

# FTA

FEDERAL TRANSIT ADMINISTRATION

## Buy America Update

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U.S. Department of Transportation  
Federal Transit Administration

# Agenda

- Buy America Requirements
- Fast Act Amendments
- Rolling Stock
- Waivers
- Construction Projects
- Common Buy America Issues

# Statutory Requirement

- 49 U.S.C. § 5323(j)(1):

*“The Secretary may obligate an amount to be appropriated to carry out this chapter for a **project** only if the **steel, iron, and manufactured goods** used in the project **are produced in the United States.**”*

# Regulations: 49 CFR Part 661

- 49 CFR 661.3 defines:
  - Rolling Stock
  - Steel & Iron End Products, including Bridges, Structures, and Trackwork including turnouts, running rail, and contact rail
  - Manufactured End Products - Not made primarily of steel or iron, including structures (terminals, depots, garages, and bus shelters), ties and ballast; contact rail not made primarily of steel or iron; fare collection systems; computers; information systems; security systems; data processing systems; and mobile lifts, hoists, and elevators.

# Steel & Iron 49 CFR § 661.5(b)

- All production must occur in the United States (exception: metallurgical refining)
- Applies to structural (load-bearing) steel and iron (e.g., girders, I-beams, trestles) used on construction projects
- Does not apply to manufactured products that happen to incorporate components made of steel or iron (e.g., electrical cabinets, bus shelter frames)

# Manufactured Products

## § 661.5(d)

- A broad catch-all - anything procured with FTA financial assistance
- “Systems” are manufactured products – see sample list in Appendix A of section 661.3
- Includes lighting systems, surveillance systems, communications systems, fare collection systems, fire suppression systems
- 100% components must be US-made

# Manufactured Product

- 49 CFR 661.5(d):
  - For a manufactured product to be considered produced in the US, the following requirements need to be met:
    - All manufacturing processes for the product must take place in US; and
    - All of the components of the product must be of US origin. A component is considered of US origin if it is manufactured in the United States, regardless of the origin of its subcomponents.

# Fast Act Amendments

- Rolling Stock
  - Phased increase in domestic content for rolling stock
  - Explicitly included pilot vehicles in definition of rolling stock
  - Allows the cost of US steel or iron used for carbody shells as domestic content
- Other Changes
  - Small Purchase Waivers
  - Non-availability Waivers

# Rolling Stock Waiver

## 49 U.S.C. § 5323(j)(2)(C)

(C) when **procuring** rolling stock (including train control, communication, traction power equipment, and rolling stock prototypes) under this chapter--

(i) the cost of components and subcomponents **produced** in the United States

(I) **for fiscal years 2016 and 2017**, is more than **60** percent of the cost of all components of the rolling stock;

(II) **for fiscal years 2018 and 2019**, is more than **65** percent of the cost of all components of the rolling stock; and

(III) **for fiscal year 2020 and each fiscal year thereafter**, is more than **70** percent of the cost of all components of the rolling stock; and

(ii) final assembly of the rolling stock has occurred in the United States;

# FTA Final Policy Statement

- Contracts entered into before October 1, 2015
  - 60% domestic content applies, regardless of when vehicles are delivered or option exercised
  - No assignment of options (“piggybacking”)
- Contracts entered into after October 1, 2015
  - Domestic content in effect for the year of delivery of the first production vehicle applies:
    - FY2016-2017: 60%
    - FY2018-2019: 65%
    - FY2020+: 70%

# FTA Public Interest Waiver

- 60% domestic content applies, regardless of when vehicles are delivered or option exercised for the following contracts:
  - Contracts entered into between October 1, 2015 and December 4, 2015
  - Contracts entered into after December 4, 2015 as a result of solicitations advertised before December 4, 2015
  - Contract solicitations advertised on or after December 4, 2015 and entered into within 60 days of publication of the Federal Register notice
- No assignment of options (“piggybacking”)

# Calculation of Domestic Content

- FTA will adjust the calculation for determining whether a component is of domestic origin under 49 CFR 661.11 to accommodate the increase in domestic content for FY2018 and beyond.
  - For vehicles subject to the more than 65% domestic content, more than 65% of the subcomponents of that component, by cost, must be of domestic origin, and for FY2020 or beyond, more than 70 percent of the subcomponents of the component must be of domestic origin.
  - Manufacture of the component must take place in the United States.
- Additionally, if a component is determined to be of domestic origin, its entire cost may be used in calculating the cost of content of an end product.

# Cost of Domestic Steel & Iron

- The FAST Act, which added 49 U.S.C. 5323(j)(5), allows domestic content to include steel and iron produced in the United States and incorporated into a rolling stock frame or car shell outside the United States, provided that the frame or car shell is imported back into the United States for final assembly.
  - Only applies to vehicles that cost more than \$300,000.
- Manufacturers may include the cost of domestic steel and iron on vehicles produced after October 1, 2015, the effective date of the FAST Act.

# Train Control, Communication and

## Traction Power Equipment

- The domestic content requirement in effect on the date a contract was signed for train control, communication, and traction power equipment will control.
  - Contracts signed in FY2016 or FY2017, shall require an overall domestic content that exceeds 60 %; contracts signed in FY2018 or 2019, must include overall domestic content that exceeds 65%; and contracts signed in FY2020 or beyond, the domestic content must exceed 70%.

# Procurements of Ferry Vessels

- Due to the long lead time in establishing vessel design specifications, obtaining Coast Guard certifications and other regulatory approval, the date on which a transit agency signs the vessel contract will govern the domestic content for all vessels delivered under that contract.
- Vessel contracts domestic content requirements:
  - Contracts signed during FY2016 or 2017, more than 60%
  - Contracts signed during FY2018 or 2019, more than 65%
  - Contracts signed in FY2020 and beyond, more than 70%.

# State Purchasing Schedules

- For purchase orders placed against State schedules on or after October 1, 2015, for rolling stock that will be delivered in FY 2016 or 2017, the domestic content requirement must exceed 60%. For purchase orders placed against State schedules for rolling stock that will be delivered in FY2018 or 2019, the domestic content must exceed 65%, and for purchase orders placed against State schedules for rolling stock that will be delivered in FY2020 or beyond, the domestic content must exceed 70%.

# Statutory Waivers

- Section 5323(j)(2) sets forth 4 statutory waivers:
  - Applying Buy America would be inconsistent with the public interest;
  - Non-availability -- the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality;
  - Rolling stock (including train control, communication, traction power equipment, and rolling stock prototypes) waiver
    - Note: Under FAST Act domestic content is increasing from more than 60% to more than 70%; final assembly in the U.S. still required; or
  - Including domestic material will increase the cost of the overall project by more than 25 percent.
- Section 5323(j)(13) Small Purchase Waiver
  - For purposes of determining whether a purchase qualifies for a general public interest waiver under paragraph (2)(A) of this subsection, including under any regulation promulgated under that paragraph, the term "small purchase" means a purchase of not more than \$150,000.

# Small Purchase Waiver

- 49 USC 5323(j)(13) Definition of small purchase.
  - For purposes of determining whether a **purchase** qualifies for a general public interest waiver under paragraph (2)(A) of this subsection, including under any regulation promulgated under that paragraph, the term “small purchase” means a **purchase** of not more than \$150,000.

# September 16, 2016

## Dear Colleague Letter

- Small Purchase Waiver is now statutory
- Applies to *purchases* of \$150,000 or less
  - Previously limited to projects of \$150,000 or less
- Waiver is capped at \$150,000 and will **NOT** increase with changes to the small purchase threshold set in the FAR

# Small Purchase Waiver

- Applies to contracts entered into by either the recipient or subrecipient or subcontracts entered into by general contractors
- Total Contract Price, including labor, materials and options must be \$150,000 or less
- Cannot break apart larger procurements into \$150,000 pieces to circumvent Buy America

# Non-Availability Waivers

- 49 U.S.C. 5323(j)(6):
  - If non-availability waiver is denied, FTA must certify that the steel, iron, or manufactured goods, as applicable, is produced in the United States in a sufficient and reasonably available amount and of a satisfactory quality; and
  - include a list of known manufacturers in the United States from which the item can be obtained.

# Non-Availability Waivers

- 49 CFR 661.7(c) Non-availability Waivers
  - Administrator may presume materials are not available if no responsive and responsible bid is received offering an item produced in the United States.
  - In the case of a sole source procurement, grantee must provide sufficient information which indicates that the item is only available from a single source or is not produced in sufficient and reasonably available quantities of a satisfactory quality in the United States.
  - After contract award, the Administrator may grant a non-availability waiver, in any case in which a bidder or offeror originally certified compliance in good faith, but can no longer comply with its certification. Grantee must provide sufficient evidence of good faith and that the item cannot now be obtained domestically due to commercial impossibility or impracticability. Case-by-case determination.

# Regulations: 49 CFR Part 661

- Price Differential Waiver
  - Applies, per the statute, when the domestic content will increase the cost of the “overall project” by more than 25 percent.
  - 661.7(d) reference to contract is incorrect

# Minivan Waiver

- Public Interest Waiver for non-ADA accessible minivans and vans was issued on October 20, 2016 (81 FR 72667)
- Waiver of domestic content requirements for 3 years
- Final Assembly must be in U.S.

# Why Do Waiver Requests Take So Long?

- Statutory requirement that before granting a waiver, FTA must publish notice in the *Federal Register* for comment. 49 U.S.C. 5323(j)(3)
- Waivers are disfavored and are only granted when the grantee is able to provide documentation supporting the waiver request
- Grantees do not provide adequate information to support their waiver applications
- Grantees wait too long to come in for a waiver request
- Project designers are not aware of Buy America requirements

# Construction Projects

- Project Sponsor ultimately responsible for compliance
  - Buy America clause must be included in all procurements and contracts
- Obtain Pre-Award Buy America Certifications from all prime contractors & manufacturers and insist that their contracts have “pass down” to subs
- No audits required; however, diligence and follow-up (audit or investigation) needed for any indication of exceptions/complaints
- Waiver requests to FTA from Project Sponsor
  - Limited circumstances set forth in 49 CFR 661.8 for manufacturer to make direct request

# Utility Relocation Work

- Unique Characteristics of Utility Work
  - The work is performed by a monopoly (utility agreements v. competitive procurements)
  - Most likely, there is no Federal contractual interest in the completed utility work
  - Utility work related to Federally-funded construction is traditionally construed as a "displacement " triggering compensation

# FTA Statement on Applicability of Buy America to Utility Work

“Buy America rules have always applied to the entire scope of an FTA-funded project, including utility work. ... The statute is clear -- FTA may obligate money for a project ‘only if the steel, iron, and manufactured goods used in the project are produced in the United States.’ 49 U.S.C. § 5323(j). Buy America rules apply to the entire project. Application to the entire project means that all contracts necessary to complete a project must include Buy America provisions.”

September 7, 2012 Letter from Chief Counsel

# Southern California Edison – April 30, 2014 Letter from Chief Counsel

## Key Determinations

- If a utility company is prohibited from seeking reimbursement from FTA, then the costs are not part of the FTA-funded project and not subject to FTA's Buy America requirements.
- The grantee is responsible for ensuring compliance with Buy America (material procurements) and flowing this down to the utility company.
- Betterments (upgrades to utility facilities), which are paid for by the utility company at its own expense, are not considered part of the FTA-funded project and not subject to FTA's Buy America requirements.

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# Common Buy America Issues

- Grantees, contractors and manufacturers do not understand Buy America and often confuse it with Buy American or other non-DOT Buy America provisions
  - Person certifying compliance applies wrong standard (e.g., rolling stock vs. manufactured product)
  - Grantee includes certificates for both rolling stock and manufactured products in the same solicitation
  - Manufacturer does not understand definition of end product, system, components or subcomponents
  - Manufacturer/Project Sponsor defines the end product as too large
  - Supplier does not understanding the difference between manufacturing and assembly

# Common Buy America Issues

1. Contractor notifies Project Sponsor of inability to deliver domestic material/supplies after having certified intent to fully comply with Buy America requirements
2. Buy America non-compliance discovered while project is under construction or after item is installed
3. Performance specification cannot be met with domestic supply/material and is discovered by Contractor prior to placing order but after certifying intent to comply
4. Increased use of technologically-advanced materials having sustainable traits increasing compliance

# Common Buy America Issues

5. Use of brand names, or equal, places inordinate and sometimes impossible responsibility on Contractor to meet with domestic source
6. Using specifications that can only be met with a non-domestic product
7. Existing business relationships with municipal agencies or utilities that allow for non-domestic materials/supplies
8. Supplier sources material from both domestic and non-domestic manufacturers and doesn't pay attention to the inventory used on FTA-funded project
9. Domestic manufacturer is no longer manufacturing product in the US

# Common Buy America Issues

10. Grantee procrastinates raising Buy America issue with FTA.

*Unlike, wine and cheese, Buy America issues do not get better with age.*



# Best Practices for Grantees

- Cite Buy America requirement in all procurement docs
- Require Buy America Certificates from all contractors, subcontractors, and material suppliers
- Identify all likely components & develop a project specific “checklist”
- Hold Pre-Proposal or Pre-Bid meetings emphasizing the need to comply with Buy America requirements
- Require all suppliers to include Buy America compliance sheets (key components listed) with deliverable submittals
- Collect & retain Receiving documentation
- Take Photos of material origin markings

# Best Practices for Grantees

- Promptly address issues on non-compliance
- Assign Buy America Coordinator - responsible for tracking and maintaining files
- Put more contractual responsibility on Engineers and Designers to specify construction/manufacturing materials and supplies that have domestic availability
- Consult with industry Professional organizations and societies to address problems with common materials and supplies that have experienced problems

# More Information

- Buy America Policy Statement, [81 Fed. Reg. 60278](#) (Sept. 1, 2016)
- Dear Colleague Letter, September 16, 2016
- Buy America page: [www.transit.dot.gov](http://www.transit.dot.gov)
- Sign up for GovDelivery Emails on Buy America page
- [Cecelia.Comito@dot.gov](mailto:Cecelia.Comito@dot.gov) or (202)366-2217



Federal Transit  
Administration  
[www.fta.dot.gov](http://www.fta.dot.gov)