

BUY AMERICA

*Or...What Happens When
Lawyers Do Math*



A Brief Primer



Why Buy America?

- Overarching goal – federal funds should benefit US interests
- Supported by both sides of the political aisle
- Directed by federal statutes
- No relief under NAFTA or other international trade agreements



Executive Branch Emphasis

“The Department of Transportation is committed to maximizing the economic benefits of the Obama Administration’s historic infrastructure investments through Buy America provisions that keep American companies healthy and families working.”



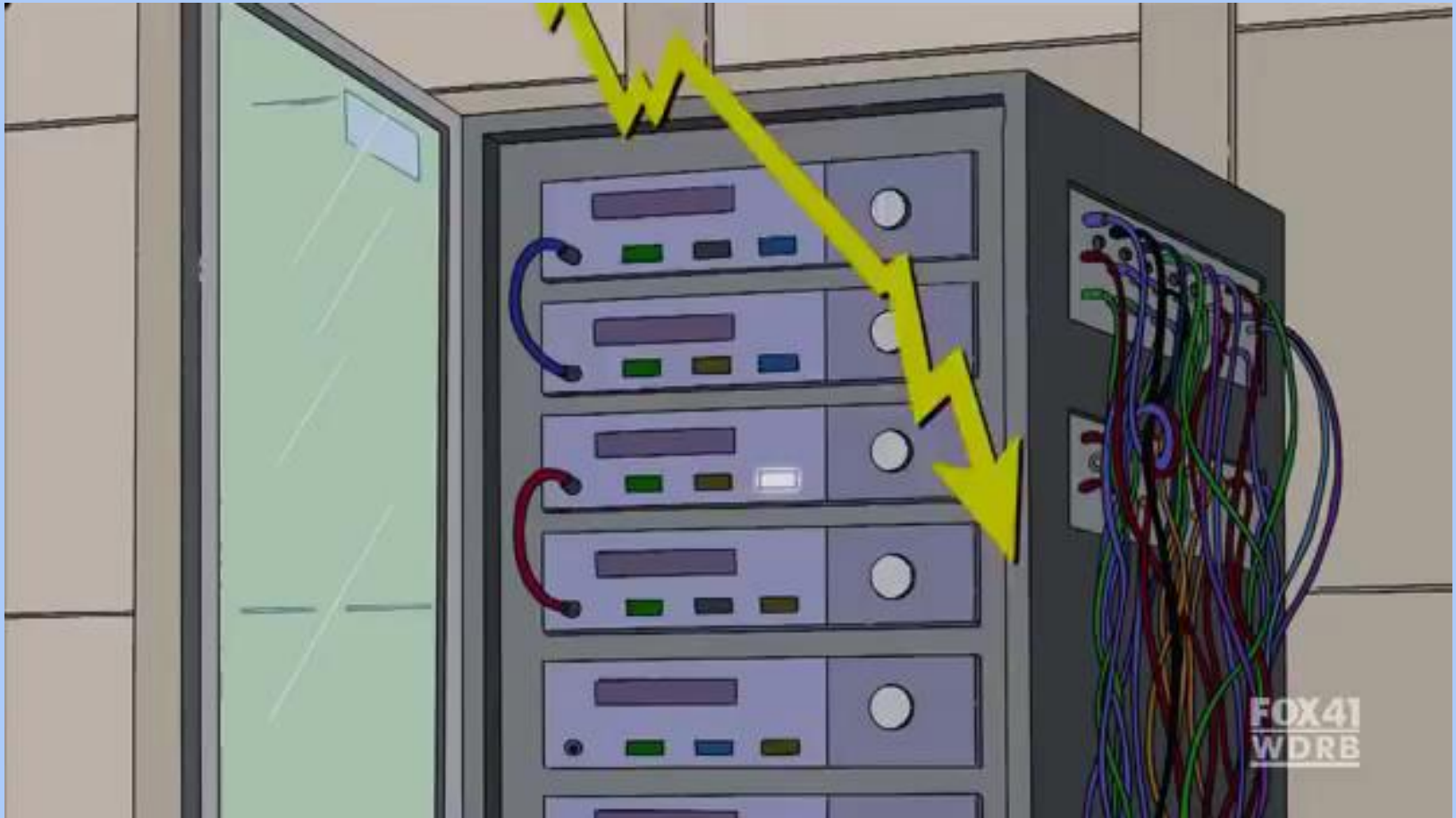
Buy American & hire American are the principles at the core of my agenda, which is: JOBS, JOBS, JOBS! Thank you [@exxonmobil](#).



A Maze of Varying Rules

- Different statutes, different Congresses, different eras
- Many pre-date creation of the US Department of Transportation!
- Buy America, Buy American, Amtrak preference
- Other rules for Recovery Act, FHWA, and FAA funding as well





A Maze of Varying Rules

American Recovery and Reinvestment Act of 2009, Section 1605 – Buy American (100% Domestic Content of items below)	Federal Aviation Administration (FAA) 49 U.S.C. § 50101 – Buy American (see discretionary waiver when 60% Domestic Content of items below)	Federal Highway Administration (FHWA) 23 U.S.C. § 313 – Buy America, 23 C.F.R. § 635.410 (100% Domestic Content of items below)	Federal Railroad Administration (FRA) High Speed Rail Program 49 U.S.C. Chapters 244, 246; § 24405 – Buy America (100% Domestic Content of items below)	National Railroad Passenger Corporation (AMTRAK) 49 U.S.C. § 24305	Federal Transit Administration (FTA) 49 U.S.C. § 5323(i); 49 C.F.R. Part 661 (Buy America Requirements); (See 60% Domestic Content for buses and other Rolling Stock)
<p><u>Buy American</u></p> <p>The Recovery Act prohibits use of recovery funds for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.</p> <p><u>Waivers</u></p> <p>The head of the Federal department or agency finds that:</p> <p>(1) It would be inconsistent with the public interest;</p> <p>(2) Iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or</p> <p>(3) Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.</p> <p><u>Other</u></p> <p>There are provisions in the Recovery Act for the Federal Aviation Administration, Federal Railroad Administration, and Federal Highway Administration to apply their own grant requirements, including Buy America(n).</p> <p>All waivers have to be posted in Federal Register.</p> <p>U.S. international obligations (World Trade Organization Government Procurement Agreement, U.S. Free Trade Agreements, U.S.-EC Exchange of Letters (May 15, 1995), and Canada-U.S. Agreement on Government Procurement) apply.</p>	<p><u>Buy American</u></p> <p>The FAA will not obligate any funds authorized to be appropriated for any project unless steel and manufactured products used in such projects are produced in the United States.</p> <p><u>Waivers</u></p> <p>The Administrator has delegated authority to grant waivers to this requirement to Director of Acquisition and Contracting; Regional Administrators; and Center Directors upon finding that compliance with the Act would:</p> <p>(1) It would be inconsistent with the public interest;</p> <p>(2) The steel and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality;</p> <p>(3) When procuring a facility or equipment under the Airport and Airway Improvement Act of 1982:</p> <p>(A) the cost of components and subcomponents produced in the United States is more than 60 percent of the cost of all components of the facility or equipment; and</p> <p>(B) final assembly of the facility or equipment has occurred in the United States; or</p> <p>(4) Including domestic material will increase the cost of the overall project by more than 25 percent.</p> <p><u>Other</u></p> <p>Labor costs involved in final assembly are not included in calculating the cost of components.</p> <p>U.S. international obligations (World Trade Organization Government Procurement Agreement, U.S. Free Trade Agreements, U.S.-EC Exchange of Letters (May 15, 1995), and Canada-U.S. Agreement on Government Procurement) do not apply.</p>	<p><u>Buy America</u></p> <p>The Secretary of Transportation shall not obligate any funds unless steel, iron, and manufactured goods used in such project are produced in the United States.</p> <p>Applies to iron and steel products and their coatings that are to be permanently incorporated into the project. The FHWA, in its 1983 rulemaking, determined that Buy America did not apply to raw materials and waived its application to manufactured products, although in the statute, based on the public interest. Lack of adequate domestic supply resulted in a 1995 nationwide waiver for iron ore, pig iron, and reduced/processed/pelletized iron ore. In 1994, a nationwide waiver for specific ferryboat parts came into effect.</p> <p><u>Waivers</u></p> <p>The Secretary of Transportation may waive the requirement if the Secretary finds that:</p> <p>(1) It would be inconsistent with the public interest;</p> <p>(2) Such materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or</p> <p>(3) Inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent (this is a standing waiver codified in regulations when alternate bidding procedures are used).</p> <p><u>Other</u></p> <p>Labor costs involved in final assembly are not included in calculating the cost of components.</p> <p>All waivers have to be posted in Federal Register.</p> <p>All proposed waivers are first posted on the FHWA's website for a 15-day comment period prior to publishing the final decision in the Federal Register.</p> <p>U.S. international obligations (World Trade Organization Government Procurement Agreement, U.S. Free Trade Agreements, U.S.-EC Exchange of Letters (May 15, 1995), and Canada-U.S. Agreement on Government Procurement) do not apply.</p>	<p><u>Buy America</u></p> <p>The Secretary of Transportation may obligate funds for a project only if the steel, iron, and manufactured goods used in the project are produced in the United States.</p> <p><u>Waivers</u></p> <p>The Secretary of Transportation may waive the requirement if the Secretary finds that:</p> <p>(1) It would be inconsistent with the public interest;</p> <p>(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 a satisfactory quality;</p> <p>(3) Rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time; or</p> <p>(4) Including domestic material will increase the cost of the overall project by more than 25 percent.</p> <p><u>Other</u></p> <p>The requirements only apply to projects for which the costs exceed \$100,000.</p> <p>Labor costs involved in final assembly are not included in calculating the cost of components.</p> <p>All waivers have to be posted in Federal Register.</p> <p>U.S. international obligations (World Trade Organization Government Procurement Agreement, U.S. Free Trade Agreements, U.S.-EC Exchange of Letters (May 15, 1995), and Canada-U.S. Agreement on Government Procurement) do not apply.</p>	<p><u>Domestic Buying Preferences</u></p> <p>Amtrak shall buy only:</p> <p>(A) unmanufactured articles, material, and supplies mined or produced in the United States; or</p> <p>(B) manufactured articles, material, and supplies manufactured in the United States substantially from articles, material, and supplies mined, produced, or manufactured in the United States.</p> <p><u>Waivers</u></p> <p>The Secretary may exempt Amtrak from this subsection if the Secretary decides that:</p> <p>(A) for particular articles, material, or supplies-</p> <p>(i) the requirements are inconsistent with the public interest;</p> <p>(ii) the cost of imposing those requirements is unreasonable; or</p> <p>(iii) the articles, material, or supplies, or the articles, material, or supplies from which they are manufactured, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality; or</p> <p>(B) rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time.</p> <p><u>Other</u></p> <p>The requirements apply only when the cost of those articles, material, or supplies bought is at least \$1 million.</p>	<p><u>Buy America</u></p> <p>No funds may be obligated by FTA for a grantee project unless all iron, steel, and manufactured goods used in the project are produced in the United States.</p> <p><u>Waivers</u></p> <p>The Administrator may waive the general requirements if the Administrator finds that:</p> <p>(1) It would be inconsistent with the public interest;</p> <p>(2) 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;</p> <p>(3) The inclusion of a domestic item or domestic material will increase the cost of the contract between the grantee and its supplier of that item or material by more than 25 percent.</p> <p><u>Rolling stock procurements</u></p> <p>(a) The Buy America provisions do not apply to the procurement of buses and other rolling stock (including train control, communication, and traction power equipment), if the cost of components produced in the United States is more than 60 percent of the cost of all components and final assembly takes place in the United States.</p> <p><u>Other</u></p> <p>Labor costs involved in final assembly are not included in calculating the cost of components.</p> <p>Post only "public interest" waivers in Federal Register.</p> <p>U.S. international obligations (World Trade Organization Government Procurement Agreement, U.S. Free Trade Agreements, U.S.-EC Exchange of Letters (May 15, 1995), and Canada-U.S. Agreement on Government Procurement) do not apply.</p>

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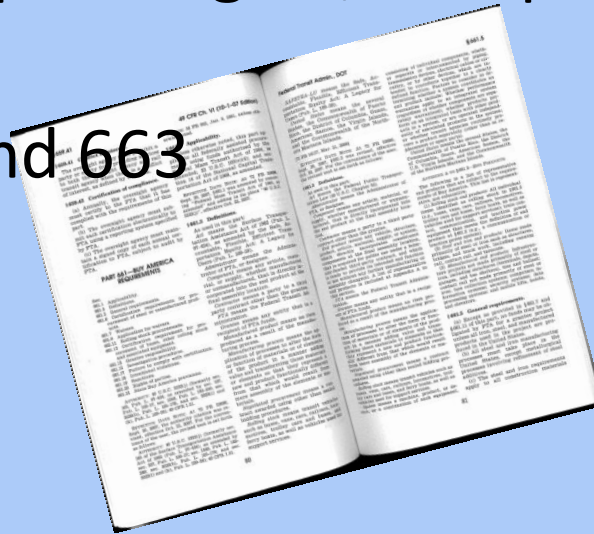
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Buy America

- FTA version
- 49 USC 5323(j)
- FTA responsible to promulgate, interpret, and enforce provisions
- 49 CFR Parts 661 and 663



Buy America History

- First added to transit law in 1978 (although a much weaker preference was in the original *Urban Mass Transportation Act*)
- “Required” US sources in 1982 and set a 50% floor for US rolling stock content
- *Surface Transportation and Uniform Relocation Assistance Act of 1987* (STURAA) required 50% minimum or more of rolling stock subcomponents be of US origin to qualify a component as domestic
- STURAA also directed stepped increases for US rolling stock content – 55% starting in 1989 and 60% in 1991
- The Fixing America’s Surface Transportation Act (FAST) passed in 2016, raising rolling stock content requirements to 65% as of 2018 and 70% as of 2020

Only Three Levels of Manufacturing in FTA's World

- The end product – The vehicle, building, or product
- Components – Everything directly incorporated into the end product
- Subcomponents – Things manufactured into components
- Everything below the subcomponent level is ignored

What is a US Product?

- Manufactured products = “manufactured” in the US + all US components
- US components = “manufactured” in the US
- Subcomponent sources are not considered



“Manufactured”

“Manufacturing process means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.”

“End Product”

“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 at Appendix A to this section.”

Appendix A – List of End Products

The following is a list of representative end products that are subject to the requirements of Buy America. This list is representative, not exhaustive.

- (1) Rolling stock end products: 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, including manufactured bimetallic power rail).
- (2) Steel and iron end products: Items made primarily of steel or iron such as structures, bridges, and track work, including running rail, contact rail, and turnouts.
- (3) Manufactured end products: 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.

Iron and Steel

“The steel and iron requirements apply 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 and 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, or to bimetallic power rail incorporating steel or iron components.”



What is a US Product?

- The rolling stock waiver
- Rolling stock – “final assembly” in US + more than 60/65/70% of component material content of US origin
- Components = “manufactured” in the US + more than 60/65/70% of subcomponent material content of US origin

“Component”

- 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. 49 CFR 661.3
- A component is considered to be manufactured if there are sufficient activities taking place to advance the value or improve the condition of the subcomponents of that component; that is, if the subcomponents have been substantially transformed or merged into a new and functionally different article.
- A subcomponent is any article, material, or supply, whether manufactured or unmanufactured, that is one step removed from a component in the manufacturing process and that is incorporated directly into a component.

What is a Component?

Appendix B to § 661.11 - TYPICAL COMPONENTS OF BUSES

The following is a list of items that typically would be considered components of a bus. This list is not all-inclusive.

Car body shells, engines, transmissions, front axle assemblies, rear axle assemblies, drive shaft assemblies, front suspension assemblies, rear suspension assemblies, air compressor and pneumatic systems, generator/alternator and electrical systems, steering system assemblies, front and rear air brake assemblies, air conditioning compressor assemblies, air conditioning evaporator/condenser assemblies, heating systems, passenger seats, driver's seat assemblies, window assemblies, entrance and exit door assemblies, door control systems, destination sign assemblies, interior lighting assemblies, front and rear end cap assemblies, front and rear bumper assemblies, specialty steel (structural steel tubing, etc.) aluminum extrusions, aluminum, steel or fiberglass exterior panels, and interior trim, flooring, and floor coverings.

What is a Component?

Appendix C TO § 661.11—TYPICAL COMPONENTS OF RAIL ROLLING STOCK

The following is a list of items that typically would be considered components of rail rolling stock. This list is not all inclusive.

Car shells, engines, main transformer, pantographs, traction motors, propulsion gear boxes, interior linings, acceleration and braking resistors, propulsion controls, low voltage auxiliary power supplies, air conditioning equipment, air brake compressors, brake controls, foundation brake equipment, articulation assemblies, train control systems, window assemblies, communication equipment, lighting, seating, doors, door actuators and controls, wheelchair lifts and ramps to make the vehicle accessible to persons with disabilities, couplers and draft gear, trucks, journal bearings, axles, diagnostic equipment, and third rail pick-up equipment.

What is a Component?

Appendix D TO § 661.11—MINIMUM REQUIREMENTS FOR FINAL ASSEMBLY

(a) Rail Cars: 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.

What is a Component?

Appendix D to § 661.11 - MINIMUM REQUIREMENTS FOR FINAL ASSEMBLY

(b) Buses: 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.

What do These Lists Mean?

- The items from both lists – as a practical matter – have to be considered components
- Each must be considered separately to determine compliance
- Example – wheel assembly = wheels and axle
 - One delivered product
 - Two components for BA analysis
 - Each must contain 70% US content to get full credit!



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Waivers

- Statutory
 - Public interest – wild card authority
 - Non-availability
 - Price differential
 - Rolling stock
- Regulatory
 - Small purchases
 - Microprocessors



Waiver Process

- Manufacturers may submit waiver requests for components or subcomponents
- Requests must be in writing, fully justified
- Publication in the *Federal Register*
- Very limited
- Waiver = US content



Auditing

- 49 CFR Part 663
- Required for rolling stock procurements
- Pre-award and post-delivery required
- Does it meet the requirements?
- Proper certifications?
- Is there enough US content?
- Is the final assembly process robust enough?

Auditors

- Manufacturer's representative
- Purchaser's auditor
- FTA oversight auditor
- Confidentiality



Pre-Award Audits

- Based on the final offer or proposal
- Examines supplier certifications
- Reviews calculations
- Anticipated costs
- Confidence in meeting the required US content percentage



Supplier Certifications

- Each supplier certifies its product(s)
- Client, project, PO or contract
- Identify component and subcomponents to establish US content
- Manufacturing site – city and state
- Identify percentage of US content





NICE TRY, USA...

Content Matters!

- When a component is manufactured in the US and contains more than the minimum US subcomponent content, 100% of the cost counts toward the overall US content
- When that same component falls below the minimum, the value is limited to the cost of US subcomponents and the manufacturing costs
 - No credit for the rest of the components, profit realized by the component manufacturer
- When the component is manufactured outside the US, the value is limited to the value of subcomponents that retain their US identity under 19 CFR 10.11, et seq

What is the Real Rule?



Practice Tips

- Document everything!
- Be wary of the hierarchy of components and subcomponents
- Analyze whether final assembly fits the FTA criteria
- Analyze manufacturing processes
- Keep current on the math, particularly when reviewing change orders

The Bottom Line?

