

Legal Research Digest 31

GUIDE TO FEDERAL BUY AMERICA REQUIREMENTS—2009 SUPPLEMENT

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Jaye Pershing Johnson, Esq. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

The nation's 6,000 plus transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their business. Some transit programs involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private-sector programs, and labor or environmental standards relating to transit operations. Also, much of the information that is needed by transit attorneys to address legal concerns is scattered and fragmented. Consequently, it would be helpful to the transit lawyer to have well-resourced and well-documented reports on specific legal topics available to the transit legal community.

The *Legal Research Digests* (LRDs) are developed to assist transit attorneys in dealing with the myriad of initiatives and problems associated with transit start-up and operations, as well as with day-to-day legal work. The LRDs address such issues as eminent domain, civil rights, constitutional rights, contracting, environmental concerns, labor, procurement, risk management, security, tort liability, and zoning. The transit legal research, when conducted through the TRB's legal studies process, either collects primary data that generally are not available elsewhere or performs analysis of existing literature.

Applications

The Buy America requirements imposed on transit grantees by federal law have often been misunder-

stood by federal transit grantees and the focus of considerable discussion in the transit industry. Essentially, transit agencies undertaking federally assisted procurement for manufactured products, or infrastructure projects containing steel, iron, or manufactured products, must ensure that the item or project meets statutory requirements concerning domestic origin and content.

Legal Research Digest (LRD) 17, the initial digest on this subject, was published in 2001 with the hope of clarifying many of the issues that arise under Buy America. Since LRD 17 was published, there have been amendments to the Buy America provisions. The Federal Transit Administration now provides a plethora of material on its Web site that is intended to ensure greater understanding of Buy America. Nonetheless, the project committee thought this topic should be supplemented to provide a convenient guide to available resources.

Transit operators purchase billions in manufactured goods and rolling stock buses and trains. Uncertainty in the way federal requirements apply can be costly and/or delay the purchase of essential equipment. Some transit agencies have extensive experience with Buy America issues and are familiar with its nuances and pitfalls. Others are not quite so familiar. Hopefully, this report will assist transit attorneys and procurement officials in the latter category anticipate and avoid Buy America pitfalls.

This report provides an easy to use guide to the Buy America requirements, with an emphasis on the specific requirements that apply to manufactured products and to rolling stock. It should be useful to attorneys, transit administrators, contracting officers, engineers, and all officials that have purchasing responsibilities.

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GUIDE TO FEDERAL BUY AMERICA REQUIREMENTS—2009 SUPPLEMENT

By Jaye Pershing Johnson, Esquire

I. INTRODUCTION

Buy America is a fact of the public transit industry and has been a requirement for federally-funded transit procurements for the last 30 years. This digest is intended to assist transit attorneys and procurement officers to anticipate and avoid Buy America compliance pitfalls before they arise, thereby avoiding unnecessary Buy America–related delay, expense, and aggravation in federally-funded procurements. This digest was originally prepared in 2001 and then revised and updated in 2009 due to substantive statutory and regulatory changes affecting the implementation of the Federal Buy America provisions.

To shed some light on what Buy America is intended to accomplish, Section II of this digest discusses the history and evolution of Buy America. This discussion provides perspective on the social and economic purposes and priorities of Congress in enacting Buy America. Section III of the digest discusses, in light of its history, what Buy America is *not*. For example, neither the Buy American Act nor the North American Free Trade Agreement (NAFTA) apply to transit procurements. Section IV is a brief discussion of the Buy America requirements in the 2009 American Recovery and Reinvestment Act. Section V of the digest attempts to parse and clarify the complicated regulatory scheme of Buy America. Section VI discusses the circumstances under which a grantee may obtain a waiver from Buy America, and Section VII considers Buy America enforcement, including what remedies the Federal Transit Administration (FTA) might pursue against a grantee for noncompliance.

A questionnaire (see Appendix A) was circulated among various members of the public transit community in connection with the original preparation of this report in 2001. The questionnaire was intended to elicit anecdotal evidence from the public transit industry regarding the impact of Buy America; responses are cited throughout this report. Eighty responses were received, and 29 of those were from transit agencies in urbanized areas with populations exceeding 200,000. It is interesting to note that 44, or more than half of the questionnaire responses, indicated no negative Buy America impact on transit procurements whatsoever. Twenty-five other responses indicated that the impact of Buy America had been greatly reduced by the \$100,000 “small purchase” and microcomputer exceptions. Only five of the respondents recounted their Buy America war stories in any detail; three of those five were from

public transit agencies in urbanized areas with populations exceeding 200,000.¹

The impact of Buy America has been reduced for many public transit agencies as a result of (1) the threshold of \$100,000 for Buy America applicability; (2) the nonapplicability of Buy America to microcomputer equipment; and (3) the elimination of federal operating grants to agencies in urbanized areas with populations exceeding 200,000.² Several transit agencies indicated that problematic Buy America procurements are funded with other than federal money (i.e., state or local monies appropriated for that purpose or tax-exempt bond funds) if possible.

Many respondents indicated Buy America was not an issue because the requirements are now familiar to and have been accommodated by the industry. As the Berks Area Reading Transportation Authority noted in its questionnaire response, “Since this regulation has been around so long and all vendors are familiar with the requirements, it’s really not a problem or an issue.”

What is not known is the number of public transit agencies that may have insufficient experience with Buy America to appreciate its nuance and complexity. The FTA does not routinely initiate investigations of Buy America compliance. The bulk of compliance issues are raised by disappointed bidders that challenge the Buy America certifications of successful competitors.³ This digest is for public transit attorneys and procurement officers who may have reason to believe they fall into this category, for those who may be conducting a procurement for something more complex than rolling stock, and for anyone else who has ever been intrigued or affected by Buy America.

Since 2001, the FTA has greatly expanded the use of its Web site to enhance Buy America transparency. In a very user-friendly format, one can access the following online:

- Regulations.
- Waivers and Letters of Interpretation (including clerical error, final assembly, guidance, investigations, and pre-award and post-delivery reviews and waivers (both granted and denied)).
- Notices of Waiver Requests.
- Dear Colleague Letters.
- Questions and Answers.

¹ Six other responses were not substantive, indicating only that another public entity conducted their procurements.

² 49 U.S.C. § 5307.

³ While FTA is authorized to initiate Buy America audits *de novo*, in practice, this seldom occurs.

- Handbooks.
- Best Practices.
- Congressional Testimony.
- *Federal Register* Selected Buy America Rulemaking documents (1981–present).

Examples from FTA waiver letters and letters of interpretation are also cited throughout this digest.⁴

II. HISTORY OF THE BUY AMERICA REQUIREMENTS

A. The 1933 Buy American Act

In 1875 Congress enacted one of the first statutory provisions, other than tariff acts, relating to preferential treatment of American material in contracts for public improvements.⁵ This act applied only to materials purchased by the Department of War and was superseded in 1933 by legislation popularly referred to as the “Buy American” Act.⁶ The Buy American Act was enacted as part of the government’s response to the unemployment crisis of the Great Depression.

The legislative history of the Buy American Act has been referred to as “sparse and confusing;” however, the protection of the American worker is the dominant theme.⁷ Remarks of Senator Davis on the Senate floor during the debate of the bill typify Congress’s concern that the Act benefit the American worker: “The adoption of this amendment will mean work for our workers. It will help stem the tide of foreign competition and thus prevent further reduction of wages for the American worker.”⁸

Similarly, Representative Eaton stated that the Act was designed as a device “to foster and protect American industry, American workers, and American invested capital.”⁹

The Buy American provisions were originally added as a Senate amendment to a House appropriations bill and consist of two key sections. First, unless a department head determines it to be inconsistent with the public interest, or the cost to be unreasonable, only unmanufactured materials mined or produced in the United States and only manufactured materials manufactured in the United States substantially from all materials mined, produced, or manufactured in the

United States shall be acquired for public use.¹⁰ This provision does not apply to materials for use outside the United States or if domestic materials are not produced in sufficient quantity and of a satisfactory quality. Second, every contract for public building or public work projects in the United States shall use unmanufactured materials mined or produced in the United States and only manufactured materials manufactured in the United States substantially from all materials mined, produced, or manufactured in the United States.¹¹ If a contractor fails to comply with this requirement, it will be barred from further government contracts for a period of 3 years.¹²

The Buy American Act defines the terms “public use,” “public building,” and “public work” to mean only use by, building of, and public work of the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands.¹³ The Buy American Act is applicable only to purchases by federal agencies and departments and not to grants made by federal agencies and departments. Purchases by state and local governments with federal funds are not subject to the Buy American Act.

B. Urban Mass Transportation Act of 1964

The applicability of Buy American regulations to transit procurements in the 1930s was limited because transit systems were controlled largely by private companies. Following World War II, the economics of the transit industry were changing and transit was no longer profitable. By 1955, publicly-operated transit systems were carrying 35 percent of the Nation’s transit ridership; this percentage had risen to 50 percent by 1960.¹⁴ In 1964, Congress passed the Urban Mass Transportation Act of 1964,¹⁵ which authorized federal assistance for up to 80 percent of the cost of transit equipment through the Urban Mass Transit Administration (UMTA). However, while Section 9(c) of the Urban Mass Transportation Act of 1964 originally mirrored the intent of the Buy American Act and provided for use by contractors of domestically manufactured articles, this provision was repealed by the Housing and Urban Development Act of 1965.¹⁶ Further, in 1974,

⁴ Go to http://www.fta.dot.gov/laws/leg_reg_178.html.

⁵ Act of Mar. 3, 1875, ch. 133, § 2, 18 Stat. 455 (1875) (codified at 41 U.S.C. § 10, superseded by 41 U.S.C. §§ 10(a)–10(c)).

⁶ Buy American Act, ch. 212, tit. III, 47 Stat. 1520 (1933) (codified as amended at 41 U.S.C. §§ 10(a)–10(c)).

⁷ *Allis Chalmers Corp., Hydro-Turbine Div. v. Friedkin*, 635 F. 2d 248,257, n. 17, 258 (C.A. Pa. 1980).

⁸ *Id.* 76 Cong. Rec. 1933 (1933) (remarks of Sen. Davis). See also *Textron Inc., Bell Helicopter Textron Div. v. Adams*, 493 F. Supp. 824 (D.C. Dist. Ct. 1980).

⁹ 76 Cong. Rec. 1896 (1933) (remarks of Rep. Eaton), cited in *Textron Inc., Bell Helicopter Textron Div. v. Adams*, 493 F. Supp. 824, 830 (D.C. Dist. Ct. 1980).

¹⁰ 41 U.S.C. § 10(a).

¹¹ 41 U.S.C. § 10(b).

¹² For a comprehensive discussion of the legislative history of the Buy American Act, see Lawrence Hughes, *Buy North America: A Revision to FTA Buy America Requirements*, 23 TRANSP. L.J. (1995).

¹³ 41 U.S.C. § 10(c).

¹⁴ Hughes, *supra* note 12, at 213.

¹⁵ Urban Mass Transportation Act of 1964 (now known as the Federal Transit Act), P.L. No. 88-365, 78 Stat. 302 (1964) (codified at 49 U.S.C. § 1601 *et seq.*).

¹⁶ Housing and Urban Development Act of 1965, P.L. No. 89-117, § 1109 (1965).

Congress amended the Urban Mass Transportation Act to prohibit discriminatory specifications.¹⁷

C. Congress Enacts Buy America for Transit

By the mid-1970s, a growing number of congressional lawmakers were concerned at how much success foreign manufacturers were having in U.S. heavy industries markets; this concern was especially high with regard to the U.S. transit supplier community.¹⁸ The Surface Transportation Assistance Act of 1978 (1978 STAA) included a Buy America provision applicable to the UMTA program. The provision established a preference for products produced, mined, or manufactured in the United States. This initial provision only applied to contracts of UMTA grantees exceeding \$500,000.¹⁹

As with the 1933 Buy American provisions, Section 401(b) of the 1978 STAA excepted the application of the new Buy America provisions where the Secretary of Transportation determined their application to be inconsistent with the public interest, if their application to rolling stock would result in unreasonable costs, if domestic supplies were unavailable or were of unsatisfactory quality, or if the inclusion of domestic materials would increase the cost of the overall project contract by more than 10 percent. In December 1978, UMTA issued regulations applicable only to UMTA grantees that implemented the 1978 STAA Buy America provisions and instituted the requirement for all contractors to complete a certificate of compliance with Buy America (unless an appropriate waiver was granted).²⁰

The 1978 STAA Buy America provision was enacted in response to what was perceived at the time as an uneven playing field that had been shaped by European and Japanese protectionism.²¹ The House Report stated that the Buy America provision was added:

to protect American manufacturers and suppliers who have suffered substantial losses as a result of competition from foreign imports which, in many cases, are underpriced because of governmental financial support and cheap labor costs. The loss of business by domestic companies adds to the trade deficit, fuels inflation and leads to unemployment and reduced productivity.²²

¹⁷ Urban Mass Transportation Act § 3, P.L. No. 93-503, § 106, Nov. 26, 1974.

¹⁸ Hughes, *supra* note 12, at 213–14; citing Cliff Henke, *Bye Bye, Buy America?*, METRO, Sept./Oct. 1994, at A40.

¹⁹ Surface Transportation Assistance Act of 1978, P.L. No. 95-599, § 401, 92 Stat. 2689 (1978) (codified at 49 U.S.C. § 1602—Title IV Buy America).

²⁰ Buy America Requirements, 43 Fed. Reg. 57,144 (1978) (codified at 49 C.F.R. pt. 660).

²¹ Henke, *supra* note 18, at A42.

²² H.R. REP. NO. 95-1485, at 68 (1978).

D. Congress Strengthens Buy America for Transit

Section 165 of the Surface Transportation Act of 1982 (1982 STAA)²³ deleted 1978 STAA Section 401 and strengthened the Buy America provisions for transit with the intent of curing the perceived inequity of trade laws in the face of high unemployment.²⁴ The 1982 STAA prohibited the obligation of UMTA-administered grant funds unless steel, cement, and manufactured products used in transit projects were produced in the United States; cement was later deleted from the materials and products covered under 1982 STAA Section 165.²⁵ The 1982 STAA also eliminated the \$500,000 threshold for application of Buy America requirements and permitted states to adopt more stringent Buy America requirements.

The 1982 STAA included four exceptions to the Buy America requirements. Like the 1978 STAA, the 1982 STAA permitted exceptions upon a determination by the Secretary of Transportation that the application of Buy America would be inconsistent with the public interest, or if domestic supplies were not produced in sufficient and reasonably available quantities and of a satisfactory quality. The third exception provided that Buy America would not apply if the inclusion of domestic material would increase the cost of the overall project contract by more than 10 percent in the case of projects for the acquisition of buses and other rolling stock or 25 percent in the case of other projects.

The fourth “exception” essentially established an entirely new Buy America program with its own requirements, applicable only to rolling stock. This exception provided that the Buy America provisions would not apply to the procurement of buses and other rolling stock if the cost of components produced in the United States was more than 50 percent of the cost of all components of the vehicles or equipment, and if final assembly took place in the United States. “Rolling stock” was defined to include train control, communications, and traction power equipment. Labor costs involved in the final assembly were not to be counted for purposes of calculating the component’s costs.

In September 1983, UMTA issued revised Buy America regulations consistent with the provisions of the 1982 STAA.²⁶

²³ Surface Transportation Assistance Act of 1982, P.L. No. 97-424, § 165, 96 Stat. 2136 (1982) (codified at 23 U.S.C. § 101 *et seq.*).

²⁴ The House Report discusses at length a provision that was not incorporated in the final 1982 STAA and that would have prohibited the use of federal funds to purchase rolling stock if a significant portion of such rolling stock is a product of a country with a trade deficit with the United States. H.R. REP. NO. 97-555, at 44–45 (1982).

²⁵ Section 10 of P.L. No. 98-229, enacted on Mar. 9, 1984, amended § 165 by striking “cement” from § 165(a).

²⁶ 48 Fed. Reg. 41,562 (1983).

E. Surface Transportation and Uniform Relocation Assistance Act of 1987

The Surface Transportation and Uniform Relocation Assistance Act of 1987 (1987 STURAA) made additional significant changes to UMTA's Buy America requirements for buses and other rolling stock. First, the 1987 STURAA required that more than 50 percent of the cost of a component's subcomponents be of U.S. origin for the component to be considered of U.S. origin. Further, the domestic content requirement was increased from 50 percent to 55 percent as of October 1, 1989, and to 60 percent as of October 1, 1991.²⁷ Finally, the project cost differential waiver for rolling stock was increased from 10 percent to 25 percent. One additional change, which has had a tremendous impact on the timing, cost, and logistics of future rolling stock procurements, was Congress's direction to UMTA in Section 319 of the 1987 STURAA to require pre-award and post-delivery audits to ensure compliance with Federal Motor Vehicle Safety Standards (FMVSS) requirements, Federal Buy America requirements, and a grantee's bid specifications. Section 319 further provides that UMTA require independent inspection and audits, noting that a manufacturer's certification of compliance with certain requirements is not sufficient. Congress was concerned with the quality of mass transportation equipment purchased with federal financial assistance and the inspection and verification procedures used in the procurement process.²⁸

In January 1991, UMTA adopted its final rule implementing the 1987 STURAA.²⁹ UMTA's final rule enumerated the train control, communications, and traction power equipment to be considered rolling stock for purposes of implementing Section 165 of the 1982 STAA. Contact rail was expressly excluded as traction power equipment, and automatic door control was excluded as part of the train control system.³⁰ UMTA's final rule also included, as appendices to the regulation, listings of major components of buses and rail rolling stock set out in the Conference Report to the 1987 STURAA.³¹ While the lists are not exhaustive, UMTA's intent in including them as appendices to the regulation was to assist grantees and manufacturers in distinguishing between the terms "components" and "subcomponents" for the purpose of establishing Buy America compliance. (This concept of enumerating components and subcomponents may also be the source of some confusion, as a "component" may, in certain instances, be an end product and different rules may apply. This issue is addressed below in Section V.D.I.)

The enumeration was also intended to prevent possible abuse resulting from overclassifying vehicle parts as subcomponents.³²

In September 1991, UMTA acted to require pre-award and post-delivery audits of rolling stock purchased by federal grantees pursuant to its authority under 1987 STURAA.³³ The final rule required each grantee to certify to UMTA that it will conduct pre-award and post-delivery audits to verify compliance with its bid specification requirements, Buy America, and FMVSS requirements.³⁴ For UMTA-funded procurements of 10 or more buses and any number of railcars or other rolling stock, a resident inspector is required at the vehicle manufacturing site. For 10 or fewer buses, a grantee would make its certification after visual inspection and road testing of the vehicles. UMTA noted in its general overview of comments to the proposed rule that most commenters objected to the actual implementation scheme proposed as "burdensome, redundant, and costly."³⁵

In response to the confusion that generally reigned after the institution of the pre-award and post-delivery audit requirements, the FTA published a series of questions and answers regarding its 1991 rule less than 1 year after issuance of the rule. The FTA made special note in this document that the legislative history of the 1987 STURAA indicated that it was the intent of the drafters that the paperwork requirements imposed by this provision would not create a significant cost burden.³⁶

In August 1994, the FTA issued "regulatory guidance" regarding the small purchase exemption to the pre-award/post-delivery audit regulations. This guidance clarified that the exemption from the requirement of an on-site inspector from procurements of 10 or fewer buses applies to subrecipients under a statewide procurement, emphasizing that the intent of the exception was to relieve FTA grantees procuring a small number of vehicles from the cost burden associated with the requirement.³⁷

On May 1, 1995, the FTA issued additional guidance on the pre-award and post-delivery audit process, publishing extensive guides: FTA-DC-90-7713-93-1, Revision B, *Conducting Pre-Award and Post-Delivery Reviews for Bus Procurements*, and FTA-DC-90-7713-94-1, Revision B, *Conducting Pre-Award and Post-Delivery Reviews for Rail Vehicle Procurements*. These guides detail certifications and documents needed to support the procurement process, suggest procedures for conducting the pre-award and post-delivery reviews, provide examples and other activities that may be helpful to those conducting such reviews, and provide more responses to frequently asked questions.

²⁷ The House version of the bill sought an increase to 85 percent. See H.R. REP. NO. 100-27 (1987) (Conf. Rep.).

²⁸ Surface Transportation and Uniform Relocation Assistance Act of 1987, P.L. No. 100-17, § 337 (1987).

²⁹ 56 Fed. Reg. 926 (Jan. 9, 1991).

³⁰ *Id.*

³¹ 56 Fed. Reg. 926 (1991); 49 C.F.R. § 661.11, Apps. B and C.

³² *Id.*

³³ 56 Fed. Reg. 48,384 (Sept. 24, 1991).

³⁴ 49 U.S.C. § 5323(l), 49 C.F.R. § 663.7.

³⁵ 56 Fed. Reg. 48,384 (1991).

³⁶ 57 Fed. Reg. 10,834, 10,835 (1992).

³⁷ 59 Fed. Reg. 43,778 (1994).

Finally, as all of the preceding guidance apparently remained problematic, the FTA issued a “Dear Colleague Letter,” dated March 18, 1997, that outlined procedures a grantee must use to ensure that any vehicle it purchases complies with Buy America.³⁸ *This letter was amended by a Dear Colleague Letter dated August 5, 1997; however, the amendment was subsequently rescinded by a Dear Colleague Letter dated September 25, 1997. The March 18, 1997, Dear Colleague Letter provisions were later codified in the provisions of The Transportation Equity Act for the 21st Century (TEA-21) (defined herein).* The FTA noted that many grantees and their contractors were not conducting adequate pre-award and post-delivery reviews of the Buy America requirements, particularly with respect to final assembly activities. The letter specifies the minimum activities required of the final assembly process for rail cars and buses, respectively, and enumerates certain post-delivery review requirements for grantees.

While the mission of this digest is not intended to suggest alternative approaches to Buy America administration, the foregoing history, as well as a significant transit industry response, suggests that there must be a better way.³⁹ (Additional discussion on the pre-award and post-delivery audit process is described below in Section V.D.4.)

F. Intermodal Surface Transportation Efficiency Act of 1991 and Transportation Equity Act for the 21st Century

The Buy America provisions applicable to transit procurements were generally untouched by Congress in the 1990s, even as they were subject to several regulatory revisions and clarifications. The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA)⁴⁰ amended the Buy America requirements by adding “iron” to the products covered, thereby extending Buy America protection to iron and iron products, in addition to steel and manufactured products, which were previously protected. ISTEA also added a provision that would make any person who intentionally misrepresents that a product was made in the United States

³⁸ “Dear Colleague Letters” are frequently issued by the FTA Administrator to provide guidance to grantees on industry-wide issues regarding FTA policies and procedures. Dear Colleague Letters are not rulemakings, but are more analogous to the FTA *Best Practices Manual* or FTA Circulars. As noted above, the March 18, 1997, Dear Colleague Letter was given the force of law when it was codified in the Transportation Equity Act for the 21st Century (TEA-21).

³⁹ While more efficient and effective mechanisms have been suggested, such as centralizing responsibility for compliance with the manufacturers rather than the myriad transit properties, or instituting a compliance certification process more akin to a DBE certification process, the FTA merely implemented congressional direction; alternative audit suggestions should be scrutinized for the need for legislative, as opposed to regulatory, change.

⁴⁰ Intermodal Surface Transportation Efficiency Act of 1991, P.L. No. 102-240, 105 Stat. 1914.

ineligible to receive funds authorized under ISTEA. Last, but not least, ISTEA changed UMTA’s name to the FTA. The term “FTA” will be used hereafter in this digest. In subsequent legislation, Congress formally codified the Buy America requirements.⁴¹

When the FTA enacted regulations implementing ISTEA, it also updated and clarified the regulations by adding a definition of “component,” which is applicable to both manufactured products and rolling stock. Further, FTA clarified that for a manufactured product to be produced in the United States, its components must be of U.S. origin. A component is considered to be of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.

In 1998, TEA-21 modified the Buy America provisions only slightly.⁴² Section 3020(b) of TEA-21 permitted bidders to correct inadvertent errors in their Buy America certifications after bid opening, and Section 3035 provided that all buses manufactured after September 1, 1999, that are purchased with FTA funds must conform to the March 18, 1997, Dear Colleague Letter (discussed above in Subsection E).

In February 2003, the FTA issued a final rule implementing Section 3020(b).⁴³ The FTA amended 49 C.F.R. § 661.13(b) to allow correction of a certification when there has been a clerical or inadvertent error, but prohibited situations where the bidder would gain a competitive advantage over other bidders. A bidder may submit to the FTA Chief Counsel, within 10 days of bid opening, a written explanation of the circumstances surrounding the submission of the incomplete or incorrect certification, including evidence of intent. The final rule explicitly states that inadvertent or clerical error shall not include failure to sign the certificate, submission of certificates of both compliance and noncompliance, or failure to submit any certification. Further, certification based on ignorance of the proper application of the Buy America requirements is not an inadvertent or clerical error.⁴⁴

G. Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users⁴⁵

The Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users (SAFETEA-LU) was signed into law on August 10, 2005, authorizing federal transit and highway programs through Fiscal Year (FY) 2009. The changes to Buy America included in SAFETEA-LU 1) required the Secretary to issue a detailed justification as to why a waiver based on a public interest determination serves the public interest and to publish such waiver in the *Federal Register*; 2) permitted a party adversely affected by agency action with respect to Buy America to seek review under

⁴¹ See Pub. L. No. 103-272, 108 Stat. 745 (codified at 49 U.S.C. § 5323 (j)).

⁴² TEA-21, Pub. L. No. 105-178, 112 Stat. 107 (1998).

⁴³ 68 Fed. Reg. 9798 (2003).

⁴⁴ 49 C.F.R. § 661.13(b)(1) and (3).

⁴⁵ See Pub. L. No. 109-59.

the Administrative Procedure Act (APA)⁴⁶; 3) repealed the general waiver previously granted in the regulations for 15-passenger vans and wagons produced by Chrysler Corporation; and 4) directed the Secretary to issue a rule to clarify the microprocessor waiver; define end product, negotiated procurement, and contractor; allow for a post-award waiver; and include a certification under a negotiated procurement process.

SAFETEA-LU also amended and restated 49 U.S.C. § 5323(l) to authorize the Secretary to terminate financial assistance and seek reimbursement directly or by offsetting amounts in the event of a false certification. SAFETEA-LU also provided for pre-award and post-delivery review of rolling stock purchases⁴⁷ and provided that rolling stock procurements of 20 or fewer vehicles for other than urban areas or small urban areas shall be subject to the same requirements as procurements for 10 or fewer buses under 49 C.F.R. § 663.37(c).⁴⁸

Finally, as a more ministerial matter, 49 U.S.C. § 5323(j)(6) was updated to refer to funding under the Federal Public Transportation Act of 2005 rather than ISTEA.⁴⁹

In November 2005, the FTA issued a notice of proposed rulemaking (NPRM I) to implement changes consistent with and directed by SAFETEA-LU.⁵⁰ This rulemaking was done in two parts. An interim final rule, issued in March 2006, addressed fewer issues than were proposed in the NPRM I because of the complexity and number of recommendations and issues presented during the comment period. The interim final rule addressed the following issues, which had received little or no public comment.⁵¹

Administrative Review

In NPRM I, the FTA requested comments on its proposal to implement the SAFETEA-LU requirement that parties adversely affected by an agency action may seek judicial review under the APA. FTA considered the statutory directive largely self-explanatory and took the position that FTA always believed that its final agency actions are subject to judicial review under the APA.⁵² To clarify this, the FTA modified 49 C.F.R. § 661.20 to reflect that *all* parties have the right to judicial review under the APA. Further, FTA took the position that additional “enforcement” language was unnecessary, as it “already has full range of administrative tools at its disposal to enforce Buy America compliance to include

⁴⁶ 5 U.S.C. § 702 *et seq.*

⁴⁷ These audits were mandated by § 319 of the 1987 STURAA. The Safe, Accountable, Flexible, Efficient Transportation Equity Act—A Legacy for Users (SAFETEA-LU) raised the threshold to provide limited relief to operators in non-urbanized areas.

⁴⁸ 49 U.S.C. § 5323(m).

⁴⁹ 49 U.S.C. § 5323(j)(6).

⁵⁰ 70 Fed. Reg. 71246.

⁵¹ 71 Fed. Reg. 14112.

⁵² 70 Fed. Reg. 71247.

possible cancellation of federal funding of a project, and suspension and debarment actions for willful violations.⁵³

Repeal of General Waiver for Chrysler Vans

In 1984, FTA granted its first public interest waiver at the request of Chrysler Corporation, along with several states, which petitioned FTA to grant such a waiver for Chrysler’s 15-passenger vans, which are assembled in Canada. This waiver was subsequently included as a General Waiver in Appendix A to 49 C.F.R. § 661.7. Chrysler argued that since only it and the Ford Motor Company manufactured the vans, the waiver was necessary in the interest of competition.⁵⁴ This waiver applied to 15-passenger vans and wagons only. SAFETEA-LU repealed these two general waivers for Chrysler vehicles in Appendix A. Accordingly, FTA deleted Subsections (b) and (c) of Appendix A, 49 C.F.R. § 7661.7, and Subsection (d), the general waiver pertaining to microcomputers, was redesignated as Subsection (b).⁵⁵

Definition of Negotiated Procurement

SAFETEA-LU required the Secretary to issue a rule to define the term “negotiated procurement.” In the NPRM I, the FTA distinguished negotiated procurements from sealed bidding as “marked by greater flexibility and variety than sealed bid solicitations.” Negotiated procurements may include discussions or negotiations between agency and offerors, may include multiple offers by each contractor with the “best and final offer” or “final revised” offer controlling, and contracting officers generally have discretion to weigh non-price factors to a greater extent.⁵⁶ As a result, FTA amended 49 C.F.R. § 661.3 to add the “flexible” definition of negotiated contracts used in Federal Acquisition Regulations (FAR), Part 15, as follows: “Negotiated Procurement means a contract awarded using other than sealed bidding procedures.” FTA took the position that this language is broad enough to reflect standard practices in a particular industry or personal preferences and expressed its preference to base the definition on existing precedents in public contracting law and practice. Further, FTA declined to define “sealed bidding” on the grounds it was unnecessary.⁵⁷

Definition of Contractor

SAFETEA-LU required the Secretary to issue a rule to define the term “contractor.” In the NPRM I, FTA

⁵³ 71 Fed. Reg. 14113.

⁵⁴ 49 Fed. Reg. 13,944 (1984); 49 C.F.R. § 661.7, App. A. Fifteen-passenger wagons produced by Chrysler Corporation also received a public interest exemption from the requirement that final assembly of the wagons take place in the United States. (Letter to Chrysler Corporation from FTA dated May 13, 1987.)

⁵⁵ See 71 Fed. Reg. 14117.

⁵⁶ 70 Fed. Reg. 71248–71249.

⁵⁷ 71 Fed. Reg. 14113.

proposed two alternative definitions, one from 48 C.F.R. § 9.403 (the Federal Acquisition Regulation on Debarment, Suspension, and Ineligibility), and another from the Contractor Disputes Act (CDA), 41 U.S.C. § 601(4). The bulk of the comments received favored the proposed definition of “contractor” from the CDA. Several commenters felt that the definition from the FAR is worded too broadly to include parties to whom a contract has not yet been issued or has no business relationship with a grantee. As discussed above, with relation to the term “negotiated procurement,” the FTA reiterated its preference to base proposed definitions and regulatory requirements on existing precedents in public contracting law and practice.

FTA preferred the plain meaning of the CDA usage, which limits a contractor to a party that executes a government contract with the government. Nevertheless, in response to comments that the CDA definition lacks clarity, and to make the term “contractor” more applicable to the scenario of third-party contracts, FTA adopted as final the following definition in 49 C.F.R. § 661.3: “Contractor means a party to a third party contract other than the grantee.”⁵⁸

Certification Under Negotiated Procurement

SAFETEA-LU requires that “in any case in which a negotiated procurement is used, compliance with the Buy America requirements shall be determined on the basis of the certification submitted with the final offer.”⁵⁹ In response to comments received to the NPRM I, the FTA added the following language to 49 C.F.R. § 661.13: “For negotiated procurements, compliance with the Buy America requirements shall be determined on the basis of the certification submitted with the final offer or revised final proposal. However, where a grantee awards on the basis of initial proposals without discussion, the certification submitted with the initial proposal shall control.”

The FTA expressed its belief that the additional language on “initial proposals” puts grantees and suppliers squarely on notice of the absolute necessity of submitting Buy America certifications with any final offer or final revised proposal, in any type of negotiated procurement. Offerors will not be excluded for failing to include certifications with initial proposals where grantees do not award on the basis of initial proposals.⁶⁰

This regulation is consistent with prior FTA guidance issued in 2004 to Palm Beach County in response to a request as to whether Palm Beach County may reject an initial offer as not being responsive to a request for proposals (RFP) without performing a technical evaluation, if the offer does not include a Buy America certificate. The FTA advised that the county must reject a proposal that does not include a Buy America certificate as “technically unacceptable” if the county reserves the right to accept initial proposals and there

is no opportunity to change a proposal to comply with the Buy America certification requirement. “However, if the County enters into discussions requiring submission of final offers, any offeror could change its original proposal to include a Buy America certification, or change the original certification,” prior to best and final offers.⁶¹ Similarly, grantees may not unfairly eliminate proposals from the “competitive range” simply because there was not Buy America certification. The FTA advised the county that the determination of technical acceptability is part of the technical evaluation and the county may not reject an initial offer without performing at least some form of technical evaluation.⁶²

Pre-Award and Post-Delivery Review of Rolling Stock Purchases

SAFETEA-LU amends 49 U.S.C. § 5323(m) by mandating that rolling stock procurements of 20 vehicles or fewer that serve rural (other than urbanized) areas, or urbanized areas of 200,000 people or fewer, are subject to the same post-delivery certification requirements that apply to procurements of “10 or fewer buses,” i.e., no resident factory inspector is required.⁶³ FTA considers this mandate to be self-explanatory, and to implement the change, revised 49 C.F.R. § 663.37(c) to reiterate the statutory exemption. FTA declined to eliminate the requirement for post-delivery audits in this type of smaller procurement, citing congressional intent to require pre-award and post-award audits in all cases.⁶⁴

Miscellaneous Corrections and Clarifications

The interim final rule also made several other minor corrections and clarifications to the Buy America regulations, including 1) replacing references to the 1987 STURRA with SAFETEA-LU in 49 C.F.R. § 661.3, “Definitions”; 2) in 49 C.F.R. § 661.6, adding the word “iron” after the word “steel” to reflect that iron, as well as steel and manufactured products, is subject to the certification requirement; and 3) adding the words “offer” or “offeror” after the words “bid” or “bidder,” respectively, to reflect that grantees may elect to use negotiated procurement methods in FTA-funded projects.⁶⁵

After the issuance of the interim final rule, the FTA issued a Second Notice of Proposed Rulemaking (NPRM II).⁶⁶ NPRM II addressed six issues that were identified in NPRM I but not covered in the interim final rule. The final rule⁶⁷ addresses those six issues as follows.

⁶¹ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Palm Beach County (July 27, 2004), available at http://www.fta.dot.gov/printer_friendly/leg_reg_616.html (Last visited Dec. 1, 2009).

⁶² *Id.*

⁶³ 71 Fed. Reg. 14115.

⁶⁴ 71 Fed. Reg. 14116

⁶⁵ 71 Fed. Reg. 14116, 70 Fed. Reg. 71254.

⁶⁶ 71 Fed. Reg. 69412, Nov. 30, 2006.

⁶⁷ 72 Fed. Reg. 53688, Sept. 20, 2007.

⁵⁸ 71 Fed. Reg. 14114.

⁵⁹ Pub. L. No. 109-59, § 3023(i)(5)(D).

⁶⁰ 71 Fed. Reg. 14115.

Published Justification for Public Interest Waivers

SAFETEA-LU requires the FTA to issue detailed justifications for public interest waivers and to publish such waivers in the *Federal Register*. In the final rule, the FTA took the position that SAFETEA-LU intended a four-step process: 1) Publish the incoming waiver request on FTA's Web site for public review and comment; 2) based on the comments received, prepare a justification that explains the rationale for approving or denying the waiver request; 3) publish the justification in the *Federal Register* for notice and comment with a reasonable time for notice and comment of not more than 7 days⁶⁸; and 4) post copies of the final decision on the FTA Web site.⁶⁹ While SAFETEA-LU and its legislative history only require the publication of a written justification when the justification supports a waiver request, FTA publishes both approval and denial letters on its Web site.⁷⁰ Further, interested parties can subscribe to be notified whenever a new item is published on a specific FTA Web page, including FTA's table of its *Federal Register* publications.⁷¹

Microcomputer/Microprocessor Waivers

SAFETEA-LU requires the FTA to "clarify" that any waiver of the Buy America requirements for a microprocessor, computer, or microcomputer applies "only to a device used solely for the purpose of processing or storing data" and does not extend to the product or device containing a microprocessor, computer, or microcomputer. FTA notes in NPRM II and the final rule that Congress did not intend for FTA to change its current regulatory treatment of microcomputer equipment.⁷² Since congressional intent was to "clarify" and not alter existing regulatory practice, FTA amended paragraph (b) of Appendix A to 49 C.F.R. § 661.7 to continue to allow both software and input/output devices to be covered under the microcomputer/microprocessor waiver, provided that the waiver is limited to the device used solely for the processing or storing of data. While the language of the amendment does not expressly include input/output devices, FTA took the position that the express inclusion of input/output devices was not needed, as it was used in a previous definition of microcomputer, referring to 50 *Federal Register* 18760, May 2, 1985: "A basic microcomputer includes a microproc-

essor, storage, and input/output facility, which may or not be one chip." The microcomputer/microprocessor waiver is expressly limited to exclude an entire product or device, such as a laptop computer, video display monitor, fare card reader, or similar piece of hardware or equipment, merely because it contains a microprocessor or microcomputer and is not used solely for the purposes of processing or storing data.⁷³

Post-Award Waivers

SAFETEA LU required the FTA to adopt regulations to permit a grantee to request a nonavailability waiver from the Buy America requirements under a 49 C.F.R. § 661.7(c) contract award in any case in which the contractor has made a certification of compliance with the requirements in good faith.⁷⁴ Such a post-award waiver was previously not permitted under 49 C.F.R. § 661.13(c), which binds a contractor to its original certification or the certification submitted with its final offer, as the case may be. In response, and in the interest of consistency, FTA opted to use the existing process for nonavailability waivers set forth in 49 C.F.R. § 661.7(c).

The FTA establishes a two-part test for consideration of a post-contract award waiver. First, a grantee should provide specific evidence that the original certification was made in good faith when justifying a post-award waiver, such as information about the origin of the product or materials, invoices, or other relevant solicitation documents. Second, the grantee must demonstrate that the item to be procured cannot now be obtained domestically due to commercial impossibility or practicability. FTA articulated a "commercially senseless" standard, derived from federal case law as the appropriate standard for determining commercial impracticability in Buy America post-award waivers. When questions arise as to what constitutes commercial impracticability or impossibility, FTA will rely on precedents established in federal contract law for guidance.⁷⁵

FTA will consider all appropriate factors on a case-by-case basis, including such factors as the status of other bidders or offerors and project schedule and budget. It is the grantee's responsibility to point out such factors in requesting a post-award waiver.⁷⁶

⁶⁸ 49 C.F.R. § 661.7(b) regarding waivers was amended to codify this third step of the process.

⁶⁹ 72 Fed. Reg. 53690.

⁷⁰ 72 Fed. Reg. 53689; 49 U.S.C. § 5323(j)(3); H.R. REP. NO. 109-203, at 952 (2005) (Conf. Rep.).

⁷¹ 72 Fed. Reg. 53689. Go to http://www.fta.dot.gov/laws/leg_reg_86.html and click on the link "Sign up for e-mail updates."

⁷² 71 Fed. Reg. 69414; 72 Fed. Reg. 53696; See H.R. REP. NO. 109-203, at 952 (2005) (Conf. Rep.) ("In directing the Secretary to issue new regulations regarding microprocessors, computers or microcomputers, there is no intent to change the existing regulatory treatment of software or of microcomputer equipment.")

⁷³ See discussion below under the heading "Waivers and Exemptions—General Waivers Available Under Appendix A to 49 C.F.R. § 661.7—Microcomputers and Software."

⁷⁴ Pub. L. No. 109-59, tit. III, § 3023(i)(5).

⁷⁵ See *Int'l Elecs. Corp. v. United States*, 227 Ct. Cl. 208, 231, 646 F. 2d 496, 510 (1981); *Jennie-O Foods, Inc. v. United States*, 217 Ct. Cl. 314, 329, 580 F. 2d 400, 409 (1978). *Maxwell Dynamometer Co. v. United States*, 181 Ct. Cl. 607, 630-31, 386 F.2d 855,870 (1967).

⁷⁶ 49 C.F.R. § 661.7(c)(3); 72 Fed. Reg. 53690-53691; 71 Fed. Reg. 69415.

End Product

SAFETEA-LU directed the FTA to define “end product,” and in defining the term, FTA was to “develop a list of representative items that are subject to the Buy America requirements, and [address] the procurement of systems under the definition to ensure that major system procurements are not used to circumvent the Buy America Requirements.”⁷⁷ FTA adopted “non-shifting” methodology and ended its long-standing application of a “shifting” approach, whereby the end product is the deliverable item specified by the grantee in a third-party contract. Under this “shifting” methodology, the same item could be an end product, a component, or a subcomponent, depending upon the deliverable specified in the third-party contract. In the final rule, FTA removed and reserved paragraph(s) of 49 C.F.R. § 661.11⁷⁸ and defined “end product” in 49 C.F.R. § 661.3, basing its definition on that found in the FAR at 48 C.F.R. Part 25, implementing the Buy American Act, 41 U.S.C. 10a–10d, as follows:

End product means any vehicle, structure, product, article, material, supply or system, which directly incorporates constituent components at the final assembly location, that is acquired for public use under a federally-funded third-party contract, and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s). A list of representative end products is included in Appendix A to this section.

Under the new definition, end products do not shift, but rather directly incorporate constituent components at the final assembly location and are ready to provide the intended end function or use without any further manufacturing or assembly changes.⁷⁹ An illustrative list of representative end products is included at Appendix A to 49 C.F.R. § 661.3. The list, which includes rolling stock end products, steel and iron end products, and manufactured end products, is intended to be “representative not exhaustive.”⁸⁰ FTA clarified that the term “mobile” was intended to apply to all portable or moveable lifts, hoists, and elevators. FTA did not intend that permanently affixed lifts, hoists, and elevators would be “end products,” but rather components of the larger facility that itself could constitute the “end product.”⁸¹

Using the “nonshifting” methodology, procurements for replacement parts, whether components or subcomponents of the original end product, would retain their characterization and the requirements applicable to manufactured products under 49 C.F.R. § 661.5 would apply. Components and subcomponents will not be considered “end products.” FTA recognized that the illus-

trative list of “typical” rolling stock components in Appendices B and C to 49 C.F.R. § 661.11 will assist procurement officers in identifying components. For manufactured products, the contract or the bid proposal would govern the hierarchy of components and subcomponents.

“System” as End Product

SAFETEA-LU requires the FTA to address the procurement of systems “to ensure that major ‘system’ procurements are not used to circumvent the Buy America requirements.”⁸² FTA added the word “system” to the definition of “end product” and defined “system” as:

A machine, product or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices which are intended to contribute together to a clearly defined function. Factors to consider in determining whether a system constitutes an end product include: Whether performance warranties apply to an integrated system (regardless of whether components are separately warranted); whether products perform on an integrated basis with other products in a system or are operated independently of associated products in the system; or whether transit agencies routinely procure a product separately (other than as replacement or spare parts).⁸³

This definition excludes all second and subsequent system elements that may be proposed by a supplier to meet the site capacity specified by the grantee, which would be additional end products applied to the original system. In addition, second and subsequent sites in a procurement addressing multiple geographic sites would be additional end products applied to the original system. FTA expressed its belief that the definition and the new illustrative criteria will protect against the bundling of unrelated independent products into a “super system” that would undermine the principles of Buy America. Further, FTA will review major system procurements in Buy America cases to determine whether an integrated system actually exists, and, if so, which items of equipment constitute the system. Under FTA’s Buy America methodology, if a purported end product is too large or is composed of what FTA traditionally considers to be separate end products, such as structures, vehicles, fare collection equipment, etc., FTA will break it down into its constituent end products.⁸⁴

Communication, Train Control, and Traction Power Equipment

As part of the SAFETEA-LU rulemaking process, FTA sought comment on three substantive proposals to the Buy America requirements for rolling stock in 49 C.F.R. § 661.11. In the first of these, the FTA sought comment on, and made a determination to continue, its longstanding interpretation that the items of communi-

⁷⁷ Pub. L. No. 109-59, tit. III, § 3023(i)(5).

⁷⁸ Paragraph (s) formerly read, “An end product means any item subject to 49 USC § 5323(j) that is to be acquired by a grantee, as specified in the overall project contract.”

⁷⁹ 49 C.F.R. § 661.3.

⁸⁰ *Id.*, App. A.

⁸¹ 72 Fed. Reg. 53694.

⁸² Pub. L. No. 109-59, tit. III, § 3023(i)(5)(B).

⁸³ 49 C.F.R. § 661.3.

⁸⁴ 71 Fed. Reg. 69421; 72 Fed. Reg. 53693.

cation equipment listed in 49 C.F.R. § 661.11 include wayside equipment, i.e., equipment that is not in or on a vehicle, but is nonetheless subject to the rolling stock standard.⁸⁵

In the second of these three proposals, the FTA sought comment on whether the items of train control, communication, and traction power equipment listed in 49 C.F.R. § 661.11(t), (u), and (v) should be deleted and whether any new items should be added to these lists to reflect new technology. FTA declined to delete any of the enumerated items, but added certain items as recommended by commenters.⁸⁶

FTA also initially declined to add bimetallic power transmission (BPTS) equipment, which is a combination of an aluminum conductor and a stainless steel, abrasion-resistant cap, to the list of power traction equipment in 49 C.F.R. § 661.11(v).⁸⁷ However, after issuing an NIPR on this issue on November 24, 2008,⁸⁸ FTA issued a final rule on June 25, 2009, which amends 49 C.F.R. § 661.11(v) to include BPTS equipment on the list of traction power equipment.⁸⁹ BPTS equipment is now held to a less stringent “final assembly” standard as opposed to a “manufacturing standard.”

Finally, FTA also sought comment on whether the term “communication equipment” should be limited to equipment whose primary function is communication “with or between people” or whether it should be expanded to include a “machine-to-machine” interface. FTA determined that no distinction should be made, as communications networks frequently support both capabilities either directly or indirectly and it cannot always be said whether communication equipment primarily supports one purpose or another. Nevertheless, FTA expressed its intent to continue to scrutinize, on a case-by-case basis, whether equipment may properly be characterized as “communications equipment” within the meaning of 49 U.S.C. § 5323(j) and 40 C.F.R. § 661.11.⁹⁰

⁸⁵ 71 Fed. Reg. 69424; 72 Fed. Reg. 53695.

⁸⁶ 72 Fed. Reg. 53697. Under 49 C.F.R. § 661.11(t), Train Control Equipment, FTA added cab signaling, ATA equipment, ATP equipment, wayside transponders, trip stop equipment, wayside magnets, speed measuring devices, car axle counters, and communication based train control. Under 49 C.F.R. § 661.11(u), Communication Equipment, FTA added antennas; wireless telemetry equipment; passenger information displays; communications control units; communication control heads; wireless intercar transceivers; multiplexers; SCADA systems; LED arrays; screen displays, such as LEDs and LCDs for communications systems; fiber optic transmission equipment; frame or cell-based multiplexing equipment; and communication system network elements. Under 49 C.F.R. § 661.11(v), traction power equipment, FTA added propulsion control systems, surge arrestors, and protective relaying.

⁸⁷ 72 Fed. Reg. 53695.

⁸⁸ 73 Fed. Reg. 70950.

⁸⁹ 74 Fed. Reg. 30237.

⁹⁰ 71 Fed. Reg. 69424; 72 Fed. Reg. 53695.

Statutory Update

Consistent with Section 3023 of SAFETEA-LU, which amended 49 U.S.C. § 5323(j)(6) to strike the reference to ISTEA and replace it with “Federal Transportation Act of 2005,” the final rule amended the debarment and suspension provisions in 49 C.F.R. § 661.18 to replace the reference to ISTEA with SAFETEA-LU.⁹¹

In addition to issuing regulations implementing federal statutory Buy America provisions as discussed above, FTA, pursuant to its statutory authorization, issues waivers from the Buy America provisions when the Secretary of Transportation makes a determination that 1) applying the Buy America provisions would be inconsistent with the public interest; 2) the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of satisfactory quality; or 3) including domestic material will increase the cost of the overall project by more than 25 percent.⁹² (See the discussion below in Section VI.)

III. WHAT BUY AMERICA IS NOT

As may be evident from the discussion of legislative history above, the statutory requirements of the Buy America provisions applicable to transit procurements may be easily confused with other similar or apparently inconsistent provisions of federal law. The following federal statutory provisions are *not* applicable to FTA grant-funded transit procurements:

A. 1933 Buy American Act

The 1933 Buy American Act codified, as amended, at 41 U.S.C. §§ 10a–10d and implemented pursuant to Part 25 of the FAR⁹³ applies only to purchases by federal agencies and departments. Even though federal participation in a transit project may be as high as 80 percent, purchases by state and local governments with federal funds are not subject to the 1933 Buy American Act.⁹⁴ Purchases made by the U.S. Department of Transportation for its own use are subject to the 1933 Buy American provisions; purchases by FTA grantees and their contractors are not. Confusing the FTA Buy America requirements with the 1933 Buy American Act is problematic because application of the 1933 Buy American Act requires the cost of domestic components to exceed 50 percent of the cost of all components, as opposed to the FTA Buy America requirement of 100 percent (or 60 percent for rolling stock). A vendor that

⁹¹ 72 Fed. Reg. 53695.

⁹² 49 U.S.C. § 5323(j)(2).

⁹³ 64 Fed. Reg. 72,416 (1999).

⁹⁴ See letter dated Oct. 5, 2004, from the FTA to the General Counsel of the MBTA and to Mistral Security, explaining that Executive Order 12849, dated May 25, 1993, exempts certain procurements from the requirements of 41 U.S.C. § 10a–10d, but not from the requirements of 49 U.S.C. § 5323(j); see also “Buy America: Frequently Asked Questions,” Number 15, http://www.fta.dot.gov/laws/leg_reg_464.html.

certifies compliance with reference to the 1933 Act clearly could not be compliant with the FTA Buy America requirements. Until or unless there is a complaint, a grantee is unlikely to look behind a vendor's Buy America certification to verify that the entity signing the certification understood the requirement.⁹⁵

B. The North American Free Trade Agreement⁹⁶

FTA grantees are not subject to the provisions of NAFTA.⁹⁷ While the general rule of Chapter 10 of NAFTA is that the three NAFTA countries, United States, Mexico, and Canada, must treat goods and services, and suppliers of such goods and services, from another NAFTA country “no less favorably” than domestic goods, services, and suppliers with respect to purchases by covered government entities, NAFTA expressly excepts from government procurements “non-contractual agreements or any form of government assistance, including cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services to persons or state, provincial and regional governments.”⁹⁸

Products manufactured in Canada are considered foreign goods and are entitled to no special treatment under Buy America.⁹⁹ While the objectives of NAFTA are to open the North American market to free trade, the Buy America barriers to the free trade of transit equipment still exist and remain applicable to FTA grantee procurements.¹⁰⁰

IV. AMERICAN RECOVERY AND REINVESTMENT ACT—BUY AMERICA APPLIES

The American Recovery and Reinvestment Act of 2009 (ARRA) was signed into law on February 17,

⁹⁵ FTA noted 1933 Buy American Act confusion in its notice of proposed waiver from Buy America requirements for small purchases. 60 Fed Reg. 14,178 (1995).

⁹⁶ North American Free Trade Agreement (NAFTA) Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

⁹⁷ See “Buy America: Frequently Asked Questions,” Number 3, http://www.fta.dot.gov/laws/leg_reg_464.html.

⁹⁸ North American Free Trade Agreement Implementation Act, Article 1001(5)(a). The Statement of Administrative Action that accompanied the NAFTA Implementation Act also expressly stated that the rules of Chapter 10 of NAFTA do not apply to certain kinds of purchases by the U.S. government, among them state and local government procurements, including procurements funded by federal grants, such as those made by FTA. H.R. DOC. NO. 103-159, vol. 1, at 584–585 (1993).

⁹⁹ NAFTA negotiations were based largely on the U.S.-Canada Free Trade Agreement (CFTA). FTA expressly noted in 56 Fed. Reg. 926 (1991), “the [CFTA] does not exempt Canadian-made products from the [FTA] Buy America requirements.”

¹⁰⁰ Commentators have noted that the United States has taken an inherently inconsistent position regarding its application of Buy America and NAFTA: transit is a federal function so Buy America may be applied and transit is a state or local function so NAFTA does not apply. See Hughes, *supra* note 12.

2009.¹⁰¹ The ARRA is a multifaceted package of appropriations and tax law changes intended to stimulate the U.S. economy. Of the \$787 billion of spending and tax law changes in ARRA, over \$48 billion is expected to be invested in transportation infrastructure, facilities, and equipment. The ARRA includes a total of \$8.4 billion in General Fund dollars for public transportation appropriated for three different programs: Transit Capital Assistance, Fixed Guideway Infrastructure Investment, and Capital Investment Grants (New/Small Starts).¹⁰²

Section 1605 of the ARRA requires that projects funded by ARRA for the construction, alteration, maintenance, or repair of a public building or public work use American iron, steel, and manufactured goods in the project unless one of the specified exemptions applies. The exemptions include nonavailability, unreasonable cost (an increase of more than 25 percent), and when an exemption is found to be in the public interest. “Public building and public work” may include, without limitation, subways, tunnels, power lines, heavy generators, railways, and the construction, maintenance, or repair of such buildings or work.¹⁰³

On March 5, 2009, the FTA issued a Notice relating to ARRA Public Transportation Apportionments, Allocations, and Grant Program Information.¹⁰⁴ With respect to Buy America, the FTA expressly provided for the applicability of the typical Buy America requirements for transit procurements as follows:

[T]he Buy America requirements under 49 USC § 5323(j) that typically apply to projects accepting federal assistance under the Federal transit program authorized under Chapter 53 of Title 49, United States Code, apply to all capital public transportation projects funded with amounts appropriated in the ARRA. Therefore, an applicant, in carrying out a procurement financed with federal assistance authorized under the ARRA must comply with the applicable Buy America requirements in 49 USC § 5323(j) and 49 C.F.R. part 661.¹⁰⁵

V. BUY AMERICA REQUIREMENTS—TESTS AND INTERPRETATIONS

It has been established that Buy America applies across the board to all FTA grantee purchases of steel, iron, and manufactured goods exceeding \$100,000. If no federal funds are involved in the project, Federal Buy America requirements are not applicable.¹⁰⁶ The Buy

¹⁰¹ Pub. L. No. 111-5.

¹⁰² 74 Fed. Reg. 9657.

¹⁰³ 2 C.F.R. § 176.140.

¹⁰⁴ 74 Fed. Reg. 9656–9683.

¹⁰⁵ *Id.* at 9664. FTA has also provided this advice in a Q&A online found at [http://www.fta.dot.gov/index_9440_9327.html - Grant](http://www.fta.dot.gov/index_9440_9327.html-Grant).

¹⁰⁶ See “Buy America: Frequently Asked Questions,” Number 4, http://www.fta.dot.gov/laws/leg_reg_464.html; see also letter dated Oct. 5, 2004, from FTA to the General Counsel of MBTA and to Mistral Security regarding an investigation requested by a disappointed bidder (“Although MBTA used FTA clauses in the solicitation, FTA’s requirements do not apply to

America requirements apply to intergovernmental agreements or otherwise jointly purchased manufactured products, and grantees are required to pass the requirements down to contractors. There are no statutory exceptions to Buy America other than for cement products¹⁰⁷; however, the Secretary of Transportation is authorized to grant waivers under certain circumstances. Waivers are made on a case-by-case basis, unless they have been codified in the regulations as general waivers. (See the discussion below in Section V.) While rolling stock procurements are considered an exception to the general Buy America requirement, any attorney or procurement officer who has been involved in a rolling stock procurement will tell you that rolling stock is a vehicle and, as such, will be treated as a creature unto itself for purposes of this report. This section analyzes the applicability of Buy America to the three discrete categories: iron and steel in infrastructure projects, manufactured goods, and rolling stock.

A. State and Local Buy America Requirements

Individual states are not precluded from adopting their own state and local Buy National or Buy America restrictions, but they are precluded from inserting “Buy Local” preferences.¹⁰⁸ In 49 U.S.C. § 5323(j)(6), the Secretary of Transportation is expressly prohibited from limiting FTA assistance that restricts any state from imposing more stringent requirements than Buy America or that restricts a recipient of that assistance from complying with those state-imposed requirements.¹⁰⁹

Further, FTA adopted 49 C.F.R. § 661.21, which prohibits FTA grant funding of any contract governed by 1) state Buy America or Buy National preference provisions that are less strict than the federal requirements; 2) state and local Buy National or Buy America preference provisions that are not explicitly set out under state law; and 3) state and local Buy Local preference provisions.¹¹⁰

Procurement officers and attorneys are advised to review and analyze the impact of applicable state and local Buy America and Buy National and state and local Buy Local preference requirements before proceeding with a federally-funded transit procurement.

this procurement because MBTA did not use FTA funds for the purchase: FTA has verified that MBTA used grant funds from the Department of Homeland Security.”)

¹⁰⁷ Section 10 of Public Law 98-229, enacted on Mar. 9, 1984, amended § 165 by striking “cement” from § 165(a) of the 1982 STAA. In the final rule implementing the change, FTA noted that Congress clearly indicated that the domestic preference requirements of § 165 should not be applied to the procurement of cement and cement products in [FTA] grantee third party contracts utilizing federal funds. 50 Fed. Reg. 2289.

¹⁰⁸ See FTA Circular 4220.1E § 8B, http://www.fta.dot.gov/laws/circulars/publications_4063.html.

¹⁰⁹ 49 U.S.C. 5323(j)(6).

¹¹⁰ 49 C.F.R. § 661.21; 56 Fed. Reg. 932 (1991).

B. Iron and Steel in Infrastructure Projects¹¹¹

Under Buy America, federal funds may not be obligated unless steel, iron, and manufactured products, other than rolling stock, used in FTA-funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver.¹¹² These requirements apply to all construction materials made primarily of steel or iron and used in infrastructure projects such as transit facilities, rail lines, and bridges.¹¹³ All steel and iron manufacturing processes must take place in the United States except for metallurgical processes involving refinement of steel additives.¹¹⁴

In 2003, the FTA issued guidance to the Chicago Transit Authority (CTA) regarding applicable law and regulation with respect to steel frogs. CTA had suggested that since the steel frogs are subcomponents of the work, as such they can be of foreign origin. The FTA clarified that, although subcomponents of manufactured products can be of foreign origin, all steel and manufacturing processes must take place in the United States. Further, this requirement applies to “all construction materials made primarily of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams, running rail, and contact rail.”¹¹⁵ The FTA opined,

It is clear that in building a rail line, the frogs and the steel of which they are made must be of U.S. origin as required by 49 C.F.R. 661.5(b) and (c). Once the steel and iron requirements are satisfied, Section 661.5(d), the manufactured product section, applies to the balance of the construction contract.¹¹⁶

This approach was echoed in 2007 in a statement of James S. Simpson, Administrator of FTA, that with respect to infrastructure projects that are made primarily of steel and iron, such as track work or a steel bridge, the requirements are clear: “all steel and iron manufacturing processes must take place in the United States,” whether the item is an end product, a component, or a subcomponent.¹¹⁷

The Buy America steel and iron requirements apply to all construction materials made *primarily* of steel or iron and used in infrastructure projects such as transit

¹¹¹ 49 C.F.R. § 661.5.

¹¹² 49 U.S.C. 5323(j), 49 C.F.R. § 661.5(a).

¹¹³ FED. TRANSIT ADMIN., BEST PRACTICES PROCUREMENT MANUAL, § 4.3.3.2.2, available at http://www.fta.dot.gov/funding/thirdpartyprocurement/bppm/grants_financing_6102.html.

¹¹⁴ 49 C.F.R. § 661.5(b).

¹¹⁵ 49 C.F.R. § 661.5(c).

¹¹⁶ Guidance letter from the FTA to the CTA (Feb. 5, 2003), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹¹⁷ Statement of James S. Simpson before the Subcommittee on Highways and Transit, Committee on Transportation and Infrastructure, U.S. House of Representatives, Apr. 24, 2007.

or maintenance facilities, rail lines (including third rails), and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams or columns, running rail, and contact rail. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured products or rolling stock. FTA preferred not to clarify its use of the word “primarily” in 49 C.F.R. § 661.5(c) since the percentage of steel or iron in a particular item may vary according to an individual producer’s refinement or manufacturing processes. FTA explained:

Generally, the definition refers to construction or building materials made either principally or entirely from steel or iron. All other manufactured products, even though they may contain some steel or iron elements, would not be covered. Therefore, steel girders would fall within the definition while buses with frames made partially from steel, would not be covered.¹¹⁸

Nevertheless, the FTA has given guidance that prefabricated concrete items containing 3 percent to 5 percent volume of steel rebar are not “primarily” made of steel.¹¹⁹

Issues arise when there are assertions that the necessary steel cannot be obtained from American sources.

- In 2009 the FTA granted a post-award nonavailability waiver to the Detroit Department of Transportation for the purchase of steel tubing to be used for the construction of a transit center canopy after a showing by the grantee that the original certification was made in good faith and that the item to be procured could not be obtained domestically due to commercial impossibility or impracticability. The Economic Development Corporation of the City of Detroit provided a list of 3 of the 10 steel companies, which were unsuccessfully contacted for the tubing required.¹²⁰

- In 2005, Valley Metro Rail also requested a post-award public interest for foreign steel when the required domestic steel became unavailable after the contract award. Similarly, FTA found that the grantee had acted in good faith after the Office of Trade Policy for the Commonwealth of Pennsylvania had made exhaustive and detailed inquiries with steel manufacturers and suppliers in that state and elsewhere and was unable to find a single domestic supplier of the steel pipe required.¹²¹

- New Jersey Transit Corporation (NJTC) responded to the questionnaire that its experience has been that, during the construction of large projects that were sub-

stantially under way, a supplier or fabricator of steel may stop producing a necessary gauge of steel.

- The Brockton Area Transit Authority of Brockton, Massachusetts, reported granting a 32-day extension pursuant to its contract with the contractor building its Intermodal Transportation Centre due to the unavailability of domestic steel supplies during the construction of the project. The contractor found that domestic steel deliveries were running approximately 2 months behind schedule. The contractor documented its detailed search for the materials, including its calls to the three American mills that make the size pieces required for the project and four other large steel fabricators and suppliers that could possibly have had surplus steel. Two of these companies were Canadian and were contacted on the theory that they would have more American steel in their shops than Canadian based on the value of the Canadian dollar at the time. The Authority granted the extension, but the contractor was responsible for additional project costs.

- In May 2008, the Utah Transit Authority (UTA) petitioned the FTA for a waiver for certain steel rail and rail components, bridge beams, and structural steel because the cost to procure the steel domestically would increase the cost of the project by more than 25 percent. While the FTA considered the possibility that it could grant a post-award nonavailability waiver as well, it did not do so, as the UTA had submitted information supporting price-differential waiver.

C. Manufactured Products¹²²

Buy America prohibits the obligation of FTA funds unless “manufactured products,” other than rolling stock, used in FTA-funded projects are produced in the United States; a waiver has been granted by FTA; or the product is subject to a general waiver.¹²³ For a manufactured product to be considered produced in the United States 1) all of the “manufacturing processes” for the product must take place in the United States and 2) all of the components of the product must be of U.S. origin. A component is considered to be of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.¹²⁴

At the time the applicable regulation, 49 C.F.R. § 661.5, was proposed, commentators argued that nothing in the 1982 STAA or existing FTA regulations required a manufactured product to contain a minimum domestic content and that the statutory requirement would be met so long as the manufacturing process took place in the United States. FTA made reference to language in Section 401(a) of the 1978 STAA and the Buy American Act of 1933 as support for its determination that Congress intended manufactured products to be held to a standard of 100 percent domestic content.¹²⁵

¹¹⁸ 61 Fed. Reg. 6300 (Feb. 16, 1996).

¹¹⁹ Letter from the FTA to the Puerto Rico Highway and Transportation Authority (Jan. 18, 2001).

¹²⁰ Letter from the FTA to the Detroit Department of Transportation (Jan. 14, 2009), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹²¹ Letter from the FTA to Valley Metro Rail (Apr. 14, 2005), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹²² 49 C.F.R. § 661.5.

¹²³ 49 U.S.C. § 5323(j); 49 C.F.R. § 661.5(a).

¹²⁴ 49 C.F.R. § 661.5.

¹²⁵ Likewise, the FTA contrasts the domestic content requirements for subcomponents as well as components for roll-

FTA defines “manufactured product” to mean an item produced as a result of manufacturing process.¹²⁶ The “manufacturing process” alters the form or function of materials or of elements of the product so as to add value and transform those materials or elements so that they represent a new and functionally different end product. The manufacturing process is more than mere assembly. FTA has explained its concept of alteration as follows:

The processes of alteration may include forming, extruding, material removal, welding, soldering, etching, plating, material deposition, pressing, permanent adhesive joining, shot blasting, brushing, grinding, lapping, finishing, vacuum impregnating and, in electrical and electronic pneumatic, or mechanical products, the collection, interconnection, and testing of various elements.¹²⁷

In a guidance letter in 2003, the FTA observed that welding can serve to alter the material as part of a step in the manufacturing process or merely serve as an aid to assembling subcomponents. FTA was asked whether a “car frame” could be considered a subcomponent of the component car body. FTA reviewed the manufacturing plan and the submitted materials and found that the panels to be altered were already highly manufactured. FTA noted that the tolerances given for assembling the panels required an alignment of within several millimeters over 20 to 30 ft to receive the final weldments. The weldments were to be performed in a welding jig that holds the frames in position for final welding. The FTA determined that, given the close tolerances of the delivered products and the use of welding solely for purposes of joining the metal pieces together, this was an act of “mere assembly,” not a step in the manufacturing process that altered the pieces to produce a new product. As such, the “car frame” is more properly designated as a component rather than a subcomponent.¹²⁸

Similarly, NJT responded to the questionnaire with an FTA interpretation of manufacturing process that resulted in the disqualification of the low bidder for noncompliance with Buy America. In 1992, Hoppecke Battery Systems, Inc., the second low bidder, lodged a protest against the low bidder, Saft-Nife, Inc., in an NJT procurement for transit car storage batteries. Saft-Nife had included in its domestic content calculations the cost of “cell assemblies,” including freight, recycling, labor, administration, overhead costs, and allowance for profit. FTA determined that the fitting together of battery parts to create “cell assemblies” did not meet the

definition of manufacture, but constituted “mere assembly.” NJT also responded to the questionnaire that it sought FTA’s interpretation in the case of a contractor that purchased steel in the United States, but sought to fabricate (i.e., drill, cot, and flange) the steel in Canada. The cost of this process was minimal compared to the cost of the project and the steel itself. FTA verbally advised that it considered fabrication to be a manufacturing process required to be done in the United States.

Prior to SAFETEA-LU, there may have been some confusion with respect to the terms “manufactured product” and “end product.” However, as discussed above in Section II.B, FTA defined “end product” and added Appendix A to 49 C.F.R. § 661.3, which includes a list of representative manufactured end products, as follows:

Infrastructure projects 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.

Except for the iron and steel used in a construction contract, FTA treats the procurement of construction projects as the procurement of a “manufactured product” subject to 49 C.F.R. § 661.5.¹²⁹ However, a grantee must first satisfy the steel and iron requirements, as discussed above, before applying the manufactured product section to the balance of the construction contract. Foreign manufacture of components for use in FTA-funded construction projects is prohibited under the Buy America regulations at 49 C.F.R. § 661.5(d)(2).¹³⁰

Final assembly takes place at the construction site, and the main elements incorporated into the project at the job site are the components. For example, if the deliverable under a particular contract is the construction of a passenger terminal, the terminal itself is the manufactured end product and the main elements incorporated into the terminal, e.g., shelters, elevators, and platforms, are the components of the manufactured end product. These main elements are generally specified in the grantee’s construction contract.¹³¹

D. Rolling Stock¹³²

As discussed above in the legislative history of Buy America, rolling stock procurements were first differen-

ing stock in support of its determination that it will look only to where a component is manufactured and will not look to the origin of the various materials included in the product during the manufacturing process. 56 Fed. Reg. 926 (1991).

¹²⁶ 49 C.F.R. § 661.3.

¹²⁷ This explanation of the nature of “manufacture” is made in 56 Fed. Reg. 926 (1991) with reference to rolling stock, but is applicable to manufactured products as well.

¹²⁸ Letter from FTA to the Commercial Contract Manager of Siemens Transportation (June 3, 2003), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹²⁹ FED. TRANSIT ADMIN., BEST PRACTICES PROCUREMENT MANUAL, § 4.3.3.2.2, available at http://www.fta.dot.gov/funding/thirdpartyprocurement/bppm/grants_financing_6102.html.

¹³⁰ See letter to the President of Steril-Koni from the FTA Deputy Chief Counsel (Sept. 15, 2000).

¹³¹ FED. TRANSIT ADMIN., BEST PRACTICES PROCUREMENT MANUAL, § 4.3.3.2.2, available at http://www.fta.dot.gov/funding/thirdpartyprocurement/bppm/grants_financing_6102.html.

¹³² 49 C.F.R. § 661.11, including Apps. A, B, and C.

tiated from Buy America as an exception to the 100 percent domestic content rule applicable to manufactured products. The area of rolling stock procurements has, however, evolved into a hydra with its own detailed regulatory scheme. “Rolling stock” is considered to be “transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services.”¹³³ It also applies to train control, communications, and traction power equipment. The FTA regulations at 49 C.F.R. § 661.11(t), (u), and (v) are nonexhaustive listings of the train control, communications, and traction power equipment considered to be rolling stock.¹³⁴ Rolling stock includes both on-board and wayside equipment.

While the regulations do not specify wayside equipment, as discussed above under Section II.G, FTA made clear during the SAFETEA-LU rulemaking process that it would continue its longstanding interpretation that the items of communication equipment listed in 49 C.F.R. § 661.11 include wayside equipment. This longstanding guidance includes a letter dated June 2, 2004, from FTA to AESF Communications, which discusses FTA’s application of the rolling stock requirements, as opposed to the manufactured products provisions, to procurements of wayside communications equipment. It also includes a letter dated June 18, 2003, from FTA to Telephonics denying the company’s petition requesting that FTA investigate Buy America compliance on two New York City Transit procurements (“The statutory provisions of Buy America expressly define rolling stock to include ‘communications equipment.’”) FTA regulations further provide a nonexhaustive listing of certain communication equipment considered to be rolling stock components, including public address amplifiers and speakers. Pursuant to statute and regulation, communications equipment need not be on a vehicle, and is procured under the “rolling stock” rule, not the “manufactured products” rule.

Essentially, there are two requirements for a bus or rolling stock to qualify as a domestic product under Buy America: 1) the cost of its components produced in the United States must exceed 60 percent of the cost of all its components, and 2) final assembly must take place in the United States.¹³⁵ The implementing regulations for rolling stock procurements are found at 49 C.F.R. § 661.11.

1. Components

A “component” is any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an “end product” at the “final

assembly location.”¹³⁶ The FTA has determined that Buy America applies only to “major components” and “primary subcomponents” of rolling stock and related equipment.¹³⁷ “Major components” of buses and rail cars are listed in Appendices B and C, respectively, to 49 C.F.R. § 661.11. While the lists are not intended to be exhaustive, they are intended to clarify the distinction between components and subcomponents.¹³⁸ A “subcomponent” is any article, material, or supply, other than raw materials produced in the United States and then exported for incorporation into a component, that is 1) one step removed from a component in the manufacturing process and 2) incorporated directly into a component.¹³⁹

In a Dear Colleague Letter dated March 30, 2001, restated and explained in the *Federal Register* on June 14, 2001, the FTA addressed inquiries regarding 49 C.F.R. § 661.11 and its appendices.¹⁴⁰ The FTA expressed concern that grantees were identifying the entire propulsion system in rolling stock procurements as a single component without reference to the regulations. The Dear Colleague Letter and the *Federal Register* Notice reiterate and clarify that all items included in the list of major components in the appendices of the rolling stock regulations are components and not subcomponents. Standards for designation as domestic are more rigorous for components than for subcomponents, and distinction between the two is important.

For a component to be domestic, more than 60 percent of the subcomponents of that component, by cost (as determined by reference to 49 C.F.R. § 661.11(m), (n), and (p)), must be of domestic origin, and the manufacture of the component must take place in the United States. If a component is determined to be domestic, its entire cost may be used in calculating the cost of domestic content of an end product.¹⁴¹ FTA has concluded that the origin of subcomponents and sub-subcomponents is immaterial and that to be considered domestic, a subcomponent need only be manufactured in the United States.¹⁴² A component is considered to be manufactured if there are sufficient activities taking place to substantially transform or merge the subcomponents into a new and functionally different article.¹⁴³ As discussed above under Section V.C, manufacture of a component must be more than mere assembly.¹⁴⁴

¹³⁶ 49 C.F.R. § 661.11(c).

¹³⁷ 56 Fed. Reg. 926 (1991).

¹³⁸ *Id.*

¹³⁹ 49 C.F.R. § 661.11(f). Raw materials produced in the United States and then exported for incorporation into a component are not considered to be a subcomponent for the purposes of calculating domestic content. The value of such raw materials is to be included in the cost of the foreign component. 49 C.F.R. § 661.11(k).

¹⁴⁰ 66 Fed. Reg. 32,412–32,413 (June 14, 2001).

¹⁴¹ 49 C.F.R. § 661.11(g).

¹⁴² 49 C.F.R. § 661.11(h), 56 Fed. Reg. 926 (1991).

¹⁴³ 49 C.F.R. § 661.11(e).

¹⁴⁴ 56 Fed. Reg. 926 (1991).

¹³³ 49 C.F.R. § 661.3.

¹³⁴ Contact rail is expressly excluded as traction power equipment and automatic door control is excluded as part of the train control system. See 56 Fed. Reg. 926 (1991); 49 C.F.R. § 661.11(w).

¹³⁵ 49 C.F.R. § 661.11(a).

The FTA has issued guidance in response to a request for clarification of the Buy America requirements as they relate to the manufacture of electrical connectors, which are subcomponents used in railcars. The FTA explained:

When a railcar manufacturer incorporates an electrical connector into a component in its vehicle, that subcomponent may be counted towards the 60 percent subcomponent requirement only if it is manufactured in the U.S. The railcar manufacturer may use a foreign-made subcomponent, but it may not count that product towards the required 60 percent domestic content of a component.¹⁴⁵

If a subcomponent is manufactured in the United States and then exported for incorporation in a component manufactured outside of the United States, it retains its domestic identity and can be included in the domestic content of an end product if it receives tariff exemptions as provided in Customs Service regulations set forth in 19 C.F.R. § 10.11–10.24. This is so even if the subcomponent represents less than 60 percent of the cost of a particular component. Conversely, if it does not receive such tariff exemptions, it loses its domestic identity and cannot be included in the calculation of the domestic content of an end product.¹⁴⁶

As discussed above in Section II.G, FTA has now defined “end product” and added Appendix A to 49 C.F.R. § 661.3, which includes a list of representative rolling-stock end products as follows:

All individual items identified as rolling stock in § 661.3 (e.g., buses, vans, cars, railcars, locomotives, trolley cars and buses, ferry boats, as well as vehicles used for support services); train control, communication, and traction power equipment that meets the definition of end product at § 661.3 (e.g., a communication or traction power system).¹⁴⁷

With respect to the procurement of an entire public transportation system (a turnkey project), the FTA has determined that each subsystem identified in the contract is a separate end product. For example, FTA has determined in the past that an entire people mover system is comprised of six subsystems to be supplied by the contractor and that each subsystem is an individual end product. Accordingly, six separate end products must be analyzed as to whether they constitute manufactured end products or rolling-stock end products for application of the correct Buy America requirements.¹⁴⁸

2. Final Assembly

“Final assembly” is the creation of the end product from individual elements brought together for that purpose through the application of manufacturing processes. If a system is being procured as the end product

by the grantee, the installation of the system qualifies as final assembly.¹⁴⁹ Adequate final assembly is an issue with which FTA has had some difficulty. Prior to 1991, FTA had presumed sufficient final assembly if the cost of final assembly was at least 10 percent of the overall project contract cost. In 1991 FTA abandoned the 10 percent test as arbitrary, recognizing that several manufacturers of rolling stock were performing adequate final assembly requirements, but not meeting the 10 percent test. The “manufacturing processes” test was adopted at that time. The FTA suggested that these manufacturing processes may include joining; welding; installing; interconnecting (wire, fibers or tube); filling; finishing; cutting; trimming; inspecting; and testing. The FTA also suggested minimum operations for the final assembly of a rail car.¹⁵⁰

In a letter to NJT dated August 14, 1992, from the FTA Administrator, FTA took the position that a rebuild or overhaul of a rail car that prolongs its useful life under the terms of Chapter IV, Paragraph IV (3)(a), of FTA Circular 9030.1A is a rolling-stock procurement and final assembly must take place in the United States. The FTA explained that although the agency had imposed no specific cost requirement or test for final assembly, “significant operations” must take place and made reference to the language cited above from 56 *Federal Register* 928, 930 (January 9, 1991).¹⁵¹

FTA’s March 18, 1997, Dear Colleague Letter sets out minimum operations for the final assembly of rail cars and buses as follows:

In the case of the manufacture of a new rail car, final assembly would typically include, as a minimum, the following operations: installation and interconnection of propulsion control equipment, propulsion cooling equipment, brake equipment, energy sources for auxiliaries and controls, heating and air conditioning, communications equipment, motors, wheels and axles, suspensions and frames; the inspection and verification of all installation and interconnection work; and the in-plant testing of the stationary product to verify all functions.

In the case of a new bus, final assembly would typically include, at a minimum, the installation and interconnection of the engine, transmission, axles, including the cooling and braking systems; the installation and interconnection of the heating and air conditioning equipment; the installation of pneumatic and electrical systems, door systems, passenger seats, passenger grab rails, destination signs, wheelchair lifts; and road testing, final inspection, repairs and preparation of the vehicles for delivery.

The March 18, 1997, Dear Colleague Letter states that if a manufacturer’s final assembly processes do not include all of the activities that are typically considered

¹⁴⁵ Letter from the FTA to the President of Spacecraft Components Corporation (Mar. 30, 2004), available at http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6102.html.

¹⁴⁶ 49 C.F.R. § 661.11(i), (j); 56 Fed. Reg. 926 (1991).

¹⁴⁷ 49 C.F.R. § 661.3, App. A.

¹⁴⁸ 56 Fed. Reg. 926 (1991).

¹⁴⁹ 49 C.F.R. § 661.11(r).

¹⁵⁰ 56 Fed. Reg. 926 (1991).

¹⁵¹ See also guidance letter from the FTA to the Corporate Counsel of Alstom Transportation, Inc. (Oct. 10, 2002) (“FTA makes no distinction between the manufacture of new rail cars and the rebuild or overhaul of existing vehicles in requiring that final assembly take place in the US.”), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

the minimum requirements, then the manufacturer can request an FTA determination of compliance. FTA will review these requests on a case-by-case basis.

Section 3035 of TEA-21 incorporated the requirements of the March 18, 1997, Dear Colleague Letter into law. Further, when FTA issued its final rule to implement SAFETEA-LU in September 2007, FTA considered amending the definition of final assembly for rolling stock procurements by incorporating the minimum requirements for final assembly in the March 18, 1997, Dear Colleague Letter. In response to commenters who pointed out that, not only had the Dear Colleague Letter been acknowledged and memorialized by Congress in TEA-21, but that it had been successfully implemented for 10 years and that any changes could create confusion for manufacturers and grantees, FTA withdrew proposed language in the SNPRM. FTA will instead continue to implement the Dear Colleague Letter with minor additions to reflect industry practices that have taken effect after the 1997 Dear Colleague Letter was issued, such as the construction of bus shells and the installation of locomotive engines in passenger railcars.¹⁵² Nevertheless, FTA added an Appendix D to 49 C.F.R. § 661.11, which restates the minimum requirements for final assembly from the March 1997 Dear Colleague Letter.¹⁵³

3. Cost of Components and Subcomponents

Largely reiterated here, 49 C.F.R. § 661.11 is the road map to follow in determining compliance with the cost element of the Buy America domestic content requirements and should be followed step-by-step in that process.¹⁵⁴ The cost of a subcomponent that retains its domestic identity shall be the cost of the subcomponent when last purchased, free on board (f.o.b.) U.S. port of exportation or point of border crossing, as set out in the invoice and entry papers or, if no purchase was made, the value of the subcomponent at the time of its shipment for exportation, f.o.b. U.S. port of exportation or point of border crossing, as set out in the invoice and entry papers.¹⁵⁵ If a component is manufactured in the United States but contains less than 60 percent domestic subcomponents, by cost, the cost of 1) the domestic subcomponents and 2) manufacturing the component may be included in the calculation of the domestic content of the rolling stock end product.¹⁵⁶

¹⁵² 72 Fed. Reg. 53694.

¹⁵³ 49 C.F.R. § 661.11, App. D; note that in the SAFETEA-LU Final Rule, the revised definition of “final assembly” was inadvertently included (72 Fed. Reg. 53697–53698). This inadvertent error was corrected in 72 Fed. Reg. 55103.

¹⁵⁴ FED. TRANSIT ADMIN., BEST PRACTICES PROCUREMENT MANUAL, § 4.3.3.2.2, available at http://www.fta.dot.gov/funding/thirdpartyprocurement/bppm/grants_financing_6102.html.

¹⁵⁵ 49 C.F.R. § 661.11(o).

¹⁵⁶ 49 C.F.R. § 661.11(l).

The following provisions of Buy America relate to the determination of the cost of components and subcomponents:

- The cost of a component or a subcomponent is the price that a bidder or offeror must pay to a subcontractor or supplier for that component or subcomponent.¹⁵⁷
- Transportation costs to the final assembly location must be included in calculating the cost of foreign components and subcomponents.¹⁵⁸
- If a component or subcomponent is manufactured by the bidder or offeror, the cost of the component is the cost of labor and materials incorporated into the component or subcomponent, an allowance for profit, and the administrative and overhead costs attributable to that component or subcomponent under normal accounting principles.¹⁵⁹
- The cost of a component of foreign origin is set using the foreign exchange rate at the time the bidder or offeror executes the appropriate Buy America certificate.¹⁶⁰
- Labor costs involved in final assembly shall not be included in calculating component costs.¹⁶¹
- The actual cost, not the bid price, of a component is to be considered in calculating domestic content.¹⁶²

4. Pre-Award and Post-Delivery Audits

Each grantee must certify to FTA that it will conduct pre-award and post-delivery audits to verify compliance with its own bid specification requirements and with Buy America and FMVSS requirements.¹⁶³ The FTA published two extensive guides on bus and rail vehicle procurement reviews entitled, *Conducting Pre-Award and Post-Delivery Reviews for Bus Procurements* (FTA-DC-90-7713-93-1, Revision B) and *Conducting Pre-Award and Post-Delivery Reviews for Rail Vehicle Procurements* (FTA-DC-90-7713-94-1, Revision B). These guides detail certifications and documents needed to support the procurement process, suggest procedures for conducting the pre-award and post-delivery reviews, provide examples and other activities that may be helpful to those conducting such reviews, and provide more responses to frequently asked questions.

The Buy America pre-award and post-delivery audit requirements elicited the most comment from the questionnaire respondents. At least 12 questionnaire respondents indicated some additional cost and delay of awards. NJT and San Diego’s Metropolitan Transit Development Board both reported that certain manufacturers were unwilling to release the proprietary information necessary for department staff to conduct the

¹⁵⁷ 49 C.F.R. § 661.11(m), (1).

¹⁵⁸ *Id.*

¹⁵⁹ 49 C.F.R. § 661.11(m)(2).

¹⁶⁰ 49 C.F.R. § 661.11(n).

¹⁶¹ 49 U.S.C. § 5323(j), 49 C.F.R. § 661.11(p).

¹⁶² 49 C.F.R. § 661.11(q).

¹⁶³ 49 U.S.C. § 5323(l), 49 C.F.R. § 663.7.

audits. This unwillingness subjects the procurement to the additional delay and expense caused by the need to hire an independent auditing firm. In contrast, NJT also reported that in most cases, manufacturers are willing to provide the necessary cost data once the agency executes a confidentiality agreement. The Red Rose Transit Authority of Lancaster, Pennsylvania, reported that its experience has been that vendors provide the requested cost data in advance, allowing sufficient time to review the necessary documentation.

Grantees must also make reference to the March 18, 1997, Dear Colleague Letter, which 1) specifies the minimum activities required of the final assembly processes for rail cars and buses, and 2) enumerates certain post-delivery review requirements for grantees. The Dear Colleague letter guidance addresses only the Buy America requirements of the pre-award and post-delivery reviews; the grantee's bid requirements and other federal requirements must also be met.

Grantee contract files should contain the following certifications and supporting documentation for each procurement of rolling stock:

- *Pre-Award Audit*—A grantee purchasing revenue service rolling stock with FTA funds must ensure that a pre-award audit is completed before entering into a formal contract with the manufacturer. The pre-award audit must list 1) the component and subcomponent parts of the rolling stock to be purchased identified by a) the manufacturer, b) country of origin, and c) costs; and 2) the final assembly location, final assembly activities, and final assembly costs. The pre-award audit is to be used by grantees as a basis for the Pre-Award Buy America Certification. The Pre-Award Buy America Certification and the Pre-Award Purchaser's Requirements Certification described as follows must be prepared and retained by the grantee.¹⁶⁴

Pre-Award Buy America Certification—The grantee is required to certify that either the FTA has granted a Buy America waiver for the vehicle or the grantee has satisfied itself (either by its own review or with an audit prepared by someone other than the manufacturer) that the manufacturer intends to build vehicles that meet the Buy America content and final assembly requirements.¹⁶⁵

Pre-Award Purchaser's Requirements Certification—The grantee is required to certify that the vehicles are consistent with a grantee's specifications and the proposed manufacturer is responsible and capable of producing the vehicles.¹⁶⁶

- *Post-Delivery Audit Requirements*—Following construction of the vehicles, a grantee must complete a

post-delivery audit before title to the rolling stock can be transferred to ensure that the manufacturer has complied with the Buy America requirements. The post-delivery audit must list 1) the component and subcomponent parts of the rolling stock identified by a) the manufacturer, b) country of origin, and c) costs; and 2) the actual final assembly location, final assembly activities, and final assembly costs. A grantee shall use the post-delivery audit as a basis for completing the Post-Delivery Certification. The Post-Delivery Certification and the Post-Delivery Purchaser's Requirements Certifications must be completed and retained on file by a grantee.¹⁶⁷

Post-Delivery Buy America Certification—The grantee is required to certify that the vehicle either meets Buy America domestic content and final assembly requirements or the FTA has granted a Buy America waiver for the vehicle.¹⁶⁸

Post-Delivery Purchaser's Requirements Certification—For vehicle orders of more than 10 buses or rail vehicles, the grantee must certify that an on-site inspector was present throughout the manufacturing period and that the grantee has received an inspector's report that accurately records all vehicle construction activities and explains how construction and operation of the vehicle meets specifications. For orders of 10 or fewer buses, a grantee must certify it has visually inspected and road tested the delivered vehicles and determined that the vehicles meet contract specifications.¹⁶⁹

- *Certification of Compliance with the FMVSS*—If a vehicle is subject to FMVSS issued by the National Highway Traffic Safety Administration (49 C.F.R. § 571), a grantee must keep on file a certification that it has received, at both the pre-award and post-delivery stages, a copy of the manufacturer's self-certification information that the vehicle complies with the FMVSS. If a vehicle, other than rolling stock that is not a motor vehicle, is not subject to FMVSS, a grantee is required to keep on file its certification that it received a statement to that effect from the manufacturer.¹⁷⁰

E. Design-Build Contracts

FTA has provided guidance to grantees conducting design-build procurements on its Buy America Web site.¹⁷¹ When considering design-build procurement, before the solicitation is advertised, a grantee should request a public interest waiver for the procedural requirements of Buy America that would permit bidders to submit their certifications after award and after the

¹⁶⁴ 49 C.F.R. §§ 663.21, 663.23, 663.25; FED. TRANSIT ADMIN., BEST PRACTICES PROCUREMENT MANUAL, ch. 4, Methods of Solicitation and Selection—Buy America Certification, § 4.3.3.2.2, available at http://www.fta.dot.gov/funding/thirdpartyprocurement/bppmgrants_financing_6102.html.

¹⁶⁵ 49 C.F.R. § 663.25.

¹⁶⁶ 49 C.F.R. § 663.27.

¹⁶⁷ 49 C.F.R. §§ 663.31, 663.33.

¹⁶⁸ 49 C.F.R. § 663.35.

¹⁶⁹ 49 C.F.R. § 663.37.

¹⁷⁰ 49 C.F.R. §§ 663.41, 663.43.

¹⁷¹ See "Buy America: Frequently Asked Questions," Number 10, http://www.fta.dot.gov/laws/leg_reg_464.html. See cross reference to this guidance in a letter from the FTA to the Senior Director of Capital Programming and Design of New Jersey Transit (Mar. 6, 2003).

design portion of the project is complete. With an FTA waiver of the procedural requirements, the grantee could put language in the solicitation that directs bidders/offerors that they would be required to comply with Buy America unless they qualified for a nonavailability waiver or a public interest waiver for certain components of the project. After design, the contractor would be required to submit its certification to the grantee, and, if necessary, the grantee could request a waiver at that time.

The FTA briefly considered a recommendation in the context of the SAFETEA-LU rulemaking to include language pertaining to design-build contracts in the definition of “negotiated procurement.” FTA considered the comment outside of the scope of the proposed rulemaking since the Buy America regulations do not mention design-build contracts. However, FTA added that implementation of rules specifically for design-build contracts may be appropriate at a later date.¹⁷²

F. Service Contracts

The FTA has also offered guidance on its Buy America Web site regarding the applicability of the Buy America requirements to equipment owned or leased by private service providers under an FTA-funded contract with an FTA grantee.¹⁷³ FTA has advised that it will apply the Buy America requirements to equipment acquired for, or in anticipation of, an FTA-funded contract. The requirements will not apply if equipment is owned or leased by the contractor before the invitation for bids or the RFP is issued. Grantees should put the Buy America certification forms in all service contract solicitations and direct bidders or offerors to complete the certification if they will be buying or leasing equipment to fulfill the contract.

VI. WAIVERS AND EXEMPTIONS

At this point, the reader should be fairly clear that the FTA Buy America provisions are applicable to all FTA-funded contracts in all instances except when a waiver has been obtained or a general waiver is applicable. This section of the report discusses who may seek a waiver and how; general waivers, as set forth in Appendix A to 49 C.F.R. § 661.7; and the types of waivers that may be granted on a case-by-case basis by FTA, including public interest, nonavailability, and price-differential waivers.

A. How to Petition for a Waiver

If a general waiver has been granted, no individual application for a waiver is required. Otherwise, generally only an FTA grantee may request a waiver from the applicability of the FTA Buy America requirements. A waiver request would typically be submitted prior to contract award when the need for a waiver has been

determined by the grantee, vendor, bidder, contractor, and supplier. While FTA is concerned with maintaining strict uniformity in the granting of waivers, requests made by grantees for nonavailability and price-differential waivers are handled through the regional offices, while public interest waivers, all waivers sought by potential bidders or suppliers, as discussed below, and all Washington, D.C., area waivers must be approved at FTA Headquarters and copied to the appropriate Regional Administrator. Except as set forth below, contractors seeking to establish grounds for a waiver must seek the waiver through the FTA grantee.¹⁷⁴ FTA has issued guidance on whom waivers apply to and how to request a waiver on its public Buy America Web site.¹⁷⁵

FTA will consider a request for a waiver from a potential bidder or supplier only if the waiver is being sought as a public interest or nonavailability waiver for 1) components or subcomponents of rolling stock or 2) specific items or material that are used in the production of a manufactured product. As discussed above in Section II.G, FTA is now required to publish waivers granted to foreign manufacturers in the *Federal Register*. Recent examples include 2-year nonavailability waivers granted to Alstom Transportation, Inc., to utilize a foreign Insulated Gate Bi-Polar Transistor to create the waveform for a DC Chopper Propulsion System and to control traction power and voltage frequency;¹⁷⁶ to Allison Transmission, Inc., for an Energy Storage Unit (ESU) that is one of five subsystems of a hybrid-electric propulsion system;¹⁷⁷ to Asahi Seiko USA, Inc. for the Model SA-595 Compact Coin Dispensing Hopper, which is manufactured in Japan for use in ticket-vending machines;¹⁷⁸ and to MEI for the Sodeco BNA57/542 Bill Handling Units, which are manufactured in Switzerland for use in ticket-vending machines.¹⁷⁹ These waivers are limited in duration and are typically granted after industry surveys confirm that only the foreign manufacturers produce the items in sufficient and reasonably available quantities and of satisfactory quality. Allison Transmission was granted a nonavailability waiver after it sent a request for qualifications to 16 potential suppliers, 9 of which have

¹⁷⁴ 49 C.F.R. § 661.9(b), (c), 56 Fed. Reg. 932 (1991).

¹⁷⁵ See “Buy America: Frequently Asked Questions,” Number 7 and Number 8, available at http://www.fta.dot.gov/laws/leg_reg_464.html.

¹⁷⁶ Letter from the FTA to the Customer Director of Alstom Transportation, Inc. (May 4, 2009), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹⁷⁷ Letter from the FTA to counsel for Allison Transmission, Inc. (Apr. 3, 2009), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹⁷⁸ Letter from the FTA to the General Manager of Asahi Seiko USA, Inc. (Feb. 25, 2009), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹⁷⁹ Letter from the FTA to the Sales Director, Transit and Parking of MEI (Feb. 23, 2009), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹⁷² 71 Fed. Reg. 14115.

¹⁷³ See “Buy America: Frequently Asked Questions,” Number 18, http://www.fta.dot.gov/laws/leg_reg_464.html.

facilities in the United States or have indicated the possibility of opening a facility in the United States. Responses indicated that there would be no domestic suppliers of ESUs within the next 4 to 6 years. The waiver was granted for the earlier of a period of 2 years or until such time as a domestic supplier becomes available.

FTA does monitor the status of the industry and will revoke or deny the renewal of a limited duration waiver. For example, Steril-Koni, Inc., was granted a public interest waiver for Omer heavy-duty parallelogram bus lifts on February 14, 2001, on the grounds that there were only two suppliers active in the U.S. market, of which only one could certify compliance with Buy America.¹⁸⁰ The waiver was granted for the earlier of a period of 2 years or until such time as a second domestic manufacturer for this type of lift becomes available. By letter dated July 3, 2001, the FTA advised that the waiver had expired by its terms because the FTA had received verified information that Mohawk Resources, Inc., is now a second U.S. marketer of the heavy-duty lifts.¹⁸¹

FTA will also renew a waiver if a 2-year waiver had been granted previously and no domestic manufacturer has come to the attention of the FTA. In all three cases (Alstom Transportation, Inc., Asahi Seiko, and MEI) discussed previously, the FTA granted the renewal of a 2-year waiver after a prior 2-year waiver had been granted and no domestic supplier had surfaced.

FTA has also considered numerous nonavailability and public interest waiver requests from contractors and the justifications for denial are instructive. FTA denied a nonavailability waiver request from Webasto Product North America for diesel and natural gas auxiliary bus heaters. Webasto had justified the request by stating that the waiver would allow a number of bus manufacturers to include the heater as domestic for the purpose of calculating aggregate domestic content. FTA's denial rested on the fact that several of the manufacturers listed already counted the heaters in the nondomestic 40 percent category of their Buy America calculations.

Because these manufacturers are able to comply with the requirements of Buy America, notwithstanding that they count the auxiliary heaters as foreign-sourced, and that other bus manufacturers may be likewise, there is no justification for granting the component waiver.¹⁸²

Alstom Transportation, Inc., requested a nonavailability waiver for an "Arpege" truck axle bridge for use in low-floor light rail vehicles (LRVs) because the Houston Metro solicitation required equipment that is "identical" to the supplier's existing equipment. Alstom ar-

gued that Renault, the manufacturer of the axle bridge, refused to release its proprietary design to third-party U.S. manufacturers. FTA responded that Renault's unwillingness was not a sufficient basis for granting the nonavailability waiver, as it appeared that Alstom could obtain a compliant axle bridge, although not from a domestic source. FTA added that this foreign component could fall within the nondomestic (40 percent) rolling stock allowance.¹⁸³

North American Bus Industries (NABI) requested FTA to extend a component waiver for the CompoBus's 40-ft and 45-ft integrated frame/chassis shell on the basis of domestic nonavailability. FTA declined, responding that since the NABI's Hungarian parent corporation can sublicense the patented technology to NABI, "there appears to be no legal or technical impediment to NABI's manufacturing the CompoBus shell at its Anniston, Alabama, facility." While NABI pleaded that it was not be in a position to finance such a capital expansion, FTA found that such cost factors do not justify extending a nonavailability component waiver. "Many manufacturers could similarly argue that major component items are domestically 'unavailable' simply because it is cheaper for them to produce such components overseas. This argument is self-serving and defeats the intent of Buy America."¹⁸⁴

The Regional Transportation Commission of Southern Nevada requested a post-award nonavailability and public interest waiver for "streetcar" vehicles to be manufactured by Wright Group in the United Kingdom. The basis for the request was that such vehicles are not reasonably available and produced in the United States in sufficient quantities and of satisfactory quality. FTA responded, citing SAFETEA-LU, that Congress had precluded the granting of post-award waivers based on public interest and granted a waiver based on nonavailability.¹⁸⁵

Before commencing competitive competition, the City of High Point, North Carolina, requested a waiver for the purchase of three Dodge Sprinter vans (made in Germany) on the basis of public interest. The city argued that the public interest would be better served by the use of the Sprinter because of fuel economy, additional seating capacity, improved accessibility, enhanced safety, reduced maintenance cost, and better value over its life cycle. The FTA denied the request, stating that the grantee should determine whether a

¹⁸⁰ Letter from FTA Deputy Chief Counsel to Frost, Brown, Todd LLC (July 3, 2001).

¹⁸¹ Letter from FTA Deputy Chief Counsel to Mohawk (July 3, 2001), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹⁸² Letter from the FTA to the OEM Account Manager Bus & Transit of Webasto North America (Nov. 2, 2004), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹⁸³ Letter from the FTA to the Customer Director of Alstom Transportation, Inc. (Nov. 25, 2008), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹⁸⁴ Letter from the FTA to the Interim President and Chief Executive Officer of North American Bus Industries (Dec. 15, 2004), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹⁸⁵ Letter from the FTA to Jacob Snow, General Manager of the Regional Transportation Commission (Dec. 8, 2008), available at http://www.fta.dot.gov/laws/leg_reg_598.html.

sole source could be justified and then request a nonavailability waiver.¹⁸⁶

Finally, when FTA receives a nonavailability waiver request from a manufacturer it may conduct its own market survey. In letters to Swecoin U.S., Inc. (magnetic ticket printer/encoder unit), and ASK Contactless Technologies, Inc. (original equipment manufacturer contactless smart-card couplers), FTA explained that it had received comment from domestic manufacturers and, based on these responses, denied the nonavailability waiver requests.¹⁸⁷

It has been suggested that this practice may harm the competitive position of grantees. For example, FTA denied a public interest waiver request from the Michelin Tire Corporation to permit the procurement of bus tires produced at several locations in Europe to allow increased competition in the bus tire supply industry.¹⁸⁸ The Pinellas Suncoast Transit Authority (PSTA) indicated in its survey response that, with respect to tire procurements, Buy America has the effect of limiting competition. PSTA had sent out a proposal for a tire lease for which it received one response from Goodyear and one response from Firestone. Firestone was declared nonresponsive because one of the tires did not comply with Buy America, leaving PSTA with only one proposal.

B. General Waivers

General waivers available to FTA grantees are set forth in Appendix A to 49 C.F.R. § 661.7. A grantee need not make a written request to the FTA should it wish to take advantage of a general waiver. General waivers include the following:

- A waiver of all articles, materials and supplies published in 48 C.F.R. § 25.104 that have been determined to be nonavailable in accordance with 48 C.F.R. § 25.103 for purposes of the 1933 Buy American Act.¹⁸⁹
- Microcomputer equipment, including software, of foreign origin.¹⁹⁰
- “Small purchases” (as defined in the “common grant rule,” at 49 C.F.R. § 18.36(d), currently set at

¹⁸⁶ See Letter from the FTA to Matthew D. Cox, Transit Manager, City of High Point, North Carolina (Nov. 25, 2008), available at http://www.fta.dot.gov/laws/leg_reg_598.html.

¹⁸⁷ Letter from the FTA to the President of Swecoin U.S., Inc. (Nov. 29, 2004); letter from the FTA to ASK Contactless Technologies, Inc. (Dec. 2, 2004).

¹⁸⁸ 53 Fed. Reg. 22,418 (1988).

¹⁸⁹ 49 C.F.R. § 661.7, App. A. Please note that the reference in the Appendix is to the waivers set forth in 48 C.F.R. § 25.108; this reference has not been updated to reflect that this section of the C.F.R. was rewritten and renumbered in 64 Fed. Reg. 72,416, 72,422–72,423. See “Buy America: Frequently Asked Questions,” Number 12, http://www.fta.dot.gov/laws/leg_reg_464.html.

¹⁹⁰ 50 Fed. Reg. 18,760 (1985) and 51 Fed. Reg. 36,126 (1986); see discussion, *supra*.

\$100,000) made by FTA grantees with capital, planning, or operating assistance.¹⁹¹

An additional general waiver, applicable to rolling stock, is set forth in Appendix A to 49 C.F.R. § 661.11, and applies to foreign-sourced spare parts for buses and other rolling stock (including train control, communication, and traction power equipment) whose total cost is 10 percent or less of the overall project contract cost procured as part of the same contract for the major capital item.

Microcomputers and Software

In 1986, FTA granted its first permanent “nonavailability” waiver from Buy America for microcomputers and software after the Secretary of Transportation concluded that many hardware and software components are manufactured abroad and it is difficult to estimate when, if ever, microcomputer component manufacturing will relocate to the United States. FTA reserved the right to reassess the need for a permanent waiver if, for example, international market conditions were to change. This waiver was subsequently included as a General Waiver in Appendix A to 49 C.F.R. § 661.7.¹⁹²

Small Purchases

In 1995, the FTA established a general public interest waiver for “small purchases” (as defined in the “common grant rule” at 49 C.F.R. § 18.36(d), currently set at \$100,000) made by FTA grantees with capital, planning, or operating assistance.¹⁹³ The FTA found itself inundated with nonavailability waiver requests for such items as office supplies and maintenance items needed for routine operations, often involving purchases of less than \$20. The volume of the waiver requests resulted in significant delays in the grantees’ procurement processes. Several FTA grantees had stated that to comply with Buy America requirements, procurement staffs had to be increased. “The goal of this public interest waiver [was] to eliminate some of the procurement delays, ‘red tape’ and paperwork from FTA grantees’ procurement processes.”¹⁹⁴ The small purchase waiver was inadvertently deleted in the final rule implementing SAFETEA-LU, but FTA recently restored the language permitting this waiver.¹⁹⁵ Both large and small transit properties report that institu-

¹⁹¹ 56 Fed. Reg. 932 (1991), as amended at 60 Fed. Reg. 37,930 (1995), 61 Fed. Reg. 6,300 (1996). With respect to small purchases, see “Buy America: Frequently Asked Questions,” Number 5, http://www.fta.dot.gov/laws/leg_reg_464.html.

¹⁹² 51 Fed. Reg. 36,126 (Oct. 8, 1986); 49 C.F.R. 661.7, App. A.

¹⁹³ 56 Fed. Reg. 932 (1991), as amended at 60 Fed. Reg. 37,930 (July 24, 1995), 61 Fed. Reg. 6302 (Feb. 16, 1996).

¹⁹⁴ 60 Fed. Reg. 14,178 (1995)—Notice of proposed waiver from Buy America requirements for small purchases and for purchases with operating assistance).

¹⁹⁵ 72 Fed. Reg. 53696; 74 Fed. Reg. 30239.

tion of the small purchase waiver has significantly reduced the impact of Buy America on their operations.

C. Public Interest Waivers

The Administrator of FTA or a designee may waive the general requirements of Buy America if the Administrator finds that application of the requirements would be inconsistent with the public interest. All appropriate factors will be considered on a case-by-case basis.¹⁹⁶ The FTA has made it clear that public interest waivers are very difficult to obtain. As FTA noted when it rejected the public interest waiver petition of the Michelin Tire Corporation (discussed *supra*), “It is [FTA]’s position that Congress intended that the public interest waiver provision of the 1982 STAA be utilized in extremely limited situations.”¹⁹⁷ In that case, Michelin argued that the public interest would be best served by increased competition in the marketplace. Firestone and Goodyear, the two principal suppliers of domestic tires for buses, argued that sufficient competition existed. FTA took the position that case-by-case waivers were always available and that a general waiver was not intended to be used to allow a product manufactured outside of the United States to be market-tested in the United States while the manufacturer of such product made a marketing determination concerning the economic feasibility of initiating full-scale production in the United States.¹⁹⁸ As discussed above, SAFETEA-LU directed the FTA to issue a detailed written justification as to why a public interest waiver is in fact in the public interest and to provide the public with a reasonable period of time for notice and comment. In fact, FTA began publishing its responses to waiver requests online as early as 1999.¹⁹⁹

FTA’s April 2009 letter to the president and chief executive officer of the Metropolitan Transit Authority of Harris County, Texas (METRO), explains the legal standard to which public interest waiver requests are held. METRO asked the FTA to waive its “Buy America requirements for two pilot LRVs to allow the construction of the pilot vehicles in Spain. This waiver was requested despite the fact that the manufacturer had signed a Certificate of Compliance with FTA’s Buy America requirements. METRO argued that the waiver was required because the manufacturer 1) proposed to offer 100 percent low floor LRVs for the first time in the United States, 2) needed to make the LRVs suitable for the Houston environment fully compliant with all legal requirements of the METRO RFP, and 3) had engineering staff located at its plant in Spain and could handle the manufacturing processes more efficiently in Spain.

While FTA denied the request because the manufacturer had signed a Certificate of Compliance with the Buy America requirements, FTA laid out its legal

analysis for public interest waivers of prototype vehicles. First, “FTA requires a clear nexus between the item requested and the beneficial impact on the public. In determining whether the conditions exist to grant a public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis.”²⁰⁰ FTA will take into account “the realities of the industry and the practical necessities of foreign assembly of prototype vehicles in appropriate circumstances” and will thus grant waivers when scheduling delays would result in a negative impact on the traveling public. FTA cited to its letter dated February 1, 2001, to the Port Authority of Allegheny County in which FTA granted a public interest waiver to the Port Authority of Allegheny County for final assembly of two remanufactured and two new prototype LRVs. The waiver prevented a 9-month delay in the Port Authority’s reconstruction of its Overlook Line. This delay would have negatively affected 27,000 existing riders and 14,000 new riders.

FTA has also allowed that the need for first article testing and inspection before full domestic production justifies a public interest waiver for a prototype.²⁰¹ In a December 17, 1999, letter to the Washington Metropolitan Area Transit Authority (WMATA), which had requested a waiver of the final assembly requirement for a prototype, the FTA approved the waiver and included a detailed explanation of the information supplied by WMATA, including specifics as to how the expedited schedule permitted by such a waiver would enable WMATA to put new cars into service faster, thereby increasing customer satisfaction. FTA noted increased ridership statistics, service increases, and the impact on ongoing rehabilitation programs as important factors to be considered when making a public interest determination regarding prototypes.²⁰²

FTA has also considered factors such as safety and the introduction of significant new technology. The Southeastern Pennsylvania Transportation Authority requested a waiver of the final assembly requirements of Buy America for three prototype electric multiple units. In support of its request, the authority claimed that public safety requires that all reasonable efforts be

²⁰⁰ Letter from the FTA to the President and Chief Executive Officer of the Metropolitan Transit Authority of Harris County, Texas (Apr. 14, 2009), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

²⁰¹ See letters from FTA Deputy Chief Counsel to the Sacramento Regional District for one prototype Light Rail Vehicle (Aug. 12, 1999) and to Metropolitan Atlanta Rapid Transit Authority for two married pairs of preproduction rail cars (Aug. 20, 1999), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

²⁰² Letter from FTA Chief Counsel to WMATA (Nov. 17, 1999); see also letter from FTA Chief Counsel to Metropolitan Atlanta Rapid Transit Authority (Aug. 20, 1999) (“[b]oth an understanding of the need for first article testing and inspection and the inevitable negative effect of a five-month delay on the riding public present the conditions necessary for a ‘public interest’ waiver”), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

¹⁹⁶ 49 C.F.R. § 661.7(b).

¹⁹⁷ 53 Fed. Reg. 22,418, 22,419 (1988).

¹⁹⁸ *Id.*

¹⁹⁹ Most of FTA’s waiver determinations can be seen online at http://www.fta.dot.gov/laws/leg_reg_598.html.

made to ensure that rail vehicles are properly designed and tested, and therefore the successful offeror should be permitted to assemble and test the prototypes using its primary facility, whether that is in the United States or not. Granted the public interest waiver, the FTA explained, “Given the public’s interest in riding and paying for properly tested trains, FTA believes that a final assembly waiver for the prototypes is in the public interest.”²⁰³

FTA also waived its Buy America requirements for projects funded under the FTA’s Fuel Cell Bus Program. In its justification, FTA found that:

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.²⁰⁴

Generally, FTA’s policy is to grant a waiver for one prototype vehicle. Anything beyond one prototype will be subject to closer scrutiny. Past practices may not be indicative of future results. A grantee will be required to articulate how a second public interest waiver for a second prototype will advance the public interest. For example, a grantee may detail how technical issues will affect the delivery schedule or why a single prototype cannot be coupled with existing vehicles. In an October 1999 letter from the FTA Chief Counsel to the Sacramento Regional Transit District, FTA denied the district’s request for a second prototype pilot car because the second request merely restated the reasoning present in the first waiver request.²⁰⁵

FTA has consistently denied requests for public interest waivers that are predicated on convenience for the manufacturer or a cost saving of less than 25 percent. In a November 2008 letter to the Massachusetts Bay Transportation Authority (MBTA), FTA denied a public interest waiver for the assembly of two pilot locomotives in Spain. The justification for the request was that the geographic separation between design engineering in Spain and the final assembly facility in Kentucky would result in an unacceptable increase in labor costs to the manufacturer. FTA declared, “waiving FTA’s Buy America requirements to allow for a competitive bid on price and schedule alone is not in the public interest.”²⁰⁶ FTA denied a similar request by Met-

roNorth Railroad. With only two interested suppliers, MetroNorth asked FTA to waive its Buy America requirements “to generate competition in the procurement.” FTA denied MetroNorth’s request in part, because “the statute provides that unless there is more than a 25% difference between the compliant and non-compliant bid, the compliant bid prevails.”²⁰⁷

D. Nonavailability Waivers

The Administrator of FTA or a designee may waive the general requirements of Buy America if the Administrator finds that the materials for which a waiver is requested are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.²⁰⁸ FTA regional counsel have been delegated the authority to consider nonavailability waivers. FTA will presume that the conditions exist to grant a nonavailability waiver if no responsive and reasonable bid is received that offers an item produced in the United States.²⁰⁹ When a public transit agency requests a nonavailability waiver, the FTA will scrutinize the agency’s procurement process for compliance with appropriate competitive procurement principles. This is outlined in a letter dated June 12, 2000, from FTA’s Deputy Chief Counsel to the Deputy General Manager of the MBTA. MBTA sought a nonavailability waiver in connection with procurement of 30 low-floor electric trolley buses and 32 low-floor articulated dual-mode buses. FTA noted MBTA’s extensive due diligence process during the 2-year period prior to formal advertisement for these vehicles, issuance of detailed technical specifications to every major vehicle supplier for comment, and formal advertisement of an RFP based on the comments. Only 1 of 15 bus manufacturers and suppliers that attended a pre-proposal conference, Neoplan, responded with a formal proposal, but noted that the small size of the order and unique technology and manufacturing processes would necessitate manufacture in Germany. FTA found that appropriate competitive principles had been complied with and granted the waiver.

FTA will only approve Buy America nonavailability waivers for sole source procurements upon a showing of compliance with FTA’s procurement requirements. San Diego’s Metropolitan Transit Development Board reported requesting a sole source waiver for a Light Rail Vehicle Coupler Kit, which was denied. The item was then put out to bid. Four bidders responded and a waiver was then requested on nonavailability. In the case of a sole source procurement, the grantee must provide sufficient evidence to indicate that the item to be procured is only available from a single source or that the item is not produced in the United States in sufficient and reasonably available quantities and of a

²⁰³ Letter from FTA Deputy Chief Counsel to SEPTA Senior Director of Procurement (Dec. 16, 2003), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

²⁰⁴ 73 Fed. Reg. 46350 (Aug. 8, 2008).

²⁰⁵ See letter from FTA Chief Counsel to Sacramento Regional Transit District (Oct. 20, 1999), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

²⁰⁶ Letter from the FTA to the MBTA (Nov. 14, 2008), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

²⁰⁷ Letter from the FTA to the Assistant Director, Purchasing of the MetroNorth Railroad (Mar. 26, 2004), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

²⁰⁸ 49 C.F.R. § 661.7(c).

²⁰⁹ 49 C.F.R. § 661.7(c)(1).

satisfactory quality.²¹⁰ Prior to approving a nonavailability waiver for a sole source procurement, the FTA will require evidence that the grantee has solicited equivalent domestic suppliers on an “or equal” basis.²¹¹ For example, FTA will consider an original equipment manufacturer as a sole source supplier when the grantee produces evidence that such manufacturer owns proprietary rights and design for the item and that no domestic manufacturers are able to provide equivalent items.²¹²

In 1991, the FTA sought comments on whether a general nonavailability waiver should be granted to audiovisual training equipment produced outside of the United States, but received inadequate information on which to base a determination to do so. FTA has granted a number of nonavailability waivers for audiovisual equipment and indicated its intention to reconsider granting a general waiver if changed conditions warrant.²¹³

E. Price-Differential Waivers

The Administrator of FTA or a designee may waive the general requirements of Buy America if the Administrator finds that the inclusion of a domestic item or domestic material will increase the cost of the contract by more than 25 percent. The Administrator will grant this price-differential waiver if the amount of the lowest responsive and responsible bid offering the item or material that is not produced in the United States, multiplied by 1.25, is less than the amount of the lowest responsive and responsible bid offering the item or material produced in the United States. FTA regional counsel have been delegated the authority to consider price-differential waivers. The price-differential waiver is applied as follows:

- In the case of a contract for a single end product, the 25 percent price differential applies to the overall price of the foreign bid.
- If a grantee is purchasing multiple manufactured products and some bidders offer items of both foreign and domestic origin, the price differential applies only to the foreign items. The foreign bidder’s overall price is then adjusted accordingly and compared to the lowest responsive and responsible bid offering all domestic

²¹⁰ 49 C.F.R. § 661.7(c)(2).

²¹¹ Letter from FTA Chief Counsel to Metro-North Railroad (Dec. 17, 1999) (public solicitation allowing for an approved equal to all known bidders in industry resulted in only one bid that was not compliant with Buy America), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

²¹² Letter from the FTA Deputy Chief Counsel to the Southeastern Pennsylvania Transportation Authority (Jan. 28, 2000); letter from FTA Deputy Chief Counsel to King County Department of Transportation (Apr. 14, 2000), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html. Letter from FTA Chief Counsel to Pinellas Suncoast Transit Authority (Sept. 7, 1999).

²¹³ 56 Fed. Reg. 926 (1991).

items; the price differential is not to be applied to the overall contract between the grantee and the supplier, but to the comparative costs of each individual item being supplied.²¹⁴

An NJT request for a price-differential waiver was granted by FTA in a letter dated January 28, 1991. FTA’s analysis was simple and straightforward:

In evaluating the bids for your procurement, the largest responsive and responsible bid, from Marconi Instruments, Inc., was multiplied by 1.25 and the resulting amount was less than the amount of the bid from Hewlett Packard, the lowest responsive and responsible bid offering all items produced in the United States. Since inclusion of the domestic preference will increase the cost of the overall project contract by more than twenty-five percent, the grounds for a price differential waiver properly exist.

More recently, FTA issued a price-differential waiver to the UTA for certain steel rail and rail components, bridge beams, and structural steel. The inclusion of domestic steel would have increased the cost by approximately \$1.3 million, a difference of more than 25 percent from the lowest responsive and responsible bid offering steel rail produced in the United States.²¹⁵ Questionnaire respondents pointed out that the 25 percent price differential results in higher prices for domestic goods when a foreign-made product is less expensive but does not meet the 25 percent threshold.

VII. BUY AMERICA COMPLIANCE

A. Who Is Subject to the Buy America Requirements?

Every FTA grantee is a party to FTA’s Master Agreement, which documents the standard terms and conditions of FTA funding.²¹⁶ Pursuant to Section 14(a) of the Master Agreement, a grantee agrees to comply with 49 U.S.C. § 5323(j) and FTA’s implementing regulations, at 49 C.F.R. Part 661, and implementing guidance FTA may issue. The Buy America requirements flow down from FTA grantees to first-tier contractors who are responsible for ensuring that lower-tier contractors and subcontractors are in compliance.

In 49 C.F.R. § 661.13, a grantee is required to include in its bid specification for procurements of steel, iron, manufactured products, and rolling stock an appropriate notice of the Buy America provision. The second model clause in Appendix A-I in the FTA *Best Prac-*

²¹⁴ *Id.*; FED. TRANSIT ADMIN., BEST PRACTICES PROCUREMENT MANUAL, § 4.3.3.2.2, available at http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6102.html.

²¹⁵ Letter from the FTA to the General Manager and Chief Executive Officer of the Utah Transit Authority (May 28, 2008), available at http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

²¹⁶ The version of the Master Agreement referred to herein is dated Oct. 1, 2008.

tices Procurement Manual suggests language to meet the appropriate notice requirement of 49 C.F.R. § 661.13(b). This suggested language is written as a preamble to the certifications required by 49 C.F.R. §§ 661.6 and 661.7, discussed in greater detail below. Other grantees have satisfied the notice requirement in their general or special provisions by including language as substantially set forth in the *FTA Best Practices Procurement Manual*, Section 4.3.3.2.2.

A grantee's bid specifications shall require, *as a condition of responsiveness*, that the bidder or offeror submit a completed Buy America certificate with the bid in accordance with 49 C.F.R. § 661.6 or § 661.12, as applicable.²¹⁷ Forms of certificates of compliance can be found in Appendix A-1 of the *FTA Best Practices Procurement Manual*. A bidder or offeror is bound by its original certification and is not permitted to change its certification after bid opening except to correct inadvertent errors.²¹⁸

If Buy America certifications are not completed and submitted with a bid, that bid is nonresponsive and cannot be considered by the grantee. If the bidder or offeror certifies that it will comply with the applicable Buy America requirements, it will not be eligible later for a waiver of those requirements.²¹⁹ Certification for steel, iron, or manufactured products is required under 49 C.F.R. § 661.6. A bidder or offeror may certify *either* that it will comply with the provisions of 49 U.S.C. § 5323(j)(1) and the applicable provisions in 49 C.F.R. Part 661; *or* that it cannot comply with the provisions of 49 U.S.C. § 5323(j)(1) but may qualify for an exception pursuant to 49 U.S.C. § 5323(j)(2)(B) or 49 U.S.C. § 5323(j)(2)(D) and the applicable provisions in 49 C.F.R. Part 661. In this case, the grantee or the bidder, as appropriate pursuant to 49 C.F.R. § 661.9, must seek a waiver.

Certification for buses and rolling stock (including train control, communication, and traction power equipment) is required under 49 C.F.R. § 661.12. A bidder or offeror may certify *either* that it will comply with the provisions of 49 U.S.C. § 5323(j)(2)(C) and the applicable provisions in 49 C.F.R. Part 661, *or* that it cannot comply with the provisions of 49 U.S.C. § 5323(j)(2)(C) but may qualify for an exception pursuant to 49 U.S.C. § 5323(j)(2)(B) or 49 U.S.C. § 5323(j)(2)(D) and the applicable provisions in 49 C.F.R. Part 661. In this case, the grantee or the bidder, as appropriate pursuant to 49 C.F.R. § 661.9, must seek a waiver. Model Buy America contract language can be found in Appendix A-1 of the *FTA Best Practices Procurement Manual*.

B. FTA Investigation of Buy America Compliance

A third party may petition FTA to investigate the compliance of a successful bidder with the bidder's FTA certification in accordance with the requirements of 49 C.F.R. § 661.15(b). The petitioning party must state the

grounds of the petition and include any supporting documentation. The FTA presumes that any bidder who has supplied the required Buy America certificate is complying with the Buy America requirements.²²⁰ It is rare for a petitioner to overcome this presumption. However, in 2002 and again in 2006, FTA granted Cubic Transportation Systems' (Cubic) petitions for investigation of an MBTA automated fare collection (AFC) system procurement. The 2002 petition resulted in an FTA investigation and determination that the apparent successful bidder, Scheidt & Bachmann (SB), demonstrated compliance with Buy America requirements by providing FTA with a detailed manufacturing plan and bill of material documents that identified SB's plan to manufacture the AFC system in the United States. In 2006, Cubic alleged that SB "contravened the manufacturing plan approved by FTA in 2002 by performing certain manufacturing activities in Germany." In support of these allegations, Cubic included selected documents from SB's best and final offer. Based on Cubic's petition and its supporting documentation, FTA determined that the presumption of compliance had been overcome; accordingly, an investigation was warranted. The investigation revealed that prototype equipment was financed by SB and had been manufactured in Germany, then installed on MBTA buses as pilot fare boxes for observation and testing, but at all times remained the property of the contractor. All pilot fare boxes were removed by the MBTA from MBTA buses, returned to SB, and replaced with fare boxes. FTA also verified that certain fare-vending machines and fare gates alleged by Cubic to have been manufactured in Germany and installed in MBTA's Airport and Aquarium stations had in fact been manufactured in New York and Massachusetts. After concluding its investigation, FTA found that SB met its burden of proving that it had complied with the Buy America requirements and Cubic had not proven its allegations.²²¹

More typical is the February 2006 response from FTA to allegations made by N/S Corporation that a foreign manufacturer of a rail-car washing system merely operated out of a small office in a residential neighborhood in Pennsylvania. FTA received express assurances from the grantee that the manufacturer's supplier of this equipment will manufacture the components in the United States from both domestic and foreign subcomponents. The finished components will then be shipped to the grantee's site for final assembly of the washing system. The FTA found that N/S Corporation had failed to overcome the presumption of compliance.²²² Similarly, in a letter dated September 30, 1999, from FTA Chief

²²⁰ 49 C.F.R. § 661.15.

²²¹ Letter from the FTA to the General Manager of the MBTA (Aug. 12, 2002); letter from the FTA to the General Manager of the MBTA (Apr. 29, 2009), *available at* http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

²²² Letter from FTA to N/S Corporation (Feb. 3, 2006), *available at* http://www.fta.dot.gov/printer_friendly/leg_reg_598.html.

²¹⁷ 49 C.F.R. § 661.13(b).

²¹⁸ 49 C.F.R. § 661.13(c), TEA-21 § 3020(b).

²¹⁹ 49 C.F.R. § 661.13(c).

Counsel to Quaker Rubber Company responding to Quaker's protest of a WMATA procurement for outdoor escalator handrails, FTA indicated that upon receipt of the protest it had directed WMATA to make inquiries about the facilities and equipment of the winning bidder, Escalator Handrail, Inc. FTA determined that the plant at issue was located in Iowa and had sufficient equipment and personnel to complete the work. FTA's presumption of compliance was not overcome because FTA had no reason to believe that Escalator Handrail had erroneously certified compliance and Quaker Rubber had supplied no information to support that Escalator Handrail intended to act in violation of its certification. However, once a showing is made sufficient to overcome that presumption, FTA will initiate an investigation.²²³

Other than the aforementioned right to petition the FTA to investigate the compliance of a successful bidder, a third party has no independent private right of action under the Buy America statute.²²⁴ In one of the very limited number of cases involving Buy America, the United States District Court for the Western District of New York held that the 1982 STAA makes no provision for a private right of action, nor may any such right be implied.²²⁵ The *Ar-Lite* litigation arose out of the construction of a pedestrian mall and passenger stations for the Niagara Frontier Transportation Authority (NFTA). NFTA had requested a Buy American nonavailability waiver from FTA with respect to NFTA's light rail rapid transit system based on NFTA's determination that plaintiff's product had not met the project's specifications and requirements. FTA granted NFTA a partial waiver subject to further testing of plaintiff's product. After further testing, the plaintiff's product still failed to meet project specifications and FTA granted a full waiver. Plaintiff sued for, among other things, violation of Buy America. The court held that this claim was to be dismissed for failure to state a claim, stating, "the statute does not create a federal right in favor of the plaintiff, and there is no indication of legislative intent to create such a right."²²⁶

Once a presumption of compliance has been overcome, FTA may determine on its own to initiate an investigation.²²⁷ When FTA commences an investigation, it usually requests that the grantee require the successful bidder to demonstrate its compliance with its Buy America certificate, specifying the required documentation on a case-by-case basis. The successful bidder then has the burden of proof to establish that it is in compliance.²²⁸ Consistent with § 661.15, the grantee must respond to the FTA's request within 15 working days of

the request. The bidder under investigation may correspond directly with FTA, but only if it notifies the grantee in writing, the grantee agrees in writing, and the grantee notifies the FTA in writing. The FTA may conduct site visits to the manufacturing site with adequate notice to the parties.²²⁹ FTA will, upon request, make the information submitted to it during an investigation public, except to the extent withholding the information is permitted or required by law or regulation. A party submitting proprietary material may advise the FTA that such material should be withheld. Confidential or proprietary material is any material or data whose disclosure could reasonably be expected to cause substantial competitive harm to the party claiming that the material is confidential or proprietary.²³⁰

When a petition for investigation has been filed before a grantee has awarded a contract, the grantee should not make an award before the resolution of the investigation unless 1) the items to be procured are urgently required, 2) delivery of performance will be unduly delayed by failure to make the award promptly, or 3) failure to make prompt award will otherwise cause undue harm to the grantee or the federal government.²³¹ In the event the grantee makes an award during an investigation, it must notify the FTA; FTA reserves the right to withhold funding from a project during the pendency of an investigation.

Initial decisions by the FTA will be in writing. A request for reconsideration of the initial decision may be made by any party involved in the investigation not later than 10 working days after the initial decision. FTA will reconsider an initial decision only if a party requesting reconsideration submits new matters of fact or points of law that were not known or available to the party during the investigation.

C. Noncompliance With Buy America

If a successful bidder fails to demonstrate that it is in compliance with its certification, FTA will establish the necessary steps to achieve compliance. If a bidder takes these necessary steps, it will not be permitted to change its original bid price. If a bidder does not take the necessary steps, it will not be awarded the contract if the contract has not yet been awarded; if a contract has been awarded, the contractor will be in breach of its Buy America obligations under the contract.²³² FTA grant recipients should ensure that their contracts have apportioned liability for the costs of Buy America noncompliance. Enforcement rights of the grantee regarding vendor liability for Buy America noncompliance should be clearly articulated in the contract.

²²³ 49 C.F.R. § 661.15(a), (b).

²²⁴ 49 C.F.R. § 661.20.

²²⁵ *Ar-Lite Panelcraft, Inc. v. Siegfried Constr. Co., Inc.*, No. Civ-86-525C, 1989 U.S. Dist. LEXIS 6394 (W.D.N.Y. Mar. 10, 1989).

²²⁶ *Id.*

²²⁷ 49 C.F.R. § 661.15(c).

²²⁸ 49 C.F.R. § 661.15(d).

²²⁹ 49 C.F.R. § 661.15(e), (i).

²³⁰ 49 C.F.R. § 661.15(j), (k), (l).

²³¹ 49 C.F.R. § 661.15(m).

²³² 49 C.F.R. § 661.17.

D. Sanctions Against Vendors

1. FTA Remedies

A successful bidder's willful refusal to comply with certification may lead to the initiation of debarment or suspension proceedings under 49 C.F.R. Part 29. Further, a person shall be ineligible to receive any contract or subcontract made with federal funds if it has been determined by a court or federal agency that the person intentionally misrepresented, by label bearing a "Made in America" inscription or otherwise, that any such product was produced in the United States.²³³

2. Grantee Remedies

A grantee may exercise any legal rights it may have under the contract or at law or equity. If a violation is discovered after the award, the contractor is responsible for completing the contract, including satisfying the Buy America requirements, even if that requires a determination of default and substitute performance. One approach has been to permit the contractor to substitute a Buy America-compliant product that meets the specifications at the contractor's expense. As a result of SAFETEA-LU, FTA now has the authority to approve a post-award nonavailability waiver.²³⁴ In the event Buy America compliance is not possible, the noncompliant item may be severed from the FTA-funded portion of the project and funded through nonfederal funding sources.

Remedies may also include conditional acceptance of rolling stock pending manufacturer's correction of deviations within a reasonable time at no additional cost to the grantee.²³⁵ If a grantee cannot complete the post-delivery audit because the grantee or its agent cannot certify Buy America compliance or that the rolling stock meets the grantee's specification requirements, the rolling stock may be rejected and final acceptance by the grantee will not be required.²³⁶

Finally, a grantee may petition FTA to investigate whether a bidder has committed a criminal act in violation of 18 U.S.C. § 1001 (false certification).²³⁷

It bears repeating that the grantee's contractual relationship with the vendor must articulate the Buy America obligations of the contractor and specify the obligations of the contractor for costs of compliance.

E. FTA Sanctions Against Grantees

As amended by SAFETEA-LU, 49 U.S.C. § 5323(l) authorizes the Secretary to terminate financial assistance and seek reimbursement directly or by offsetting amounts in the event of a false certification. In the event an FTA grantee is found to be in violation of Buy America, Section 11 of the Master Agreement is very

clear that the federal government may suspend or terminate all or part of the federal financial assistance. Further, if FTA determines that the grantee has willfully misused federal assistance funds by failing to comply with the terms of the Master Agreement (including Buy America), FTA reserves the right, pursuant to Section 11 of the Master Agreement, to require the grantee to refund the entire amount of federal funds provided for the project, or any lesser amount as the FTA may determine.

Typically, the FTA will subject the grantee's Buy America compliance to a higher level of scrutiny for a certain period. In December 1999, the FTA granted a conditional public interest waiver to the Missouri Department of Transportation (MoDOT) for noncompliant vehicles. MoDOT had purchased 59 Dodge Caravans as part of a blanket state contract, and the dealer had certified compliance with Buy America. Noncompliance was not discovered until after the vehicles had already been placed in revenue service. MoDOT demonstrated that unless the waiver was granted, the burden would have negatively affected the riding public. As a condition to granting the waiver, FTA required the grantee to send the following information to FTA Headquarters and its regional office prior to vehicle solicitations for a period of 2 years: bid packages for FTA review prior to publication, bid summary sheet and pre-award audit prior to entering into any contracts, written process for implementing pre-award and post-delivery audits, and completed post-delivery audit within 30 days of vehicle acceptance.²³⁸

VIII. CONCLUSION

Some would argue that the conditions favoring protectionism that prompted the enactment of the 1933 Buy American Act and the 1987 STURAA no longer apply to transit procurements in North America.²³⁹ Nevertheless, while the causality has never been analyzed (to the knowledge of this author), several major European and Japanese railcar builders and European and Canadian bus manufacturers have located assembly plants in the United States for purposes of Buy America compliance.²⁴⁰ In an FTA response to a certification pro-

²³⁸ Letter from FTA Chief Counsel to Missouri Department of Transportation (Dec. 14, 1999).

²³⁹ See Hughes, *supra* note 12.

²⁴⁰ A partial list includes Nova Bus, a Canadian subsidiary of Volvo Bus Corporation, a Swedish corporation that has manufacturing plants in Schenectady, New York, and Roswell, New Mexico; Neoplan USA, an American licensee of the German Neoplan Group, which has a bus manufacturing facility in Lamar, Colorado; New Flyer, a Canadian bus company that has manufacturing plants in Crookston and St. Cloud, Minnesota; North American Bus Industries, Incorporated, a subsidiary of a Hungarian parent that has a facility in Anniston, Alabama; Orion Bus Industries, a Canadian subsidiary of Daimler Chrysler that has a bus manufacturing facility in Oriskany, New York; and Bombardier, Inc. (Canada), Breda (Italy), GEC Alsthom (France), Kawasaki (Japan), Kinki-Sharyo (Japan),

²³³ 49 C.F.R. § 661.18.

²³⁴ 49 C.F.R. § 661.7(c)(3).

²³⁵ 49 C.F.R. § 663.39(b).

²³⁶ 49 C.F.R. § 663.39.

²³⁷ 49 C.F.R. § 661.15(a).

test, FTA noted that Pfaff Silberblau, a Canadian supplier of lift and hoist equipment, had entered into a business agreement with Simmons Machine Tool Corporation in Albany, New York, to provide a domestic manufacture location for its hoist systems. As the FTA stated in its June 10, 2002, Dear Colleague Letter, “the Buy America law has been an integral part of our industry and this country’s federal transit grant program for almost a quarter of a century,” and it cannot be avoided when FTA funding of steel, iron, manufactured products, or rolling stock is involved.

Always keep in mind the following Buy America essentials:

- Make sure you correctly differentiate between manufactured products and rolling stock.
- If you plan to award to a bidder that has certified noncompliance, request a waiver *before* you award the contract.
- Follow 49 C.F.R. § 661.11 step by step in determining compliance with the cost element of the Buy America domestic content requirements.
- Make sure the contractor is contractually liable for costs of Buy America compliance.

When grappling with Buy America, you will need in your arsenal the following essential materials:

- 49 U.S.C. § 5323(j).
- 49 C.F.R. Parts 661 and 663.
- Chapters 4, 6, and 8 and appendices of the FTA *Best Practices Procurement Manual*.

- FTA-DC-90-7713-93-1, Revision B, “Conducting Pre-Award and Post-Delivery Reviews for Bus Procurements” and FTA-DC-90-7713-94-1, Revision B, “Conducting Pre-Award and Post-Delivery Reviews for Rail Vehicle Procurements.”

- The name, address, and phone number of your FTA Regional Counsel and the following contact at the FTA Office of the Chief Counsel:

Office of Chief Counsel
 Federal Transit Administration
 U.S. Department of Transportation
 1200 New Jersey Avenue, S.E., Room E56-311
 Washington, D.C. 20590
 Phone: (202) 366-4011
 Fax: (202) 366-3809
 Email: jayme.blakesley@dot.gov or
 richard.wong@dot.gov

- FTA Buy America Web site at http://www.fta.dot.gov/laws/leg_reg_178.html.

APPENDIX A

NATIONAL ACADEMY OF SCIENCES
TRANSPORTATION RESEARCH BOARD
SUBJECT: TCRP J-5, STUDY TOPIC 5-03
A GUIDE TO THE BUY AMERICA REQUIREMENTS
BUY AMERICA SURVEY

The Transportation Research Board has retained a consultant to do a study with the goal of producing an easy to use guide for implementation of Buy America for use by attorneys and procurement officers.

The purpose of this survey is to elicit information from transit systems, companies and other institutions involved in the transit industry to develop an industry-wide perspective on the impact of Buy America on transit procurements with the goal of identifying areas where streamlining of the federal statutory and regulatory requirements could be accomplished without jeopardizing the public policy goals of Buy America.

1. Please provide the name and address of your agency or firm.

2. Please provide the name, telephone number and e-mail number of an appropriate contact person who is primarily responsible for Buy America matters for your agency or firm.

Name: _____

Telephone: _____

E-Mail: _____

3. Please describe the impact, if any, which Buy America has on your transit procurement processes, making reference to specific procurements if necessary. What, if any, project delays and additional project costs would you attribute directly to Buy America compliance? Please specify any Buy America compliance issues that arose as a result of change orders or other factors. Please estimate your agency's cost of compliance with Buy America.

4. Have you sought an FTA waiver or other interpretation regarding steel and iron, other than rolling stock?

Yes No

If yes, please describe the request and the FTA response.

5. Have you sought a waiver or other interpretation regarding manufactured products or manufacturing processes?

Yes No

If yes, please describe the request and the FTA response.

6. Have you sought a waiver or other interpretation regarding FTA's application of the concept of "manufactured product" to a construction project?

Yes No

If yes, please describe the request and the FTA response.

7. Have you sought, in connection with a specific rolling stock procurement, a waiver or other FTA interpretation regarding:

- Component:** Yes No
- Subcomponent:** Yes No
- End Product:** Yes No
- Turnkey project:** Yes No
- Final Assembly:** Yes No
- “Manufacture” of a component:** Yes No
- Export of subcomponents:** Yes No

If yes, please describe the request and the FTA response.

8. Have you sought an FTA interpretation regarding the determination of project costs for purposes of the 60% domestic content calculation?

Yes No

If yes, please describe the request and the FTA response.

9. Have you sought any of the following waivers, which you may not have discussed above:

- Public interest waiver:** Yes No
- Price-differential waiver:** Yes No
- Non-availability waiver:** Yes No

If yes, please describe the request and the FTA response.

10. Have you ever assumed a general waiver for “microcomputer equipment”?

Yes No

If yes, please describe the item procured.

11. Have you taken advantage of the recent change set forth in TEA-21, which permits the correction of inadvertent errors after bid opening?

Yes No

If yes, please describe the circumstances and any challenges to this determination.

12. Have you sought an FTA investigation into the compliance of a successful bidder with the bidder’s Buy America certification?

Yes No

If yes, please describe the FTA’s role and articulate, if possible, the standard used by FTA to determine sufficient evidence to overcome the FTA presumption of compliance.

13. Has the requirement for pre-award audits significantly impacted your transit procurement process?

Yes No

If yes, please elaborate. Please articulate specific recommendations you may have for streamlining this process.

14. Has the requirement for post-delivery audits significantly impacted your transit procurement process?

Yes No

If yes, please elaborate. Please articulate specific recommendations you may have for streamlining this process.

15. Have you litigated against a vendor using Buy America as part of your litigation strategy?

Yes No

If yes, please elaborate. Please attach any relevant motion papers.

Please mail or fax completed surveys no later than March 31, 2000 to the attention of:

Jaye Pershing Johnson Kalkines, Arky, Zall & Bernstein LLP 1675 Broadway New York, New York 10019

FAX: 212-541-9250 PHONE: 212-830-7241

E-MAIL: JJOHNSON@KAZB.COM

To the extent you may have written responses of the FTA or other publicly available information or correspondence with regard to any of the matters discussed above, please fax any of these materials to the attention of Ms. Johnson. Thank you very much for your responses to this survey.

ACKNOWLEDGMENTS

This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by **Robin M. Reitzes**, San Francisco City Attorney's Office, San Francisco, California. Members are **Rolf G. Asphaug**, Denver Regional Transportation District, Denver, Colorado; **Sheryl King Benford**, Greater Cleveland Regional Transit Authority, Cleveland, Ohio; **Darrell Brown**, Darrell Brown & Associates, New Orleans, Louisiana; **Dennis C. Gardner**, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; **Clark Jordan-Holmes**, Joyner & Jordan-Holmes, P.A., Tampa, Florida; **Elizabeth M. O'Neill**, Metropolitan Atlanta Rapid Transit Authority, Atlanta, Georgia; **Ellen L. Partridge**, Chicago Transit Authority, Chicago, Illinois; and **James S. Thiel**, Wisconsin Department of Transportation, Madison, Wisconsin. **Rita M. Maristch** provides liaison with the Federal Transit Administration, **James P. LaRusch** serves as liaison with the American Public Transportation Association, and **Robert I. Brownstein** is the liaison for the TCRP Oversight and Project Selection Committee. **Gwen Chisholm Smith** represents the TCRP staff.

Transportation Research Board

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