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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548



B-194859

AUGUST 3, 1979

The Honorable Adam Benjamin, Jr.
House of Representatives



Dear Mr. Benjamin:

By letter dated May 9, 1979, you requested that we obtain information concerning compliance with the Buy America provisions of the Surface Transportation Assistance Act of 1978 in the award of a contract for the construction of a bridge in Lake County, Indiana. In a subsequent discussion with your office, we agreed to provide information on life-cycle costs of steel and concrete bridges and Federal Highway Administration (FHWA) monitoring of its Buy America requirements. We agreed also to answer three specific legal questions concerning FHWA Buy America regulations, Indiana Buy America law, and FHWA and Indiana State Highway Commission awareness of and compliance with these laws and regulations.

On June 28, 1979, we briefed your office on the results of our work in these areas. At that time, your office requested that we give you a letter summarizing the information provided at the briefing.

The contract, for \$53.5 million, awarded by the Indiana State Highway Commission, was for the construction of a continuous segmented concrete bridge. Ninety percent of the project's cost is to be funded by FHWA. Following the contract award, newspapers reported that the contractor intended to use foreign steel in constructing the bridge. Subsequent correspondence from the contractor to the Indiana State Highway Commission stated that the contractor intended to purchase steel products, with the possible exception of strand steel, from domestic suppliers. By letter dated June 8, 1979, the contractor notified the State that the strand steel also would be purchased from a domestic supplier.

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Life-cycle costs--concrete and steel bridges

As agreed with your office, we limited our work in this area to a review and summarization of existing information on life-cycle costs of concrete and steel bridges (construction costs plus maintenance costs over the life of the bridge). We discussed this subject with FHWA officials in FHWA Washington headquarters and Indiana division offices, State officials in three States, and an official with the American Association of State Highway and Transportation Officials. None of these knew of any formal studies that had been done on this issue.

However, a number of the State and FHWA officials expressed opinions on the life-cycle costs of the two types of bridges. They told us that they do not determine life-cycle costs because maintenance costs are not a factor in awarding contracts. Contracts are awarded on the basis of the lowest bid for construction.

Most of the officials who expressed an opinion believed that where the bridges are of comparable design and are under similar environmental conditions, maintenance costs would be about the same for concrete or steel bridges. Thus, the bridge with the lowest initial cost would have the lowest life-cycle cost.

One State official said that minor maintenance costs would be about the same but, overall, maintenance of steel bridges would be greater. He noted that in his State the cost of repainting 20-year-old steel bridges would be as much as the initial construction costs. He noted, however, that new designs and technology for steel bridges had reduced the amount of steel and painting. An FHWA official believed that steel bridges would be more cost effective over their life.

FHWA's monitoring of the Buy America provisions

According to FHWA officials, the agency has no special provisions for monitoring compliance with its Buy America

requirements. These requirements, or State Buy America requirements if they are more restrictive, are made part of the construction contract and are considered the same as any other contract provision.) The Indiana State Buy America provisions were included in the contract we reviewed.

According to FHWA officials, (the States are primarily responsible for monitoring contractors' compliance with contract terms.) The States rely on a project engineer to assure contractors' compliance with contract provisions. The project engineer approves all materials used in construction as complying with the plans and specifications. The engineer would approve steel products by reviewing a mill test, which is a written report accompanying the steel, noting where the steel was manufactured, the date it was poured, the temperature at which it was poured, its chemical makeup, and other information. This information could be used in monitoring the Buy America provision.

Generally, FHWA monitoring consists of occasional reviews of State operations. FHWA Indiana division officials and a representative of the Department of Transportation's Office of Inspector General said that they have not reviewed compliance with the Buy America requirements.

Legal questions

Your office asked us to provide answers to the following legal questions concerning the FHWA and State Buy America requirements.

QUESTION: Does FHWA's regulation promulgated pursuant to §401 (of the Surface Transportation Assistance Act of 1978) manifest congressional intent? If not, why not, and what will the Department of Transportation do to rectify the situation?

ANSWER: Yes, the FHWA regulation does manifest congressional intent in that §401 specifically states that (the Buy America provisions shall not apply where the Secretary of Transportation determines that their application would

It was the intent of Congress that

be inconsistent with the public interest.) Thus, the Congress gave the Secretary discretion to waive the section, and he has done so.

The Surface Transportation Assistance Act of 1978, Public Law 95-599, §401, 92 Stat. 2756 (1978) states:

"Sec. 401. (a). Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated by this Act or by any Act amended by this Act and administered by the Department of Transportation, whose total cost exceeds \$500,000 unless only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, and supplies mined, produced, or manufactured, as the case may be, in the United States, will be used in such project.

(b) The provisions of subsection (a) of this section shall not apply where the Secretary determines--

(1) their application would be inconsistent with the public interest; * * *."

Other exceptions apply if the cost of domestic material is unreasonable with respect to rolling stock; if supplies are not "sufficient and reasonably available" and of a "satisfactory" quality; or if inclusion of domestic materials would increase the cost of a project by more than 10 percent.

The FHWA Administrator, to whom authority to waive §401 apparently was delegated, announced (in an emergency regulation effective November 6, 1978, that ^{while it had been} it had been determined ^{that it was} to be in the public interest to temporarily waive the ^{section} section except for structural steel, defined as "shapes, plates, H-piling, and sheet piling." The

preamble to the regulation states that foreign structural steel is the only product having a significant nationwide effect on the cost of Federal-aid highway construction projects (43 Fed. Reg. 53717 (1978), amending 23 C.F.R. Part 635, Subpart D).

There is little legislative history for §401. The Senate Committee on Environment and Public Works expressed concern that large amounts of "foreign steel" were being used in federally assisted highway construction projects and estimated that 25 percent of the bridges on the interstate system used "foreign steel." (S. Rep. No. 95-833, 95th Cong., 2d Sess. 18 (1978)). However, the committee did not identify any particular type of foreign steel as affecting the economy. Thus, neither the legislative history nor the act itself provides a basis to dispute FHWA's decision that it is in the public interest to limit the application of §401 to foreign structural steel.

FHWA states that comments are still being received on the emergency regulation and that it may be revised.

QUESTION: In spite of the FHWA regulation, would Indiana law deny the use of foreign steel (prestressed cable) if the contractor used it while it was available in comparable form from domestic producers?

ANSWER: Yes, (Indiana law would deny the use of foreign steel, if a relatively new Indiana statute is read literally. The statute requires use of domestic steel in State projects unless it is not produced in "sufficient quantities to meet the requirements of the contract.")

Public Law 27, Ind. Stat. Ann. §5-16-8 (Burns, 1978 Supp.) states:

"Sec. 2. (a). Each public agency shall require that every contract for the construction, reconstruction, alteration, repair, improvement or maintenance of public works contain a provision that, if any steel products are to be used or supplied in the performance of the contract or

subcontract, only steel products as defined by this chapter shall be used or supplied in the performance of the contract or any of the subcontracts unless the head of the public agency determines, in writing, that the cost of steel products is deemed to be unreasonable."

Cost is considered unreasonable if there is a 15-percent difference between domestic and foreign steel. Steel products are defined as:

"* * * products rolled, formed, shaped, drawn, extruded, forged, cast, fabricated, or otherwise similarly processed, or processed by a combination of two (2) or more of such operations, from steel made in the United States by the open hearth, basic oxygen, electric furnace, Bessemer or other steel making process."

The contract in question contains a supplemental specification which requires use of domestic steel products, as defined by the Indiana statute; however, it also contains an exception for "materials for prestressing and extruded steel sections for bridge expansion joints."

We believe the Indiana statute is broad enough to cover both prestressed and extruded steel. Thus, the question is whether these types of steel are either so expensive or unavailable that the exception was properly included in the contract.

Correspondence between the Indiana State Highway Commission and FHWA indicates that they understood the State requirements would be enforced "except under conditions of shortages or if the market and construction industry makes a concerted effort to have the Commission permit foreign materials." The State statute, rather than the FHWA regulation, applies because it is more stringent. (See 23 C.F.R. 635.410(b)(4), supra.)

An informal determination (not a written one, as required by the statute) was made that only about 30 percent of the U.S. demand for the steel in question

was available domestically. While this may constitute commercial unavailability, the Indiana statute appears to require the contractor to use domestic steel unless not enough is produced in the United States for this particular bridge:

"Sec. 4. The provisions of this chapter do not apply where the head of the public agency determines, in writing, that steel products are not produced in the United States in sufficient quantities to meet the requirements of the contract."

This statute was approved on March 3, 1978; Indiana courts have not yet construed it. We question whether it should be read literally or as the Indiana State Highway Commission and FHWA have interpreted it, and we suggest that the State Attorney General be asked for an opinion.

We also note that the regulations implementing the Buy American Act applicable to direct Federal procurement distinguish "components" from "end products." Material which is brought to a construction site for incorporation into work at the site is considered domestic if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the total cost of all its components (Federal Procurement Regulations § 1-18.601 (1964 ed., amend 48)). Under this analysis, if concrete bridge segments incorporating steel were manufactured offsite, and the steel cost less than 50 percent of their total cost, steel would be merely a foreign component of a domestic end product.

In this case, the contractor has stated that foreign steel, if used for prestressing, would have represented less than 3 percent of the total contract value; however, the precise amounts cannot be broken out on the basis of the unit prices contained in its bid. Again, we suggest that the State Attorney General be consulted to determine whether the Indiana Legislature was aware of or intended the "component" and "end product" distinction in connection with the Indiana statute.

QUESTION: Were FHWA and the Indiana State Highway Commission aware of §401 and Indiana Code 5-16-8, and was their action contrary to either law?

ANSWER: Yes, our review showed that these officials were aware of both Buy America provisions. For the reasons outlined above, we cannot conclude that their action was contrary to either.

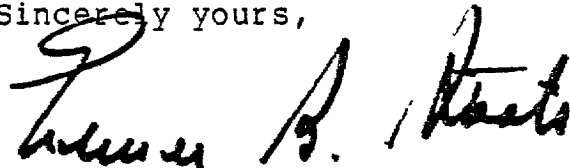
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It should be noted that (there may be questions about the constitutionality of the Indiana statute. In the leading case, a California court found that California's Buy America Act effectively placed an embargo on foreign products and encroached upon the Federal Government's power over foreign relations. (Bethlehem Steel Corp. v. Bd. of Comm'rs., 176 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969)). On the other hand, the New Jersey Supreme Court distinguished that State's statute on grounds that it provided certain exceptions and did not have a demonstrable effect on foreign affairs. (K.S.B. Technical Sales Corp. v. New Jersey Water Supply Commission, 381 A. 2d 774, 784 (1977)).

The New York Legislature recently passed a Buy America Act which, as of July 13, 1979, had not been acted upon by the Governor. Questions were being raised about conflict between the statute and the multilateral trade negotiations agreed to by the United States, in Geneva during April 1979. (See "The Wall Street Journal," July 13, 1979, at 8, Col. 1). *in the event there is a*

As instructed by your office, we have not obtained comments from FHWA on the matters discussed in this report. Also, as arranged with your office, copies of this report will be available to interested parties who request them. We are sending copies to the Secretary of Transportation.

Sincerely yours,



Comptroller General
of the United States