

Arlington,



Transportation
Security
Administration

ACTION

September 11, 2009

MEMORANDUM FOR:

THE SECRETARY

FROM:

Gale D. Rossides
Acting Administrator

A handwritten signature in black ink that reads "Gale D. Rossides".

SUBJECT:

Request for Limited Nationwide Waiver of the Buy American Provision under the American Recovery and Reinvestment Act of 2009

Purpose

This memorandum recommends your approval of a limited nationwide waiver of the Buy American provision contained in Section 1605 of the American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5) provided that at least 95 percent of the costs of each Transportation Security Administration (TSA) Electronic Baggage Screening Program (EBSP) project will comply with Section 1605.

Background

On February 17, 2009, ARRA was enacted to assist those most impacted by the recession by creating and preserving jobs and promoting economic recovery. Funding was provided for multiple areas of national interest. TSA received \$1 billion to invest in the procurement and installation of checked baggage explosives detection systems and checkpoint explosives detection equipment to be obligated by September 30, 2010.

TSA's Electronic Baggage Screening Program supports the Department's goals of protecting our Nation from dangerous goods and protecting our Nation's critical transportation infrastructure by strengthening screening of checked baggage to reduce the probability of a successful terrorist or other criminal attack against the air transportation system. EBSP's objective is to deter, detect, mitigate, and prevent transportation of explosives or other prohibited items in checked baggage on commercial aircraft. The EBSP deploys optimal solutions by constructing Checked Baggage Inspection Systems (CBIS), consisting of a high-speed baggage handling system (BHS) and with integrated Explosive Detection System (EDS) equipment. EBSP directly benefits the traveling public, air carriers, airport authorities, and our Nation as a whole, by strengthening our critical transportation security infrastructure and ensuring freedom of movement for people and commerce.

Approximately \$500 million in ARRA funding will be allocated to airport facility modification projects, which will enhance security. This investment will enable TSA to implement optimal screening solutions at checked baggage screening areas in airports throughout the Nation. It will enhance TSA's current threat detection capabilities, increase the efficiency of the checked baggage screening process, and contribute to the long-term development of a flexible security infrastructure "platform" capable of accommodating future growth in airline traffic over the next 20 years.

TSA has identified 25 airports for security enhancement projects where a CBIS will be constructed. Working in partnership with the airport authorities and stakeholder air carriers, TSA facilitates the design and funding of these complex systems to achieve maximum operational efficiency for TSA and the airport. TSA engages the airport authorities in the negotiation of a project award to modify existing facilities and BHS into a CBIS that will fully integrate with the airports' behind-the-scenes BHS. As part of the negotiation process, the airport authority is briefed on the ARRA requirements relevant to the project with specific emphasis placed on the ARRA Buy American provision.

Discussion

Section 1605(a) of the ARRA, the Buy American provision, states that none of the funds appropriated by the Act, including the funds that have been dedicated to project awards under the Checked Baggage Inspection System Program "may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States."

Subsections 1605(b) and (c) of ARRA authorize the Secretary to waive application of the Buy American restriction if: (1) applying the provision would be inconsistent with the public interest; (2) the relevant goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) the inclusion of the goods produced in the United States will increase the cost of the project by more than 25 percent. If it is determined that a waiver is appropriate, the Secretary is required to publish a detailed justification in the Federal Register.

CBIS projects are comprised of thousands of manufactured goods, such as conveyor, conveyor motor drives, electrical and communications controls, programmable logic controllers, electronic tracking devices, high speed diverters, vertical sorters, specialty fasteners and switches. Not all of these items are domestically available. Furthermore, in many instances, the geographic origin of the equipment is not readily ascertainable. While arguably DHS would be justified in using the authority under section 1605(b)(2) (non-availability waiver), the burden placed on TSA and contractors in sourcing and evaluating equipment availability would be unduly burdensome, impracticable and not in keeping with the ARRA's overall goal of expeditious spending of recovery funds.

TSA will attempt to obtain 100 percent compliance with the buy American provision on all airport facility modification projects. For airports that cannot comply 100 percent with the buy

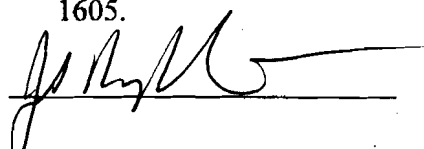
American provision, TSA recommends a limited nationwide waiver because applying the provision would be inconsistent with the public interest in accordance with section 1605(b)(1). TSA will ensure that at least 95 percent of the costs of each TSA EBSP project will comply with Section 1605. It is in the public interest to expeditiously complete these airport security modifications. This significant investment in checked baggage screening will accelerate TSA's planned deployment schedule by more than two years and strengthen EBSP's ability to meet its objectives, which include:

- Maintaining 100 percent screening of passenger checked baggage;
- Improving efficiency and effectiveness by deploying next generation in-line EDS technology;
- Providing EDS capability to additional airports; and
- Standardizing the production, acquisition, and deployment of optimal baggage screening solutions.

On some projects it may be difficult, if not impossible, for an airport authority to have certain knowledge of the manufacturing origins of each of the numerous manufactured items comprising the CBIS. The requirement to do so would be so overwhelmingly burdensome as to deter participation in the project. These burdens would cause delays and hinder TSA in meeting the ARRA objective to obligate all ARRA funds by September 30, 2010¹.

Recommendation

Based upon the foregoing, I recommend that the Secretary grant a limited nationwide waiver of Section 1605 of the ARRA with respect to security modification projects where a CBIS will be constructed, provided that at least 95 percent of the costs of each TSA EBSP project will comply with Section 1605.

Approve  Disapprove _____
Modify _____ Needs more discussion _____

Attachment: Draft Federal Register Notice

¹ See ARRA §1603.

Federal Register Notice (draft 9/11/09)

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Electronic Baggage Screening Program

AGENCY: Transportation Security Administration, U.S. Department of Homeland Security

ACTION: Notice of Waiver of Section 1605 (Buy American Requirement) of the American Recovery and Reinvestment Act of 2009.

SUMMARY: The Department of Homeland Security (DHS) is hereby granting a limited nationwide waiver of the Buy American provision contained in Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) Pub. L. No. 111-5, 123 Stat. 115, 303 (2009) under the authority of Section 1605(b) (1) (public interest exception) provided that at least 95 percent of the costs of each Transportation Security Administration (TSA) Electronic Baggage Screening Program (EBSP) project will comply with Section 1605.

DATES:

FOR FURTHER INFORMATION CONTACT:

I. BACKGROUND:

On February 17, 2009, the Recovery Act was enacted to assist those most impacted by the recession by creating and preserving jobs and promoting economic recovery. The funding was specified for multiple areas of national interest. TSA received \$1 billion to invest in the procurement and installation of checked baggage explosives detection systems and checkpoint explosives detection equipment to be obligated by September 30, 2010. Approximately \$500 million in Recovery Act funding will be allocated to facility modification projects to be administered through TSA's EBSP. This program directly benefits the traveling public, air carriers, airport authorities, and our Nation as a whole.

TSA's EBSP supports the DHS goals of protecting our Nation from dangerous goods and protecting our Nation's critical transportation infrastructure by strengthening screening of checked baggage to reduce the probability of a successful terrorist or other criminal attack to the air transportation system. Since December 31, 2003, EBSP has been responsible for ensuring 100% screening of checked baggage in the United States. The EBSP's objective is to deter, detect, mitigate, and prevent transportation of explosives or other prohibited items in checked baggage on commercial aircraft. One significant way EBSP accomplishes its objectives is through the construction of Checked Baggage Inspection Systems (CBIS). These projects form the backbone of TSA's EBSP and represent the highest level of baggage screening capability in terms of processing efficiency and security. TSA has identified twenty-six airports across the country with "shovel ready" facility modification projects that include CBIS construction. These

projects are dependent on Recovery Act funding. Several of these projects, however, are on hold and in jeopardy because of concerns over compliance with section 1605(a).

Section 1605(a) of the Recovery Act, the Buy American provision, states that none of the funds appropriated by the Act, including the funds that have been dedicated to project awards under EBSP, “may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.” Subsections 1605(b) and (c) of the Recovery Act authorize the head of a Federal department or agency to waive the Buy American provision by finding that: (1) applying the provision would be inconsistent with the public interest; (2) the relevant goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) the inclusion of the goods produced in the United States will increase the cost of the project by more than 25 percent. If the head of the Federal department or agency waives the Buy American provision, then the head of the department or agency is required to publish a detailed justification in the **Federal Register**. Finally, section 1605(d) of the Recovery Act states that the Buy American provision must be applied in a manner consistent with the United States’ obligations under international agreements.

II. PUBLIC INTEREST FINDING

The Secretary of the Department of Homeland Security has determined that it would be inconsistent with the public interest--and particularly with the Recovery Act’s directives to ensure expeditious spending of construction funds consistent with prudent management, as cited above--to apply the Buy American requirement to an entire CBIS project where at least 95% of the costs of the project will comply with Section 1605.

A CBIS is a highly sophisticated electromechanical system for screening checked baggage. It consists of hundreds of mechanical and electrical items. It includes a mechanical conveyor system or baggage handling system (BHS) that transports checked baggage through the system. The CBIS also features a security screening matrix area where baggage is fed through one or more Explosion Detection Systems (EDS) or Explosive Trace Detection (ETD) systems to be analyzed. All of the mechanical and electrical items and processes that make up the CBIS are controlled by a central programmable logic controller (PLC) or programmable controller. The PLC is essentially a computer ‘brain’ used for the automation of electro-mechanical processes, such as the control of machinery on factory assembly lines. The PLC controls all aspects of the CBIS including conveyor belt speeds, baggage tracking and managing the BHS merge points or windows.

CBIS projects are comprised of thousands of manufactured goods, such as conveyor, conveyor motor drives, electrical and communications controls, programmable logic controllers, electronic tracking devices, high speed diverters, vertical sorters, specialty fasteners and switches. Not all of these items are domestically available. Furthermore, in many instances, the geographic origin of the equipment is not readily ascertainable. While arguably DHS would be justified in using the authority under section 1605(b)(2) (non-availability waiver), the burden placed on TSA and contractors in sourcing and evaluating equipment availability would be unduly burdensome,

impracticable and not in keeping with the Recovery Act's overall goal of expeditious spending of recovery funds.

In the construction of such a sophisticated system as a CBIS, complete adherence to the requirements of section 1605(a) is impracticable, if not impossible. And it has become a serious obstacle to ensuring that all identified airports will be able to sign construction contracts by September 30, 2010. Some airport authorities have simply been unable or unwilling to certify that the construction contracts it signs are compliant with the Buy American provisions. The alternative would be for the airports and communities to lose their Recovery Act assistance, requiring TSA to reallocate funds, which is inconsistent with the public interest and the intent and purpose of the Recovery Act.

DHS has considered the disproportionate cost and delay that would ensue if a limited waiver is not issued. The exercise of ascertaining whether compliant products exist or can be made to meet these requirements is already becoming a demanding and time-consuming task far out of proportion to the total percentage of project costs. On balance, the public interest in having these projects completed outweighs the Buy American requirement; particularly where the value of noncompliant goods is relatively small when compared to total project cost. CBIS projects significantly benefit aviation security, baggage screening efficiency and the flying public in general. Also, these projects help stimulate job growth for local construction workers, technicians, equipment designers, engineers, and others who will operate and maintain the equipment. Therefore, DHS supports a limited, nationwide public interest waiver.

DHS has found that it would be inconsistent with the public interest--and particularly with the Recovery Act's directives --to apply the Buy American requirement to an entire CBIS project in which at least 95% of the costs of the project will comply with Section 1605. DHS has determined the 5 percent limit based on research and informed professional judgment as to the maximum total amount of costs used in most CBIS projects.

III. WAIVER

Accordingly, DHS is granting a limited, nationwide waiver of the requirements of section 1605(a) of the Recovery Act, Public Law 111-5, buy American requirements, based on the public interest authority of section 1605(b) (1), provided that at least 95% of the costs of each TSA EBSP project will comply with Section 1605. This waiver applies to all eligible EBSP projects for which the TSA has awarded or will award a project award using Recovery Act funds, and where at least 95% of the costs of the project will comply with Section 1605.

TSA will attempt to obtain 100 percent compliance with buy American provision on all airport projects. For airports that cannot comply 100 percent with the Buy American provision this limited nationwide waiver is available because applying the provision would be inconsistent with the public interest in accordance with section 1605(b)(1). TSA will ensure that on all projects at least 95% of the costs will comply with Section 1605. Recipients who wish to use this waiver should in consultation with their contractors determine the items to be covered by this waiver, must retain relevant documentation as to those items in their project files, and must summarize in reports to TSA the types and/or categories of items to which this waiver is applied, the total cost

of the goods covered by the waiver, and the calculations by which they determined the total cost of materials used in and incorporated into the project.