

the procedures set forth in 49 CFR part 397, subpart E—Preemption Procedures. ATA requests that the FMCSA Administrator make a determination on whether the highway routing designations established by Boston are preempted pursuant to § 397.69(b). A copy of the ATA application for preemption determination is available for review in the docket for this notice. You may view or obtain a copy of the application online by visiting <http://www.regulations.gov> and going to the docket number for this matter (FMCSA–2008–0204).

#### Public Comments

FMCSA seeks comments on whether 49 CFR 397.69(b) preempts Boston's highway routing designations that are being challenged by ATA. Comments should specifically address the preemption standard established under 49 CFR 397.69(b) and 49 U.S.C. 5125(c).

Issued on: August 1, 2008.

**John H. Hill,**

*Administrator.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

[Docket No. FTA–2008–0024]

#### Notice of Buy America Waiver for the National Fuel Cell Bus Technology Development Program

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of Buy America waiver.

**SUMMARY:** On May 22, 2008, the Federal Transit Administration (FTA) published a Notice of Proposed Buy America Waiver for the National Fuel Cell Bus Technology Development Program (Fuel Cell Bus Program). After careful review of comments, FTA has decided to waive its Buy America requirements for projects funded under the Fuel Cell Bus Program. This Notice sets forth FTA's justification and response to comments.

**FOR FURTHER INFORMATION CONTACT:** For program questions please contact Christina Gikakis at (202) 366–2637 or [christina.gikakis@dot.gov](mailto:christina.gikakis@dot.gov). For legal questions please contact Jayme L. Blakesley at (202) 366–0304 or [jayme.blakesley@dot.gov](mailto:jayme.blakesley@dot.gov).

**SUPPLEMENTARY INFORMATION:** This Notice sets forth the Federal Transit Administration's (FTA) justification for waiving its Buy America requirements for projects funded under the National

Fuel Cell Bus Technology Development Program (Fuel Cell Bus Program).

#### The National Fuel Cell Bus Technology Development Program

Section 3046 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, instructed FTA “to establish a national fuel cell bus technology program [Fuel Cell Bus Program] to facilitate the development of commercially viable fuel cell bus technology and related infrastructure.”

By notice dated April 14, 2006, FTA solicited applications to the Fuel Cell Bus Program and restated the statutory criteria for evaluating applications. These criteria included the ability of the project “to contribute significantly to furthering fuel cell technology as it relates to transit bus operations, including hydrogen production, energy storage, fuel cell technologies, vehicle systems integration, and power electronics technology,” and to advance “different fuel cell technologies, including hydrogen-fueled and methanol-powered liquid-fueled fuel cell technologies, that may be viable for public transportation systems.” 71 FR 19612 (April 14, 2006).

FTA selected three consortia to participate in the Fuel Cell Bus Program: the Center for Transportation and the Environment in Atlanta, the Northeast Advanced Vehicle Consortium in Boston, and Westart/CALSTART in Pasadena. These consortia will manage fourteen projects. Of these, eight are development and demonstration projects, two are component technology development, and four support analysis, outreach and coordination.

The Fuel Cell Bus Program seeks to develop commercially viable fuel cell buses by demonstrating that buses powered by fuel cell technology can achieve several technical targets, including a four to six year (20,000 to 30,000 hour) fuel cell durability, a cost of less than five times that of an equivalent diesel, greater than 90% reliability, twice the fuel efficiency of a comparable bus, emissions below the 2010 Environmental Protection Agency standards and vehicle performance comparable to a diesel bus.

#### Public Interest Waiver

The purpose of this notice is to articulate FTA's justification for waiving its Buy America requirements for all projects funded under the Fuel Cell Bus Program.

With certain exceptions, FTA's “Buy America” requirements prevent FTA from obligating an amount that may be

appropriated to carry out its program for a project unless “the steel, iron, and manufactured goods used in the project are produced in the United States.” 49 U.S.C. 5323(j)(1). One such exception is if applying the Buy America requirements “would be inconsistent with the public interest.” 49 U.S.C. 5323(j)(2)(A). After considering all appropriate factors on a case-by-case basis, 49 CFR 661.7(b), if FTA determines that the conditions exist to grant a public interest waiver, FTA will issue a detailed written statement justifying why the waiver is in the public interest, and will 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).

#### Justification

Because the U.S. market for fuel cell bus technology and related infrastructure is not fully developed, participants in the Fuel Cell Bus Program asked FTA to waive its Buy America requirements for projects funded under the Fuel Cell Bus Program. According to one participant, “[a] successful Fuel Cell transit bus must meet and be consistent with the public transit market's ability to incorporate and afford such technology on a mass scale. \* \* \* At this stage of technology development more engineering data is necessary to accurately specify a fuel cell for a competitive bid. [Requiring participants to comply with FTA's Buy America requirements] would significantly delay the development effort, would be extremely expensive, and would result in a huge set back to the overall development of Fuel Cell technology. [Allowing participants to use all available technology, regardless of origin,] is the fastest, soundest method to perfect the technology, assure future competition, and hasten the advent of fuel cell buses in transit.”

In order to develop commercially viable fuel cell buses, FTA's Fuel Cell Bus Program must examine all current technologies. But at this time, because fuel cell technologies for transit are still in the developmental and technical validation phase, it is impossible to determine which configurations are most likely to reach commercialization. As development continues, the industry will require objective demonstrations and evaluations of different bus propulsion systems. Permitting participants to use foreign and domestic suppliers will allow FTA to evaluate which technologies are closest to successful deployment. If certain

technologies are omitted from the program because they are of foreign origin, it will severely affect FTA's ability to fully analyze fuel cell bus technology.

There are several benefits to waiving FTA's Buy America requirements on a program-wide basis. FTA selected projects to include all significant technologies within a centrally managed program. By granting a waiver for the entire program, FTA can decrease the start-up time for individual projects. Otherwise, each project would have to apply for waivers on a case-by-case basis. This is impractical in a research setting. Research projects often encounter unexpected problems that require changes to the scope of work. The continued development of Fuel Cell technology will result in more choices for FTA grantees and better, more environmentally friendly, buses for the riding public. Successful demonstrations through the Fuel Cell Bus Program will increase awareness of fuel cell technology and foster a domestic industry by identifying and mitigating barriers and uncertainties in the market. A limited waiver to support research and development will increase and improve domestic technical expertise. Moreover, a fully inclusive public interest waiver will allow Fuel Cell Bus Program participants to collaborate to achieve the program goals in an appropriate timeframe. By reducing risk and expanding expertise, the Fuel Cell Bus Program will improve the availability of capital for a self-sustaining domestic fuel cell industry.

#### Summary of Comments

On May 22, 2008, pursuant to 49 CFR 661.7(b), FTA published a detailed written statement in the **Federal Register** at 73 FR 29841. This notice stated why FTA proposed to waive its Buy America requirements for projects funded under the Fuel Cell Bus Program and allowed interested parties a reasonable time to comment on the proposed waiver.

By an overwhelming margin, the commenters supported waiving FTA's Buy America requirements. Of the nine parties that submitted comments, six favor and only one opposes waiving FTA's Buy America requirements. The remaining two comments were ambiguous. One expressed interest in working with FTA but did not state its position on waiving FTA's Buy America requirements. The other stated the commenter's intent to submit comments at a later date (this intent was not realized as this party has not submitted comments to date). The following is a summary of the comments received.

1. GE Global Research stated, "[t]his program is supporting leading-edge research that requires sourcing partners from around the world to satisfy the challenging requirements set forth in the program."

2. The Northeast Advanced Vehicle Consortium commented, "[t]he very nature of the research \* \* \* requires that participating corporations are granted access to the most appropriate and advanced technologies in, what is in the United States, a nascent industry. Several of the participating business [sic], all experts in fuel-cell transportation research and development, have determined that procuring the best possible technologies will at times require them to acquire parts from foreign sources if they are to develop internationally competitive transportation products. \* \* \* any delay in this critical development program [is] a lost opportunity to satisfy America's transportation needs for the twenty-first century."

3. Alameda-Contra Costa Transit District (AC Transit), an entity that has been developing fuel cell bus technology and supporting hydrogen fueling infrastructure since 1999, expressed its support of FTA's recommendation to waive the Buy America requirements for projects funded under the Fuel Cell Bus Program, stating that "FTA staff has made a convincing case for a sound and reasonable process to expedite the research and development efforts in support of the deployment of fuel cell technology in the United States." According to AC Transit, demonstrating "overall vehicle reliability and durability under real-world, heavy-duty operating conditions" will open up "a new generation of technology \* \* \* that not only can deliver significant benefits in air quality, noise reduction, and carbon emissions reductions, but will serve to help diversify our nation's fuel supply towards the goal of energy independence."

4. Nuvera Fuel Cells, a U.S.-based company that utilizes international cooperation for the fuel cell engine that will be used in the Fuel Cell Bus Program, supports a waiver, stating that "[t]his waiver is important to ensure timely access to the latest engine technology."

5. UTC Power, a United Technologies Company based in South Windsor, Connecticut, supports waiving FTA's Buy America requirements because (1) "the waiver will facilitate timely achievement of the Fuel Cell Bus Program objectives"; (2) "validation of the commercial viability of fuel cell buses will stimulate and further expand

the U.S. fuel cell industry"; and (3) "the scope of the waiver is limited solely to the Fuel Cell Bus Program."

6. Santa Clara Valley Transportation Authority supports FTA's proposal "so that [fuel cell bus] technology can develop beyond the present developmental/technical validation phase."

7. Delphi Corporation submitted comments but did not state whether it favored or disfavored waiving FTA's Buy America requirements for projects funded under the Fuel Cell Bus Program. Delphi believes that its "U.S.-developed fuel cell technology is applicable to heavy duty vehicle applications," and "look[s] forward to any current or future opportunities to work with the FTA on assessing, developing, demonstrating and commercializing solid oxide fuel cell systems in public transit applications."

8. Air Products and Chemicals, Inc. (Air Products) submitted comments opposed to waiving FTA's Buy America requirements. According to Air Products, "domestic sourcing difficulty does not apply to hydrogen fueling infrastructure and hydrogen" because "the two largest merchant hydrogen producers in the world are United States companies. The production capacity of these two firms can easily fuel 1 million personal vehicles or 30,000 buses."

9. North American Bus Industries (NABI) submitted a comment stating that it "intends to provide comments on the captioned matter within the next seven to ten days." To date, FTA has not received comments from NABI.

#### Response to Comments

While it is not the intent of FTA to support or fund foreign suppliers of fueling infrastructure, FTA does feel that restricting the selected projects to U.S. suppliers would limit the ability of the managing consortia to select and demonstrate a range of innovative technologies.

FTA agrees with Air Products that the Nation would be poorly served by a research program that contributes to the transfer of market leadership or Intellectual Property (IP) to foreign interests in the market for hydrogen infrastructure. FTA has determined that the infrastructure components of the Fuel Cell Bus Program are very small relative to the national hydrogen infrastructure markets, and appear to involve predominantly U.S. suppliers of infrastructure. Furthermore, some demonstration sites have not finalized plans for fueling infrastructure. Requiring project managers to apply for individual waivers as these decisions are finalized will significantly delay

project implementation. It would also restrict the flexibility of the sites to quickly change project partners and cost share, which is important in research programs to respond to unforeseen problems.

Therefore, FTA feels there is no risk that this research program will contribute to the transfer of market leadership from a U.S. to a foreign entity in the national market for hydrogen infrastructure.

In regard to IP, FTA fully appreciates the importance of IP in highly competitive industries. FTA has no interest in facilitating the transfer of IP from U.S. firms to foreign entities. FTA assures all concerned that, within the Fuel Cell Bus Program, all IP developed or retained by U.S. interests will remain under the control of those interests. There is no additional risk that IP belonging to U.S. interests will be unwittingly transferred to outside entities. Foreign companies participating in the National Fuel Cell Bus Program are required to agree to standardized data collection. Objective evaluations of the bus demonstration programs are a major component of the program and will provide U.S. companies non-proprietary performance data and analysis of all fueling infrastructure used in the program.

FTA recognizes that U.S. companies have significant experience developing and operating hydrogen fueling stations. However, though hydrogen production has advanced further than fuel cell technology, FTA determines it is still beneficial to examine all available and developing technologies. In cases where infrastructure funding is a major component of the project, it is focused on novel applications, not on replicating or competing with efforts where U.S. companies have already proven to be capable leaders.

In conclusion, FTA's review of the selection process and industry comments relating to the Fuel Cell Bus Program support our judgment that the transit industry and American public at large will best be served by a fuel cell bus research program not bound by Buy America requirements.

#### Waiver

Therefore, after carefully considering all comments, and for the reasons stated in its justification above, FTA hereby waives its Buy America requirements for all projects funded through its Fuel Cell Bus Program. Quick and successful deployment of fuel cell bus technology and infrastructure is in the public interest. Fuel cell technology will benefit the environment by lessening carbon emissions and decreasing the use

of petroleum and other fossil fuels. Allowing foreign technologies will allow the project teams to focus on commercial viability instead of having to make fundamental advances independent of existing technology. Ultimately, this will lead to increased domestic demand for fuel cell bus technology and infrastructure, resulting in a sustainable U.S. market.

Issued this 31st day of July, 2008.

**Severn E.S. Miller,**  
*Chief Counsel.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

[Docket Number: FTA-2008-0020]

#### Final Guidance on New Starts/Small Starts Policies and Procedures

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of Availability of Final Guidance on New Starts/Small Starts Policies and Procedures.

**SUMMARY:** This notice conveys the Federal Transit Administration's (FTA) Final Guidance on New Starts/Small Starts Policies and Procedures.

**DATES:** Effective Date: These policies and procedures will take effect on August 8, 2008.

**FOR FURTHER INFORMATION CONTACT:** Ron Fisher, Office of Planning and Environment, telephone (202) 366-4033, Federal Transit Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590 or [Ronald.Fisher@dot.gov](mailto:Ronald.Fisher@dot.gov).

#### Availability of Comments Considered in the Development of This Guidance

A copy of the notice of availability of the proposed Guidance, issued on April 18, 2008, and comments and material received from the public as a part of its review of the proposed Guidance, are part of docket FTA-2008-0020 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, West Building, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may retrieve the comments online at: <http://www.regulations.gov>. Enter docket number FTA-2008-0020 in the search field. In the "Narrow Results" section on the left side of the screen, click on

"Rules." The Web site is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site. An electronic copy of this document may also be downloaded by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may also reach the Office of the Federal Register's home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's Web page at: <http://www.gpoaccess.gov/fr/index.html>.

#### Response to Comments and New and Small Starts Program Changes

The purpose of this notice is to convey the Final Guidance on New Starts/Small Starts Policies and Procedures, reflecting the changes implemented as a result of comments received on the April 18, 2008 Notice of Availability (73 FR 21170). FTA finds that there is good cause to make this guidance effective upon publication of this notice in order to assist grantees to enter or complete development of proposed projects.

##### 1. Initiation Package

FTA adopts as final its proposal to require that project sponsors beginning an alternatives analysis prepare and provide to FTA a package of information on: (1) The problems that motivate consideration of major transit alternatives in a corridor; (2) the alternatives that have been identified for consideration; and (3) the information that will be prepared to support decisions on the alternatives along with the identification of the general approach to development of that information.

Preparing the package at the beginning of an alternative analysis allows FTA and other stakeholders to better understand the key considerations for an alternatives analysis. We anticipate that this will result in a more streamlined process.

*Comments:* A significant number of respondents supported this measure as a way to discuss potential road blocks that may occur in the project development process. Several commenters opposed this proposal indicating the scope of the proposal is best suited for a rulemaking process and is beyond the level of change appropriate for annual policy guidance.

*Response:* The proposal is a small change in FTA requirements that is properly implemented through policy guidance.