

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket Nos. FTA-2016-0019 & FTA-2016-0020]

Notice of Policy on the Implementation of the Phased Increase in Domestic Content under the Buy America Waiver for Rolling Stock and Notice of Proposed Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of final policy and public interest waiver.

SUMMARY: This Notice consists of the Federal Transit Administration's (FTA) policy statement regarding its implementation of the phased-in increase in domestic content for rolling stock under the FTA's Buy America statute, as amended by the Fixing America's Surface Transportation (FAST) Act. Through this Notice, FTA is providing guidance to transit agencies and transit vehicle manufacturers regarding how they are to implement the FAST Act's statutory amendments. Additionally, FTA is providing notice of public interest waivers of Buy America domestic content requirements for rolling stock procurements in limited circumstances.

DATES: The final policy takes effect on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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I. Introduction

This Notice provides guidance and clarification to transit agencies and transit vehicle manufacturers regarding FTA’s implementation of the FAST Act’s amendments to 49 U.S.C. 5323(j)(2)(C).

Section 3011 of the FAST Act (Pub. Law 114-94, enacted December 4, 2015) amended the rolling stock waiver in 49 U.S.C. 5323(j)(2)(C) to require a two-step increase in the domestic content of rolling stock as follows:

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

–

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

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

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

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

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

...”

Given the potential effect of the FAST Act changes to vehicle procurements by the statutory use of the term “produced,” transit agencies and transit vehicle manufacturers asked FTA to provide specific guidance on the applicability of the FAST Act’s new Buy America provisions to contracts entered into before, on, or after October 1, 2015, the effective date set forth in section 1003 of the FAST Act.

Under existing law (49 U.S.C. §5325(e)), recipients of FTA financial assistance may enter into rolling stock contracts for up to five years for buses and seven years for railcars. In FTA Circular 4220.1F, “Third Party Contracting Guidance,” FTA permits these five- and seven-year periods to cover the recipient’s “material requirements” for rolling stock and replacement needs from the effective date of the contract through the end of the fifth or seventh year. FTA does not require that “the recipient must obtain delivery, acceptance, or even fabrication in five or seven years – instead, it means only that FTA limits a contract to purchasing no more than the recipient’s material requirements for rolling stock or replacement parts for five or seven years, based on the effective date of the contract.” See FTA Circular 4220.1F, Chapter IV, page 23. Under this rule, options for vehicles must be exercised within the five- or seven-year contract term, although the vehicles may be produced and delivered after the contract term.

II. Proposed Policy and Public Interest Waiver

A. Proposed Policy Guidance

The FAST Act identified two points in time: (1) “when procuring rolling stock,” which FTA’s proposed policy interpreted as the date the vehicle procurement contract

was signed; and (2) “the cost of components and subcomponents produced in the United States for fiscal years ...”, which FTA interpreted as the delivery date of the vehicle.

Individual and Joint Procurements. FTA proposed to implement the FAST Act by requiring that if a recipient (or a group of recipients under a joint procurement) enters into a contract for rolling stock after the effective date of the FAST Act, i.e., October 1, 2015, the new FAST Act provisions for domestic content of the rolling stock would apply based on the delivery date of the vehicle. Thus, for vehicles delivered in FY2018 and FY2019, the domestic content would have to be more than 65 percent, and for vehicles delivered in FY2020 and beyond, the domestic content would have to be more than 70 percent. These higher domestic content requirements would apply to all contracts signed after the effective date of the FAST Act unless FTA issues a waiver, which FTA addressed in a separate **Federal Register** Notice (81 FR 20051, April 6, 2016).

In its proposed policy statement, FTA proposed that the FAST Act amendments would not apply to a contract entered into before the effective date of the FAST Act, i.e., October 1, 2015, even if the contract provides for the delivery of vehicles after FY2017. In addition, the policy statement proposed to continue to permit options to be exercised for those contracts entered into before October 1, 2015, even if the vehicles would be delivered outside the five- or seven-year contract term, consistent with Circular 4220.1F.

However, recipients who were not direct parties to a contract executed before October 1, 2015, would not be allowed to exercise options (a/k/a “piggybacking”) on those contracts and thereby could not take advantage of the lower domestic content requirement. Because the assignment of options to a third party results in the third party and the vendor entering into a new contract that would be entered into after the effective

date of the FAST Act, FTA proposed to apply the increased domestic content requirements to vehicles scheduled for delivery in FY 2018 and beyond.

State Purchasing Schedules. In the proposed policy statement, FTA recognized that some recipients and subrecipients purchase rolling stock from a State purchasing schedule (i.e., an arrangement that a State has negotiated with multiple vendors in which those vendors essentially agree to provide an option to the State, as well as subordinate and local governmental entities allowed to participate in the schedule, to acquire specific property or services in the future at established prices). Because the purchasing schedule does not commit the State to procuring a minimum number of vehicles, a “contract” does not exist until a State, recipient, or subrecipient enters into a purchase order with a vendor listed on the schedule.

Therefore, the proposed policy statement proposed to retain the 60 percent domestic content requirement for purchase orders placed against State purchasing schedules before October 1, 2015, regardless of the ultimate delivery date(s). However, for purchase orders placed against State purchasing schedules on or after October 1, 2015, FTA proposed to adopt the elevated FAST Act content requirements.

This interpretation is consistent with the language of the statute, follows Congress’ intention to increase the domestic content for vehicles produced in FY2018 or later, and adheres to basic principles of statutory construction.

Calculation of Domestic Content for Components and Subcomponents. In its proposed policy statement, FTA proposed to adjust the calculation for determining whether a component is of domestic origin under 49 CFR 661.11 to mirror the increase in domestic content for FY2018 and beyond. Currently under 49 CFR 661.11(g), “for a

component to be of domestic origin, more than 60 percent of the subcomponents of that component, by cost, must be of domestic origin, and the manufacture of the component must take place in the United States. If, under the terms of this part, a component is determined to be of domestic origin, its entire cost may be used in calculating the cost of domestic content of an end product.”

Thus, for vehicles to be delivered in FY2018 and 2019, FTA proposed that more than 65 percent of the subcomponents of that component, by cost, must be of domestic origin, and for FY2020 and beyond, more than 70 percent of the subcomponents of the component must be of domestic origin. The existing requirement that manufacture of the component take place in the United States would continue to apply, as well as the provision that states that if a component is determined to be of domestic origin, its entire cost may be used in calculating the domestic value of the rolling stock, regardless of the value of its individual subcomponents.

B. Proposed Public Interest Waiver

FTA recognized that the FAST Act amendments may produce significant hardship for two categories of recipients and manufacturers: (1) recipients who entered into contracts or placed purchase orders against State schedules between October 1, 2015 and December 4, 2015 (i.e., the effective date of the Act and its enactment date, respectively); and (2) recipients who entered into contracts after December 4, 2015, as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015.

Under 49 U.S.C. 5323(j)(2)(A), the Secretary of Transportation may waive the Buy America requirements if the Secretary finds that applying the Buy America

requirements would be “inconsistent with the public interest.” This function has been delegated to the FTA Administrator by 49 CFR 1.91, and section 661.7(b) of FTA’s implementing regulation (49 CFR part 661) provides: “In determining whether the conditions exist to grant this public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis When granting a public interest waiver, the Administrator shall issue a detailed written statement justifying why the waiver is in the public interest. The Administrator shall publish this justification in the **Federal Register**, providing the public with a reasonable time for notice and comment of not more than seven calendar days.”

In a separate Notice accompanying the proposed policy statement (Docket FTA-2016-0020), FTA sought comment on a general public interest waiver for those affected parties (81 FR 20051, April 6, 2016). FTA proposed a public interest waiver for the following categories of contracts: (1) for contracts entered into between the FAST Act’s effective date and date of enactment (i.e., from October 1, 2015 through December 4, 2015), the increased domestic content requirements for FY2018 and beyond would not apply, regardless of when the vehicles were delivered; and (2) for contracts entered into after December 4, 2015 as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015, the increased domestic content requirements for FY2018 and beyond would not apply, regardless of when the vehicles were delivered.

III. Response to Comments

FTA received comments from 24 entities in Docket FTA-2016-0019 and comments from 14 entities in Docket FTA-2016-0020 from a broad cross-section of

transit agencies, transit vehicle manufacturers, transit industry trade associations, the passenger vessel industry, an alliance of domestic manufacturing interests, compliance auditors, and the general public. The comments and proposals were diverse. The comments and questions can be categorized into the following primary categories:

A. What Date Controls the Percentage of Domestic Content?

Numerous commenters objected to the proposed policy statement's use of the delivery schedule as the determining factor. Some suggested that domestic content should be based on the solicitation date, which establishes the transit agency's domestic content expectations for prospective bidders, and allows suppliers to begin identifying domestic suppliers. They claimed that using the solicitation date of an invitation for bids or a request for proposals provides certainty to transit vehicle manufacturers, as transit agencies and transit vehicle manufacturers cannot forecast when a contract will be signed or when the vehicles will be delivered.

As an alternative to the solicitation date, a significant number of commenters proposed that FTA apply the domestic content requirements based upon the date a contract was entered into, for three primary reasons – consistency in vehicle components to avoid cardinal changes and increased pricing risks, reduction of administrative burdens, and consistency with the approach Congress used in implementing the last legislative increase in domestic content, which took place in 1987.

According to transit vehicle manufacturers, their vehicle bid quotes are based on the price of components known at the time the vehicle manufacturer receives the transit agency's solicitation and begins planning its supply chain by contacting potential

suppliers. According to commenters, FTA’s proposed policy had the potential of requiring three different component calculations based on a multi-year delivery schedule stemming from a single contract – one for vehicles delivered during FYs 2016-2017, another for FYs 2018-2019, and a third for FYs 2020 and beyond. This would require the vehicle manufacturer to identify new and potentially untried domestic suppliers for each successive configuration, integrate those new components in the midst of an ongoing production line, and incur the risk of price increases for those new components, as well as the possibility that the replacement or substitution of components might be characterized by some competitors as a “cardinal change.” Commenters also noted that a vehicle scheduled for delivery during the FY 2018-2019 time frame with a 65 percent domestic content requirement could find itself subject to a 70 percent domestic content requirement if delays and slippages beyond the control of the transit agency and the transit vehicle manufacturer resulted in the vehicle being delivered in FY 2020 or later. They requested a constant domestic content level that would exist for the duration of the production contract.

In addition, transit agencies expressed concerns regarding the administrative costs and burdens of performing three separate pre-award audits and three separate post-award audits on three potentially different vehicle configurations. As a term and condition of assistance, recipients of FTA funding must conduct a pre-award and post-delivery audit on every rolling stock model they procure. If domestic content was based on the delivery date, a transit agency with a multi-year delivery schedule faced the possibility that their vehicles could have three different levels of domestic content, which they would need to

verify and confirm. In addition, unforeseen delays in production could result in a vehicle delivery occurring in a subsequent fiscal year with a higher domestic content obligation.

Several commenters pointed out that when Congress elevated the domestic content requirement from 50 percent to 60 percent in section 337 of Title III of the Surface Transportation and Urban Relocation Assistance Act of 1987 (Pub. Law 100-17)(STURAA), Congress provided that a vehicle's domestic content percentage would be based on the date the procurement contract was signed. Commenters suggested that FTA follow that approach.

Finally, one commenter requested clarification on the Notice's use of the term "advertised" when referring to "solicitations for bids or requests for proposals that were advertised before December 4, 2015." FTA will address this request in the discussion of the public interest waiver, below.

FTA's Response:

Basing domestic content standards on the date the solicitation is made available to the public and potential bidders or on the date the contract is executed is contrary to language in the FAST Act. Using the date of solicitation would allow transit agencies to lock in a lower domestic content threshold for a contract that may be signed at a date when the higher domestic content standards are in effect, contrary to the statutory language. FTA believes Congress provided adequate advance notice in the FAST Act regarding the increase in domestic content, such that manufacturers and vendors have sufficient time to amend open solicitations for bids prior to the submission of bid proposals or the execution of a contract, and in fact, FTA is aware of transit agencies that have amended solicitations after they have been published. FTA also is aware that some

vehicle manufacturers have indicated through a survey of pre-award audit data that they are already capable of meeting a higher domestic content threshold.

FTA does not find the request to follow the language used in earlier revisions to domestic content requirements to be persuasive. When Congress enacted STURRA in 1987, it amended the statutory language in the authorizing statute to increase the domestic content requirement from 50 percent to 55 percent effective October 1, 1989, and section 337(a)(1)(B) increased the domestic content from 55 percent to 60 percent effective October 1, 1991. Specifically, section 337(a)(2)(B) provided:

The amendments made by paragraph (1) shall not apply with respect to any supplier or contractor or any successor in interest or assignee which qualified under the provisions of section 165(b)(3) of the Surface Transportation Assistance Act of 1982 prior to the date of enactment of this Act **under a contract entered into prior to April 1, 1992.** (Emphasis added).

UMTA (FTA's predecessor agency) quickly published an implementing Notice that stated:

The Buy America domestic content requirement for buses, rolling stock and associated equipment will be increased from its existing 50 percent to 55 percent at the end of three years, and to 60 percent at the end of five years, except that any company that has met the existing Buy America requirement would be exempted from these increases for all contracts entered into before April 1, 1992. In addition, the rolling stock price differential waiver is increased from its current 10 percent to 25

percent, and the definition of "components" is specifically to include "subcomponents." UMTA will be revising its Buy America regulation to reflect these changes. (52 FR 15440, April 28, 1987)

UMTA then published a Notice of Proposed Rulemaking to implement these new provisions (53 FR 32994, August 29, 1988), issuing its Final Rule on January 9, 1991 (56 FR 926). In the Final Rule, UMTA stated that it "believes that Congress intended to apply the increased domestic content requirements on an accelerated basis to firms entering the marketplace after April 2, 1987, and that it intended to grandfather existing firms that had complied with previous Buy America requirements regardless of the number of contracts or the product supplied (e.g., a bus versus a rail car)."

Although Congress had the precedent of the timing language used in STURAA when it drafted the FAST Act, Congress declined to reintroduce that language.

However, FTA finds the requests that the domestic content of a vehicle be fixed upon a single date that establishes the domestic content level for the duration of the contract to be persuasive, for the reasons articulated by the commenters. For those reasons, the applicable domestic content percentage will be based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding. This approach is closest to the FAST Act's statutory language and to Congress' clear direction. If the delivery date slips into a subsequent FY due to unforeseen circumstances, FTA will address those situations on a case-by-case basis. (Note that FTA is basing the domestic content requirement on the delivery date of the first production vehicle, rather than on the delivery date of a prototype unit, for several reasons. First, prototype units are

constructed by the manufacturer for the limited purpose of design qualification testing, and may not necessarily represent the finalized car design or car content. Second, prototypes are produced for testing purposes, and do not typically enter revenue (i.e., passenger) service in their prototype configuration. Finally, prototype units are delivered several months before the scheduled delivery date of the first production model and may not necessarily represent the final vehicle configuration, although the scheduled delivery date of the first production unit will undoubtedly control the components contained in the prototype unit. Consistent with the FAST Act, however, prototype units must contain an identical percentage of domestic content as the production units.)

This approach of using the date of first production vehicle delivery best reflects the statutory language of the FAST Act, while providing the consistency in componentry and relieving the need to conduct multiple pre-award and post-delivery audits raised as concerns by numerous commenters. The FAST Act's phased-in approach provides adequate notice to transit agencies and transit vehicle manufacturer suppliers of the domestic content requirements.

B. How Do the New Requirements Apply to Options, Joint Procurements, and Piggyback Procurements?

FTA received numerous comments regarding the effect of the higher domestic content provisions on options, joint procurements, and piggyback procurements. One commenter objected to extending the domestic content percentages throughout the life of a multi-year contract, including the exercise of any options, believing that Congress intended to increase domestic content as soon as possible, and that allowing the exercise

of options would lock in a lower domestic content threshold well through FY 2020 and beyond. In contrast, several transit agencies and vehicle manufacturers proposed that the domestic content for rolling stock extend to the exercise of options for additional vehicles of identical manufacture, citing the benefits to rolling stock manufacturers and transit agencies, such as the predictability of pricing, the availability of components, consistency within the supply chain, and facilitating the ongoing manufacturing of rolling stock. They also cited the retroactive effect of such an approach, stating that applying a higher domestic content standard to a pre-existing contract that established a lower threshold was inconsistent with public interest and general principles of contract law.

One commenter sought clarity regarding the applicability of the proposed policy guidance to joint procurement contracts executed prior to the effective date of the FAST Act.

Several commenters objected to FTA's proposed guidance that would not allow recipients to piggyback on another agency's contract unless the vehicles being produced under the original contract met the domestic content requirements at the time the optioned vehicles are delivered.

FTA's Response:

FTA's proposed policy recognized the differences between the exercise of options by the original parties to a contract or a joint procurement between two or more purchasers and a single vehicle manufacturer, and piggyback procurements by third parties who were not parties to the original contract. With regard to the exercise of options, FTA is persuaded that the predictability of pricing and consistency within the supply chain outweighs any risks that the FAST Act is being circumvented. Therefore,

FTA is modifying its final policy guidance to reflect that the date of the delivery of the first production vehicle under the contract controls the domestic content of all vehicles delivered under the contract, including vehicles delivered pursuant to the exercise of options. The exercise of options by the original parties to the contract or joint procurement establishes a predictable contract price for the buyers, and provides a standardized component list for the transit vehicle manufacturer, while at the same time it allows the transit vehicle manufacturer to keep its production line open, ensuring American jobs. However, only the original parties to a contract (including signatories to a joint procurement) are entitled to the benefits of exercising rights under that procurement.

FTA is not persuaded by the commenters who objected to FTA's limitations on the use of piggyback procurements during this transition period. The right to exercise an option does not create a contractual obligation until that contract is actually signed. Thus, assigning contract options to a third party will result in a new contract between that third party and the transit vehicle manufacturer, negating commenters' concerns that an increase in domestic content might be viewed as a "cardinal change." Third parties seeking the assignment of procurement options (a/k/a "piggybacking") have no contractual or statutory right to that option, and FTA considers that procurement to be a "new" contract and therefore subject to the applicable FAST Act standard based upon the scheduled delivery date of the first production vehicle under the new contract.

C. Do the Increased Domestic Content Requirements Extend to Subcomponents?

In its April 6 publication, FTA proposed to extend the elevated domestic content requirements to the subcomponents that constitute a component. FTA received relatively little comment on this specific provision. Several commenters proposed that a component's domestic content be based upon the date the component was offered in response to a solicitation, rather than upon the component's actual date of manufacture or the vehicle's intended delivery date. In support of their position, transit vehicle manufacturers said that they solicit bids for vendors for specific vehicle components. The prices submitted by those bidders are based upon quotes received from their suppliers and sub-suppliers, and the transit vehicle manufacturer has limited ability to leverage that bidder to increase the domestic content of its subcomponents. In addition, changing suppliers midway through a production schedule would be disruptive to production schedules, particularly if a manufacturer must switch to an untested supplier solely to meet a gradual increase in domestic content. In contrast, the association supporting domestic manufacturing expressed concerns that maintaining fixed domestic component and subcomponent levels throughout the life of the contract discourages new rolling stock suppliers from entering the market.

FTA's Response:

With the exception of components manufactured by the transit vehicle manufacturer itself, the vehicle manufacturer has little influence over the subcomponent content of a given component, and given the prevalence of multi-year vehicle delivery schedules, the effective date for a component's domestic content will be based upon the requirements in the contract. For solicitations advertised after the effective date of this

Notice, however, the solicitation must include the appropriate statutory domestic content percentages for both components and subcomponents.

FTA is sensitive to the position that the elevated domestic content requirements eventually will encourage new entrants into the vehicle supply chain. All contracts signed after the FAST Act's effective date, including piggyback procurements and procurements off a state's procurement schedule, will be subject to the higher domestic content standards, resulting in more domestic suppliers entering the supply chain and the incorporation of more domestic content into vehicles funded with FTA financial assistance.

D. Do the Changes Also Apply to Train Control, Communication, and Traction Power Systems?

For purposes of Buy America, rolling stock includes train control, communication, and traction power equipment. 49 U.S.C. 5323(j)(2)(C). See also 49 CFR 661.11(t), (u), and (v). One commenter pointed out that the delivery of components on a construction contract differs from the delivery schedule of a rolling stock contract. Unlike rolling stock procurements where the transit agency is contracting for a fleet of homogenous transit vehicles, a construction contract may encompass a communication system, a traction power system, and a train control system, all of which may have differing construction schedules and varying component lists. Attempting to impose a domestic content based on when components are delivered to a job site, or the completion date of a particular construction segment may force the substitution of materials midway through a construction project, or in a worse-case scenario, may force the removal and

replacement of components if delays push the completion of the contract into a subsequent fiscal year. The commenter proposed that the contracting date for the construction project would be a better determinant of the domestic content requirement, rather than one based on the installation date of each component or the completion of a particular portion of a construction contract.

FTA's Response:

FTA agrees with the commenter that there are significant differences between procurements for identical units of rolling stock, and a construction contract consisting of multiple deliverables, and therefore, the contracting award dates for train control, communication, and traction power systems will determine the contract's domestic content percentage. If a contract was signed in FY2016 or FY2017, the resulting components must consist of at least 60 percent domestically-manufactured components. If a construction contract is awarded during FY 2018 or FY 2019, the contract must include a domestic content percentage for that project that exceeds the 65 percent threshold. And if a construction contract is awarded in FY 2020 or beyond, the percentage of domestically-manufactured components must exceed 70 percent.

E. Does the Increase in Domestic Content Requirements Apply to Remanufactured, Overhauled, or Rebuilt Transit Vehicles?

A transit vehicle rebuilder proposed that the FAST Act amendments should not apply to overhauls, rebuilds or remanufacture of any buses procured prior to the effective date of the FAST Act. The commenter also asked that the requirements be applied consistently throughout the duration of a contract so that the resulting vehicles will have

consistent Buy America content. The commenter argues that the FAST Act amendments should not be interpreted in any manner that decreases transit agencies' abilities to complete their intended overhauls by forcing a higher standard of American content at the time of overhaul than when the bus was originally manufactured.

FTA's Response:

Consistent with the commenter's recommendation, FTA agrees that the domestic content in effect at the time the vehicle was delivered will apply to any future contracts for overhaul, rebuild, or remanufacturing projects, limited to the parties on the original contract.

F. Do the FAST Act Amendments Apply to Passenger Ferry Vessels?

FTA received two comments from the passenger ferry vessel industry and a ferry operator that proposed an implementation process for ferry vessels that based the domestic content requirement on the date of vessel contracting, rather than on the delivery date of the vessel. Commenters argued that it can be hard at the time of the contract's execution to anticipate with specificity exactly when the constructed ferry vessel will be finished, pass required regulatory inspections and sea trials, and be delivered to the customer. For vessels scheduled to be delivered over a multi-year program, they noted the difficulty and inefficiency in maintaining multiple component lists for identical vessels that would be delivered across different fiscal years.

FTA's Response:

FTA acknowledges that the long lead times associated with issuing design specifications, obtaining Coast Guard and other regulatory approval, bid solicitations, and

construction of a ferry vessel exceed that required for other traditional types of rolling stock. Accordingly, for ferry vessels, the date on which a transit agency signs the procurement contract will govern the domestic content for all vessels delivered under that contract.

G. How Do the New Rules Apply to Reimported Domestic Steel and Iron?

One commenter asked that FTA address the applicability of section 3011 of the FAST Act, which added 49 U.S.C. 5323(j)(5), allowing the inclusion of steel and iron produced in the United States and incorporated into a rolling stock frame or car shell outside the United States, provided that the frame or car shell is imported back into the United States for final assembly.

FTA's Response:

Consistent with the statutory provision, the cost of any domestic steel and iron may be included in the calculation of the transit vehicle's domestic content, provided that the average cost of the vehicle exceeds \$300,000, as provided by the FAST Act. Manufacturers may include the cost of domestic steel and iron on vehicles produced after October 1, 2015, the effective date of the FAST Act.

H. Will FTA Issue Public Interest Waivers for Vehicle Procurements

Underway When the FAST Act Was Enacted?

In a Notice published concurrently with the proposed policy statement (81 FR 20051, April 6, 2016), FTA invited the public to comment on a proposed public interest waiver that would apply the current domestic content standard to rolling stock contracts

entered into between October 1, 2015 (the effective date of the FAST Act) and December 4, 2015, (the date on which the Act was enacted), and for contracts entered into after December 4, 2015, as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015.

FTA received 14 comments on the proposed waiver from: a transit industry trade association, a passenger vessel trade group, several public transportation agencies, numerous transit vehicle manufacturers and remanufacturers, and Buy America consultants, all of whom supported the proposed waiver. Among the cited benefits of a waiver were the avoidance of additional costs to transit agencies that would have to rewrite and re-advertise existing solicitations to incorporate the new domestic content thresholds, the administrative costs to vehicle manufacturers who would need to identify and solicit new domestic suppliers, and most importantly, predictable delays in the acquisition of new transit vehicles, which would pose a disservice to transit riders.

The passenger vessel group asked that FTA extend the waiver to ferry vessel procurements for which the vessel design was substantially complete before the enactment of the FAST Act; vehicle remanufacturers asked that the waiver extend to contracts for rebuilds, overhauls, and remanufacturing entered into prior to the enactment date of the FAST Act; and several transit agencies and vehicle manufacturers asked that the waiver extend to contract options assigned to another transit agency if the contract was entered into prior to the FAST Act's enactment date.

FTA's Response:

Based on the foregoing discussion of the FAST Act's implementation and input from commenters, FTA believes that a request for a public interest waiver to address

contracts signed before the date the FAST Act was enacted is reasonable, and is extending the waiver to contracts for ferry vessels and to contracts for the remanufacturing, rebuilding, and overhaul of a recipient's existing fleet. However, as stated previously, FTA will not extend pre-FAST Act domestic content percentages to options exercised by a third party after the effective date of the Act.

Further, to avoid the disruption of ongoing contract solicitations and to facilitate the delivery of transit vehicles to the public, FTA is extending the waiver to contract solicitations advertised on or after December 4, 2015, provided the contract is awarded within 60 days after the publication date of this Notice. If a solicitation was advertised (i.e., published or distributed to potential bidders in manner that constitutes constructive notice) on or after the enactment date of the FAST Act and the parties are unable to execute a contract within 60 days of this Notice, the solicitation must be amended to reflect the applicable domestic content standard that will be in effect when the first production vehicle is scheduled to be delivered. If compliance with this requirement would pose an undue hardship, FTA will evaluate requests for a waiver on a case-by-case basis.

A request for a public interest waiver should set forth the detailed justification for the proposed waiver, including information about the history of the procurement and the burden on the recipient and/or the industry in complying with the FAST Act. Public interest waivers should be narrowly tailored and FTA will not generally look favorably on waivers that provide for contracts that include the exercise of options for vehicles that will be delivered beyond FY2020. FTA will act expeditiously on public interest waiver requests that provide the information requested.

IV. Final Policy Guidance and Public Interest Waiver

A. Final Policy Guidance

Individual and Joint Procurements of Buses and Railcars. For rolling stock contracts entered into on or after October 1, 2015, i.e., the effective date of the FAST Act, the applicable domestic content percentage under section 5323(j)(2)(C) will be based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding. Thus, if a recipient or group of recipients as part of a joint procurement enter into a contract for rolling stock on or after October 1, 2015, then the new FAST Act provisions applicable for the date of delivery of the first production vehicle shall apply. Accordingly, if the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent. These delivery provisions apply to contracts entered into on or after October 1, 2015, unless a waiver is granted. If the delivery date of the first production vehicle is delayed such that it will be delivered in a year with a higher domestic content, FTA will address those situations on a case-by-case basis.

The FAST Act amendments do not apply to contracts entered into before October 1, 2015, even if the contract provides for the delivery of the first production vehicle after FY2017. For contracts entered into before October 1, 2015, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract may contain a domestic content of more than 60 percent, per the pre-FAST Act requirements. Recipients who are not direct parties to a contract

executed before October 1, 2015, however, may not exercise assigned options (a/k/a “piggybacking”) on such contracts.

Procurements of Ferry Vessels. Due to the long lead time in establishing vessel design specifications, obtaining Coast Guard certifications and other regulatory approval, and the bid solicitation and review process that exceeds that required for other traditional types of rolling stock, the date on which a transit agency signs the vessel contract will govern the domestic content for all vessels delivered under that contract. Therefore, for vessel contracts signed during FYs 2016 or 2017, the vessels must contain a minimum of 60 percent domestic content; contracts signed in FYs 2018 or 2019 must require no less than 65 percent domestic content; and contracts signed in FY 2020 or beyond must mandate a domestic content of no less than 70 percent.

Train Control, Communication and Traction Power Equipment. For purposes of Buy America, rolling stock includes train control, communication, and traction power equipment. 49 U.S.C. 5323(j)(2)(C). See also 49 CFR 661.11(t), (u), and (v). The domestic content requirement in effect on the date a contract was signed for train control, communication, and traction power equipment will control. If the contract is signed in FY2016 or FY2017, the contract shall require an overall domestic content that exceeds 60 percent; if a contract is signed in FYs 2018 or 2019, the contract must include an overall domestic content percentage that exceeds 65 percent; and if a contract is signed in FY 2020 or beyond, the domestic content must exceed 70 percent.

State Purchasing Schedules. Some recipients purchase rolling stock from a State purchasing schedule. A State purchasing schedule is an arrangement that a State has established with multiple vendors in which those vendors agree to provide essentially an

option to the State and its subordinate governmental entities and others it might include in its programs, to acquire specific property or services in the future at established prices. Because the purchasing schedule does not commit the State to procuring a minimum number of vehicles, a “contract” does not exist until a State, recipient or subrecipient enters into a purchase order with a vendor listed on the schedule.

Therefore, for purchase orders placed against State purchasing schedules before October 1, 2015, for the delivery of rolling stock in FY2018 and beyond, the increased domestic content requirements will not apply. For purchase orders placed against State schedules on or after October 1, 2015, for rolling stock that will be delivered in FY 2016 or 2017, the domestic content requirement must exceed 60%. For purchase orders placed against State schedules for rolling stock that will be delivered in FYs 2018 or 2019, the domestic content must exceed 65%, and for purchase orders placed against State schedules for rolling stock that will be delivered in FY 2020 or beyond, the domestic content must exceed 70%.

Calculation of Domestic Content. FTA will adjust the calculation for determining whether a component is of domestic origin under 49 CFR 661.11 to accommodate the increase in domestic content for FY2018 and beyond. Currently under 49 CFR 661.11(g), “for a component to be of domestic origin, more than 60 percent of the subcomponents of that component, by cost, must be of domestic origin, and the manufacture of the component must take place in the United States. If, under the terms of this part, a component is determined to be of domestic origin, its entire cost may be used in calculating the cost of domestic content of an end product.”

Thus, for vehicles to be delivered in FY2018 or 2019, for a component to be of domestic content, more than 65 percent of the subcomponents of that component, by cost, must be of domestic origin, and for FY2020 or beyond, more than 70 percent of the subcomponents of the component must be of domestic origin. The requirement that manufacture of the component take place in the United States still applies. Additionally, if a component is determined to be of domestic origin, its entire cost may be used in calculating the cost of content of an end product.

Cost of Domestic Steel and Iron for Rolling Stock Frame or Car Shell. Section 3011 of the FAST Act, which added 49 U.S.C. 5323(j)(5), allows domestic content to include steel and iron produced in the United States and incorporated into a rolling stock frame or car shell outside the United States, provided that the frame or car shell is imported back into the United States for final assembly. Consistent with the statutory provision, the cost of any domestic steel and iron may be included in the calculation of the transit vehicle's domestic content, provided that the average cost of the vehicles exceeds \$300,000, as provided by the FAST Act. Manufacturers may include the cost of domestic steel and iron on vehicles produced after October 1, 2015, the effective date of the FAST Act.

B. General Public Interest Waivers

FTA is issuing two general public interest waivers to address two categories of recipients and manufacturers: (1) recipients who entered into contracts or placed purchase orders against State schedules between October 1, 2015 and December 4, 2015; and (2) recipients who have entered into contracts after December 4, 2015, as a result of solicitations for bids or requests for proposals that were advertised before December 4,

2015. In addition, FTA is issuing a third public interest waiver for recipients who solicited contracts on or after December 4, 2015, provided they enter into a contract within 60 days of publication of this Notice.

Under 49 U.S.C. 5323(j)(2)(A), the Administrator may waive the Buy America requirements if the Administrator finds that applying the Buy America requirements would be inconsistent with the public interest. “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 ... When granting a public interest waiver, the Administrator shall issue a detailed written statement justifying why the waiver is in the public interest. The Administrator shall publish this justification in the **Federal Register**, providing the public with a reasonable time for notice and comment of not more than seven calendar days.” 49 CFR 661.7(b).

Public interest waiver for contracts entered into between October 1, 2015 and December 4, 2015. FTA grants a general public interest waiver for contracts entered into between the FAST Act’s effective date and date of enactment (i.e., between October 1, 2015 and December 4, 2015). For these contracts, the increased domestic content requirements for FY2018 and beyond will not apply, regardless of when the first production vehicle is delivered. However, consistent with FTA’s policy statement above, parties to the contracts may exercise options under the contract, but recipients will not be permitted to piggyback on the contracts.

Public interest waiver for contracts entered into after December 4, 2015 as a result of solicitations advertised before December 4, 2015. FTA grants a general public interest waiver for contracts entered into after December 4, 2015 as a result of solicitations for

bids or requests for proposals that were advertised (i.e., published or distributed to potential bidders in a manner that constitutes constructive notice) before December 4, 2015. Under these circumstances, the increased domestic content requirements for FY2018 and beyond will not apply, regardless of when the first production vehicle is delivered. However, consistent with FTA's policy statement above, parties to the contracts may exercise options under the contract, but recipients will not be permitted to piggyback on the contracts.

Public interest waiver for contract solicitations advertised on or after December 4, 2015 and entered into within 60 days of publication of this notice. To avoid the disruption of ongoing contract solicitations and to facilitate the delivery of transit vehicles to the public, FTA is extending the waiver to contract solicitations advertised on or after December 4, 2015, and entered into within 60 days after the publication date of this Notice. If a solicitation was advertised (i.e., published or distributed to potential bidders in a manner that constitutes constructive notice) after the enactment date of the FAST Act and the parties are unable to execute a contract within 60 days of this Notice, the solicitation must be amended to reflect the applicable domestic content standard that will be in effect when the first production vehicle is scheduled to be delivered. If compliance with this requirement would pose an undue hardship, FTA will evaluate requests for a waiver on a case-by-case basis.

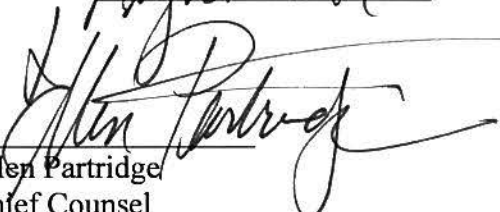
Recipients may apply to FTA for individual public interest waivers for contracts that do not fall within the scope of a general public interest waiver. A request for a public interest waiver should set forth the detailed justification for the proposed waiver, including information about the history of the procurement and the burden on the

recipient and/or the industry in complying with the FAST Act. Public interest waivers should be narrowly tailored and FTA will not generally look favorably on waivers that provide for contracts that include the exercise of options for vehicles that will be delivered beyond FY2020. FTA will act expeditiously on public interest waiver requests that provide the information requested.

V. Effective Date:

Because the statute is self-effectuating, the changes are effective upon the FAST Act's enactment. FTA will be initiating a subsequent rulemaking updating 49 CFR Part 661 to reflect these changes; however, today's Policy Statement and Waiver represents FTA's implementation of the FAST Act provisions during this interim period.

Issued on August 26, 2016.


Ellen Partridge
Chief Counsel