

From: [Alan S. Zimmet](#)
To: [Alvin Burns](#); [Edith Randle](#)
Cc: [Nikki C. Day](#)
Subject: Award of electric bus RFP to BYD
Date: Wednesday, October 13, 2021 5:03:45 PM

Following up on our conversation today, you asked us to review federal statute and guidance to determine if PSTA could enter into an agreement with BYD, and if other agencies could “piggyback” off of PSTA’s procurement of electric buses. You have advised that BYD is a Chinese corporation that receives Chinese government funds. The relevant federal statute to address your question is the National Defense Authority Action for Fiscal Year 2020 (the “Act”) which was adopted on December 20, 2019. The Act generally prohibits the use of FTA funds to purchase rolling stock from certain corporations with foreign ties. For purposes of this email, and based on your statements, I am going to assume that BYD is a restricted manufacturer under the Act. This seems to be confirmed by information provided by BYD that addresses the application of this statute and FTA guidance to the purchase of BYD products.

While the Act prohibits the use of FTA funds to purchase rolling stock from restricted manufacturers such as BYD, the Act provides that this prohibition does not take effect until 2 years after the Act was adopted, or December 20, 2021. 49 USC section 5323(u)(5)(B). The Act specifically allows a public transit agency to enter into an agreement for the purchase of rolling stock of buses prior to December 20, 2021. The FTA has issued guidance on the application of the Act. While not binding, PSTA has some assurance that FTA will apply the Act as set forth in its guidance. FTA’s guidance states that if a public transit agency enters into an agreement for the purchase of buses over multiple years beyond December 20, 2021 with a restricted manufacturer, the bus purchases pursuant to that contract beyond December 20 2021 will be eligible for FTA funding, so long as the contract with the restricted manufacturer was entered into prior to December 20, 2021. Therefore, if PSTA enters into an agreement with BYD for the purchase of buses prior to December 20, 2021 that provides for the purchase of buses in future years, those bus purchases will be eligible for FTA funding so long as they are made within 5 years of the date of the agreement with BYD. See 49 USC section 5325(e). Please note that the 5 years runs from the date of the agreement, not from December 20, 2021.

As for other public transit agencies that wish to “piggyback” off PSTA’s procurement, according to the FTA guidance, they also would have to enter into their own agreement with BYD prior to December 20, 2021. PSTA should respond to any inquiries from such agencies by providing the FTA guidance (see link below) and referring them to their respective counsel.

Please let me know if you have any further questions regarding these issues.

Here is the FTA Guidance:

<https://www.transit.dot.gov/funding/procurement/frequently-asked-questions-regarding-section-7613-national-defense>

Here are links to the two relevant federal statutes:

<https://www.law.cornell.edu/uscode/text/49/5323>

<https://www.law.cornell.edu/uscode/text/49/5325>

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