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Guide to Federal Buy America Requirements

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THE PROBLEM AND ITS SOLUTION

The nation's 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 businesses. The TCRP Project J-5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may 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. Emphasis is placed on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

The Buy America requirements, imposed on transit grantees by federal law, have been misunderstood by federal transit grantees and the focus of considerable confusion in the transit industry. Essentially, transit agencies undertaking federally assisted procurements for items containing steel must ensure that the item meets statutory and regulatory requirements concerning domestic steel origin and content.

Transit operators purchase hundreds of millions in manufactured goods, and rolling stock-buses and trains. Confusion and uncertainty in the way federal requirements apply can be costly and/or considerably delay the purchase of essential equipment.

The purpose of this report is to provide an easy-to-use guide that provides all the Buy America requirements with an emphasis on the specific requirements that apply both to manufactured products and to rolling stock. It should be useful to attorneys, administrators, contracting officers, engineers, and all officials that have purchasing responsibilities.

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GUIDE TO FEDERAL BUY AMERICA REQUIREMENTS

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I. INTRODUCTION

Buy America is a fact of the public transit industry and apparently it's here to stay. This report is intended to assist transit attorneys and procurement officers in anticipating Buy America compliance pitfalls before they arise, thereby avoiding unnecessary Buy America-related delay, expense, and aggravation in federally funded procurements.

In order to shed some light on what Buy America is intended to accomplish, Section II of this report 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 report discusses, in light of its history, what Buy America is *not*. There seems to be some confusion in the transit industry as to whether, for example, the North American Free Trade Agreement (NAFTA) applies to transit procurements (it doesn't). Section IV of the report attempts to parse and clarify the incredibly dense provisions of the Buy America regulations. Section V discusses the circumstances under which a grantee may obtain a waiver from Buy America, and Section VI considers Buy America enforcement, including what remedies the FTA might pursue against a grantee for noncompliance.

A questionnaire (a copy of which is attached in Appendix A) was circulated among various members of the public transit community in connection with the preparation of this report. The questionnaire was intended to elicit anecdotal evidence from the public transit industry regarding the impact of Buy America. Responses are cited throughout, as are examples taken from Federal Transit Administration (FTA) Buy America waiver letters and letters of interpretation.¹ 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, in-

dicated no 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 200,000.²

The impact of Buy America has been reduced for many public transit agencies as a result of (a) the threshold of \$100,000 for Buy America applicability, (b) the nonapplicability of Buy America to microcomputer equipment, and/or (c) the elimination of federal operating grants to agencies in urbanized areas with populations exceeding 200,000.³ 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 fail to appreciate the nuance and complexity of Buy America compliance. FTA does not routinely initiate investigation of Buy America compliance. The bulk of compliance issues are raised by disappointed bidders who challenge the Buy America certifications of successful competitors.⁴ This report is for public transit attorneys and procurement officers who may have reason to believe they fall into this category, for those who may

¹ FTA Buy America waivers and interpretations are now posted on the Internet for informational purposes at www.fta.dot.gov/library/legal/buyamer/inltrs/batoc.html.

² Six other responses were not substantive, indicating only that another public entity conducted their procurements.

³ 49 U.S.C. § 5307.

⁴ While FTA is authorized to initiate Buy America audits *de novo*, in practice, this seldom occurs.

be conducting a procurement for something more complex than transit vehicles, and for anyone else who has ever been intrigued or burned by Buy America.

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 rose to 50 percent by 1960.¹⁴ In 1964, Congress passed the Urban Mass Transportation Act of

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

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

⁷ *Allis Chalmers Corporation, Hydro-Turbine Division 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 Division 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 Division 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’s *Buy North America: A Revision to FTA Buy America Requirements*, 23 TRANSP. L.J., No. 2 (1995).

¹³ 41 U.S.C. § 10(c).

¹⁴ Hughes, *supra* note 12, at 213.

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, Congress amended the 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 American heavy industries markets; this concern was especially high with the United States 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

¹⁵ Urban Mass Transportation Act of 1964 (now known as the Federal Transit Act), P.L. 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. 89-117, § 1109 (1965).

¹⁷ Urban Mass Transportation Act § 3, P.L. 93-503, § 106, November 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. 95-599, § 401, 92 Stat. 2689 (1978) (codified at 49 U.S.C. § 1602—Title IV Buy America).

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

D. Congress Strengthens Buy America for Transit

Section 165 of the Surface Transportation Assistance 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,

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

²¹ Henke, *supra* note 18, at A42.

²² H.R. REP. NO. 95-1485, 95th Cong., 2d Sess., at 68 (1978).

²³ Surface Transportation Assistance Act of 1982, P.L. 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, 97th Cong., 2d Sess., at 44-45 (1982).

²⁵ Section 10 of Public Law 98-229, enacted on March 9, 1984, amended § 165 by striking “cement” from § 165(a).

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 components’ costs.

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

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 sub-components be of United States origin for the component to be considered of United States 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 Con-

gress’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 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 the 1982 STAA Section 165. Contact rail is expressly excluded, as traction power equipment and automatic door control is 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 “sub-components” for the purpose of establishing Buy America compliance. (This concept of enumerating components and sub-components 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 is addressed below in the Section entitled “Buy America Requirements—Tests and Interpretations—Rolling Stock—Components.”) The enumeration was also intended to prevent possible abuse resulting from over-classifying vehicle parts as sub-components.³²

In September 1991, UMTA acted to require pre-award and post-delivery audits of rolling stock purchased by federal grantees pursuant to its author-

²⁸ Surface Transportation and Uniform Relocation Assistance Act of 1987, P.L. 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, Appendices B and C.

³² *Id.*

²⁶ 48 Fed. Reg. 41,562 (1983).

²⁷ The House version of the bill sought an increase to 85 percent. See H.R. CONF. REP. No. 27, 100th Cong., 1st Sess. (1987).

ity 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 federal Motor Vehicle Safety 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 site of the vehicle manufacture. 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 commentators objected to the actual implementation scheme proposed as “burdensome, redundant and costly.”³⁵

In a testimony 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.

Finally, as all of the preceding guidance apparently remained problematic, the FTA issued a “Dear Colleague Letter” dated March 18, 1997, which outlined procedures a grantee must use to ensure that any vehicle it purchases complies with Buy America.³⁸ *Please note that 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 report 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 the Section entitled “Buy America Requirements—Tests and Interpretations—Rolling Stock—Pre-award and Post-delivery Audits.”)

³⁸ “Dear Colleague Letters” are frequently issued by the FTA Administrator to provide guidance to grantees on industrywide 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 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.

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, 10835 (1992).

³⁷ 59 Fed. Reg. 43,778 (1994).

F. Buy America in the 1990s

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 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 report. With the passage of ISTEA, Congress finally 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 United States origin. A component is considered to be of United States origin if it is manufactured in the United States, regardless of the origin of its subcomponents.

The most recent Congressional action to impact Buy America was TEA-21.⁴² The amendments made to Buy America in TEA-21 were slight. Section 3020(b) of TEA-21 permits bidders to correct inadvertent errors in their Buy America certifications after bid opening and Section 3035 provides 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 under “Surface Transportation and Relocation Assistance Act of 1987”). In February 1999, the FTA issued a notice of proposed rule-making regarding implementation of Section 3020(b).⁴³

⁴⁰ Intermodal Surface Transportation Efficiency Act of 1991, P.L. 102-240, 105 Stat. 1914.

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 64 Fed. Reg. 8051 (1999).

G. FTA Actions

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 (i) applying the Buy America provisions would be inconsistent with the public interest, (ii) 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 (iii) including domestic material will increase the cost of the overall project by more than 25 percent.⁴⁴ FTA’s published waiver determinations are reviewed here chronologically.

1. Fifteen-Passenger 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.⁴⁵ This waiver applies to 15-passenger vans and wagons *only*. It does not apply to any other Chrysler-manufactured vehicle, including mini-vans. (See the discussion under Section VI.E below, “Buy America Compliance—FTA Sanctions Against Grantees,” regarding the Missouri Department of Transportation’s procurement of Dodge Caravans.)

2. Microcomputers and Software

In 1986, FTA granted its first permanent “unavailability” 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

⁴⁴ U.S.C. 49 § 5323(j)(2).

⁴⁵ 49 Fed. Reg. 13,944 (1984); 49 C.F.R. § 661.7, Appendix 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.)

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. § 661.7.⁴⁶ FTA currently is considering whether the waiver should be retained, revoked, or modified in response to a petition made in 1999, which asserts that (i) the state of the microcomputer and microprocessor industry in the United States today is significantly different than when the waiver was originally issued; (ii) the original intent of the waiver was to address significantly different equipment (*i.e.*, traditional “desk-top” computers) than the recent application by the FTA of the waiver to digital recording equipment; and (iii) FTA’s definition of microcomputer may not be appropriate for the number of products to which the FTA now applies the waiver. The FTA sought comment on this matter in December 1999, but to date has made no determination on this issue.⁴⁷

3. *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.⁴⁸ 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.”⁴⁹ Both large and small transit properties report that insti-

⁴⁶ 51 Fed. Reg. 36,126 (October 8, 1986); 49 C.F.R. 116.7, Appendix A.

⁴⁷ 64 Fed. Reg. 54,855 (October 8, 1999). Comments were to be submitted to the FTA by December 7, 1999.

⁴⁸ 56 Fed. Reg. 932 (1991), as amended at 60 Fed. Reg. 37,930 (July 24, 1995), 61 Fed. Reg. 6300 (February 16, 1996).

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

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

4. *FTA Publication of Waivers Granted to Manufacturers*

The FTA recently made an informal policy determination to publish waivers granted to manufacturers in the *Federal Register* to ensure that the public, particularly potential manufacturers, is aware of such waivers. The intent of such publication is to raise the awareness of domestic manufacturers and encourage domestic production of these items. The first such published waiver was granted May 1, 2000, to Orion Bus Industries and allows Orion to count the axle used in the Orion II paratransit vehicle as a domestic component for purposes of calculating overall domestic content. The waiver was predicated on the nonavailability of the item domestically.⁵⁰

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. §§ 10(a) *et seq.*, and implemented pursuant to Part 25 of the Federal Acquisition Regulation,⁵¹ 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. Purchases made by the United States 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

⁵⁰ 65 Fed. Reg. 25,419 (2000).

⁵¹ 64 Fed. Reg. 72,416 (1999).

all components, as opposed to the FTA Buy America requirement of 100 percent (or 60 percent for rolling stock). A vendor that 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.⁵²

B. The North American Free Trade Agreement⁵³

FTA grantees are not subject to the provisions of NAFTA. While the general rule of Chapter 10 of NAFTA is that the three NAFTA countries, the 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."⁵⁴

Products manufactured in Canada are considered foreign goods and are entitled to no special treatment under Buy America.⁵⁵ While the objectives of NAFTA are to open the North American market to free trade, the Buy America barriers to

⁵² 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).

⁵³ North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993).

⁵⁴ 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, 103d Cong., 1st Sess., 584-85 (1993).

⁵⁵ 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."

the free trade of transit equipment still exist and remain applicable to FTA grantee procurements.⁵⁶

IV. BUY AMERICA REQUIREMENTS—TESTS AND INTERPRETATIONS

A. Generally—49 U.S.C. § 5323(j) (Buy America)

Buy America applies across the board to all FTA grantee purchases of steel, iron, and manufactured goods exceeding \$100,000, regardless of whether they involve capital, operating, or planning funds. There are no statutory exceptions to Buy America; however, the Secretary of Transportation is authorized to grant waivers under certain circumstances. All 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.) A few pithy truisms on Buy America include the following:

- The Buy America requirements apply to inter-governmental agreements, or otherwise jointly purchased manufactured products.
- The Buy America requirements do not apply to service contracts. Grantees are required to pass the requirements down to contractors.
- The requirements are applicable to any grantee purchase of more than \$100,000.
- End product" is always the item to be procured by a grantee as specified in the overall project contract.⁵⁷

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 creature unto itself 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 of (i) iron and steel in infrastructure projects, (ii) manufactured goods, and (iii) rolling stock.

B. State and Local Buy America Requirements

Individual states are not precluded from adopting their own State and local Buy National or Buy

⁵⁶ 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.

⁵⁷ 49 C.F.R. § 661.11(s).

America restrictions. Forty-nine U.S.C 5323 (j)(6) expressly prohibits the Secretary of Transportation from restricting any state from imposing more stringent requirements than Buy America or from restricting a recipient of that assistance from complying with those State-imposed requirements.⁵⁸

Further, 49 C.F.R § 661.21 prohibits FTA from funding 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.⁵⁹

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.

C. Iron and Steel in Infrastructure Projects⁶⁰

Under the provisions of 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.⁶¹ All steel and iron manufacturing processes must take place in the United States except for metallurgical processes involving refinement of steel additives.⁶²

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 or maintenance facilities, rail lines (including third rail), 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.⁶³ 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.⁶⁴

Anecdotal evidence suggests that American steel manufacturers are not equipped to provide the domestic steel required under Buy America on a timely basis. New Jersey Transit Corporation (NJT) responded to the questionnaire that its experience has been that, during the construction of large projects that are substantially under way, a supplier or fabricator of steel may stop producing a necessary gauge of steel. Under those circumstances FTA is unable to issue a waiver to pay for foreign replacement steel products in the event of domestic unavailability. NJT has been forced to use other than federal money for replacement steel products not manufactured in the United States.

Similarly, in 1999 the Chicago Department of Transportation (CDOT) sought a public interest waiver when its prime contractor for the procurement of two structural steel roof beams that had certified compliance was unable to procure the beams domestically. CDOT indicated that domestic fabrication would add 6 to 10 months to the project. FTA was asked to consider the impact of the delay on the surrounding school community as well as the riding public. FTA found that the prime contractor was negligent in signing the Buy America certification and that CDOT had not provided sufficient grounds to grant the requested waiver. FTA advised that it could not authorize the use of FTA funds for the beams. However, FTA also advised that should CDOT formally terminate that portion of the overall contract and do a separate non-FTA procurement for the beams, then the balance of the project could continue to use FTA funds. FTA further advised that should CDOT decide to use FTA funds on the separate steel procurement, it could apply for a nonavailability waiver at the appropriate time.

The Brockton Area Transit Authority of Brockton, Massachusetts, reported granting a 32-day extension pursuant to its contract with the

⁵⁸ 49 U.S.C. 5323 (j)(6).

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

⁶⁰ 49 C.F.R. § 661.5.

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

⁶² 49 C.F.R. § 661.5(b).

⁶³ 49 C.F.R. § 661.5(c); *see also* the FTA *Best Practices Procurement Manual*, § 8.1.4.

⁶⁴ 61 Fed. Reg. 6,300 (Feb. 16, 1996).

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.

D. Manufactured Products⁶⁵

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. There are exceptions if a waiver has been granted by FTA or the product is subject to a general waiver.⁶⁶ For a manufactured product to be considered produced in the United States, (i) all of the “manufacturing processes” for the end product must take place in the United States, and (ii) all of the components of the end 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.⁶⁷

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.⁶⁸

⁶⁵ 49 C.F.R. § 661.5.

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

⁶⁷ 49 C.F.R. § 661.5.

⁶⁸ Likewise, the FTA contrasts the domestic content requirements for subcomponents as well as components for rolling 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

FTA defines “manufactured product” to mean an item produced as a result of the manufacturing process.⁶⁹ 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.”⁷⁰

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 lowest 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 it considered fabrication to be a manufacturing process required to be done in the United States.

FTA treats the procurement of construction projects as the procurement of a “manufactured product” for purposes of 49 C.F.R. § 661.5. In regulations promulgated January 19, 1981, FTA discussed construction contracts specifically. FTA

product during the manufacturing process. 56 Fed. Reg. 926 (1991).

⁶⁹ 49 C.F.R. § 661.3.

⁷⁰ 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.

determined that the procurement of construction is treated as procurement of a manufactured product in that the deliverable of the construction contract is considered the end product and the construction materials used therein are considered components of the end product.⁷¹ Foreign manufacture of components for use in FTA-funded construction projects is prohibited under the Buy America regulations at 49 § 661.5(d)(2).⁷²

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 end product and the main elements incorporated into the terminal, e.g., shelters, elevators, and platforms, are the components of the end product. These main elements are generally specified in the grantee's construction contract.⁷³

Some confusion has arisen with respect to the terms "manufactured product" and "end product." The term "end product" is used in the FTA regulations solely in the context of rolling stock and does not appear in the text applicable to manufactured products. Nevertheless, FTA takes the position that "end product" applies to manufactured products as well as rolling stock. While the nomenclature may not be absolutely clear, keep in mind that a manufactured product may be an end product.⁷⁴

Understanding whether a manufactured product is an end product or a component depends on the type of procurement at issue. To illustrate, consider the February 10, 2000, FTA response to a petition by the Macton Corporation challenging the procurement by the Bay Area Rapid Transit (BART) system of lift and hoist equipment for BART's Concord Shop Expansion Project. FTA made it clear that the lift and hoist equipment to be manufactured in Albany, New York, by Pfaff, a Canadian corporation, was a component of the Shop Expansion

Project. The Shop Expansion Project itself was considered the end product.⁷⁵

In a June 2000 affirmation of its February response to Macton, the FTA clearly articulated its analysis as follows:

Indeed, the question is one of perspective: any given item, from a screw to a maintenance garage, may be viewed as an end product, a component, a subcomponent, or less. Accordingly, FTA's rule looks at the end product being acquired in a given case. Here, the procurement contract was for the garage; accordingly, the vehicle lift to be installed in the garage was the component. Further, the end product must be the result of a manufacturing process. In this case, the hoist will ultimately be a fixture of the garage, and installation of the hoist is part of the manufacturing process. The construction of the garage as a whole, is the subject of the procurement and the end product.⁷⁶

E. Rolling Stock⁷⁷

As discussed above in the legislative history of Buy America, rolling stock procurements were first differentiated 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 maze with its own detailed regulatory scheme. "Rolling stock" is considered to be "transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars, ferry boats and vehicles used for supportive services."⁷⁸ 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.⁷⁹ Rolling stock includes both onboard and wayside equipment. While the regulations are not absolutely clear on this

⁷¹ 46 Fed. Reg. 5,808, 5,809 (1981).

⁷² See letter dated Sept. 15, 2000, to the President of Stertil-Koni from the FTA Deputy Chief Counsel.

⁷³ FTA *Best Practices Procurement Manual*, § 8.1.4.

⁷⁴ In a questionnaire response submitted by the Montachusett Regional Transit Authority, the Authority reported FTA advice that office supplies would be considered manufactured products for purposes of Buy America.

⁷⁵ See letter dated Feb. 10, 2000, from FTA Deputy Chief Counsel to David R. Perkins, President, Macton Corporation and David M. Cunningham, Manager, Transportation Sales, Whiting Corporation.

⁷⁶ See letter dated June 8, 2000, from FTA Acting Administrator to David R. Perkins, President, Macton Corporation.

⁷⁷ 49 C.F.R. § 661.11, including Appendices A, B, and C.

⁷⁸ 49 C.F.R. § 661.3.

⁷⁹ 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).

point, this equipment is always to be procured as rolling stock and not as manufactured products.

NJT provided an instructive FTA opinion letter differentiating the procurement of rolling stock from manufactured products in the context of NJT's Arrow III overhaul program. The letter, dated August 2, 1988, from the FTA Deputy Chief Counsel, reiterated FTA's position that in a rehabilitation or overhaul project like the Arrow III program, Buy America will be applied to individual pieces or systems that are being installed in the overhauled cars, rather than to the car as a whole.

FTA's review of the program's specifications indicated that NJT would be procuring both manufactured products (subject to Section 165(a) of the 1987 STURAA) and various items of equipment that fell into one of the three categories of train control, traction power, or communications equipment (subject to Section 165(b)(3) of the 1987 STURAA).

FTA then went on to identify, either by item or system, whether the various elements of the overhaul project constituted manufactured products or rolling stock. FTA originally determined the door control system to be a manufactured product; however, it noted it would reconsider this determination if NJT presented a persuasive argument that the door control system is so connected (e.g., the train's movement is controlled by the closing of doors) as to be considered "train control equipment."

FTA differentiated the provision of a new propulsion system from the overhaul of the truck and determined the truck by itself to be a manufactured product. In the case of the procurement of a new rail car, the propulsion system is usually a part of the truck and thus the entire truck is considered a component of the traction power equipment for purposes of Buy America. Since for purposes of the Arrow III program the truck was considered to be a manufactured product, a number of truck parts, including the wheels, were required to be 100 percent of U.S. origin to comply with Buy America. FTA also specified that Buy America only applied if a new item or new equipment were being installed. Buy America would not apply to the rehabilitation of existing equipment.

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 per-

cent of the cost of all its components, and (2) final assembly must take place in the United States.⁸⁰

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."⁸¹ The FTA has determined that Buy America applies only to "major components" and "primary subcomponents" of rolling stock and related equipment.⁸² "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.⁸³ 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 (i) one step removed from a component in the manufacturing process, and (ii) incorporated directly into a component.⁸⁴

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.⁸⁵ 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 the domestic content

⁸⁰ 49 C.F.R. § 661.11(a).

⁸¹ 49 C.F.R. § 661.11(c).

⁸² 56 Fed. Reg. 926 (1991).

⁸³ *Id.*

⁸⁴ 49 C.F.R. § 661.11(f), (k).

⁸⁵ 66 Fed. Reg. 32,412-32,413 (June 14, 2001).

of an end product.⁸⁶ 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.⁸⁷ 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.⁸⁸ As discussed above under Section IV, “Buy America Requirements—Tests and Interpretations—Manufactured Products,” manufacture of a component must be more than mere assembly.⁸⁹

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 through 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.⁹⁰

As discussed above in Section IV, “Buy America Requirements—Tests and Interpretations—Manufactured Products,” the key determinant for purposes of analyzing whether an item of rolling stock is an end product, a component, or a subcomponent, is the grantee’s specification.⁹¹ A March 14, 2000, letter from the FTA Deputy Chief Counsel to Hubner Manufacturing Corporation, a manufacturer of bellows for articulated buses, illustrates this point. Hubner had asked for a clarification of the applicability of the Buy America provisions to its product. The FTA responded that, while the grantee is responsible for doing the calculations to verify compliance, the analysis applied depends on the procurement at issue. If the grantee’s contract specifies the purchase of a bus and the bellows is to be sold to the bus manufacturer, then the manufacturer and the grantee would likely count the bellows as a component of an end product. If, however,

the bellows is being procured as a replacement part for a bus and is purchased by the FTA grantee directly from Hubner, the procurement is not for rolling stock but for the bellows itself, a manufactured product subject to the general requirements found at 49 C.F.R. § 661.5. In that case, all manufacturing processes for the bellows must take place in the United States and all the components of the bellows must be of United States origin, *i.e.*, manufactured in the United States, regardless of the origins of its subcomponents.⁹²

With respect to the procurement of an entire public transportation system (a turn-key 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 and their components must be analyzed as to whether they constitute manufactured products or rolling stock for application of the correct Buy America requirements.⁹³

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 transportation system is being procured as the end product by the grantee, the installation of the system qualifies as final assembly.⁹⁴ Adequate final assembly is an issue FTA has had some difficulty with. 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

⁸⁶ 49 C.F.R. § 661.11(g).

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

⁸⁸ 49 C.F.R. § 661.11(e).

⁸⁹ 56 Fed. Reg. 926 (1991).

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

⁹¹ 56 Fed. Reg. 926 (1991).

⁹² See letter dated March 14, 2000, from the FTA Deputy Chief Counsel to Hubner Manufacturing Corporation.

⁹³ 56 Fed. Reg. 926 (1991).

⁹⁴ 49 C.F.R. § 661.11(r).

FTA also suggested minimum operations for the final assembly of a rail car.⁹⁵

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).

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

3. *Cost of Components and Subcomponents*

49 C.F.R. § 661.11, largely reiterated here, 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.⁹⁶ The cost of a subcomponent

that retains its domestic identity shall be the cost of the subcomponent when last purchased, freight on board (f.o.b.) United States 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. United States port of exportation or point of border crossing as set out in the invoice and entry papers.⁹⁷ If a component is manufactured in the United States, but contains less than 60 percent domestic subcomponents, by cost, the cost of (a) the domestic subcomponents and (b) manufacturing the component may be included in the calculation of the domestic content of the end product.⁹⁸

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.⁹⁹
- Transportation costs to the final assembly location must be included in calculating the cost of foreign components and subcomponents.¹⁰⁰
- 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.¹⁰¹
- 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.¹⁰²
- Labor costs involved in final assembly shall not be included in calculating component costs.¹⁰³
- The actual cost, not the bid price, of a component is to be considered in calculating domestic content.¹⁰⁴

§ 8.1.4.

⁹⁷ 49 C.F.R. § 661.11(o).

⁹⁸ 49 C.F.R. § 661.11(l).

⁹⁹ 49 C.F.R. § 661.11(m)(1).

¹⁰⁰ *Id.*

¹⁰¹ 49 C.F.R. § 661.11(m)(2).

¹⁰² 49 C.F.R. § 661.11(n).

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

¹⁰⁴ 49 C.F.R. § 661.11(q).

⁹⁵ 56 Fed. Reg. 926 (1991).

⁹⁶ FTA *Best Practices Procurement Manual*,

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, Buy America, and Federal Motor Vehicle Safety requirements.¹⁰⁵ The FTA has 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 (MTDB) both reported that certain manufacturers were unwilling to release the proprietary information necessary for department staff to conduct the audits. This unwillingness subjects the procurement to the additional delay and expense caused by the need to hire an independent audit firm. In contrast, NJT also reported that in most cases, manufacturers are willing to provide the necessary cost data when 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 (i) specifies the minimum activities required of the final assembly processes for rail cars and buses and (ii) 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 Federal Motor Vehicle Safety 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 (a) the component and subcomponent parts of the rolling stock to be purchased, identified by (i) the manufacturer, (ii) country of origin, and (iii) costs; and (b) 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.¹⁰⁶

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.¹⁰⁷

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.¹⁰⁸

- **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 (a) the component and subcomponent parts of the rolling stock identified by (i) the manufacturer, (ii) country of origin, and (iii) costs; and (b) 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 Re-

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

¹⁰⁶ 49 C.F.R. §§ 663.21, 663.23, 663.25; FTA, BEST PRACTICES PROCUREMENT MANUAL, ch. 8, § 8.1.4.

¹⁰⁷ 49 C.F.R. § 663.25.

¹⁰⁸ 49 C.F.R. § 663.27.

quirements Certifications must be completed and retained on file by a grantee.¹⁰⁹

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.¹¹⁰

Post-Delivery Purchaser's Requirements Certification—For vehicle orders of more than 10 buses or rail vehicles, the grantee must certify that an onsite 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.¹¹¹

- *Certification of Compliance with the Federal Motor Vehicle Safety Standards (FMVSS)*—If a vehicle is subject to the 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 vehicles comply 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.¹¹²

V. 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 the Secretary of Transportation, including public interest, nonavailability, and price differential waivers.

A. How to Petition for a Waiver

If a general interest 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. While FTA is concerned with maintaining strict uniformity in the granting of waivers, requests made by grantees for nonavailability and price-differential waivers are now 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. Except as set forth below, contractors seeking to establish grounds for a waiver must seek the waiver through the FTA grantee.¹¹³

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 (a) components or subcomponents of rolling stock, or (b) specific items or material that are used in the production of a manufactured product. As discussed above, FTA now publishes waivers granted to foreign manufacturers in the *Federal Register* in an attempt to inform domestic manufacturers of gaps in the domestic market. Examples include nonavailability waivers presented to Orion Bus Industries to permit the axle used in the Orion II paratransit vehicle as a domestic component, to Mars Electronics International and Giesecke & Devrient America, Inc., for bill handling units and banknote identification modules used in ticket vending machines, and to Steril-Koni, Inc., for Omer heavy-duty parallelogram bus lifts. 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.

Steril-Koni was granted a public interest waiver 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.¹¹⁴ 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

¹⁰⁹ 49 C.F.R. §§ 663.31, 663.33.

¹¹⁰ 49 C.F.R. § 663.35.

¹¹¹ 49 C.F.R. § 663.37.

¹¹² 49 C.F.R. §§ 663.41, 663.43.

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

¹¹⁴ 60 Fed. Reg. 20,027–20,028 (April 18, 2001).

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 United States marketer of the heavy duty lifts.¹¹⁵

FTA has also considered and denied a public interest waiver request from the Michelin Tire Corporation to permit the procurement of bus tires produced at several locations in Europe in order to allow increased competition in the bus tire supply industry.¹¹⁶ 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 sent out a proposal for a tire lease for which it received one response from Goodyear and one response from Firestone. Firestone was declared non-responsive 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.¹¹⁷
- Fifteen-passenger vans produced by Chrysler Corporation are exempt from the requirement that final assembly of the vans take place in the United States.¹¹⁸
- Fifteen-passenger wagons produced by Chrysler Corporation are exempt from the requirement that final assembly of the wagons take place in the United States.¹¹⁹

¹¹⁵ Letter dated July 3, 2001, from FTA Deputy Chief Counsel to Frost, Brown, Todd LLC.

¹¹⁶ 53 Fed. Reg. 22,418 (1988).

¹¹⁷ 49 C.F.R. § 661.7, Appendix 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.

¹¹⁸ 49 Fed. Reg. 13,944 (1984).

¹¹⁹ Letter dated May 13, 1987, from FTA to Chrysler Corporation.

- Microcomputer equipment, including software, of foreign origin.¹²⁰

- “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.¹²¹

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.

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.¹²² 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.”¹²³ 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.¹²⁴ (See the discussion, *supra*, concerning the public interest waiver obtained by the Chrysler Corporation permitting

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

¹²¹ 56 Fed. Reg. 932 (1991), as amended at 60 Fed. Reg. 37,930 (1995), 61 Fed. Reg. 6,300 (1996).

¹²² 49 C.F.R. § 661.7(b).

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

¹²⁴ *Id.*

the assembly of 15-passenger vans outside of the United States.)

FTA's recent public interest waivers for prototype vehicles illustrate FTA's requirement for a clear nexus between the item requested and the beneficial impact on the public. The FTA has expressly declined to grant a general waiver for prototype vehicles to be procured by grantees for purposes of testing and evaluation, although it will consider such waivers on a case-by-case basis.¹²⁵ FTA has allowed that the need for first article testing and inspection before full domestic production justifies a public interest waiver for a prototype.¹²⁶ In a December 1999 letter to the Washington Metro 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.¹²⁷

Generally, FTA's policy is to grant a waiver for one prototype vehicle. Anything beyond one prototype will be subject to closer scrutiny. 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 (SRTD), FTA denied SRTD's request for a second prototype pilot

¹²⁵ 56 Fed. Reg. 926 (1991).

¹²⁶ See letters from FTA Deputy Chief Counsel dated August 12, 1999, to the Sacramento Regional District for one prototype Light Rail Vehicle and August 20, 1999, to Metropolitan Atlanta Rapid Transit Authority for two married pairs of preproduction rail cars.

¹²⁷ Letter dated December 17, 1999, from FTA Chief Counsel to WMATA; *see also* letter dated August 20, 1999, from FTA Chief Counsel to Metropolitan Atlanta Rapid Transit Authority ("[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").

car because the second request merely restated the reasoning present in the first waiver request.¹²⁸

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.¹²⁹ 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.¹³⁰ When a public transit agency requests a nonavailability waiver, the FTA will scrutinize the agency's procurement process for compliance with appropriate competitive principles. This is apparent 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 a 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, MBTA's issuance of detailed technical specifications to every major vehicle supplier for comment, and formal advertisement of a Request for Proposals based on the comments. Only one of 15 bus manufacturers and suppliers that attended a preproposal conference, Neoplan, responded with a formal proposal. The small size of the order and unique technology and manufacturing processes necessitate manufacture in Germany. FTA found that appropriate competitive principles had been complied with and granted the waiver.

FTA will only approve Buy America waivers for sole source procurements upon a showing of nonavailability. MTDB 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

¹²⁸ See letter dated October 20, 1999, from FTA Chief Counsel to Sacramento Regional Transit District.

¹²⁹ 49 C.F.R. § 661.7(c).

¹³⁰ 49 C.F.R. § 661.7(c)(1).

the item is not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.¹³¹ 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.¹³² 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.¹³³

The FTA sought comments on whether a general nonavailability waiver should be granted to audio-visual 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 audio-visual equipment and has indicated its intention to reconsider granting a general waiver if changed conditions warrant.¹³⁴

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:

¹³¹ 49 C.F.R. § 661.7(c)(2).

¹³² Letter dated December 17, 1999, from FTA Chief Counsel to Metro-North Rail Road (public solicitation allowing for an approved equal to all known bidders in industry resulted in only one bid, which was not compliant with Buy America).

¹³³ Letter dated January 28, 2000, from the FTA Deputy Chief Counsel to the Southeastern Pennsylvania Transportation Authority; letter dated April 14, 2000, from FTA Deputy Chief Counsel to King County Department of Transportation; letter dated September 7, 1999, from FTA Chief Counsel to Pinellas Suncoast Transit Authority.

¹³⁴ 56 Fed. Reg. 926 (1991).

- 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 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.¹³⁵

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.

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.

VI. BUY AMERICA COMPLIANCE

A. Who is Subject to the Buy America Requirements?

Every FTA grantee is a party to FTA's official Master Agreement, which documents the standard terms and conditions of FTA funding.¹³⁶ Pursuant to Section 14(a) of the Master Agreement, a grantee agrees to comply with 49 U.S.C. § 5323(j), FTA regulations, "Buy America Requirements," 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.

¹³⁵ *Id.*; FTA, BEST PRACTICES PROCUREMENT MANUAL, ch. 8, § 8.1.4.

¹³⁶ The version of the Master Agreement referred to herein is dated October 1, 2000.

49 C.F.R. § 661.13 requires a grantee 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 Practices 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 8.1.4.

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.¹³⁷ 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.¹³⁸

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.¹³⁹ Certification for steel, iron, or manufactured products is required under 49 C.F.R. § 661.6.¹⁴⁰ 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. § 661.12.¹⁴¹ 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. 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. In a letter dated September 30, 1999, from the FTA Chief 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 learned 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 the presumption that Escalator Handrail intended to act in violation of its

¹³⁷ 49 C.F.R. § 661.13(b).

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

¹³⁹ 49 C.F.R. § 661.13(c).

¹⁴⁰ Please note that the form of certification in the C.F.R. refers to the sections of the 1982 STAA (steel and manufactured products) and has not been updated to reflect the addition of iron, as codified in 49 U.S.C. 5323(j). The form of certification attached as Appendix A-1 to the FTA BEST PRACTICES PROCUREMENT MANUAL accurately references the correct statutory provision and should be used by grantees pending the publication of technical corrections to the C.F.R. by the FTA. (FTA, BEST PRACTICES PROCUREMENT MANUAL, ch. 4, § 4.3.3.2.2.

¹⁴¹ Like the § 661.6 certification, the C.F.R. certification language refers to the 1982 STAA and not more recent statutory language. The certification language attached as Appendix A-1 to the FTA Best Practices Procurement Manual, accurately references the correct statutory provision and should be used pending FTA revision of the C.F.R. (FTA BEST PRACTICES PROCUREMENT MANUAL, ch. 4, § 4.3.3.2.2).

certification. However, once a showing is made sufficient to overcome that presumption, FTA will initiate an investigation.¹⁴²

Other than the aforementioned right to petition the FTA to investigate the compliance of a successful bidder, a third party has no rights under Buy America.¹⁴³ 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.¹⁴⁴ 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 (LRRT), based on NFTA's determination that the plaintiff's product had not met the project's specifications and requirements. FTA granted NFTA a partial waiver subject to further testing of the 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."¹⁴⁵

In appropriate circumstances, FTA may determine on its own to initiate an investigation.¹⁴⁶ When FTA determines to conduct an investigation, it requests that the grantee require the successful bidder to document its compliance with its Buy America certificate. FTA specifies the requisite documentation on a case-by-case basis. The successful bidder has the burden of proof to establish that it is in compliance.¹⁴⁷ 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 writ-

ing, and the grantee notifies the FTA in writing. The FTA may conduct site visits to the manufacturing site with adequate notice to the parties.¹⁴⁸ 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.¹⁴⁹

When a petition for investigation has been filed before a grantee has awarded a contract, the grantee will not make an award before the resolution of the investigation unless (a) the items to be procured are urgently required, (b) delivery of performance will be unduly delayed by failure to make the award promptly, or (c) failure to make a prompt award will otherwise cause undue harm to the grantee or the federal government.¹⁵⁰ 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, it will be required to take the necessary steps in order 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

¹⁴² 49 C.F.R. § 661.15(a), (b).

¹⁴³ 49 C.F.R. § 661.20.

¹⁴⁴ *Ar-Lite Panelcraft, Inc. v. Siegfried Construction Co., Inc., et al*, No. Civ-86-525C, 1989 U.S. Dist., Lexis 6394 (W.D. N.Y. March 10, 1989) (unpublished).

¹⁴⁵ *Id.*

¹⁴⁶ 49 C.F.R. § 661.15(c).

¹⁴⁷ 49 C.F.R. § 661.15(d).

¹⁴⁸ 49 C.F.R. § 661.15(e), (i).

¹⁴⁹ 49 C.F.R. § 661.15(j), (k), (l).

¹⁵⁰ 49 C.F.R. § 661.15(m).

of its Buy America obligations under the contract.¹⁵¹ FTA grant recipients should be sure that their contracts have obligated the contractor to assume all costs of Buy America compliance. Enforcement rights of the grantee regarding vendor liability for Buy America compliance should be clearly articulated in the contract.

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.¹⁵²

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 performing the contract, including satisfying the Buy America requirements, even if that requires a determination of default and substitute performance. A typical resolution is to permit the contractor to substitute a different product that meets the specifications, including the Buy America requirement, at the contractor's expense. In rare instances, FTA may approve a public interest waiver.¹⁵³ In the event Buy America compliance is not possible, application may be made for a nonavailability waiver or the noncompliant item may be severed and funded through nonfederal funding sources.

Remedies may also include conditional acceptance of rolling stock the pending manufacturer's correction of deviations within a reasonable time at no additional cost to the grantee.¹⁵⁴ 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.¹⁵⁵

Finally, a grantee may be able to pursue a remedy for false certification, a criminal act in violation of 18 U.S.C. § 1001.¹⁵⁶ Criminal or administrative pursuit of the violation can usually be handled in consultation with FTA.

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

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 provided. 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. These draconian remedies are, however, the exception and not the rule.

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

¹⁵¹ 49 C.F.R. § 661.17.

¹⁵² 49 C.F.R. § 661.18.

¹⁵³ FTA, BEST PRACTICES PROCUREMENT MANUAL, § 8.1.4.

¹⁵⁴ 49 C.F.R. § 663.39(b).

¹⁵⁵ 49 C.F.R. § 663.39.

¹⁵⁶ 49 C.F.R. § 661.15(a).

post-delivery audit within 30 days of vehicle acceptance.¹⁵⁷

VII. 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.¹⁵⁸ Nevertheless, while the causality has never been analyzed (to the knowledge of this author), it is a fact that several major European and Japanese railcar builders and European and Canadian bus manufacturers have located assembly plants in the United States, arguably for purposes of Buy America compliance.¹⁵⁹ In a recent FTA response to a certification protest, 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. Wherever your sympathies may lie, Buy America compliance is firmly established in the FTA statutory and regulatory scheme and 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:

- Always identify the end product before deciding which provision of Buy America applies.

- 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. §§ 661.1 *et seq.* and 663.1 *et seq.*
- March 18, 1997, FTA Dear Colleague Letter.
- Sections 4 and 8 of the FTA *Best Practices Procurement Manual* (Feb. 2000).
- 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:

Meghan G. Ludtke (or successor)
Office of Chief Counsel
Federal Transit Administration
Department of Transportation
400 Seventh Street, SW, Suite 9316
Washington, D.C. 20590
202-366-1936

www.fta.dot.gov/library/legal/buyamer/

¹⁵⁷ Letter dated December 14, 1999, from FTA Chief Counsel to Missouri Department of Transportation.

¹⁵⁸ Hughes, *supra* note 12.

¹⁵⁹ A partial list includes Nova Bus, a Canadian subsidiary of the Swedish Volvo Bus Corporation, which 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, which 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) and Siemens Transportation Systems (Germany), which all have rail manufacturing facilities in the United States.

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 which 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
- **Turn key 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 sought any of the following waivers, which you may not have discussed above:**

Public interest waiver: Yes No

Non-availability waiver: Yes No

Price-differential 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 DENNIS C. GARDNER, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas. Members are ARTHUR P. BERG, Port Authority of New York and New Jersey; RICHARD W. BOWER, California Department of Transportation; DORVAL RONALD CARTER, JR., Chicago Transit Authority; CLARK JORDAN-HOLMES of Stewart, Joyner, & Jordan-Holmes, P.A., Tampa, Florida; ALAN S. MAX, City of Phoenix Law Department; ROBIN M. REITZES, City Attorney's Office, San Francisco, California; and JEANETTE J. CLARK, Washington Metropolitan Transit Authority. SHARON GREENE provides liaison with TOPS, and GWEN CHISHOLM represents the TCRP staff.

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