides the following three categories of waivers from Buy America requirements:

1. Public interest waiver - when applying the domestic content preference would be inconsistent with the public interest;
2. Nonavailability waiver - if the covered product or material is not produced in the United States in sufficient and reasonably available quantities or is not of satisfactory quality; and
3. Unreasonable cost waiver - when the inclusion of domestically produced items will increase the overall cost of the contract with the supplier by more than 25 percent.

FTA's statute requires notice and comment on proposed waivers, and with the enactment of BABA, the Office of Management and Budget (OMB) will also be involved in reviewing waivers. OMB Memorandum M-22-11 requires that an agency submit a proposed waiver to OMB after public comment is concluded for review and determination by OMB as to whether the waiver is consistent with applicable law and policy. Waiver requests to OMB must include a detailed justification for using foreign sourced products and a certification that a good faith effort was made to solicit bids for domestic products in solicitation documents and communications with suppliers, among other information. Given the strong Buy America policies of the current Administration, waivers are difficult

to obtain and challenging to justify based on the limited waiver standards described above.

The Federal Government, through OMB, has implemented BABA's requirements by creating a new section in the Code of Federal Regulations, 2 CFR Part 184.

Federal Restrictions on Rolling Stock Procurement

The National Defense Authorization Act for Fiscal Year 2020 (P.L. 116-92) expanded federal restrictions on rolling stock procurement from Chinese state-owned, controlled, or related manufacturers. This prohibition was included in section 5323(u) of FTA's statute. These restrictions apply to FTA supported projects and are in addition to other Buy America requirements applicable to iron, steel, manufactured products, and construction materials.

Specifically, federal law:

1. Prohibits federal transit funds from being used to procure rolling stock if the manufacturer is "owned or controlled by, is a subsidiary of, or is otherwise related legally or financially to a corporation based in" China, regardless of whether the manufacturer is incorporated in or has manufacturing facilities in the United States; and
2. Prohibits recipients of certain state of good repair funds from procuring rail rolling stock using non-federal funds and requires each public transportation authority to provide an annual certification of its compliance.

Federal law provides an exception to both prohibitions for rail rolling stock contracts executed before December 20, 2021. Metro has a contract with the China Railway Rolling Stock Corporation (CRRC), executed in 2017, to manufacture up to 282 new Red and Purple Lines rail cars. However, the agency subsequently made a business decision and declined to exercise an option with CRRC for the purchase of up to 218 heavy rail vehicles - above and beyond a base order of 64 vehicles the agency purchased in 2017.

The limited exception provided by the Federal Government concerning the purchase of rail rolling stock before December 20, 2021, would not apply to any new contracts Metro entered into to buy rail vehicles for its projects.

FTA has issued a FAQ related to these rolling stock restrictions, available here:

<https://www.transit.dot.gov/funding/procurement/frequently-asked-questions-regarding-section-7613-national-defense> <<https://protect-us.mimecast.com/s/3qniCgJxn8SPYkXRhoWaXz?domain=gcc02.safelinks.protection.outlook.com>>.

Congress continues to address this issue, as evidenced by the provision in the recently Senate-passed version of the Transportation, Housing and Urban Development appropriations bill for fiscal year 2024 (see Section 5 of HR 4366 EAS) that would prevent any funding under the bill from being used for the benefit of any Chinese company.

Due to a variety of circumstances, the number of Zero Emission Bus (ZEB) manufacturers across the United States has been shrinking. Most recently (November 2023), Proterra - a leading ZEB

manufacturer - announced the results of the Chapter 11 bankruptcy filing. This is a matter of significant concern to our agency and other transit providers, as we seek to transition to a ZEB fleet. The lack of a strong base of domestic ZEB manufacturers has negatively impacted the ability of the remaining firms to supply ZEB vehicles in a timely matter and has also served to increase rolling stock costs. In response to this development, Metro has joined the American Public Transportation Association Bus Manufacturing Task Force - which enjoys support of the Biden Administration -that will “recommend immediate and near-term actions to help ensure a viable and competitive bus manufacturing environment.” Metro is actively participating in this task force and looks forward to carefully considering how the recommendations of the APTA Task Force can be potentially embedded in our future ZEB procurement documents - in order to advance our shared goal of ensuring our nation has a robust base of ZEB manufacturers that can provide rolling stock in both a cost-effective and timely manner.

With respect to any future rolling stock procurements, bidders must comply with the requirements outlined in P.L. 116-92 as determined by the Federal Transit Administration Office of the Chief Counsel. A review of the landscape of rolling stock companies that could build a BABA compliant vehicle indicates that compliant manufacturers exist for light rail, heavy rail, monorail, and ZEB.

Manufacturing Careers Policy

Recognizing the growth in Metro’s transit operations, capital infrastructure program, and associated procurements for manufactured transit equipment, Metro’s MCP objectives are to increase quality job creation and career development for low-income residents facing barriers to employment, to maximize equitable outcomes and economic resiliency in disadvantaged communities, and to maximize career investments in new or existing manufacturing/assembly facilities in the United States and Los Angeles County.

The Manufacturing Careers Policy is applied to all Rolling Stock procurements and related contracts with a minimum contract value of \$50 million (reduced from the current threshold of \$100 million). Metro will also review MCP applicability on related pilot technology contracts at its discretion.

The MCP was developed and installed through a collaboration and partnership with Jobs to Move America (JMA). The MCP ensures that Metro creates opportunities for disadvantaged workers in sectors it is heavily investing in rolling stock manufacturing.

Over the last decade, Metro has been the most successful transit agency in the United States in receiving Full Funding Grant Agreements for major transit capital projects. These projects include the Metro Gold Line Eastside Extension, the Regional Connector Transit Project, and the Westside Purple Line Extension (Sections 1, 2, and 3). This success in securing Full Funding Grant Agreements has largely been due to the agency’s careful and considered policies of strictly adhering to all federal rules and regulations - including Buy America regulations.

Abiding by all federal regulations - including those outlined in the BIL, is essential to ensure the free

flow of federal transportation dollars for current and future transit capital projects. Failure to adhere to federal regulations related to BABA and other federal rules would necessarily put the federal share of any Metro transit project at risk, which would have a severe and negative impact on our agency's budget.

EQUITY PLATFORM

To successfully advance the construction of our agency's major transit capital projects, many of which will directly benefit disadvantaged communities across Los Angeles County, Metro must abide by all federal rules and regulations that govern securing a Full Funding Grant Agreement through the Federal Transit Administration's Capital Investment Grant Program. With respect to the agency's Equity Platform, it should be noted that Metro's capital projects are constructed under the terms of a Project Labor Agreement (PLA) that Metro's Board of Directors approved on January 26, 2012, and then subsequently renewed on January 26, 2017. This PLA, executed with the Los Angeles/Orange County Building and Construction Trades Council, stipulates that 40% of construction workers must reside in economically disadvantaged areas, 10% participation of disadvantaged workers, and 20% participation of apprentices. Given that the Bipartisan Infrastructure Law now permits local hiring practices on transportation projects using federal funds, Metro now has the ability to hire local workers who reside in disadvantaged communities where we are constructing our capital projects.

IMPLEMENTATION OF STRATEGIC PLAN GOALS

The recommendation supports Strategic Plan Goal #3. Specifically, Goal #3 supports enhancing communities and lives through mobility and access to opportunity. By abiding by the rules and regulations of the BABA provision in the BIL - our agency will "enhance communities and lives through mobility and access to opportunity."

NEXT STEPS

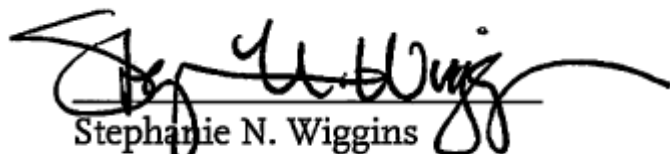
Metro staff will continue to ensure that all our major transit capital projects seeking federal funding through grants or low-interest loans abide by all the provisions stipulated in BIL.

ATTACHMENTS

Attachment A - Board Motion 10

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Board Report

File #: 2023-0657, File Type: Motion / Motion Response

Agenda Number: 10.

FINANCE, BUDGET, AND AUDIT COMMITTEE OCTOBER 18, 2023

Motion by:

DIRECTORS HORVATH, BASS, BUTTS, YAROSLAVSKY, and NAJARIAN

The *Build America, Buy America Act*, enacted as part of the *Infrastructure Investment and Jobs Act* on November 15, 2021, established a domestic content procurement preference for Federal infrastructure projects in the United States. The Act maximizes the Federal government's use of services, goods, products, and materials produced in the United States and requires that three separate product categories: 1) Iron or Steel Products; 2) Manufactured Products; and 3) Construction Materials, be produced in the United States when used in covered infrastructure projects. The Act is central to President Biden's Investing in America agenda intended to drive domestic manufacturing, rebuild America's infrastructure, and create good-paying jobs. During the February 2023 State of the Union address, President Biden committed to ensuring construction materials used in federally funded infrastructure projects are made in America.

The Office of Management and Budget (OMB) subsequently issued "Guidance" related to the *Build America, Buy America Act* and provisions contained in the *"Infrastructure Investment and Jobs Act"*, which require that after 2020, at least seventy percent (70%) of the cost of components and subcomponents for rolling stock transit vehicles be produced in the United States. Final assembly for rolling stock must also occur in the United States.

These provisions also apply to Federal financial assistance awards (e.g., grants and loans) made after May 14, 2022, that are used to construct, alter, maintain, or repair infrastructure in the United States. According to the Federal Transit Administration (FTA) a "grantee must include in its bid or request for proposal (RFP) specifications for procurement of steel, iron or manufactured goods (including rolling stock) an appropriate notice of the Buy America provision and require, as a condition of responsiveness, that the bidder or offeror submit with the bid or offer a completed Buy America certificate in accordance with 49 CFR, Sec. 661.6 or 661.12."

Similarly, in 2019 Congress passed the *"Transportation Infrastructure Vehicle Security Act"* (TIVSA) as part of the *"National Defense Authorization Act"* which imposed restrictions on the allocation of federal funding, including funds administered by the FTA, for the purchase of rolling stock produced by certain "State-Owned Enterprises." In response to the enactment of these provisions of law, in 2020 the FTA published a document providing guidance for Section 7613 of the Defense Act. The document reads in part: *"Section 5323(u)(1) generally prohibits FTA funding of procurement of rolling stock from any manufacturer that is 'owned or controlled by, is a subsidiary of, or is otherwise related*

legally or financially to a corporation based in certain foreign countries.”

The Los Angeles County Metropolitan Transportation Authority is proceeding with several voter-approved projects, currently in planning or under construction, that are seeking or intending to apply for federal funding (Sepulveda Transit Corridor Project; L (Gold) Line Extension; West Santa Ana Branch Corridor; K (Crenshaw) Line Northern Extension; East San Fernando Valley Light Rail, Eastside Transit Corridor Phase 2, *et al.*).

The Office of Management and Budget (OMB) recently (August 2023) issued final guidance to supplement the *Build America, Buy America Act* and provisions contained in the *Infrastructure Investment and Jobs Act*. The new guidance, effective October 23, 2023, is intended to be high-level coordinating guidance for Federal agencies to use in their own direct implementation of *Build America, Buy America* and will impact all entities who have or receive covered awards.

In the not-too-distant future, the Metro Board will be asked to make decisions on several draft and final environmental impact reports, and locally preferred alternatives for projects that may be seeking federal financial assistance. These decisions will weigh heavily in the context of what Metro has referred to as an impending “fiscal cliff” in fiscal years 2024 and 2025, significantly increased construction costs, as well as the upcoming five-year and decennial evaluations of Measure M projects. It is therefore timely and necessary for Metro to conduct an exhaustive evaluation of the applicable provisions of the *Build America, Buy America Act*, provisions contained in the *Infrastructure Investment and Jobs Act*, and related federal guidance, and report to the Board on any impacts the law may have on the ability to deliver Measure R and Measure M voter approved infrastructure projects.

**SUBJECT: THE IMPACT OF THE BUILD AMERICA BUY AMERICA ACT ON LA METRO’S
MAJOR CAPITAL PROJECTS MOTION**

RECOMMENDATION

APPROVE Motion by Directors Horvath, Bass, Butts, Yaroslavsky, and Najarian that the Metro Board instruct the Chief Executive Officer to report to the Board in March 2024 with an evaluation of the applicable provisions of the *Build America, Buy America Act*, provisions contained in the *Infrastructure Investment and Jobs Act* and related federal guidance (49 U.S.C. § 5323(j)), and any impact the Act may have on the feasibility of transit projects seeking a Full-Funding Grant Agreement with the FTA.