

Legal Research Digest 49

UPDATED GUIDE TO BUY AMERICA REQUIREMENTS—2015 SUPPLEMENT

This report was prepared under TCRP Project J-05, “Legal Aspects of Transit and Intermodal Transportation Programs,” for which the Transportation Research Board is the agency coordinating the research. The report was prepared under Topic 16-01 by Timothy R. Wyatt, Conner Gwyn Schenck PLLC, Greensboro, North Carolina. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

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

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

Foreword

The United States Department of Transportation (USDOT) is committed to maximizing the economic benefits of infrastructure investments through Buy

America provisions that ensure that transportation infrastructure projects are built with American made products. Funding for infrastructure investments is derived through the various grant programs of multiple agencies housed within and, in some instances, outside of USDOT, with each agency having differing statutory and regulatory Buy America requirements that may be attached to the funding.

This digest examines various statutory and regulatory Buy America requirements that a state or local governmental entity must examine when receiving funds for a public transportation project from one or more USDOT agencies. Of particular interest is the state of Buy America law, regulations, and practice in the context of infrastructure and construction projects, with particular focus on materials made primarily of steel or iron, facilities as manufactured end products, and utility relocation.

In September 2001, TRB published *TCRP Legal Research Digest 17: Guide to Buy America Requirements*. Subsequently, *TCRP Legal Research Digest 31: Guide to Federal Buy America Requirements—2009 Supplement* explored the Buy America requirements with an emphasis on the specific requirements that apply to manufactured products and rolling stock.

This digest serves as an update of the earlier TCRP digests and specifically provides a comprehensive and current summary of the Federal Transit Administration Buy America provisions. The digest will be useful for transit attorneys, procurement officials, policy makers, and all other persons interested in transit-related Buy America requirements.

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UPDATED GUIDE TO BUY AMERICA REQUIREMENTS

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I. INTRODUCTION

A. Purpose of Digest

When transportation programs receive assistance from federal funding, there are typically domestic preference conditions, or “Buy America” requirements, associated with the use of federal funds. The Buy America provision associated with Federal Transit Administration (FTA) grant funds is one of the most longstanding federal transportation Buy America provisions and is probably the subject of more documentation than all of the rest. FTA’s regulations implementing the Buy America provision are lengthy and detailed, in contrast to other federal transportation grant Buy America provisions.

The Transportation Research Board (TRB) first published its *Guide to Federal Buy America Requirements* in 2001 as Transit Cooperative Research Program (TCRP) Legal Research Digest 17.¹ A 2009 supplement to the guide was published as TCRP Legal Research Digest 31.² The 2009 supplement addressed significant legislative changes to the FTA Buy America provision enacted by Congress in 2005, as well as FTA’s 2007 final rule implementing those changes. In 2015, the FTA Buy America provision was addressed again in National Cooperative Rail Research Program (NCRRP) *Legal Research Digest 1*,³ along with other federal transportation grant Buy America provisions that are applicable to federally funded rail projects.

The purpose of this *Legal Research Digest* is to update the earlier TRB legal research to provide a comprehensive and current summary of the FTA Buy America provision for transit attorneys and

procurement officials. This accounts for changes to the FTA Buy America provision since the 2009 supplement, including a significant revision by Congress in December 2015, recent FTA guidance and decisions, and recent court decisions involving the FTA Buy America provision.

FTA maintains a Buy America website that contains current guidance, policy letters, rulemaking notices, waiver requests, and waiver decisions at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/buy-america-regulations>. Information published by FTA since the 2009 supplement is emphasized in this *Legal Research Digest*.

B. Overview of FTA Buy America

The current language of the FTA Buy America provision, as enacted by Congress, is set forth at 49 U.S.C. § 5323(j). Additional regulations promulgated by FTA to implement or interpret the FTA Buy America provision are set forth at 49 C.F.R. Part 661. The statute provides that, as a general rule, the U.S. Department of Transportation may “obligate” funds appropriated under U.S.C. Chapter 53 (“Public Transportation”) only if all “steel, iron, and manufactured goods used in the project are produced in the United States.”⁴ This provision applies when federal grant funds are used for transit capital projects,⁵ public transportation planning,⁶ and research and development related to public transportation,⁷ among other things. The regulations promulgated by FTA clarify that the provision applies to all projects that receive FTA grant funds.⁸ Generally, the FTA Buy America provision does not apply to transit projects that do not involve FTA funds, but other domestic preferences may apply depending on the source of funds.

The requirement that all “steel, iron, and manufactured goods used in the project [be] produced in the United States” applies to FTA-funded infrastructure and construction projects as well as to

¹ JAYE PERSHING JOHNSON, GUIDE TO FEDERAL BUY AMERICA REQUIREMENTS (Transit Cooperative Research Program Legal Research Digest No. 17, Transportation Research Board, 2001) [hereinafter *TCRP LRD 17*].

² JAYE PERSHING JOHNSON, GUIDE TO FEDERAL BUY AMERICA REQUIREMENTS—2009 SUPPLEMENT (Transit Cooperative Research Program, Legal Research Digest No. 31, Transportation Research Board, 2010) [hereinafter *TCRP LRD 31*].

³ TIMOTHY R. WYATT, BUY AMERICA REQUIREMENTS FOR FEDERALLY FUNDED RAIL PROJECTS 52–72 (National Cooperative Rail Research Program Legal Research Digest No. 1, Transportation Research Board, 2015) [hereinafter *NCRRP LRD 1*].

⁴ 49 U.S.C. § 5323(j)(1) (2016); see also 49 C.F.R. § 661.5(a) (2015).

⁵ 49 U.S.C. §§ 5307–5311 (2016).

⁶ 49 U.S.C. §§ 5303–5306 (2016).

⁷ 49 U.S.C. § 5312 (2016).

⁸ 49 C.F.R. § 661.5(a) (2015).

procurements of manufactured products, including rolling stock. The application of the FTA Buy America provision to each of these procurement categories is addressed in detail in Section III.

The general requirement that only domestic materials be used on FTA-funded projects is alleviated significantly by a number of waivers that are available to FTA grant recipients. First, Congress has provided a Domestic Content waiver applicable only to procurements of “rolling stock” such as vehicles, which permits rolling stock to be treated as domestic even when it includes some foreign content. The rolling stock Domestic Content waiver is addressed in detail in Section III.B.

Other waivers available to FTA grant recipients include Non-Availability (where comparable domestic products are not available in sufficient quantities of satisfactory quality), Price Differential (when domestic products would increase the cost of the project by 25 percent), and Public Interest. These types of waivers that may be requested for a specific project, and the procedures for doing so, are discussed in Section IV.B. Further, FTA has issued some waivers of general applicability, including a Small Purchase waiver, which permit FTA grant recipients to purchase some foreign products without requesting a waiver. These general waivers are discussed in Section IV.A.

The FTA Buy America provision is unique among the various federal transportation grant Buy America provisions, in that it has been the subject of a lengthy, well-documented history of legislative revisions, formal rulemaking, and waiver decision making. Section II *infra* addresses the history of the FTA Buy America provision to help the reader understand how it has iteratively evolved over the years into the version that exists today. First, however, as in the previous TCRP *Legal Research Digests*, the following section briefly contrasts the FTA Buy America provision with other domestic preferences, including other federal transportation grant Buy America provisions, to help the reader better appreciate the unique features of the FTA Buy America provision.

C. What FTA Buy America Is Not

Government agencies and their contractors can encounter a wide variety of domestic preferences and Buy America requirements. Most Buy America requirements, including the FTA Buy America provision, are variations of requirements that originated with the Buy American Act (BAA) in 1933. Although these other Buy America requirements can appear almost identical to the FTA Buy America provision, there are actually subtle yet significant differences in

the various Buy America requirements. In order to fully understand and appreciate the uniqueness of the FTA Buy America provision, it is helpful to have a basic understanding of these other domestic preferences and Buy America requirements. The remainder of this section briefly addresses these other requirements, and the remainder of the digest addresses the unique features of the FTA Buy America provision.

1. 1933 Buy American Act

The BAA,⁹ enacted by Congress in 1933, applies to direct purchases “for public use” by federal agencies, including direct purchases by FTA. The BAA nominally prohibits federal agencies from purchasing any foreign construction materials of any kind, including steel, cement, wood, and even “mined” materials such as aggregate or sand.¹⁰ The BAA also requires federal agencies to purchase only domestic manufactured products (those “that have been manufactured in the United States substantially all from” domestic components, i.e., from goods that were themselves “mined, produced, or manufactured in the United States”).¹¹

In practice, however, the BAA has several exceptions that allow for significant purchases of foreign goods by federal agencies. These include:

- *Domestic Content.* Via a 1954 Executive Order, manufactured products are deemed to be composed “substantially all” from domestic components as long as domestic components constitute at least 50 percent of the end product (by cost) and the final assembly location for the end product is in the United States.¹² Thus, manufactured products can contain a significant amount of foreign content and still be considered domestic for purposes of the BAA.

- *Price Differential.* The BAA permits federal agencies to purchase foreign goods if the price of comparable domestic goods is “unreasonable.”¹³ The 1954 Executive Order interpreted the cost of domestic goods to be “unreasonable” if it was higher than an adjusted bid to provide comparable foreign goods, when the adjusted foreign bid price is calculated by increasing the cost of the foreign goods in the bid by a minimum six percent “differential.”¹⁴ This six percent Price Differential exception is still

⁹ 41 U.S.C. §§ 8301–8305 (2016). For a detailed discussion of the legislative history of the BAA, see Lawrence Hughes, *Buy North America: A Revision to FTA Buy America Requirements*, 23 *TRANSP. L.J.* 207, 208 13 (1995).

¹⁰ 41 U.S.C. §§ 8302(a)(1), 8303(a) (2016).

¹¹ 41 U.S.C. §§ 8302(a)(1), 8303(a)(2) (2016).

¹² Exec. Order No. 10,582, 19 Fed. Reg. 8,723 (Dec. 17, 1954).

¹³ 41 U.S.C. § 8302(a)(1) (2016).

¹⁴ Exec. Order No. 10,582, 19 Fed. Reg. 8,723 (Dec. 17, 1954).

applicable in the BAA regulations that govern direct federal procurements.¹⁵

- *Non-Availability.* The BAA permits the purchase of foreign goods when comparable domestic goods “are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality.”¹⁶ Although these terms are not clearly defined or quantified in the legislation, the Federal Acquisition Regulation (FAR) provides a list of classes of goods where it has been determined “that domestic sources can only meet 50 percent or less of total U.S. government and non-government demand.”¹⁷ Although federal agencies are required to perform some market research and specifically seek out domestic sources before purchasing goods on this list, federal agencies may purchase foreign goods on the list without a written waiver determination as long as their market research does not identify sources of comparable domestic goods.¹⁸ Furthermore, if there are no domestic offers in response to an open solicitation, federal agencies are entitled to presume that domestic goods are not reasonably available, even if they are not on the FAR list.¹⁹

- *Public Interest.* The BAA includes an exception that permits federal agencies to purchase foreign goods if the acquisition of higher-priced domestic goods would “be inconsistent with the public interest.”²⁰ The FAR clarifies that the Public Interest exception to the BAA applies when the federal government “has an agreement with a foreign government that provides a blanket exception to the Buy American Act.”²¹ Specifically, under the Trade Agreements Act, the BAA has been waived for transactions covered by the World Trade Organization (WTO) Agreement on Government Procurement or other free trade agreements.²²

- *Small Purchase.* The BAA, like many federal procurement statutes, is inapplicable to purchases for which the entire contract value is less than the federal “micro-purchase threshold,” which is currently \$3,000.²³

More than 85 years after its passage, the BAA remains federal law and still applies to most direct procurements by federal agencies, including FTA. However, most transit procurements in the United States are made not by FTA, but rather by state and local transit agencies, albeit often using FTA grant funds. The FTA Buy America provision that is the subject of this digest, not the BAA, applies to these procurements. On its face, the FTA Buy America provision can appear very similar to the BAA, especially because there are waivers available under the FTA Buy America provision that can appear similar to the five general BAA exceptions previously listed.²⁴ In practice, however, the FTA Buy America provision is very different from the BAA, and the criteria for obtaining waivers from the FTA Buy America provision are generally more stringent than the criteria for exceptions to the BAA. FTA grant recipients should be aware that many products that can be purchased by federal agencies under the BAA cannot be purchased under the FTA Buy America provision.

2. Other Federal Transportation Buy America Requirements

Although the BAA does not apply to federally funded procurements by state and local transportation agencies, there typically are Buy America provisions associated with those procurements. The specific Buy America requirements associated with a given procurement depend upon which federal agency’s funds are being used.

Buy America requirements for FTA funds (and other federal transportation agencies) originated in 1978 as a result of congressional concern that the BAA was not being applied to transportation grant funds. In 1978, the U.S. General Accounting Office (GAO, now the U.S. Government Accountability Office) reported to Congress “that contracts awarded by State and local authorities under Federal grant programs are not covered by the Buy American Act, unless the statute authorizing the Federal assistance to State and local authorities explicitly provides for application of the Buy American Act.”²⁵ GAO concluded that federal grant programs administered by the Federal Highway Administration

¹⁵ 48 C.F.R. § 25.105(b)(1) (2015).

¹⁶ 41 U.S.C. §§ 8301(a)(2)(B), 8303(b)(1)(B) (2016).

¹⁷ 48 C.F.R. §§ 25.103(b)(1)(i), 25.104(a) (2015).

¹⁸ 48 C.F.R. § 25.103(b)(1)(ii) (2015).

¹⁹ 48 C.F.R. § 25.103(b)(3) (2015).

²⁰ 41 U.S.C. §§ 8302(a)(1), 8303(b)(3) (2016).

²¹ 48 C.F.R. §§ 25.103(a), 25.202(a)(1) (2015).

²² 48 C.F.R. § 25.402(a)(1) (2015); see also Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 301, 303, 93 Stat. 144 (1979).

²³ 41 U.S.C. §§ 1902(a), 8302(a)(2)(C), 8303(b)(1)(C) (2016).

²⁴ Comparable waivers from the FTA Buy America provision, including the Price Differential, Non-Availability, and Public Interest waiver, are discussed in Section IV.B.1. FTA has also issued a general Small Purchase waiver, which is discussed in Section IV.A.1. Finally, Congress has provided a general Domestic Content waiver applicable only to rolling stock, which is discussed in Section III.B.

²⁵ FEDERAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS AND OTHER ORGANIZATIONS FOR SELECTED PROGRAMS, Enclosure II, at 6, COMP GEN. REP’T No. ID 78 40, Docket Nos. B-162222, B-156489 (1978).

(FHWA), Federal Railroad Administration (FRA), and Amtrak “do not address the issue” of domestic preferences, and the grant program administered by the Urban Mass Transportation Administration (UMTA, now known as FTA) actually “prohibits domestic preference.”²⁶

Shortly thereafter, Congress enacted Buy America provisions applicable to UMTA and FHWA,²⁷ as well as Amtrak,²⁸ as amendments to transportation appropriations bills, with the intent to extend the BAA requirements to the transportation grant programs.²⁹ The FTA and FHWA Buy America requirements originated as a single statute applicable to both agencies, but the statute was administered differently by the two agencies, and since 1994 there have been separate Buy America statutes applicable to the two agencies.³⁰ In 1990, Congress enacted a Buy America provision applicable to Federal Aviation Administration (FAA) grant funds.³¹ Finally, in 2008, Congress enacted a Buy America provision applicable to FRA grant funds.³²

The various Buy America provisions applicable to federal transportation grants and the BAA are all deceptively similar in appearance, often having

²⁶ FOREIGN-SOURCE PROCUREMENT FUNDED THROUGH FEDERAL PROGRAMS BY STATES AND ORGANIZATIONS 1, COMP. GEN. REPT NO. ID-79-1, Docket Nos. B-162222, B-156489, App. 1, at 13–14 (1978). At that time, FTA was known as the Urban Mass Transportation Administration (UMTA). To avoid confusion, both FTA and UMTA are referenced interchangeably herein as “FTA.”

²⁷ Surface Transportation Assistance Act of 1978, Pub. L. No. 95-599, § 401, 92 Stat. 2689 (Nov. 6, 1978) [hereinafter *STAA 1978*].

²⁸ Amtrak Improvement Act of 1978, Pub. L. No. 95-421, § 10, 92 Stat. 923 (Oct. 5, 1978) (codified at 49 U.S.C. § 24305(f)). For more information about the Amtrak Buy America provision, see *NCRRP LRD 1*, *supra* note 3, at 26 37.

²⁹ Hughes, *supra* note 9, at 215 (“Rep. Robert W. Edgar (D-Pa.) explained that the [BAA] (enacted in 1933) applied only to direct federal procurements, and not to grants-in-aid. Rep. Edgar’s amendment would encompass grants-in-aid projects within the Buy America requirement.”).

³⁰ Pub. L. No. 103-272, § 1(e), 108 Stat. 745 (Jul. 5, 1994) (formally codifying the FTA Buy America provision at 49 U.S.C. § 5323(j)); see also Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 1903, 119 Stat. 1144 (Aug. 10, 2005) (recodifying the FHWA Buy America provision at 23 U.S.C. § 313).

³¹ Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 9129, 104 Stat. 1388 (Nov. 5, 1990) (codified at 49 U.S.C. § 50101). For more information about the FAA Buy America provision, see Timothy R. Wyatt, *BUY AMERICA REQUIREMENTS FOR FEDERALLY FUNDED AIRPORTS* (Airport Cooperative Research Program Legal Research Digest No. 18 (Feb. 2013)).

³² Rail Safety Improvement Act of 2008, Pub. L. No. 110-432, Div. B, § 301(a) (Oct. 16, 2008) (codified at 49 U.S.C. § 24405(a)). For more information about the FRA Buy America Provision, see *NCRRP LRD 1*, *supra* note 3, at 9 26.

some variation on the same five categories of available waivers or exceptions. However, there are significant differences in the way the Buy America provisions are administered from one federal transportation agency to another. Specifically, the federal agencies employ markedly different criteria for granting waivers. It is important for a federal grant recipient, such as a state or local transit agency, to understand which Buy America provisions apply to its federally funded projects and to be aware that products that can be procured under one provision might not be available under another.

State and local transit agencies must be cognizant of situations in which multiple federal transportation grant Buy America provisions apply to a given project. Multiple federal funding sources can lead to confusion because the FTA Buy America provision (and most other federal transportation grant Buy America provisions) apply to the “project,” not necessarily the portion of the project that is funded by the federal transportation grant program.³³ Where development projects are funded jointly, using FTA grant funds and funds from some other source, FTA requires “that the steel, iron, and manufactured goods used in the joint development project are produced in the United States, as described in” the FTA Buy America provision.³⁴ Therefore, the FTA Buy America provision could conceivably apply to individual contracts or “segments” of a project not funded by FTA.³⁵

Whether the FTA Buy America provision or other federal transportation grant Buy America provisions apply to a given contract may depend on the meaning of the word “project.” In 2012, the U.S. Senate

³³ The FTA Buy America provision requires all “steel, iron, and manufactured goods used in the *project*” to be “produced in the United States.” 49 U.S.C. § 5323(j)(1) (2016) (emphasis added); see also 49 C.F.R. § 661.5(a) (2015). Historically, FTA’s practice was to only apply the FTA Buy America provision to individual *contracts* funded by FTA grants, not to other contracts that were conceivably part of the same “project.” That practice, however, was expressly abandoned by FTA in 2007. Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,691 (Sept. 20, 2007).

³⁴ Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law, 72 Fed. Reg. 5,788, 5,792 (Feb. 7, 2007).

³⁵ See *infra* note 131 and accompanying text. FHWA takes the position that, when a project is jointly funded by FHWA and FTA, the joint funds should be transferred to the “lead agency.” Then the FTA Buy America provision applies to FHWA funds that “are transferred to FTA for a transit project,” and the FHWA Buy America provision applies to FTA funds that “are transferred to FTA for a highway project.” FHWA, Buy America Q and A for Federal-Aid Program, https://www.fhwa.dot.gov/construction/contracts/buyam_qa.cfm.

passed a measure that would adopt a very broad definition of a “project” for purposes of the FTA Buy America provision.³⁶ Although this measure ultimately was not enacted into law for purposes of the FTA Buy America provision, a similar measure was enacted for purposes of the FHWA Buy America provision, as discussed in Section II.F. The clear trend in federal law is to extend federal transportation Buy America provisions from one funding source to related contracts funded by another source, if the contracts are related parts of a single “project.” State and local transit agencies should identify all potentially applicable Buy America provisions and perform an independent evaluation of the compliance of the entire project with each Buy America provision. There are significant variations in the Buy America requirements from one federal grant program to the next, so a grant recipient cannot assume that a project that complies with one Buy America provision also complies with all other Buy America provisions that may apply to the project.

3. American Recovery and Reinvestment Act

The American Recovery and Reinvestment Act (ARRA) stimulus bill passed in 2009, which provided substantial funding for FTA programs, included its own Buy America provision.³⁷ ARRA also provided for expanded enforcement and monitoring of the Buy America provisions associated with ARRA-funded projects,³⁸ resulting in increased scrutiny of Buy America compliance by federal transportation grant recipients.

In 2009, FTA concluded that the ARRA Buy America provision did not supersede the obligation for FTA grant recipients to comply with the FTA Buy America provision, even when performing projects funded by ARRA.³⁹ ARRA stands as an example to FTA grant recipients that there may be domestic preferences or Buy America requirements associated with a given appropriation by Congress, but

³⁶ S. 1813, 112th Cong., § 20017 (2012), proposing to make the FTA Buy America provision applicable

to all contracts eligible for assistance under this chapter for a project carried out within the scope of the applicable finding, determination, or decision under [the National Environmental Policy Act] regardless of the funding source of such contracts, if at least 1 contract for the project is funded with amounts made available to carry out this chapter.

³⁷ American Recovery and Reinvestment Act of 2009, Pub. L. No. 111 5, § 1605(c), 123 Stat. 115, 303 (Feb. 17, 2009).

³⁸ *Id.* § 1524, 123 Stat. at 291.

³⁹ American Recovery and Reinvestment Act of 2009 Public Transportation Apportionments, Allocations and Grant Program Information, 74 Fed. Reg. 9,656, 9,664 (Mar. 5, 2009).

unless Congress provides otherwise, those additional requirements do not override or supersede the FTA Buy America provision (when the state or local transit agency receives the funding via a grant from FTA). Unless Congress or FTA states otherwise, FTA grant recipients should presume that they are required to satisfy the FTA Buy America provision as well as any specific domestic preference requirements associated with that appropriation.

4. State and Local Requirements

Some states have their own domestic preferences or Buy America provisions that can apply to procurements by state and local transit agencies, even when the agency is using FTA funds rather than state or local funds. When such procurements are funded in part with FTA grant funds, or when the procurements are otherwise made in support of an FTA-funded project, the FTA Buy America provision also applies. State and local transit agencies in such states should presume that they are required to comply with both the FTA Buy America provision and any state Buy America provision when using FTA grant funds.

Congress has specifically provided that FTA may not impose any condition on a grant recipient “that restricts a State from imposing more stringent requirements than” the FTA Buy America provision regarding the purchase of foreign goods, “or that restricts a recipient of [FTA] assistance from complying with those State-imposed requirements.”⁴⁰ Accordingly, FTA’s regulations provide that “any State may impose more stringent Buy America or buy national requirements than contained in” the FTA Buy America provision.⁴¹ Such state and local Buy America requirements must be “explicitly set out under State law.”⁴²

For example, in *L.B. Foster Co. v. Southeastern Pennsylvania Transportation Authority*,⁴³ the Commonwealth Court of Pennsylvania held that a Southeastern Pennsylvania Transportation Authority (SEPTA) contract funded in part with FTA grant funds was required to satisfy both the FTA Buy America provision and a Pennsylvania state law that required the use of domestic steel products.⁴⁴ The second-lowest bidder sought an injunction after SEPTA announced that it intended to award the contract to the noncompliant low bidder, who proposed to supply foreign castings, despite the fact that domestic castings were available and offered by

⁴⁰ 49 U.S.C. § 5323(j)(9) (2016).

⁴¹ 49 C.F.R. § 661.21(a) (2015).

⁴² 49 C.F.R. § 661.21(b)(2) (2015).

⁴³ 705 A.2d 164 (Pa. Commw. Ct. 1997).

⁴⁴ 73 PA. STAT. ANN. §§ 1881–1887 (2016).

the other bidders.⁴⁵ The trial court denied an injunction, and the unsuccessful bidder appealed.⁴⁶ On appeal, SEPTA argued that the castings were “transportation equipment,”⁴⁷ in an apparent attempt to have the castings evaluated according to the rolling stock 60 percent domestic content criterion of the FTA Buy America provision, rather than the 75 percent domestic content criterion of the Pennsylvania statute.⁴⁸ Further, the low bidder might have qualified for a Price Differential waiver under the FTA Buy America provision, as its bid price (offering foreign castings) was 25 percent less than the protester’s bid price (offering domestic castings).⁴⁹

The Commonwealth Court of Pennsylvania concluded that the trial court erred in its application of the Pennsylvania statute, and remanded to determine whether the unsuccessful bidder was entitled to an injunction.⁵⁰ Regardless of whether the castings would be subject to the rolling stock standard under the FTA Buy America provision, the court rejected the notion that the castings were exempt from the 75 percent domestic content requirement of the Pennsylvania statute.⁵¹ Furthermore, although the Pennsylvania statute allowed for a Non-Availability waiver similar to that in the FTA Buy America provision, the Pennsylvania statute did not allow for a Price Differential waiver. Therefore, even if a Price Differential waiver was available for the castings under the FTA Buy America provision, no such waiver was available under the Pennsylvania statute, and the procurement was required to comply with both.

Likewise, in 2012, in *Mabey Bridge & Shore, Inc. v. Schoch*,⁵² the U.S. Court of Appeals for the Third Circuit contrasted the Pennsylvania domestic steel statute with the FTA and FHWA Buy America

provisions, which provide “a more extensive set of exceptions [waivers]” than the Pennsylvania statute.⁵³ The court concluded that the FTA and FHWA Buy America provisions demonstrate “Congress’s intent to allow states to enact more restrictive requirements related to the use of domestic steel and, thus, that the [Pennsylvania] Steel Act is not preempted.”⁵⁴ Thus, FTA grant recipients must comply with state Buy America requirements that exceed the FTA Buy America requirements.

Since 2012, California has had a state law that allows state and local transit agencies “to provide a bidding preference to a bidder if the bidder exceeds” the FTA Buy America provision.⁵⁵ In a letter dated November 16, 2011 (shortly before the California statute became effective), FTA specifically endorsed California’s application of Buy America requirements that exceed the FTA Buy America provision, stating “FTA’s rules set a floor, not a ceiling.”⁵⁶

FTA funds may not be used, however, to fund a project when state law provides that the project may not be subject to domestic preferences as strict as the FTA Buy America provision.⁵⁷ Furthermore, FTA funds may not be used to fund a project subject to “Buy Local” requirements (as opposed to Buy America requirements), which favor in-state or local suppliers over other domestic suppliers.⁵⁸

Whether a state Buy America provision is more or less stringent than the FTA Buy America provision might not be a straightforward determination. Although FTA may have a stronger domestic content requirement for steel and iron construction materials, a comparable state Buy America provision might have stronger restrictions against foreign steel and iron parts (i.e., components and subcomponents) of manufactured products. Effectively, FTA grant recipients must perform independent evaluations of a project’s compliance with both the FTA Buy America provision and any potentially applicable state Buy America provision. The same principle generally applies to projects that receive grant funds from multiple federal agencies—the grant recipient should evaluate the project’s compliance with all potentially applicable Buy America provisions based on the funding source.

⁴⁵ Foster, 705 A.2d at 166.

⁴⁶ *Id.* at 169.

⁴⁷ *Id.*

⁴⁸ *Id.* at 167. Under FTA’s regulations, rolling stock subject to the reduced domestic content criterion includes such items as “train control equipment” and “traction power equipment.” 49 C.F.R. § 661.11(t),(v) (2015). The 100 percent domestic steel requirement of the FTA Buy America provision does not apply to such rolling stock. 49 C.F.R. § 661.5(a) (2015). See also 73 PA. STAT. ANN. § 1886 (2016) (excluding “transportation equipment” from the definition of “steel products” for purposes of the Pennsylvania statute).

⁴⁹ Foster, 705 A.2d at 169 n.3, 170.

⁵⁰ *Id.* at 170.

⁵¹ *Id.* (“If transportation equipment, as defined, is involved but is excluded under the provisions of the Federal Act, the remaining parts of the contract are not thereby excluded from compliance with the State Act.”).

⁵² 666 F.3d 862 (3d Cir. 2012).

⁵³ *Id.* at 868.

⁵⁴ *Id.* at 869.

⁵⁵ CAL. GOV’T. CODE § 14031.1 (2016).

⁵⁶ Letter from Peter Rogoff, FTA Administrator, to Bob Franklin, San Francisco Bay Area Rapid Transit District (Nov. 16, 2011), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/san-francisco-bay-area-rapid-transit-district-november-16-2011>.

⁵⁷ 49 C.F.R. § 661.21(b)(1) (2015).

⁵⁸ 49 C.F.R. § 661.21(b)(3) (2015).

5. Free Trade Agreements

As previously noted, the BAA has been waived for transactions covered by the WTO Agreement on Government Procurement and other free trade agreements such as the North America Free Trade Agreement (NAFTA). The WTO Agreement on Government Procurement and most free trade agreements (including NAFTA) do not apply to transportation grant programs, however, because such agreements typically define “procurement” to exclude federal grant funds to state government agencies.⁵⁹

Therefore, goods from foreign trading partners are not treated as domestic products for purposes of the FTA Buy America provision. Although federal agencies such as FTA may make direct purchases from foreign trading partners, pursuant to a Public Interest waiver from the BAA, FTA has not provided a similar waiver from the FTA Buy America provision for such procurements by FTA grant recipients, such as state and local transit agencies.⁶⁰ In October 2010, FTA confirmed that, “while products manufactured in a WTO covered country may be eligible for direct Federal procurements under the” BAA, the FTA Buy America provision “requires manufactured products to be manufactured in the United States, unless the product qualifies for a waiver.”⁶¹

II. HISTORY OF FTA BUY AMERICA

The lengthy regulations that implement the FTA Buy America provision are complex and at first can appear overwhelming to someone unfamiliar with the provision. The FTA Buy America provision originated as a relatively simple set of requirements, however, and has evolved over time to address congressional concerns with regard to potential abuses and loopholes, as well as practical concerns of FTA grant recipients and manufacturers. It is helpful to briefly review the legislative and regulatory history of the FTA Buy America provision to better understand what the regulations are intended to accomplish.

A. 1978 Surface Transportation Assistance Act

As discussed in Section I.C.2, Buy America requirements for FTA (then known as UMTA) and

⁵⁹ See World Trade Org., Agreement on Government Procurement, App. 1, United States, General Notes, WT/Let/672 (Mar. 22, 2005); North American Free Trade Agreement, Part IV: Government Procurement, ch. 10, § A, art. 1001.

⁶⁰ Hughes, *supra* note 9, at 224 (“Since FTA-funded transit procurements are made by state and local governments, Buy America rules have continued to be applied.”).

⁶¹ FTA, Buy America—Frequently Asked Questions, <https://www.transit.dot.gov/funding/procurement/third-party-procurement/buy-america>.

other federal transportation agencies originated in 1978 as a result of congressional concern that the BAA was not being applied to federal transportation grant funds. With the Surface Transportation Assistance Act (STAA) of 1978, Congress enacted a Buy America provision that applied to projects funded by both UMTA and FHWA.⁶²

The 1978 STAA Buy America provision closely mirrored the BAA. As a general rule, it provided that UMTA grant funds could be used to purchase only unmanufactured goods “mined or produced in the United States,” or manufactured products “manufactured in the United States substantially all from” such domestic goods.⁶³ There were also a number of exceptions, which mirror the types of waivers that are available today, although the criteria for exceptions were generally easier to achieve in 1978.⁶⁴

Perhaps most prominently, the 1978 STAA Buy America provision included a very broad Small Purchase exception, so that the statute applied only to projects or procurements in which the “total cost exceeds \$500,000.”⁶⁵ This exempted all but the most significant procurements from the 1978 STAA requirements. In addition, the statute provided a Public Interest exception (when application of the STAA Buy America provision “would be inconsistent with the public interest”), and a Non-Availability exception (when goods were “not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality”).⁶⁶

The statute also provided a Price Differential exception, so that the 1978 STAA Buy America provision would not apply if including domestic material would “increase the cost of the overall project contract by more than 10 per centum.”⁶⁷ There was an additional “unreasonable cost” exception applicable only to rolling stock procurements,⁶⁸ which presumably would permit the purchase of foreign rolling stock based on higher prices of domestic rolling stock in situations when the 10 percent Price Differential was not satisfied.

Furthermore, regulations promulgated by UMTA established that manufactured products were considered domestic as long as the cost of domestic

⁶² STAA 1978, *supra* note 27. For a detailed discussion of the legislative history of the 1978 STAA Buy America provision, see Hughes, *supra* note 9, at 213 16.

⁶³ STAA 1978, *supra* note 27.

⁶⁴ For a detailed discussion of the waivers available at the time, see PROBLEMS CONFRONTING U.S. URBAN RAILCAR MANUFACTURERS IN THE INTERNATIONAL MARKET, COMP. GEN. REP’T No. CED 79 66, Docket No. B 169491, at 55 56 (1979).

⁶⁵ STAA 1978, *supra* note 27.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

components was at least 50 percent of the total cost of all components and final assembly of components took place in the United States.⁶⁹ Thus, UMTA effectively established a Domestic Content exception that permitted significant foreign content in all manufactured products, not just rolling stock. UMTA considered the “components” to include any “article, material, or supply” directly incorporated into the manufactured product at its final assembly location.⁷⁰ Components were considered domestic as long as they were manufactured in the United States, disregarding the origin of their parts (i.e., subcomponents). If an “engineered system” consisting of several parts was delivered to the final assembly location and incorporated into the end product, then the entire system would be treated as a “component” for purposes of calculating domestic content.⁷¹ Therefore, manufacturers could assemble a number of foreign parts into a “system” at a location in the United States, and the system would be considered an entirely domestic component for purposes of calculating domestic content of the end product. In 1979, GAO concluded that the 1978 STAA Buy America provision “does not appear to pose any major barriers to foreign firms from competing in the United States provided they are willing to adjust their manufacturing procedures or assembly locations.”⁷²

UMTA’s regulations that implemented the 1978 STAA Buy America provision also established the requirement for successful bidders to submit a Buy America compliance certificate, certifying that the bidder would comply with the 1978 STAA Buy America provision unless an appropriate waiver was granted.⁷³ Potential penalties for failure to comply with the certification included civil action (e.g., lawsuit for breach of contract), debarment, and criminal prosecution.⁷⁴

B. 1982 Surface Transportation Assistance Act

The STAA Buy America provision applicable to UMTA grant-funded procurements was revised significantly by the 1982 STAA, which removed unmanufactured goods from coverage but specifically

⁶⁹ Buy America Requirements, 43 Fed. Reg. 57,144 (Dec. 6, 1978) (codified at 49 C.F.R. § 660.22 (1981)).

⁷⁰ 49 C.F.R. § 660.13(c) (1981); *see also* PROBLEMS CONFRONTING U.S. URBAN RAILCAR MANUFACTURERS IN THE INTERNATIONAL MARKET, COMP. GEN. REP’T NO. CED 79 66, Docket No. B-169491, at 54 (1979).

⁷¹ Buy America Requirements, 46 Fed. Reg. 5,808 (Jan. 19, 1981).

⁷² PROBLEMS CONFRONTING U.S. URBAN RAILCAR MANUFACTURERS IN THE INTERNATIONAL MARKET, COMP. GEN. REP’T NO. CED 79 66, Docket No. B-169491, at 28 (1979).

⁷³ 49 C.F.R. § 660.21 (1981).

⁷⁴ 49 C.F.R. §§ 660.41–660.44 (1981).

prohibited the purchase of foreign-manufactured products, steel, and cement.⁷⁵ (Cement was subsequently removed from the list of covered goods in 1984.⁷⁶ Iron was added to the list of covered goods in 1991.)⁷⁷ The 1982 STAA Buy America provision also eliminated the \$500,000 cost threshold, so that domestic preferences applied to *all* purchases of steel and manufactured products using FHWA or UMTA grant funds.

The 1982 STAA Buy America provision also added specific numeric criteria for objective application of the waivers. First, the Unreasonable Cost waiver for rolling stock was replaced with a 10 percent Price Differential waiver applicable only to rolling stock, with a more stringent 25 percent Price Differential waiver applicable to all other manufactured products, as well as steel.⁷⁸

Second, Congress replaced the exception for foreign content in a “substantially” domestic manufactured product with a 50 percent Domestic Content waiver applicable only to rolling stock, specifically allowing rolling stock (including train control, communication, and traction power equipment) to be purchased if it was assembled in the United States of at least 50 percent domestic components.⁷⁹ With the Domestic Content waiver, Congress “essentially established an entirely new Buy America program with its own requirements, applicable only to rolling stock.”⁸⁰ There was no Domestic Content waiver for other manufactured products, suggesting that manufactured products other than rolling stock must contain 100 percent domestic content.

UMTA adopted regulations to implement the new stricter Buy America provisions in September 1983.⁸¹ At the time of the enactment of the 1982 STAA, UMTA was considering whether to account for the origin of subcomponents in the calculation of

⁷⁵ Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, § 165, 96 Stat. 2097, 2136–37 (Jan. 6, 1983) [hereinafter *STAA 1982*].

⁷⁶ Pub. L. No. 98-229, § 10, 98 Stat. 55 (Mar. 9, 1984); *see also* Buy America Requirements, 50 Fed. Reg. 2,289 (Jan. 16, 1985).

⁷⁷ Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, § 1048, 105 Stat. 1914 (Dec. 18, 1991); *see also* General Material Requirements, 58 Fed. Reg. 38,973 (July 21, 1993).

⁷⁸ *STAA 1982*, *supra* note 75, at § 165(b)(4). The 10 percent Price Differential waiver for rolling stock meant that FTA grant recipients could obtain a waiver to purchase foreign rolling stock if the price of the foreign rolling stock, multiplied by 1.1, was still less than the price of comparable domestic bids.

⁷⁹ *Id.* § 165(b)(3).

⁸⁰ *TCRP LRD 31*, *supra* note 2, at 5.

⁸¹ Buy America Requirements, 48 Fed. Reg. 41,562 (Sep. 15, 1983).

domestic content. Because the 1982 STAA effectively repealed UMTA's previous Domestic Content exception for all manufactured products, however, UMTA decided not to address the subcomponent issue at that time.⁸² UMTA did identify a number of specific manufactured products that it considered to be subject to the new Domestic Content waiver for rolling stock as “train control, communication, and traction power equipment.”⁸³

C. 1987 Surface Transportation and Uniform Relocation Assistance Act

In 1987, with the Surface Transportation and Uniform Relocation Assistance Act (STURAA), Congress significantly strengthened Buy America requirements for rolling stock.⁸⁴ First, the Price Differential waiver criterion for rolling stock was increased from 10 percent to 25 percent.⁸⁵ Second, the Domestic Content waiver criterion for rolling stock was increased from 50 percent to 55 percent as of fiscal year (FY) 1989 and to 60 percent as of FY 1991.⁸⁶ In addition, Congress required that the origin of both components and subcomponents be considered in the evaluation of Domestic Content of rolling stock.⁸⁷ Finally, Congress implemented a requirement for pre-award and post-delivery audits for rolling stock, in part to ensure compliance with the Buy America provision.⁸⁸

Not until January 1991, almost 4 years after passage of STURAA, did UMTA adopt revised regulations to implement the new Buy America requirements.⁸⁹ The more notable revision at that time was UMTA's formal adoption of two nonexhaustive lists of “typical” components of buses and rail rolling stock. These lists were provided in response to Congress's direction that the origin of subcomponents be considered in evaluating the Domestic Content waiver for rolling stock, “and to prevent possible abuses resulting from an over-classification

⁸² *Id.* (“[I]n view of the statutory changes that have taken place, we have not included that proposed provision [regarding subcomponents] in our regulations implementing” the STAA Buy America provision.)

⁸³ *Id.*

⁸⁴ For a detailed discussion of the legislative history of the STURAA changes to the Buy America provision, see Hughes, *supra* note 9, at 219–20.

⁸⁵ Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100–17, § 337(c), 101 Stat. 241 (Apr. 2, 1987).

⁸⁶ *Id.* § 337(a).

⁸⁷ *Id.* § 337(b).

⁸⁸ *Id.* § 319.

⁸⁹ Buy America Requirements, 56 Fed. Reg. 926 (Jan. 9, 1991).

of vehicles parts as subcomponents.”⁹⁰ By identifying typical rolling stock components, manufacturers would no longer be able to bundle components into “systems” and thereby classify components as subcomponents of the system. Rather, the rolling stock components would always include those on UMTA's lists of typical components, and the subcomponents would be those parts that are “one step removed” from components.⁹¹

In September 1991, UMTA first adopted regulations prescribing procedures for the pre-award and post-delivery audits of Buy America compliance required by STURAA.⁹² In response to the “confusion that generally reigned after the institution of pre-award and post-delivery audit requirements,”⁹³ in 1992, FTA first published a list of typical questions and answers⁹⁴ and in 1995, FTA published extensive guides for conducting audits for rail procurements⁹⁵ and bus procurements.⁹⁶ In 1997, after determining that grant recipients were still “not conducting adequate reviews of the Buy America requirements,” FTA published a “Dear Colleague” letter that contained a list of typical “final assembly activities” that must take place at the final assembly location⁹⁷ to satisfy the statutory requirement that final assembly take place in the United States.

D. 1990s Amendments

Although FTA's guidance for implementing the pre-award and post-delivery audit requirements enacted by Congress in 1987 continued to evolve through the 1990s, Congress only made modest

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Pre-Award and Post-Delivery Audits of Rolling Stock Purchases, 56 Fed. Reg. 48,384 (Sep. 24, 1991).

⁹³ *TCRP LRD 31, supra* note 2, at 6.

⁹⁴ Pre-Award, Post-Delivery Audits of Rolling Stock Questions and Answers, 57 Fed. Reg. 10,834 (Mar. 31, 1992).

⁹⁵ FTA, CONDUCTING PRE-AWARD AND POST-DELIVERY REVIEWS FOR RAIL VEHICLE PROCUREMENTS, Report No. FTA-DC-90-7713-94-1, Rev. B (May 1, 1995), available at https://web.archive.org/web/20150918092503/http://www.fta.dot.gov/legislation_law/12921_5424.html.

⁹⁶ FTA, CONDUCTING PRE-AWARD AND POST-DELIVERY REVIEWS FOR BUS PROCUREMENTS, Report No. FTA-DC-90-7713-93-1, Rev. B (May 1, 1995), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/conducting-pre-award-and-post-delivery-audits-bus-procurements>.

⁹⁷ Buy America: Pre-Award and Post-Delivery Audits, Number C 97 03 (Mar. 18, 1997), available at <https://www.transit.dot.gov/regulations-and-guidance/policy-letters/buy-america-pre-award-and-post-delivery-audits>. FTA amended the “Dear Colleague” letter in August 1997, but the amended letter was almost immediately rescinded in September 1997. *TCRP LRD 31, supra* note 2, at 7.

changes to the Buy America statutory requirements in the 1990s.⁹⁸

With passage of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Congress changed UMTA's name to FTA.⁹⁹ Congress also added iron to the list of materials covered by the FTA Buy America provision (along with steel, manufactured products, and rolling stock).¹⁰⁰

In 1994, Congress formally codified the FTA Buy America provision, formally separating it from the FHWA Buy America provision.¹⁰¹ Prior to this time, ever since enactment of the 1978 STAA, the statutory Buy America requirements for the two agencies had been identical, although they had been administered very differently by the two agencies.¹⁰²

In 1995, FTA issued a general Public Interest waiver for all procurements within the “simplified acquisition threshold” for federal procurements, which at the time was \$100,000.¹⁰³ This Small Purchase waiver granted in 1995 has remained in effect over the years and has served to exempt less-significant purchases from the FTA Buy America provision. (In December 2015, Congress formally adopted the Small Purchase waiver and set the purchase threshold at \$150,000.¹⁰⁴)

In 1998, with the passage of the Transportation Equity Act for the 21st Century (TEA-21), Congress formally adopted the list of typical final assembly activities for buses from FTA's 1997 “Dear Colleague” letter, establishing a minimum set of activities that must take place in the United States.¹⁰⁵ TEA-21 also provided that bidders could correct “inadvertent errors” in the Buy America certifications after bid opening.¹⁰⁶ It was not until 2003, however, that FTA

⁹⁸ *TCRP LRD 31*, *supra* note 2, at 7 (“The Buy America provisions applicable to transit procurements were generally untouched by Congress in the 1990s...”); Hughes, *supra* note 9, at 221 (“The amendments made were slight.”).

⁹⁹ *Intermodal Surface Transportation Efficiency Act of 1991*, Pub. L. No. 102-240, § 3004, 105 Stat. 1914 (Dec. 18, 1991).

¹⁰⁰ *Id.* § 1048; *see also* Buy America Requirements, 61 Fed. Reg. 6,300 (Feb. 16, 1996).

¹⁰¹ Pub. L. No. 103-272, § 1(e), 108 Stat. 745 (Jul. 5, 1994) (codified at 49 U.S.C. § 5323(j)).

¹⁰² For a comparison of the FHWA and FTA Buy America provisions, *see NCRRP LRD 1*, *supra* note 3, at 37-72.

¹⁰³ Buy America Requirements, 60 Fed. Reg. 37,930 (Jul. 24, 1995); *see also* Buy America Requirements, 60 Fed. Reg. 14,174, 14,175 (Mar. 15, 1995) (waiving the FTA Buy America provision for purchases of \$2,500 or less).

¹⁰⁴ Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 3011(2)(E), 129 Stat. 1312, 1475 (Dec. 4, 2015) (codified at 49 U.S.C. § 5323(j)(13)).

¹⁰⁵ Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3035, 112 Stat. 107 (Jun. 9, 1998).

¹⁰⁶ *Id.* § 3020(b).

adopted regulations that prescribe a procedure for correcting inadvertent certification errors.¹⁰⁷

E. 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users

Congress initiated a significant update of the FTA Buy America provision with the 2005 U.S. Department of Transportation (USDOT) appropriations bill known as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU).¹⁰⁸ Many of the changes to the FTA Buy America provision in SAFETEA-LU were aimed at closing potential loopholes and perceived abuses of the FTA Buy America provision. With respect to Public Interest waivers, Congress repealed some long-standing general waivers,¹⁰⁹ required FTA to limit the applicability of others,¹¹⁰ and imposed heightened notice-and-comment requirements on future Public Interest waivers.¹¹¹ With respect to manufactured products, Congress required FTA to formally define the term “end product,” develop rules “to ensure that major system procurements are not used to circumvent the Buy America requirements,” and provide a list of “representative items,” such as end products or systems that FTA considers subject to the FTA Buy America provision.¹¹² Finally, with respect to bid certification and enforcement, Congress required FTA to clarify how the FTA Buy America compliance certification requirement applies to negotiated procurements,¹¹³ to issue formal rules governing the process for granting waivers after the bidder has certified compliance,¹¹⁴

¹⁰⁷ Buy America Requirements—Amendment to Certification Procedures, 68 Fed. Reg. 9,798 (Feb. 28, 2003); *see also* FTA, BEST PRACTICES PROCUREMENT MANUAL, ch. 4, § 4.3.3.2.2 (rev. Nov. 2003) [hereinafter *BPPM*], available at <https://www.transit.dot.gov/funding/procurement/best-practices-procurement-manual>.

¹⁰⁸ Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, § 3023(i), 119 Stat. 1144 (Aug. 10, 2005) [hereinafter *SAFETEA-LU*].

¹⁰⁹ *Id.* § 3023(i)(4). The repeal of the waiver for Chrysler vans is discussed in detail in Section IV.A.4.

¹¹⁰ *Id.* § 3023(i)(5)(A). The history of the microcomputer waiver is discussed in detail in Section IV.A.3.

¹¹¹ *Id.* § 3023(i)(1)(B). The notice-and-comment requirements for Public Interest waivers are discussed in Sections IV.B.1.c and IV.B.3.

¹¹² *Id.* § 3023(i)(5)(B). The treatment of manufactured products under the FTA Buy America provision following SAFETEA-LU is discussed in Section III.A.

¹¹³ *Id.* § 3023(i)(5)(D). The application of the FTA Buy America provision to negotiated procurements is discussed in Section V.A.

¹¹⁴ *Id.* § 3023(i)(5)(C). The process for post-award waivers is discussed in Section IV.B.1.b.

and establish potential criminal liability for false certifications.¹¹⁵

Over the next several years, in response to SAFETEA-LU, FTA engaged in a lengthy rulemaking process that significantly transformed the FTA Buy America provision.¹¹⁶ In November 2005, FTA issued its first notice of proposed rulemaking (NPRM I) in response to SAFETEA-LU, inviting public comment on its proposed regulatory revisions.¹¹⁷ In March 2006, FTA issued an interim final rule that addressed a subset of the topics raised in NPRM I, including the repeal of Public Interest waivers for Chrysler vans, the requirements for Buy America certification in a negotiated procurement, and other minor revisions to the FTA Buy America provision.¹¹⁸ In November 2006, FTA issued its second notice of proposed rulemaking (NPRM II) in response to SAFETEA-LU, inviting further public comment on issues identified in NPRM I but not addressed in the interim final rule.¹¹⁹ The final rule, issued in September 2007, addressed the remaining topics, including application of the general waiver for microcomputers and software, the notice-and-comment requirements for a Public Interest waiver, the standards for granting a post-award waiver, and the treatment of end products and systems procurements “to ensure that major system procurements are not used to circumvent the Buy America requirements.”¹²⁰ Most notably, in the 2007 final rule, FTA abandoned its long-standing practice of defining the “end product” for purposes of the FTA Buy America provision as the contract deliverable specified in the contract between the FTA grant recipient and its contractor.¹²¹ Instead, FTA adopted a nonexhaustive list of representative end products (which includes vehicles and infrastructure projects), as well as a new “non-shift” methodology, whereby the end product is typically identified by reference to FTA’s list of representative end products and does not “shift” to reflect the contract deliverable.¹²²

¹¹⁵ *Id.* § 3023(j). Criminal penalties for false certifications are discussed in Section V.D.I.

¹¹⁶ For a detailed discussion of FTA’s rulemaking in response to SAFETEA-LU, see *TCRP LRD 31, supra* note 2, at 7 12.

¹¹⁷ Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246 (Nov. 28, 2005).

¹¹⁸ Buy America Requirements—Amendments to Definitions, 71 Fed. Reg. 14,112 (Mar. 21, 2006).

¹¹⁹ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412 (Nov. 30, 2006).

¹²⁰ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688 (Sep. 20, 2007).

¹²¹ *Id.* at 53,691.

¹²² *Id.* For a detailed discussion of the application of FTA’s “non-shift” methodology, see Sections III.A and III.B.1.

As a result of the SAFETEA-LU rulemaking, the FTA Buy America provision (especially the method for evaluating domestic content) became more straightforward, conducive to more consistent application, and generally easier to satisfy, even as the regulations became more detailed. The 2007 final rule largely established the FTA Buy America provision as it exists today. Caution should be exercised when reviewing FTA guidance and waivers that pre-date SAFETEA-LU. The guidelines established by FTA as a result of SAFETEA-LU are discussed throughout the remainder of this digest.

F. 2012 Moving Ahead for Progress in the 21st Century Act

In the 2012 appropriations bill known as the Moving Ahead for Progress in the 21st Century Act (MAP-21), Congress made modest revisions to the FTA Buy America provision. Congress primarily required FTA to publish each “waiver determination” both on the USDOT website and in the *Federal Register* and to allow a reasonable period of time for the public to comment on each waiver determination.¹²³ This effectively extended the notice-and-comments requirements for Public Interest waivers, imposed by Congress in 2005 with SAFETEA-LU, to all project-specific waivers of the FTA Buy America provision. MAP-21 also required FTA to submit annual reports to Congress listing all project-specific waivers of the FTA Buy America provision issued each year.

The original version of MAP-21, which passed the U.S. Senate, would have applied the FTA Buy America provision to all contracts comprising a single project if any single contract in the overall project was funded by FTA.¹²⁴ This was part of a broader effort by the Senate to close a perceived “segmentation” loophole, whereby USDOT grant recipients might segment projects into federally funded contracts (to which Buy America requirements would apply) and nonfederally funded contracts (which would not have Buy America requirements). For example, a 1987 light rail procurement by the San Francisco regional transportation authority had been segmented into a set of railcars to be manufactured using UMTA funds (which were subject to the Buy America provision) and another

¹²³ Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 20016, 126 Stat. 405 (Jul. 6, 2012); see also Notice of FTA Transit Program Changes, Authorized Funding Levels and Implementation of the Moving Ahead for Progress in the 21st Century Act (MAP-21) and FTA Fiscal Year 2013 Apportionments, Allocations, Program Information and Interim Guidance, 77 Fed. Reg. 63,670, 63,678 (Oct. 16, 2012).

¹²⁴ S. 1813, 112th Cong. §§ 1528, 20017, 35210 (2012).

set of railcars that were manufactured using nonfederal funds (which were not subject to the Buy America provision).¹²⁵ Likewise, a 1993 rail construction project by the Los Angeles County transportation authority had been segmented into federally funded segments (which were required to comply with the FTA Buy America provision) and locally funded segments (which were not).¹²⁶ However, as a result of FTA's 2007 final rule in response to SAFETEA-LU, FTA no longer evaluates the "end product" for purposes of the FTA Buy America provision according to the contract deliverable.¹²⁷ Instead, FTA now applies the FTA Buy America provision "to all procurement contracts under the project irrespective of whether a recipient decides to fund a discrete part of the project without FTA funds."¹²⁸ This appears to effectively address segmentation concerns related to the FTA Buy America provision.

Accordingly, the final version of MAP-21 enacted by Congress did not include the antisegmentation provision targeted at FTA and only retained the antisegmentation provision applicable to FHWA. MAP-21 provides that the FHWA Buy America provision applies "to all contracts eligible for assistance" from FHWA (such as utility relocation contracts), regardless of the actual funding source of those contracts, as long as at least one contract on the "project" is funded with FHWA funds.¹²⁹ This means that when a project is jointly funded by both FHWA and FTA, the FHWA Buy America provision could apply to the entire project, even to segments or contracts funded exclusively by FTA and its grant recipient.¹³⁰ However, MAP-21 did not change the statutory requirement that the FTA Buy America provision also applies to any project funded by FTA. Therefore, for jointly funded projects, even if the

¹²⁵ Dale Vargas & Ricardo Pimentel, *Light-Rail Deal Gets House Attention: Agreement on Violation of Buy America Regulations Triggers Probe*, SACRAMENTO BEE (Jan. 31, 1987).

¹²⁶ Frank Haflich, *Rail Project Bidding Altered: Foreign, Domestic Steelmakers Uncertain of Process*, AMERICAN METAL MARKET (Jan. 18, 1993).

¹²⁷ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,691 (Sept. 20, 2007).

¹²⁸ FTA, THIRD PARTY CONTRACTING GUIDANCE, ch. IV, at 19, Circular FTA C 4220.1F (rev. Mar. 18, 2013), available at <https://www.transit.dot.gov/regulations-and-guidance/fta-circulars/third-party-contracting-guidance>.

¹²⁹ Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112–141, § 1518, 126 Stat. 405, 574 (Jul. 6, 2012) (codified at 23 U.S.C. § 313(g)).

¹³⁰ See, e.g., Letter from Dana Nifosi, FTA Deputy Chief Counsel, to Douglas Bauder, Southern California Edison (Apr. 30, 2014), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/southern-california-edison-sce-april-30-2014>.

FHWA Buy America provision applies to an FTA-funded contract (as a result of MAP-21), the FTA Buy America provision still applies as well.¹³¹

G. 2015 Fixing America's Surface Transportation (FAST) Act

Since December 2015, with passage of the Fixing America's Surface Transportation (FAST) Act, Congress has continued to strengthen the FTA Buy America provision. Pursuant to the FAST Act, FTA has been directed to increase the rolling stock domestic content criterion to 65 percent beginning in FY 2018 and to 70 percent beginning in FY 2020.¹³² FTA solicited public comments on the application of the heightened domestic content requirements in April 2016¹³³ and participated in a meeting with industry stakeholders regarding the new requirements in June 2016.¹³⁴

In September 2016, FTA issued a policy statement under which the domestic content criterion applicable to a given rolling stock procurement is determined based on the scheduled delivery date of the first production vehicle (not including prototype vehicles).¹³⁵ That is, if the first production vehicle in a given procurement is scheduled to be delivered on or after October 1, 2017, but before October 1, 2019, all vehicles in that procurement must contain at least 65 percent domestic content. If the first production vehicle in a given procurement is scheduled to

¹³¹ FTA, THIRD PARTY CONTRACTING GUIDANCE, ch. V, at 1, Circular FTA C 4220.1F (rev. Mar. 18, 2013), available at <https://www.transit.dot.gov/regulations-and-guidance/fta-circulars/third-party-contracting-guidance>; see also Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements Under Federal Transit Law, 72 Fed. Reg. 5,788, 5,792 (Feb. 7, 2007). Although this FTA guidance indicates that the FTA Buy America provision applies to projects funded jointly by FTA and FHWA, FHWA guidance suggests that on jointly funded projects, FTA could "transfer" funds to FHWA so that only the FHWA Buy America provision applies, or vice versa. See *supra* note 35.

¹³² Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 3011(2)(A), 129 Stat. 1312, 1474 (Dec. 4, 2015) (codified at 49 U.S.C. § 5323(j)(2)(C)).

¹³³ Notice of Proposed Policy Statement on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock, 81 Fed. Reg. 20,049 (Apr. 6, 2016).

¹³⁴ Buy America Stakeholder Meeting Rolling Stock, Docket No. FTA 2016-0019 (Jun. 27, 2016), available at <https://www.regulations.gov/document?D=FTA-2016-0019-0026>.

¹³⁵ Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances, 81 Fed. Reg. 60,278, 60,281, 60,283 (Sept. 1, 2016).

be delivered on or after October 1, 2019, all vehicles in that procurement must contain at least 70 percent domestic content.

The same criteria (i.e., 65 percent for vehicles to be delivered beginning in FY 2018 and 70 percent for vehicles to be delivered beginning in FY 2020) will apply to determine whether rolling stock components are considered domestic for purposes of the FTA Buy America provision.¹³⁶ However, with respect to train control, communication, and traction power equipment (which are considered rolling stock under the FTA Buy America provision) the applicable domestic content criterion is determined based on the date of the construction contract award.¹³⁷ That is, train control, communication, or traction power equipment delivered on a construction contract must contain 65 percent domestic content for construction contracts awarded in FY 2018 or 2019 or 70 percent domestic content for construction contracts awarded in FY 2020 or thereafter.

Not all of the FAST Act changes impose heightened Buy America requirements on FTA grant recipients. Notably, the FAST Act formally increases the threshold for Small Purchase waivers from \$100,000 to \$150,000,¹³⁸ significantly expanding the set of procurements that are not subject to the FTA Buy America provision. The FAST Act also provides that the cost of domestic steel or iron incorporated into foreign rolling stock frames or car shells may be considered domestic for purposes of calculating the domestic content of rolling stock.¹³⁹ The FAST Act further provides that steel or iron may be considered domestic as long as substantially all of its “manufacturing processes” take place in the United States, regardless of the origin of the raw materials.¹⁴⁰ Finally, whenever FTA denies a project-specific waiver request, the FAST Act requires FTA to certify that the product for which a waiver was requested is available from domestic manufacturers in sufficient quantities and satisfactory quality and to provide a list of known domestic manufacturers from which the product can be obtained.¹⁴¹ FTA is required to publish its waiver denials and certifications of product availability on the USDOT website.

The remainder of this digest addresses the FTA Buy America provision as it exists today. Section III explains the domestic content requirements for steel, iron, manufactured products, and rolling stock.

¹³⁶ *Id.* at 60,282, 60284.

¹³⁷ *Id.*

¹³⁸ Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, § 3011(2)(E), 129 Stat. 1312, 1475 (Dec. 4, 2015) (codified at 49 U.S.C. § 5323(j)(13)).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Section IV discusses the potential waivers that are available if the applicable domestic content criteria cannot be satisfied. Section V addresses the procedural means by which FTA can ensure compliance with the FTA Buy America provision.

III. APPLICATION OF FTA BUY AMERICA DOMESTIC CONTENT REQUIREMENT

In the absence of a waiver, the FTA Buy America provision requires that all “manufactured products” used in the performance of an FTA-funded project be “produced in the United States.”¹⁴² This general requirement—that most manufactured products contain 100 percent domestic content—is the focus of Section III.A. Congress has specifically provided a Domestic Content waiver for rolling stock, as discussed in Section III.B, making rolling stock a special category of manufactured product for purposes of the FTA Buy America provision, not subject to the 100 percent domestic content requirement. Another special category involves construction and infrastructure projects, including structures. These are considered manufactured products for purposes of the FTA Buy America provision and are thus subject to the 100 percent domestic content requirement discussed in Section III.A, but they have their own special considerations that are addressed in Section III.C.

A. Manufactured Products

A manufactured product is defined as an item produced as a result of the “manufacturing process.”¹⁴³ FTA has adopted a two-part test to determine whether a manufactured product (other than rolling stock) complies with the requirement that it be “produced in the United States”: (1) all of its aforementioned “manufacturing processes” must take place in the United States¹⁴⁴ and (2) all of its “components” must be of U.S. origin.¹⁴⁵ This is commonly understood to require 100 percent domestic content for manufactured products.¹⁴⁶ On its face, this appears to be a much stricter domestic content requirement than other federal Buy America provisions, which typically require only 50 percent domestic content plus final assembly of the end product in the United States.

¹⁴² 49 C.F.R. § 661.5(a) (2015); see also 49 U.S.C. § 5323(j)(1) (2016) (referring to “manufactured goods”).

¹⁴³ 49 C.F.R. § 661.3 (2015).

¹⁴⁴ 49 C.F.R. § 661.5(d)(1) (2015).

¹⁴⁵ 49 C.F.R. § 661.5(d)(2) (2015).

¹⁴⁶ *TCRP LRD 31, supra note 2, at 15; see also BPPM, supra note 107, at 42 (“The product itself must be manufactured in the U.S. with 100 percent U.S. components....”).*

However, under the FTA Buy America provision a component is considered domestic as long as all of its manufacturing processes take place in the United States, “regardless of the origin of its subcomponents.”¹⁴⁷ In other words, a manufactured product can incorporate foreign content, but the manufactured product will still comply with the FTA Buy America provision as long as the foreign content is at the subcomponent level. Accordingly, most Buy America disputes that involve manufactured products revolve around whether foreign content in the manufactured product qualifies as a “subcomponent” (i.e., component of a component). This in turn depends on FTA’s definition and interpretation of other terms, including “component,” “end product,” and “manufacturing process.”

A “component” of a manufactured product is defined as “any article, material, or supply” that is directly incorporated into the manufactured “end product” at its final assembly location.¹⁴⁸ The “manufacturing process” is defined as the application of processes that “alter the form or function” of the product’s components, “adding value and transforming” the components into “a new end product functionally different from that which would result from mere assembly” of the components.¹⁴⁹ This relatively sophisticated definition of “manufacturing process” prevents manufacturers from circumventing the FTA Buy America provision by importing foreign subcomponents to the United States, where they are merely assembled into components, which are in turn merely assembled into the end product. In order to disregard the foreign origin of subcomponents under the FTA Buy America provision, the subcomponents must have been substantially transformed (rather than merely assembled) into domestic components via manufacturing processes at a location in the United States.¹⁵⁰ The domestic components, in turn, must have been substantially transformed (rather than merely assembled) into the end product via manufacturing processes at a location in the United States.¹⁵¹

Whether an element of a manufactured product is a component (which must be domestic) or a subcomponent (whose origin may be disregarded) often depends on whether sufficient manufacturing processes have taken place domestically to alter or transform foreign subcomponents into domestic components. FTA has identified a number of “processes of alteration” that constitute manufacturing processes, including “welding, soldering,...

permanent adhesive joining,” and, in the case of electrical or mechanical products, “the collection, interconnection, and testing of various elements.”¹⁵² However, keep in mind that the processes must be more than “mere assembly.”¹⁵³ Therefore, FTA has rejected attempts to classify components as subcomponents where the parts in question are imported into the United States “highly manufactured”, and then undergo “the use of welding solely for purposes of joining the metal pieces together.”¹⁵⁴ In that situation, the imported parts have not undergone manufacturing processes in the United States but have been merely assembled. If the welded assembly is incorporated into a manufactured end product, the imported parts are considered components, not subcomponents, of the end product, and they will not be treated as domestic for purposes of calculating domestic content of the end product.

In its 2007 final rule in response to SAFETEA-LU, FTA defined the term “end product” and promulgated a nonexhaustive list of representative manufactured end products.¹⁵⁵ The manufactured end product may be a “product, article, material, supply or system”¹⁵⁶ that is “ready to provide its intended end function or use without any further manufacturing or assembly change(s)” once its components have been incorporated via the manufacturing process at the end product’s final assembly location.¹⁵⁷ This represents a change from FTA practice prior to 2007, in which the end product was considered the deliverable item specified in the contract between an FTA grant recipient and its contractor or supplier.¹⁵⁸ Under that prior practice, any given item could have been treated as an end product, component, or subcomponent, depending on the contract deliverable.¹⁵⁹ The definition of “end

¹⁵² Buy America Requirements, 56 Fed. Reg. 926, 929 (Jan. 9, 1991).

¹⁵³ 49 C.F.R. § 661.3 (2015).

¹⁵⁴ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Stephen Van Ogle, Siemens Transportation Systems, Inc. (Jun. 3, 2003), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/siemens-transportation-june-03-2003>.

¹⁵⁵ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,696 (Sept. 20, 2007).

¹⁵⁶ 49 C.F.R. § 661.3 (2015). Under this regulation, the end product may also be a “vehicle,” although the domestic content requirement for rolling stock is addressed in Section III.B. The regulation also provides that the end product may be a “structure,” as discussed in Section III.C.

¹⁵⁷ 49 C.F.R. § 661.3 (2015).

¹⁵⁸ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,691 (Sept. 20, 2007).

¹⁵⁹ *Id.*

¹⁴⁷ 49 C.F.R. § 661.5(d)(2) (2015).

¹⁴⁸ 49 C.F.R. § 661.3 (2015).

¹⁴⁹ 49 C.F.R. § 661.3 (2015).

¹⁵⁰ 49 C.F.R. § 661.5(d)(2) (2015).

¹⁵¹ 49 C.F.R. § 661.5(d)(1) (2015).

product”, adopted by FTA, in 2007 is intended to ensure consistency in application of the FTA Buy America provision from one FTA grant recipient to another, and from one contract to another, so that end products are always evaluated as end products, regardless of the contract deliverable.¹⁶⁰ FTA refers to the current practice as a “non-shift approach.”¹⁶¹

Representative manufactured end products identified by FTA in 2007 include “fare collection systems; computers; information systems; security systems; data processing systems; and mobile lifts, hoists, and elevators.”¹⁶² The inclusion of so many “systems” in the list of representative manufactured end products was, in part, a response to direction by Congress in SAFETEA-LU for FTA to address the applicability of the FTA Buy America provision to the procurement of systems. FTA practice prior to 2007 for the procurement of systems (such as a people-mover system) was to evaluate each “sub-system” identified in the contract as a manufactured product subject to the 100 percent domestic content requirement.¹⁶³ However, in the case of certain other systems (notably fare collection systems) FTA evaluated the entire system as a manufactured end product, so that each machine or device bundled into the system procurement was evaluated as a component rather than an end product (and thus subject to less stringent domestic content requirements).¹⁶⁴ Due to concerns about inconsistent application of the FTA Buy America provision to systems, Congress required FTA in SAFETEA-LU to “address the procurement of systems...to ensure that major system procurements are not used to circumvent the Buy America requirements.”¹⁶⁵

In response, FTA defined a “system” end product to be “a machine, product, or device, or a combination of such equipment, consisting of individual components...which are intended to contribute together to a clearly defined function.”¹⁶⁶ This definition prevents suppliers from circumventing the FTA Buy America provision by delivering a collection of unrelated equipment (comprised of foreign content) and referring to the collection as a “system” end product in an attempt to have the origin of the foreign content disregarded as subcomponents of

the end product. If a purported “system” is merely a collection of what FTA considers to be separate end products, each end product remains subject to the 100 percent domestic content requirement.¹⁶⁷

A sample application of the manufactured products analysis for the FTA Buy America provision involves the 2013 procurement of water mist fire-suppression systems by the New York Metropolitan Transportation Authority (MTA) for its Second Avenue Subway Project.¹⁶⁸ Components of the water mist fire-suppression system included pipe tubing, valves, nozzles, and fittings manufactured in Finland. MTA argued that the end product was the transit facility structure, and that the water mist fire-suppression system was merely a component of the facility. Accordingly, MTA argued that the foreign components of the water mist fire-suppression system were subcomponents of the transit facility structure end product, whose origin could be disregarded. FTA rejected this analysis and concluded that the water mist fire-suppression system was the end product for purposes of the FTA Buy America provision, because its components “work together to perform a function,” the “system functions independently” of the transit facility structure, and the system “does not depend on the physical structure to operate.”¹⁶⁹ Accordingly, the water mist fire-suppression system did not comply with the 100 percent domestic content requirement of the FTA Buy America provision because of its foreign components.

A similar example is a 2014 contract for the rehabilitation of the heating, ventilation, air conditioning, and cooling (HVAC) system of a bus garage for the Chicago Transit Authority (CTA).¹⁷⁰ Relying in part on a 2004 FTA decision in which FTA determined that a rehabilitated bus garage constituted the end product,¹⁷¹ CTA argued that the HVAC system was a component of the rehabilitated bus garage, so that its air handler units were subcomponents whose origin could be disregarded. FTA rejected this analysis and the approach taken in its 2004 decision,

¹⁶⁷ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,693 (Sept. 20, 2007).

¹⁶⁸ Letter from Dana C. Nifosi, FTA Chief Counsel, to Thomas Prendergast, MTA, Re: Buy America Investigation Decision: Second Avenue Subway Project’s Water Mist Fire Suppression System (Jan. 6, 2015), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/second-avenue-subway-projects-water-mist-fire-suppression>.

¹⁶⁹ *Id.*

¹⁷⁰ Energy Labs, Inc. v. Edwards Eng’g, Inc., No. 14 CV 07444, 2015 U.S. Dist. LEXIS 71058 (N.D. Ill. June 2, 2015).

¹⁷¹ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to John Trotta, CTA (Dec. 3, 2004).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 49 C.F.R. § 661.3, App. A(3) (2015).

¹⁶³ Buy America Requirements, 56 Fed. Reg. 926 (Jan. 9, 1991) (“[I]t is industry practice to have a contract broken down by sub-systems.”).

¹⁶⁴ Buy America Requirements—Amendments to Definitions and Waiver Requirements, 70 Fed. Reg. 71,246, 71,251 (Nov. 28, 2005).

¹⁶⁵ SAFETEA-LU, *supra* note 108, at § 3023(i)(5)(B).

¹⁶⁶ 49 C.F.R. § 661.3 (2015).

based largely on FTA's 2007 final rule that adopted a "non-shift" approach and defined "system" end products.¹⁷² FTA concluded that, regardless of whether the subject of the procurement was a rehabilitated bus garage, the HVAC system was a system end product for purposes of the FTA Buy America provision. Accordingly, the air handler units were components of the HVAC system, not subcomponents of the facility, and so the air handler units must be manufactured in the United States.¹⁷³

In summary, the nominal 100 percent domestic content requirement for most manufactured products still allows for a significant amount of foreign content at the subcomponent level. This does not violate the FTA Buy America provision as long as all of the foreign subcomponents have been substantially transformed into domestic components via significant manufacturing processes, so that the end product can truly be said to be composed of 100 percent domestic components.

B. Rolling Stock

In the FTA Buy America provision, Congress has specifically provided a Domestic Content waiver for "rolling stock (including train control, communication, and traction power equipment...)." ¹⁷⁴ This is in the nature of a "general waiver," such as those discussed in Section IV.A, so rolling stock that satisfies the statutory criteria is considered compliant with the FTA Buy America provision, and the grant recipient need not request a procurement-specific waiver as long as the statutory criteria are satisfied. As of 2016, rolling stock is considered compliant with the FTA Buy America provision as long as final assembly of the rolling stock takes place in the United States¹⁷⁵ and the rolling stock is comprised of more than 60 percent domestic content (calculated based on the cost of its components and subcomponents).¹⁷⁶ As a result of the FAST Act enacted in December 2015, the domestic content requirement for rolling stock is scheduled

to increase to 65 percent in FY 2018 and 70 percent in FY 2020.¹⁷⁷

FTA's guidelines for determining whether a component or subcomponent is domestic are addressed in Section III.B.2. After determining the cost of domestic components (and subcomponents, as the case may be), the domestic content percentage (by cost) of the rolling stock end product can be calculated. A rolling stock end product is considered compliant with the FTA Buy America provision if final assembly of the rolling stock end product takes place in the United States and if the cost of its domestic components (and subcomponents, as the case may be) satisfies the applicable rolling stock domestic content criterion (i.e., 60 percent domestic content as of 2016, 65 percent domestic content for vehicle procurements with scheduled delivery of the first production vehicle in FYs 2018 or 2019, or 70 percent domestic content for vehicle procurements with scheduled delivery of the first production vehicle in FY 2020 or thereafter).¹⁷⁸ In June 2011, FTA confirmed that the rolling stock domestic content criterion must be satisfied for each individual vehicle or rolling stock end product—domestic content is not to be evaluated at the level of the overall project or procurement contract.¹⁷⁹

Although the domestic content requirements for rolling stock differ from other manufactured products, evaluating Buy America compliance for rolling stock (as with other manufactured products) still depends on what constitutes the end product, its components, and its subcomponents.¹⁸⁰ As with other manufactured products, a component of a rolling stock end product is defined as "any article, material, or supply" that is directly incorporated

¹⁷² Letter from Dana Nifosi, FTA Deputy Chief Counsel, to Nathan Walker, CTA, Re: Question for Clarification on Buy America Requirements (Sept. 5, 2014); Defendants' Motion to Dismiss Amended Complaint, at Exh. B, *Energy Labs, Inc. v. Edwards Eng'g, Inc.*, No. 14 CV 07444 (N.D. Ill. Oct. 28, 2014).

¹⁷³ *Energy Labs, Inc. v. Edwards Eng'g, Inc.*, No. 14-CV 07444, 2015 U.S. Dist. LEXIS 71058, at *1 (N.D. Ill. June 2, 2015).

¹⁷⁴ 49 U.S.C. § 5323(j)(2)(C) (2016).

¹⁷⁵ 49 U.S.C. § 5323(j)(2)(C)(ii) (2016); 49 C.F.R. § 661.11(a) (2015).

¹⁷⁶ 49 U.S.C. § 5323(j)(2)(C)(i)(I) (2016); 49 C.F.R. § 661.11(a) (2015).

¹⁷⁷ Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 3011(2)(A), 129 Stat. 1312, 1474 (Dec. 4, 2015) (codified at 49 U.S.C. § 5323(j)(2)(C)). Section II.G *supra* summarizes FTA's September 2016 policy statement regarding the phased implementation of the heightened domestic content criteria.

¹⁷⁸ 49 C.F.R. § 661.11(a) (2015); *see also* Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances, 81 Fed. Reg. 60,278, 60,281, 60,283 (Sept. 1, 2016).

¹⁷⁹ FTA, Buy America—Frequently Asked Questions, <https://www.transit.dot.gov/funding/procurement/third-party-procurement/buy-america> ("For rolling stock procurements, each vehicle must contain at least 60% U.S. content, and final assembly must take place in the U.S").

¹⁸⁰ Notice of Granted Buy America Waiver, 66 Fed. Reg. 32,412, 32,413 (Jun. 14, 2001) ("The Buy America analysis begins with identification of the end product being procured. From that determination flows the discussion of which items are components and which are subcomponents...").

into the rolling stock end product at its “final assembly” location.¹⁸¹ Accordingly, Buy America compliance for rolling stock also turns on what constitutes final assembly.

1. End Products

A rolling stock end product includes “any vehicle” procured by an FTA grant recipient for public use, “which directly incorporates constituent components at the final assembly location,” after which it can be put to public use with no “further manufacturing or assembly change(s).”¹⁸² FTA defines rolling stock as “transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services.”¹⁸³ This is a nonexhaustive list of rolling stock end products,¹⁸⁴ all of which are eligible for the rolling stock Domestic Content waiver.

When Congress first established the rolling stock Domestic Content waiver in 1983, it provided that rolling stock includes “train control, communication, and traction power equipment.”¹⁸⁵ Therefore, certain manufactured products other than vehicles are exempt from the general rule that all components of manufactured products must be domestic, so long as the products qualify as rolling stock under one of these categories. Train control, communication, or traction power equipment are considered compliant with the FTA Buy America provision if final assembly of the end product takes place in the United States and if the cost of its domestic components (and subcomponents, as the case may be) satisfies the applicable rolling stock domestic content criterion (i.e., 60 percent domestic content as of 2016, 65 percent domestic content for construction contracts made in FYs 2018 or 2019, or 70 percent domestic content for construction contracts made in FY 2020 or thereafter).¹⁸⁶

In its regulations implementing the FTA Buy America provision, FTA has provided nonexhaustive, representative lists of train control equipment,¹⁸⁷

¹⁸¹ 49 C.F.R. § 661.11(c) (2015); *see also* 49 C.F.R. § 661.3 (2015).

¹⁸² 49 C.F.R. § 661.3 (2015).

¹⁸³ 49 C.F.R. § 661.3 (2015).

¹⁸⁴ 49 C.F.R. § 661.3, App. A(1) (2015).

¹⁸⁵ *STAA 1982*, *supra* note 75, at § 165(b)(3); *see also* 49 U.S.C. § 5323(j)(2)(C) (2016).

¹⁸⁶ 49 C.F.R. § 661.11(a) (2015); *see also* Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances, 81 Fed. Reg. 60,278, 60,282, 60,284 (Sept. 1, 2016).

¹⁸⁷ 49 C.F.R. § 661.11(t) (2015).

communication equipment,¹⁸⁸ and traction power equipment¹⁸⁹ that may be considered rolling stock for purposes of the rolling stock Domestic Content waiver.¹⁹⁰ The current lists of representative rolling stock end products include not only on-board equipment but also wayside equipment (i.e., equipment that is not in or on a vehicle).¹⁹¹ This reflects a longstanding practice by FTA to apply the rolling stock Domestic Content waiver to train control, communication, and traction power equipment, regardless of whether the equipment is in or on a vehicle.¹⁹² In its 2007 final rule in response to SAFETEA-LU, FTA determined that the rolling stock Domestic Content waiver should continue to apply to such wayside equipment.¹⁹³

As discussed in Section III.A, as a result of the “non-shift” approach adopted by FTA in 2007, items that are considered rolling stock end products are always rolling stock end products, regardless of the subject of a particular procurement.¹⁹⁴ This has implications for the procurement of rolling stock replacement parts. Under FTA’s prior practice, when rolling stock replacement parts were the subject of a procurement, those replacement parts were considered rolling stock end products and as such were subject to the 60 percent domestic content requirement for rolling stock.¹⁹⁵ As a result of the 2007 final rule in response to SAFETEA-LU, rolling stock replacement parts are now considered components

¹⁸⁸ 49 C.F.R. § 661.11(u) (2015).

¹⁸⁹ 49 C.F.R. § 661.11(v) (2015).

¹⁹⁰ FTA’s published lists of representative rolling stock end products long predate FTA’s 2007 adoption of a list of representative manufactured end products. Buy America Requirements, 61 Fed. Reg. 6,299 (Feb. 16, 1996) (adopting lists of representative train control, communication, and traction power equipment).

¹⁹¹ For example, train control equipment includes wayside signals, wayside transponders, and wayside magnets. 49 C.F.R. § 661.7(t) (2015).

¹⁹² *Seal & Co., Inc. v. Wash. Metro. Area Transit Auth.*, 768 F. Supp. 1150, 1160 (E.D. Va. 1991) (“[A] reasonable reading... leads to the conclusion that [the FTA Buy America provision] applied to the equipment at issue, as equipment used to control and communicate with trains and for traction is located outside, as well as within, trains.”); *see also TCRP LRD 31*, *supra* note 2, at 17 (summarizing FTA guidance letters in 2003 and 2004, in which FTA applied the rolling stock Domestic Content waiver to procurements of wayside communication equipment).

¹⁹³ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,695 (Sept. 20, 2007).

¹⁹⁴ For a detailed discussion of FTA’s rulemaking history in adopting the “non-shift” approach, and FTA’s consideration of the implications for rolling stock procurement, *see NCRRP LRD 1*, *supra* note 3, at 62–63.

¹⁹⁵ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,691 (Sept. 20, 2007).

or subcomponents if the original parts being replaced were components or subcomponents of a rolling stock end product.¹⁹⁶ Further, FTA decided that rolling stock replacement parts should be evaluated as components or subcomponents of manufactured end products, under which the origin of subcomponents is disregarded, rather than as components or subcomponents of rolling stock end products.¹⁹⁷ This means that a replacement part for a rolling stock component must be manufactured in the United States, although the origin of its subcomponents may be disregarded.¹⁹⁸ There is no domestic content requirement for a replacement part for a rolling stock subcomponent.¹⁹⁹

In 2012, FTA made a distinction between overhauls and rebuilds of rolling stock end products for purposes of the FTA Buy America provision.²⁰⁰ An *overhaul* or refurbishment involves the “systematic replacement or upgrade of systems.” It “is intended to enable the rolling stock to perform to the end of the original useful life” and “not extend the useful life of the vehicle itself.”²⁰¹ In that situation, the replacement parts are subject to the replacement part standard that accompanied the 2007 adoption of the “non-shift” approach; namely, all replacement parts for rolling stock components must be manufactured in the United States, although the origin of subcomponents is disregarded.

On the other hand, a rolling stock *rebuild* or reconditioning, however, “creates additional useful life” for the vehicle and typically takes place once the vehicle has “already reached the end of its minimum useful life.”²⁰² FTA concluded that a rolling stock rebuild or reconditioning is similar to the procurement of a new rolling stock end product, and therefore it should be eligible for the rolling stock Domestic Content waiver. Therefore, a rolling stock rebuild, like a new rolling stock end product procurement, may include up to 40 percent foreign components and subcomponents (i.e., 60 percent domestic content) as of 2016.²⁰³ As discussed in Section II.G,

¹⁹⁶ *Id.* at 53,692.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* (“[A]pplying the ‘manufactured products’ test to the acquisition of replacement components relieves manufacturers and buyers of the burden of documenting country-of-origin records for an endless number of possible subcomponents, so long as the component itself is manufactured in the United States.”).

¹⁹⁹ *Id.*; see also 49 C.F.R. § 661.5(d)(2) (2015).

²⁰⁰ Application of Buy America Waivers to Rolling Stock Overhauls and Rebuilds, 77 Fed. Reg. 29, 952, 29,953 (May 21, 2012).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

Congress has increased the domestic content criteria for rolling stock delivered in FY 2018 and thereafter. However, in September 2016, FTA clarified that, for purposes of rebuilds, the domestic content requirement “in effect at the time the vehicle was delivered” will apply to the rebuild contract, although this exception to the heightened domestic content criteria of the FAST Act is “limited to the parties on the original contract.”²⁰⁴ In other words, an FTA grant recipient who procured rolling stock from a manufacturer and obtained initial delivery prior to FY 2018 will be able to enter into a future contract with the same manufacturer to rebuild the previously procured rolling stock, and the 60 percent domestic content requirement will apply.

2. Components and Subcomponents

The domestic content calculation is made by first evaluating the cost of the components of the rolling stock end product. As previously noted, a rolling stock component is any product or material that is directly incorporated into the rolling stock end product at its final assembly location.²⁰⁵ In its regulations implementing the FTA Buy America provision, FTA has adopted lists of what constitute typical components of buses²⁰⁶ and typical components of rail rolling stock (e.g., railcars and locomotives).²⁰⁷ Although the published lists are nonexhaustive, they serve as useful guides to breaking down the rolling stock end product for purposes of calculating the cost of its domestic components. FTA has clarified that all items on the published lists of typical components must be considered components for purposes of calculating domestic content for rolling stock procurements.²⁰⁸

The published lists of typical rolling stock components are also intended, in part, to clarify the distinction between components and subcomponents.²⁰⁹

²⁰⁴ Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances, 81 Fed. Reg. 60,278, 60,282 (Sept. 1, 2016).

²⁰⁵ 49 C.F.R. § 661.3 (2015).

²⁰⁶ 49 C.F.R. § 661.11, App. B (2015).

²¹² *Griswold*, 381 U.S. at 485–86, 85 S. Ct. at 1682, 14 L. Ed. 2d at 515–16.

²⁰⁷ 49 C.F.R. § 661.11, App. C (2015).

²⁰⁸ Notice of Granted Buy America Waiver, 66 Fed. Reg. 32,412, 32,413 (Jun. 14, 2001). Older FTA guidance provided that only the cost of “major components” and “primary subcomponents” were to be considered for purposes of evaluating the domestic content of rolling stock. Buy America Requirements, 56 Fed. Reg. 926 (Jan. 9, 1991).

²⁰⁹ Buy America Requirements, 56 Fed. Reg. 926 (Jan. 9, 1991).

Unlike other manufactured products, for which the cost of subcomponents is disregarded, Congress specifically provided that the cost of subcomponents is to be considered for rolling stock.²¹⁰ FTA defines “subcomponent” to include any product or material “that is one step removed from a component...in the manufacturing process and that is incorporated directly into a component.”²¹¹

A rolling stock component is considered domestic if it is manufactured in the United States and if the cost of its subcomponents satisfies the applicable rolling stock domestic content criterion (i.e., 60 percent domestic content as of 2016, 65 percent domestic content for vehicles to be delivered in FYs 2018 or 2019, or 70 percent domestic content for vehicles to be delivered in FY 2020 and thereafter).²¹² If the rolling stock component qualifies as domestic under that test, then the entire cost of that component is treated as domestic when calculating the domestic content of the rolling stock end product. Otherwise, as long as the rolling stock component is manufactured in the United States, the cost of its domestic subcomponents and the cost of manufacturing the component are treated as domestic when calculating the domestic content of the rolling stock end product.²¹³ If the rolling stock component is not manufactured in the United States but includes domestic subcomponents, then the cost of the domestic subcomponents may be treated as domestic only if the subcomponents qualify for tariff exemptions;²¹⁴ otherwise, the entire cost of the imported component is treated as foreign, even though it includes domestic subcomponents.²¹⁵ The cost of a rolling stock subcomponent is considered domestic as long as it is manufactured in the United States, regardless of the origin of its sub-subcomponents.²¹⁶ As highlighted in Section III.A, to be considered manufactured in the United States, there must

²¹⁰ 49 U.S.C. § 5323(j)(2)(C)(i) (2016).

²¹¹ 49 C.F.R. § 661.11(f) (2015).

²¹² 49 C.F.R. § 661.11(g) (2015); see also Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances, 81 Fed. Reg. 60,278, 60,282, 60,284 (Sept. 1, 2016).

²¹³ 49 C.F.R. § 661.11(l) (2015).

²¹⁴ 49 C.F.R. § 661.11(i) (2015). The cost of such a subcomponent that retains its domestic identity is the cost of the subcomponent when last purchased, free on board (f.o.b.) U.S. “port of exportation or point of border crossing as set out in the invoice and entry papers or, if no purchase was made, the value of the subcomponent at the time of” such shipment or exportation. 49 C.F.R. § 661.11(o) (2015).

²¹⁵ 49 C.F.R. § 661.11(j) (2015).

²¹⁶ 49 C.F.R. § 661.11(h) (2015).

have been sufficient domestic manufacturing processes applied to substantially transform the materials or elements of the component or subcomponent into a new and functionally different product than “would result from mere assembly of the elements or materials.”²¹⁷

The cost of a rolling stock component or subcomponent is the actual price that the bidder or offeror must pay to a subcontractor or supplier for the component or subcomponent.²¹⁸ Costs for transporting the component or subcomponent to the final assembly location must be included in the cost of foreign components and subcomponents.²¹⁹ If a component or subcomponent is manufactured by the bidder or offeror, then the cost of the component or subcomponent includes the cost of both materials and labor, as well as reasonable profit, overhead, and administrative costs associated with its manufacture.²²⁰ Labor costs involved in final assembly of the end product, however, are not to be included.²²¹

In its 1995 guidance for conducting Buy America audits of rail rolling stock procurements,²²² FTA offers the following example for calculating the domestic content of rolling stock components. A manufacturer’s cost for obtaining a component from its supplier is \$22,000. After subtracting the supplier’s 10 percent markup (\$2,000) and the supplier’s cost of manufacturing (\$5,000), the actual cost of materials in the component is \$15,000. If the cost of domestic subcomponents is \$9,000, then the component contains 60 percent domestic content, by cost. The component is thus considered domestic, and its entire \$22,000 cost may be treated as domestic for purposes of calculating the domestic content of the end product. If the cost of domestic subcomponents is \$8,000, however, then the component contains only 53 percent domestic content by cost. The component is not considered domestic, but both the cost of its domestic subcomponents (\$8,000) and the cost of manufacturing the component in the United States (\$5,000) may be treated as domestic for purposes of calculating the domestic content of the end product.

A number of real-world examples illustrate how FTA evaluates rolling stock components and subcomponents for purposes of determining compliance with the rolling stock Domestic Content waiver.

²¹⁷ 49 C.F.R. § 661.3 (2015).

²¹⁸ 49 C.F.R. §§ 661.11(m)(1),(q) (2015).

²¹⁹ 49 C.F.R. § 661.11(m)(1) (2015).

²²⁰ 49 C.F.R. § 661.11(m)(2) (2015).

²²¹ 49 C.F.R. § 661.11(p) (2015).

²²² FTA, CONDUCTING PRE-AWARD AND POST-DELIVERY REVIEWS FOR RAIL VEHICLE PROCUREMENTS, Report No. FTA-DC-90-7713-94-1, Rev. B (1995), available at https://web.archive.org/web/20150918092503/http://www.fta.dot.gov/legislation_law/12921_5424.html.

In 2001, FTA confirmed that a “propulsion system” is not a rolling stock component because the propulsion system “consists of a traction motor, propulsion gearbox, acceleration and [braking] resistors, and propulsion controls,”²²³ all of which are listed on FTA’s list of typical components of rail rolling stock.²²⁴ Therefore, those items are components of the rolling stock end product (not subcomponents of the end product’s “propulsion system”) for purposes of calculating domestic content. FTA grant recipients cannot subject the components to the less rigorous domestic content standard for subcomponents by assembling them into a “system.”

Likewise, foreign subcomponents do not become sub-subcomponents by merely assembling them into an “artificial subcomponent” in the United States in order to disregard their country of origin.²²⁵ In 2002, FTA confirmed that the underframe, sidewalls, and end portals for light rail vehicles were all subcomponents of the car shell (which appears on FTA’s list of typical components of rail rolling stock). The manufacturer contended that the underframe, sidewalls, and end portals were all sub-subcomponents of the “car frame,” and that the “car frame” was a subcomponent of the car shell, for purposes of calculating domestic content. FTA concluded that the “car frame” was not the result of the manufacturing process, but the mere assembly of the three subcomponents “contrived to achieve an artificial calculation” of domestic content.²²⁶

In summary, FTA’s formal adoption of nonexhaustive lists of typical rolling stock components removes the opportunity for gamesmanship by manufacturers in calculating domestic content and helps ensure that the domestic content of rolling stock end products is evaluated consistently.

3. Final Assembly

Assuming that the applicable rolling stock domestic content criterion is satisfied, final assembly of the rolling stock end product still must take place in the

²²³ Notice of Granted Buy America Waiver, 66 Fed. Reg. 32,412 (Jun. 14, 2001).

²²⁴ 49 C.F.R. § 661.11, App. C (2015).

²²⁵ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Dennis Hough, Metropolitan Transit Authority of Harris County (Aug. 15, 2002), available at https://web.archive.org/web/20150918093029/http://www.fta.dot.gov/legislation_law/12316_610.html.

²²⁶ *Id.*; see also Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Stephen Van Ogle, Siemens Transportation Systems, Inc. (Jun. 3, 2003) (concluding that minimal welding of the subcomponents into the “car frame” did not transform the subcomponents into sub-subcomponents), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/siemens-transportation-june-03-2003>.

United States for the rolling stock end product to comply with the FTA Buy America provision.²²⁷ Final assembly of the rolling stock end product involves the joining of its “individual elements brought together for that purpose through application of manufacturing processes.”²²⁸ Therefore, final assembly must be more than “mere assembly of the elements.”²²⁹

In its regulations that implement the FTA Buy America provision, FTA has provided nonexhaustive lists of activities that typically must occur to constitute final assembly of certain rolling stock end products;²³⁰ namely buses and railcars. (Although not included in its regulations, FTA has also provided a list of typical final assembly activities for wheelchair-accessible minivans.²³¹) The list of typical final assembly activities for railcars and buses first appeared in a 1997 “Dear Colleague” letter published by FTA.²³² With the passage of TEA-21 in 1998, Congress expressly adopted FTA’s list of final assembly activities for buses.²³³ In its 2007 final rule in response to SAFETEA-LU, FTA codified the list of final assembly activities for both buses and railcars in its regulations that implemented the FTA Buy America provision.²³⁴

With respect to railcars, final assembly includes, at minimum, the “installation and interconnection” of a specific list of rail rolling stock elements, as well as “inspection and verification of all installation and interconnection work,” and “in-plant testing of the stationary product to verify all functions.”²³⁵

²²⁷ 49 U.S.C. § 5323(j)(2)(C)(ii) (2016); 49 C.F.R. § 661.11(a) (2015).

²²⁸ 49 C.F.R. § 661.11(r) (2015). In adopting the “manufacturing processes” standard for final assembly of rolling stock in 1991, FTA rejected its previous standard, which defined final assembly as activities constituting at least 10 percent of the cost of the rolling stock end product. Buy America Requirements, 56 Fed. Reg. 926 (Jan. 9, 1991).

²²⁹ 49 C.F.R. § 661.3 (2015) (defining “manufacturing processes”).

²³⁰ 49 C.F.R. § 661.11, App. D (2015).

²³¹ Memorandum from Dorval R. Carter, Jr., FTA Chief Counsel, to Peter M. Rogoff, FTA Administrator (Jun. 28, 2013); see also Letter from Dana C. Nifosi, FTA Chief Counsel, to Dennis Summers, MobilityWorks, Re: Final Assembly Determination (Nov. 25, 2014), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/mobility-works-commercial-november-25-2014>.

²³² Buy America: Pre-Award and Post-Delivery Audits, Number C 97 03 (Mar. 18, 1997), available at <https://www.transit.dot.gov/regulations-and-guidance/policy-letters/buy-america-pre-award-and-post-delivery-audits>.

²³³ Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3035, 112 Stat. 107 (Jun. 9, 1998).

²³⁴ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 55,102, 55,103 (Sept. 28, 2007).

²³⁵ 49 C.F.R. § 661.11, App. D(a) (2015).

Likewise, with respect to buses, final assembly includes, at minimum, the installation or interconnection of a specific list of bus elements, as well as “road testing, final inspection, repairs and preparation of the vehicle for delivery.”²³⁶ If a manufacturer’s domestic assembly processes do not include all of the typical final assembly activities identified in the FTA regulations, the manufacturer can still request a specific determination from FTA that the manufacturer’s domestic activities are sufficient to constitute final assembly in the United States (without necessitating a formal waiver).²³⁷

FTA’s published lists of “elements” of railcars and buses, which typically must be installed or interconnected at the final assembly location, are not identical to FTA’s published lists of typical “components” of railcars and buses. This creates the potential for inconsistency and confusion, as a component, by definition, “is directly incorporated into the end product at the final assembly location,”²³⁸ suggesting that all components (not just the typical “elements”) must be installed or interconnected at the final assembly location. Some in the industry have asked FTA to alleviate the potential confusion by merging the two lists, so that all items on the list of typical rolling stock components must be installed or interconnected at the final assembly location.²³⁹ However, in its 2007 final rule in response to SAFETEA-LU, FTA specifically rejected that proposal,²⁴⁰ so that the list of elements that must be installed or interconnected at the final assembly location remains distinct from the list of typical rolling stock components. The two lists serve different purposes: the list of typical components is used to calculate domestic content, and the list of typical elements is used to determine the final assembly location. The difference in the two lists potentially allows some components that are not on the list of final assembly elements to be interconnected into a system at a location other than the final assembly location, but the system delivered to the final assembly location does not become a component for purposes of calculating domestic content—rather, the interconnected components retain their identity as components.

The application of FTA’s final assembly requirement is illustrated by a 2010 procurement of

²³⁶ 49 C.F.R. § 661.11, App. D(b) (2015).

²³⁷ 49 C.F.R. § 661.11, App. D(c) (2015).

²³⁸ 49 C.F.R. § 661.3 (2015); *see also* 49 C.F.R. § 661.11(c) (2015).

²³⁹ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,423 (Nov. 30, 2006).

²⁴⁰ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 55,102, 55,103 (Sept. 28, 2007).

railcars from a Japanese source by the Washington Metropolitan Area Transit Authority (WMATA).²⁴¹ The railcars would be designed and engineered in Japan, where four prototype railcars would be manufactured. After initial testing in Japan, the railcars would be disassembled, and the four railcar shells would be shipped to a manufacturing facility in Nebraska. There, the four prototype railcars would be reassembled using all new components (other than the Japanese shells). Specifically, all activities on FTA’s list of typical final assembly activities for railcars would take place at the Nebraska facility. The reassembled prototype railcars, with Japanese shells, would have 61 percent domestic content. FTA concluded that this constituted final assembly in the United States, qualifying for the rolling stock Domestic Content waiver of the FTA Buy America provision.²⁴²

Likewise, a 2012 procurement by Miami-Dade Transit (MDT) of heavy rail vehicles from an Italian source was approved by FTA, despite the fact that certain in-plant testing of components would take place in Italy, where the vehicles would be designed and engineered.²⁴³ MDT confirmed that all “installation and interconnection” work required for rail rolling stock would take place in the United States. But, structural fatigue testing, crash testing, and vibration testing, as well as testing of the climatic chamber, anechoic chamber, and combined electrical components, would all take place in Italy. The amount of testing taking place in Italy suggested that a significant number of components were likely not of U.S. origin, but MDT confirmed that at least 60 percent of the components of the vehicles would be manufactured in the United States. FTA concluded that the testing taking place in Italy did not constitute in-plant testing of the stationary product (which is a minimum final assembly

²⁴¹ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Carol B. O’Keefe, WMATA, Re: Determination of Buy America Compliance for the 7000 Series Railcar Procurement (Jul. 23, 2010), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/washington-metropolitan-area-transit-authority-july-23-2010>.

²⁴² *Id.* A nearly identical final assembly proposal was later approved for the Los Angeles County Metropolitan Transportation Authority (LACMTA). Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to G. Kent Woodman, LACTMA, Re: Determination Regarding Final Assembly of Light Rail Vehicles (May 22, 2012), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/los-angeles-county-metropolitan-transportation-authority-may-22>.

²⁴³ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Ysela Llort, MDT, Re: Buy America Determination of Compliance (Apr. 2, 2012), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/miami-dade-transit-april-02-2012>.

activity that must take place in the United States), and FTA specifically noted “that component and climate room testing are excluded from the minimum final assembly activities” for rail rolling stock.²⁴⁴ Therefore, the proposed approach constituted final assembly in the United States, qualifying for the rolling stock Domestic Content waiver of the FTA Buy America provision.

C. Infrastructure and Construction Projects

1. Construction Materials Made Primarily of Steel or Iron

On all construction projects funded in part with FTA funds, “the steel, iron, and manufactured goods used in the project [must be] produced in the United States.”²⁴⁵ FTA has interpreted the requirement for domestic steel and iron to apply to “all construction materials made primarily of steel or iron and used in infrastructure projects,” including but not limited to “structural steel or iron, steel or iron beams and columns, running rail and contact rail.”²⁴⁶ Under the FTA Buy America provision, in order for construction materials “made primarily of steel or iron” to be considered domestic, “[a]ll steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.”²⁴⁷

In 2007, FTA formally adopted a list of typical end products “made primarily of steel or iron,” which includes “structures, bridges, and track work, including running rail, contact rail, and turnouts.”²⁴⁸ Absent a project-specific waiver, all such primarily steel or iron products used in a construction project must be domestic, even if they represent only a small percentage of the overall construction project. For example, in *Conti Enterprises, Inc. v. Southeastern Pennsylvania Transportation Authority*,²⁴⁹ only one bidder could supply domestic contact rail in conjunction with a major renovation of several transit stations for SEPTA. Therefore, all other bidders were unable to comply with the FTA Buy America provision and were deemed nonresponsive,²⁵⁰ even though the contact rail was only “a small fraction of the overall Stations Project contract.”²⁵¹

Although some other USDOT agencies have established quantitative thresholds of steel or iron

content below which Buy America requirements do not apply,²⁵² “FTA believes that it is not appropriate to attach a percentage” of steel or iron content to its definition of construction materials made primarily of steel or iron.²⁵³ “Generally, the definition refers to construction or building materials made either principally or entirely from either steel or iron.”²⁵⁴ For example, FTA has concluded that bimetallic power rail, which is a combination of an aluminum conductor and a steel cap,²⁵⁵ is not a construction material made primarily of steel or iron,²⁵⁶ but rather is traction power equipment eligible for the rolling stock Domestic Content waiver.²⁵⁷ Notwithstanding the exception for bimetallic power rail, “power or third rail” made primarily of iron or steel remains subject to the 100 percent domestic content requirement.²⁵⁸

The requirement that all construction materials made primarily of steel or iron be domestic does “not apply to steel or iron used as components or subcomponents of other manufactured products.”²⁵⁹ Accordingly, steel or iron items such as nuts, bolts, and screws incorporated as subcomponents into a component of a manufactured product could come from any source, foreign or domestic.²⁶⁰ Nuts, bolts, and screws that comprise structural elements of a facility (e.g., anchor bolts), however, could be considered construction materials made primarily of steel or iron, which must be domestic.²⁶¹

It is worth noting that there is older FTA guidance that concluded that items such as elevator

²⁵² For example, FHWA has applied its Buy America requirements only to items that are “predominantly” steel or iron, which FHWA has defined to mean items that contain 90 percent steel or iron by content. See cancelled memo from John R. Baxter, FHWA Associate Administrator for Infrastructure, to FHWA Division Administrators et al. (Dec. 21, 2012), available at <http://www.fhwa.dot.gov/construction/contracts/121221.cfm>. However, FHWA’s adoption of the 90 percent steel-or-iron content criterion was recently invalidated as arbitrary and capricious by the U.S. District Court for the District of Columbia. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. Fed. Highway Admin.*, 151 F. Supp. 3d 76, 90 (D.D.C. 2015).

²⁵³ Buy America Requirements, 61 Fed. Reg. 6,300 (Feb. 16, 1996).

²⁵⁴ *Id.*

²⁵⁵ Buy America Requirements—Bi Metallic Composite Conducting Rail, 74 Fed. Reg. 30,237 (Jun. 25, 2009).

²⁵⁶ 49 C.F.R. § 661.5(c) (2015) (“These requirements do not apply...to bimetallic power rail incorporating steel or iron components.”).

²⁵⁷ 49 C.F.R. § 661.11(v)(31) (2015).

²⁵⁸ 49 C.F.R. § 661.11(w) (2015).

²⁵⁹ 49 C.F.R. § 661.5(c) (2015).

²⁶⁰ FTA, Buy America—Frequently Asked Questions, <https://www.transit.dot.gov/funding/procurement/third-party-procurement/buy-america>.

²⁶¹ *Id.*

²⁴⁴ *Id.*

²⁴⁵ 49 U.S.C. § 5323(j)(1) (2016).

²⁴⁶ 49 C.F.R. § 661.5(c) (2015).

²⁴⁷ 49 C.F.R. § 661.5(b) (2015).

²⁴⁸ 49 C.F.R. § 661.3, App. A(2) (2015).

²⁴⁹ No. 03 CV 05345, 2003 U.S. Dist. LEXIS 19848 (E.D. Penn. Oct. 14, 2003).

²⁵⁰ *Id.* at *6.

²⁵¹ *Id.* at *1.

guide rails and elevator doorframes are “construction materials made *primarily* of steel or iron,”²⁶² which must be domestic. However, in 2015, FTA reversed course and concluded that elevator guide rails and elevator doorframes are subcomponents whose origin may be disregarded.²⁶³ The change in policy is based on a combination of FTA’s 2007 final rule that adopted a “non-shift” approach and FTA’s treatment of transit facilities as manufactured end products, which is discussed in greater detail in the following section. Because the elevator is a component of the transit facility, its steel and iron parts are subcomponents of the transit facility, and the origin of subcomponents may be disregarded. In a similar manner, FTA has concluded that steel reinforcement in a shotcrete tunnel liner is a subcomponent of the facility’s waterproofing system, and therefore the steel need not be domestic.²⁶⁴ This relatively recent change in policy allows a number of foreign steel and iron items to be incorporated into FTA-funded construction projects, as long as they are subcomponents of manufactured end products.

2. Constructed Facilities as Manufactured End Products

Although the FTA Buy America provision only applies to steel, iron, and manufactured products, FTA grant recipients should be aware that FTA’s published list of typical “manufactured end products” includes “[i]nfrastructure projects not made primarily of steel or iron, including structures (terminals, depots, garages, and bus shelters).”²⁶⁵ Because all components of manufactured products must be domestic under the FTA Buy America provision,²⁶⁶ the implication is that all components of these facilities (not just the construction materials made primarily of steel or iron) must be domestic. Therefore, there may be heightened domestic preferences for construction materials other than steel and iron in FTA-funded construction projects.

²⁶² Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to John Trotta, CTA (Dec. 3, 2004).

²⁶³ Letter from Dana Nifosi, FTA Chief Counsel, to Eric E. Cannon, KONE Inc., Re: Request for Advisory Opinion Regarding Components of KONE Elevator Guide Rails and Door Frames (Jan. 8, 2015), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/kone-elevators-january-08-2015>.

²⁶⁴ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Jay H. Walder, NYMTA (Aug. 3, 2011), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/nymta-august-03-2011>; *see also* Notice of Proposed Buy America Waiver To Allow Bidder To Certify Compliance, 76 Fed. Reg. 40,447 (Jul. 8, 2011).

²⁶⁵ 49 C.F.R. § 661.3, App. A(3) (2015).

²⁶⁶ 49 C.F.R. § 661.5(d)(2) (2015) (“All of the components of the product must be of U.S. origin.”).

For example, in 2015, FTA determined that polycarbonate panels, used to construct a translucent wall, were components of an Operations Building that was being constructed for the Santa Cruz Metropolitan Transit District (SCMTD), and thus the panels were required to be domestic.²⁶⁷ Both FTA and SCMTD agreed that the Operations Building itself was the end product for purposes of the FTA Buy America provision. FTA rejected SCMTD’s suggestion, however, that the translucent wall itself was the component (which would have made the polycarbonate panels subcomponents whose origin could be disregarded), because there were insufficient manufacturing processes applied to the polycarbonate panels to convert them into a translucent wall. The translucent wall was “almost entirely composed of various polycarbonate panels that are directly incorporated into the Operations Building, without undergoing a physical change in form or function.”²⁶⁸ Therefore, the polycarbonate panels were components of the facility and were required to be domestic in order to comply with the FTA Buy America provision.

In some ways, FTA’s treatment of constructed facilities as end products is consistent with its older guidance, under which “the deliverable of the construction contract [was] considered as the end product and the construction materials used therein [were] considered components of the end product.”²⁶⁹ However, in its 2007 final rule in response to SAFETEA-LU, FTA adopted its “non-shift” standard, so that the end product is no longer necessarily the contract deliverable. In the 2007 final rule, FTA also clarified that certain systems are to be considered end products, including “fare collection systems; computers; information systems; security systems; [and] data processing systems.”²⁷⁰ Accordingly, for a given construction project, there may be systems housed within a larger transit facility or structure, so that the FTA Buy America provision must be evaluated separately for the facility end product and its system end products. An item that is considered a system end product, rather than a component of the facility end product, is subject to heightened domestic content requirements, because the parts that comprise a system end product are components that

²⁶⁷ Letter from Dana C. Nifosi, FTA Chief Counsel, to Julie A. Sherman, Hanson Bridgett LLP, Re: Buy America—Santa Cruz Metropolitan Transit District, Polycarbonate Panels (Feb. 9, 2015), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/santa-cruz-metro-february-09-2015>.

²⁶⁸ *Id.*

²⁶⁹ Buy America Requirements, 46 Fed. Reg. 5,808 (Jan. 19, 1981).

²⁷⁰ 49 C.F.R. § 661.3, App. A(3) (2015).

must be domestic, rather than subcomponents of the facility whose origin may be disregarded.

As previously noted in Section III.C.1, FTA has determined that elevators and escalators permanently affixed to a transit facility are components of the facility.²⁷¹ Key to this determination is the fact that an elevator or escalator “becomes functional and can be used as intended only upon incorporation into the station.”²⁷² Because the final assembly location of elevators and escalators is the construction site, the elevators and escalators are “manufactured in the United States” and thus considered domestic, regardless of the origin of their subcomponents. FTA has determined, however, that items such as a fire suppression system and an HVAC system are system end products rather than components of the transit facility, as previously discussed in Section III.A, because the systems are comprised of components that are joined to perform a single function, which functions independently of the facility structure. Therefore, the components of those systems must be domestic.

The construction of a Regional Intermodal Transportation Center at the Bob Hope Airport in Burbank, California, offers an example of FTA’s process of determining whether an item is a manufactured end product or a component of a facility end product.²⁷³ The contractor argued that the electrical system, fire alarm system, and data system were components of the facility, so that electrical conduit and junction boxes would be subcomponents whose origin could be disregarded. FTA rejected this analysis, concluding that the electrical system, fire alarm system, and data system were system end products, similar to the system end products listed in the nonexhaustive list of manufactured end products in FTA’s regulations. Therefore, the electrical conduit and junction boxes were components of those systems and must be manufactured in the United States.

With respect to rail construction projects, as previously noted, all “track work” made primarily of

²⁷¹ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,694 (Sept. 20, 2007).

²⁷² Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Robin M. Reitzes, City of San Francisco, Subject: Letter of Interpretation—Elevators and Escalators (Dec. 7, 2010), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/san-francisco-municipal-railway-december-07-2010>.

²⁷³ Letter from Dana Nifosi, FTA Deputy Chief Counsel, to Rob F. Ragland, McCarthy Building Companies, Inc., Re: Bob Hope Airport—Regional Intermodal Transportation Center, Subject: Clarification Regarding Buy America Act (Jul. 11, 2014), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/bob-hope-airport-%E2%80%93-regional-intermodal-transportation-center>.

steel or iron, “including running rail, contact rail, and turnouts,”²⁷⁴ must be domestic, with substantially all steel and iron manufacturing processing taking place in the United States. FTA has also concluded that “ties and ballast” and “contact rail not made primarily of steel or iron” constitute manufactured end products that must all be manufactured in the United States out of 100 percent domestic components.²⁷⁵ This represents a change from FTA’s older guidance in which the end product was considered “the deliverable of the construction contract,”²⁷⁶ i.e., the rail construction project itself. On a single rail construction project, there can be several end products for which the FTA Buy America provision must be evaluated, potentially expanding the number of “components” or construction materials that must be domestic.

For example, in 2013, FTA concluded that specialized concrete blocks, incorporated into the Second Avenue Subway Project for the MTA in order to absorb noise and reduce vibration, were to be evaluated as end products.²⁷⁷ FTA concluded that the concrete blocks serve the same purpose as ties, which are identified in FTA’s regulations on the non-exhaustive list of manufactured end products.²⁷⁸ Under FTA’s prior guidance, when the construction project itself was the contract deliverable and thus the end product,²⁷⁹ the concrete block would probably have been considered a component and the origins of its subcomponents could have been disregarded. Because FTA now considers the concrete block to be a manufactured end product, however, its components (concrete, pad, rubber boot, and plastic insert) must all be domestic.

3. Utility Relocation

The FTA Buy America provision applies to an entire construction project that receives FTA funds, not just to the portion of the project that is funded by FTA.²⁸⁰ Furthermore, as a result of adopting its “non-shift” approach in 2007, the end product for purposes of the FTA Buy America provision is no longer

²⁷⁴ 49 C.F.R. § 661.3, App. A(2) (2015).

²⁷⁵ 49 C.F.R. § 661.3, App. A(3) (2015).

²⁷⁶ Buy America Requirements, 46 Fed. Reg. 5,808 (Jan. 19, 1981).

²⁷⁷ Letter from Michael L. Culotta, FTA Regional Counsel, to Evan M. Eisland, MTA, Re: Buy America Compliance Second Avenue Subway Project (Jun. 20, 2013), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/new-york-metropolitan-transportation-authority-june-20-2013>.

²⁷⁸ See 49 C.F.R. § 661.3, App. A(3) (2015).

²⁷⁹ See Buy America Requirements, 46 Fed. Reg. 5,808 (Jan. 19, 1981).

²⁸⁰ 49 U.S.C. § 5323(j)(1) (2016).

necessarily the subject of a procurement. Accordingly, FTA has concluded that utility relocation work in support of an FTA-funded construction project must comply with the FTA Buy America provision, regardless of whether FTA funds the utility relocation work.²⁸¹

The applicability of Buy America provisions to utility relocation work became more prominent during congressional debate on MAP-21 in 2012. As previously discussed in Section II.F, some in Congress were concerned that USDOT grant recipients were “segmenting” construction projects into federally funded segments (to which Buy America provisions applied) and nonfederally funded segments (to which Buy America provisions did not apply).²⁸² The version of MAP-21 that passed the U.S. Senate would have applied anti-segmentation language to the FTA Buy America provision, so that if FTA funds were used to fund any contract on a project, then all other contracts on that project would have been subject to the FTA Buy America provision.²⁸³ In the version of MAP-21 that was ultimately enacted, however, the anti-segmentation language applied only to FHWA, not FTA.²⁸⁴

As a result of MAP-21, in 2013 FHWA announced that utility relocation on federally funded highway projects would be subject to the FHWA Buy America provision, even if no federal funds were used to pay for utility relocation.²⁸⁵ Although MAP-21 did not apply anti-segmentation language to the FTA Buy America provision, FTA has also adopted the position that the FTA Buy America provision applies to all contracts on an FTA-funded project, including utility relocation contracts that do not use federal funds.²⁸⁶ There are many older cases (predating the 2007 rule-making in response to SAFETEA-LU), however, in

²⁸¹ Letter from Peter Rogoff, FTA Administrator, to Jeffrey F. Boothe, New Starts Working Group (Sept. 7 2012), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/letter-new-starts-working-group-september-07-2012>.

²⁸² See 158 CONG. REC. H3,045 (May 17, 2012).

²⁸³ S. 1813, 112th Cong. §§ 1528, 20017, 35210 (2012).

²⁸⁴ Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 1518, 126 Stat. 405 (Jul. 6, 2012).

²⁸⁵ Memorandum from Gloria M. Shepherd, FHWA Associate Administrator for Infrastructure, to FHWA Division Administrators, Re: Application of Buy America to non FHWA-funded Utility Relocations (Jul. 11, 2013), available at <http://www.fhwa.dot.gov/construction/contracts/130711.cfm>.

²⁸⁶ Letter from Peter Rogoff, FTA Administrator, to Jeffrey F. Boothe, New Starts Working Group (Sept. 7 2012), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/letter-new-starts-working-group-september-07-2012>; see also Richard L. Wong, FTA, and Jomar Maldonado, FHWA, Buy America for Utilities: Federal Perspective, 94th Annual Meeting of the Transportation Research Board (Jan. 13, 2015).

which FTA treated the FTA-funded contract deliverable (i.e., the subject of the procurement) as the end product for purposes of the FTA Buy America provision, so that the FTA Buy America provision did not apply to individual contracts in support of the projects that were not funded by FTA.²⁸⁷ Prior to MAP-21, many utilities were not aware that they were required to adhere to Buy America provisions on utility relocation contracts that were not federally funded,²⁸⁸ and substantially all of FTA’s Buy America guidance related to utility relocation has been issued since the passage of MAP-21.

In August 2013, FTA issued two decisions that illustrate FTA’s application of the FTA Buy America provision to utility relocation contracts. In one case, the City of Charlotte’s rail line extension project required AT&T to relocate approximately 4.5 mi of its phone and data lines, or its “communications network.” FTA agreed with the City of Charlotte that the end product was the communications network, and its components included “the poles, cable, conduit, manholes, handholes, pedestals, and cabinets.”²⁸⁹ Key to FTA’s determination was the fact that the components “are interconnected and contribute to a clearly defined function.” Because the communications network was the end product, all of its identified components must be manufactured in the United States, although the origin of its subcomponents (which included wire, terminals, connectors, splices, clamps, fittings, washers, screws, nuts, and bolts) may be disregarded. Similarly, the Los Angeles County Metropolitan Transportation Authority (LACMTA) needed to relocate AT&T’s communications network for two rail line extension projects. Referencing its Charlotte decision, FTA agreed with LACMTA that the communications network was the end product, and its components included “the manholes, conduits, air pipes, copper cables of

²⁸⁷ *Rail Project Bidding Altered: Foreign, Domestic Steelmakers Uncertain of Process*, AMERICAN METAL MARKET (Jan. 18, 1993) (allowing LACMTA to segment a rail construction project into federally funded segments and locally funded segments that were not subject to the FTA Buy America provision); Dale Vargas & Ricardo Pimentel, *Light-Rail Deal Gets House Attention: Agreement on Violation of Buy America Regulations Triggers Probe*, SACRAMENTO BEE (Jan. 31, 1987) (allowing Sacramento to segment a railcar procurement so that only those railcars built with federal funds had to comply with the FTA Buy America provision).

²⁸⁸ Steven J. Troch, Baltimore Gas & Electric, Buy America for Utilities: Utility Perspective, 94th Annual Meeting of the Transportation Research Board (Jan. 13, 2015).

²⁸⁹ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Bradley J. Thomas, Charlotte Area Transit System (Aug. 8, 2013), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/charlotte-area-transit-system-august-08-2013>.

various sizes, and fiber cables.”²⁹⁰ All of those components must be manufactured in the United States, although the origin of the subcomponents (which included straps, ties, connectors, splices, and clamps) may be disregarded. In October 2015, FTA confirmed that, because construction materials such as utility poles are considered components of the communications network, the FTA Buy America provision requires construction materials other than iron and steel (e.g., wood poles or fiberglass poles) to be manufactured in the United States.²⁹¹

Because the origin of subcomponents is disregarded, FTA Buy America compliance for a utility relocation effort depends on what FTA considers to be the components and subcomponents of the system end product. In 2014, FTA issued guidance to Southern California Edison (SCE) with regard to the relocation of electrical utilities for several FTA-funded projects.²⁹² FTA concluded that the transmission system and distribution system were both end products, and that their components included the poles, wires, cables, switches, vaults, cabinets, and meters. SCE argued that the wires and cables were not components but subcomponents of the conductors and therefore (as subcomponents) did not have to be domestic. FTA concluded, however, that the wires and cables were actually the conductors themselves, and that they were components of the transmission system and distribution system because they were “directly incorporated” into the system end products at the final assembly location.

Also in 2014, FTA issued guidance to the Sacramento Regional Transit District (SacRTD) with regard to the relocation of a gas transmission system.²⁹³ The gas transmission lines consisted of pipes, elbows, and control valves, with “valve lots” located at the junction of one or more gas transmission lines. SacRTD proposed that the valve lot

²⁹⁰ Letter from Dana Nifosi, FTA Deputy Chief Counsel, to Sam Mayman, LACMTA, Re: Buy America—Subcomponent Compliance Confirmation (Aug. 21, 2013), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/los-angeles-county-metropolitan-transportation-authority-august>.

²⁹¹ FTA, Buy America—Frequently Asked Questions, <https://www.transit.dot.gov/funding/procurement/third-party-procurement/buy-america>.

²⁹² Letter from Dana Nifosi, FTA Deputy Chief Counsel, to Douglas Bauder, Southern California Edison (Apr. 30, 2014), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/southern-california-edison-sce-april-30-2014>.

²⁹³ Letter from Dana Nifosi, FTA Deputy Chief Counsel, to Diane Nakano, SacRTD (Jul. 10, 2014), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/sacramento-regional-transit-district-july-10-2014>.

should be considered a component of the gas transmission system, so that the pipes and valves contained in the valve lot would be considered subcomponents whose origin could be disregarded. FTA concluded, however, that both the gas transmission system and the valve lot were end products. Therefore, pipes and valves were components of both the gas transmission system and the valve lot and must be manufactured in the United States regardless of whether the pipes and valves were contained within the valve lot or outside of it.

Application of the FTA Buy America provision to utility relocation work has not been well received by utilities, especially when the utility relocation is not funded by FTA.²⁹⁴ Nevertheless, it illustrates the principle that construction projects may not be segmented into federally funded segments and locally funded segments to avoid application of the FTA Buy America provision.

IV. WAIVERS AND EXCEPTIONS

Waivers that may be obtained from FTA are discussed below. General waivers that have been granted by FTA, for which the FTA grant recipient need not request a project-specific waiver, are addressed in Section IV.A. Additional project-specific waivers, which the FTA grant recipient may request for products not already covered by a general waiver, are addressed in Section IV.B. The Domestic Content waiver for rolling stock, which was granted by Congress and which does not require a project-specific waiver from FTA, was discussed in Section III.B.

A. General Waivers

1. Small Purchase

Although the FTA Buy America provision nominally applies to all steel, iron, and manufactured products purchased using FTA funds, in practice a significant amount of foreign products can be purchased via a Small Purchase waiver granted by FTA.²⁹⁵ Although the original FTA Buy America provision enacted as part of the 1978 STAA applied only to purchases that exceeded \$500,000, this price threshold was repealed with the 1982 STAA.²⁹⁶ As a result, the FTA Buy America provision enacted by Congress applied to all purchases made with FTA funds of manufactured items, including office

²⁹⁴ Steven J. Troch, Baltimore Gas & Electric, Buy America for Utilities: Utility Perspective, 94th Annual Meeting of the Transportation Research Board (Jan. 13, 2015).

²⁹⁵ 49 C.F.R. § 661.7, App. A(c) (2015).

²⁹⁶ See *supra* Sections II.A, II.B.

supplies and maintenance items.²⁹⁷ This proved impractical due to the general lack of domestic manufactured products, the lack of vendors that would certify that manufactured products complied with the FTA Buy America provision, and the cost to FTA grant recipients and FTA staff of generating and processing the volume of waiver requests.²⁹⁸ Accordingly, in 1995,²⁹⁹ FTA issued a general Public Interest waiver for all “small purchases,” as defined by the USDOT’s “common grant rule.”³⁰⁰ USDOT defined small purchases as procurements that do not cost more than the “simplified acquisition threshold” for direct procurements by the federal government³⁰¹ (which was \$100,000³⁰²).

In December 2013, the Office of Management and Budget promulgated new regulations for federal funding of nonfederal entities (such as state and local transit agencies).³⁰³ These regulations increased the simplified acquisition threshold to \$150,000 for nonfederal entities (although the \$150,000 threshold is subject to periodic adjustment for inflation).³⁰⁴ In December 2015, Congress formally defined small purchases for purposes of the FTA Buy America provision as those purchases “of not more than \$150,000.”³⁰⁵ As a result, the Small Purchase waiver is no longer tied to the simplified acquisition threshold (and thus is not subject to periodic adjustment for inflation, absent further action by Congress). Nevertheless, increasing the small purchase threshold from \$100,000 to \$150,000 significantly expands the scope of purchases that are exempted from the FTA Buy America provision.

²⁹⁷ Buy America Requirements, 60 Fed. Reg. 14,178 (Mar. 15, 1995).

²⁹⁸ *Id.*

²⁹⁹ Buy America Requirements, 60 Fed. Reg. 37,930 (Jul. 24, 1995); *see also* Buy America Requirements, 60 Fed. Reg. 14,174, 14,175 (Mar. 15, 1995) (waiving the FTA Buy America provision for purchases of \$2,500 or less).

³⁰⁰ 49 C.F.R. § 661.7, App. A(c) (2015). This Small Purchase waiver was briefly deleted from the Code of Federal Regulations beginning in 2007, but was reinstated in 2009 as its deletion was apparently unintentional. Buy America Requirements; Bi-Metallic Composite Conducting Rail, 74 Fed. Reg. 30,237, 30,239 (Jun. 25, 2009) (reinstating the Small Purchase waiver); Buy America Requirements; End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,696 (Sep. 20, 2007) (deleting the Small Purchase waiver).

³⁰¹ 49 C.F.R. § 18.36(d) (2015).

³⁰² *Id.*; *see also* 41 U.S.C. § 134 (2016).

³⁰³ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78,590 (Dec. 26, 2013).

³⁰⁴ 2 C.F.R. § 200.88 (2015).

³⁰⁵ Fixing America’s Surface Transportation Act, Pub. L. No. 114 94, § 3011(2)(E), 129 Stat. 1312, 1475 (Dec. 4, 2015) (codified at 49 U.S.C. § 5323(j)(13)).

This Small Purchase waiver is intended to ensure that the FTA Buy America provision is applied “only to large purchases, such as buses and trains.”³⁰⁶

The Small Purchase waiver is applied on a per-contract basis³⁰⁷—which means that the Small Purchase waiver cannot be used to purchase a foreign manufactured product that costs less than the small purchase threshold if the total contract price (including other products and services bundled into the procurement) exceeds the small purchase threshold.³⁰⁸ Furthermore, FTA grant recipients may not avoid the FTA Buy America provision by “segmenting” requirements into multiple contracts or work orders, in order to get the contract price below the small purchase threshold.³⁰⁹

2. Non-Availability

The FTA Buy America provision may be waived if certain steel, iron, or manufactured products are not produced in the United States “in a sufficient and reasonably available amount or are not of a satisfactory quality.”³¹⁰ In accordance with this authority, FTA has expressly granted a general Non-Availability waiver³¹¹ for all products that have been determined to be unavailable domestically for purposes of direct federal procurements subject to the BAA.³¹² Therefore, FTA grant recipients need not seek a project-specific waiver to use those products on an FTA grant-funded project. Although this list of products is subject to change, at present it includes a number of materials, such as tin, manganese, rubber, and petroleum products,³¹³ which might constitute components of infrastructure projects or components of manufactured products procured by FTA grant recipients. Under the general Non-Availability waiver, those materials from foreign sources may be counted as domestic content of the end product.

³⁰⁶ Hughes, *supra* note 9, at 221.

³⁰⁷ Buy America Requirements, 60 Fed. Reg. 37,930, 37,931 (Jul. 24, 1995) (“[F]or the purposes of this Buy America general public interest waiver, ‘contract price’ will be the measure for determining whether a procurement is a ‘small purchase.’”).

³⁰⁸ FTA Guidance Letter on Buy America Small Purchase Waivers (Sept. 16, 2016), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/fta-guidance-letter-buy-america-small-purchase-waivers>.

³⁰⁹ *Id.*; *see also* Letter from Dana Nifosi, FTA Deputy Chief Counsel, to Douglas Bauder, Southern California Edison (Apr. 30, 2014) (“FTA does not permit work to be split into multiple contracts for purposes of avoiding Buy America requirements.”), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/southern-california-edison-sce-april-30-2014>.

³¹⁰ 49 U.S.C. § 5323(j)(2)(B) (2016).

³¹¹ 49 C.F.R. § 661.7, App. A(a) (2015).

³¹² 48 C.F.R. § 25.104(a) (2015).

³¹³ *Id.*

For products that are not available domestically in sufficient quantities of satisfactory quality, but which are not covered by the general Non-Availability waiver, the FTA grant recipient must request a project-specific Non-Availability waiver, as discussed in Section IV.B.1.a).³¹⁴

3. Microcomputers and Software

Compliance with the FTA Buy America provision is streamlined significantly by FTA's longstanding general waiver for "microprocessors, computers, microcomputers, of software, or other such devices, which are used solely for the purpose of processing or storing data."³¹⁵ Over the years, this waiver has been the subject of considerable FTA rulemaking and guidance, as FTA has taken steps to prevent abuse of the waiver by manufacturers seeking to characterize a wide range of equipment as computers subject to the waiver.³¹⁶

The waiver originated in the mid-1980s, as the use of "microcomputers" by transit agencies was increasing. Because some components of the computers, primarily microchips, were not available from domestic sources, in 1985 FTA granted a temporary Non-Availability waiver for microcomputers,³¹⁷ and in 1986 FTA made the microcomputer waiver permanent.³¹⁸ For purposes of the waiver, FTA defined a microcomputer to be a "computer system" that "includes a microprocessor, storage, and input/output facility, which may or may not be on one chip," and FTA recognized that a microcomputer includes "associated software," such as its operating system.³¹⁹ FTA thus has interpreted the microcomputer waiver to include software, regardless of whether the software resides on a microchip, allowing FTA grant recipients to treat foreign software as domestic for purposes of the FTA Buy America provision.

In 1999, FTA received a request to clarify the microcomputer waiver.³²⁰ Specifically, the petitioner asked FTA to explain whether the waiver applied to any manufactured product that contains a microprocessor or microchip (specifically referencing "fare collection equipment"), or whether the waiver should apply only to desktop computers (which was the focus of the

original 1985 waiver request). More than 3 years later, in February 2003, FTA announced that it had determined that microcomputer components (primarily microchips) were still not available domestically in sufficient quantities of satisfactory quality, and that the general waiver for microcomputers and software remained in place.³²¹ FTA clarified, however, that it did not consider the general waiver to permit the purchase of all foreign manufactured products containing a microprocessor or microchip. If a manufactured product such as "a farecard system" contained a microcomputer, then the waiver only applied to the microcomputer; "the rest of the end product must be in compliance" with the FTA Buy America provision.³²²

FTA's 2003 clarification of the microcomputer waiver came in the midst of a legal dispute over whether fare collection equipment purchased by the Massachusetts Bay Transportation Authority (MBTA) complied with the FTA Buy America provision. In *Cubic Transportation Systems, Inc. v. Mineta*,³²³ an unsuccessful bidder challenged MBTA's purchase of an automated fare collection system. In November 2002, FTA notified MBTA that the fare collection system complied with the FTA Buy America provision, in part because it determined that one foreign-manufactured component (a "smart card reader") was a microcomputer that qualified for the microcomputer waiver. The unsuccessful bidder filed a lawsuit in 2003 to challenge the application of the microcomputer waiver to this component of fare collection equipment.³²⁴

Shortly after FTA's 2002 determination that MBTA's smart card reader qualified for the microcomputer waiver, FTA received a request from CoinCard International, Inc., to interpret the microcomputer/software waiver to exempt CoinCard's fare collection equipment. In May 2003, just 2 weeks after the Cubic lawsuit was filed challenging FTA's determination on the MBTA fare collection equipment,³²⁵ FTA responded to CoinCard with its determination that CoinCard's fare collection equipment did not comply with the FTA Buy America provision and was not exempted by the waiver.³²⁶

³²¹ Buy America Requirements—Permanent Waiver for Microcomputers, 68 Fed. Reg. 9,801 (Feb. 28, 2003).

³²² *Id.*

³²³ *Cubic Transp. Sys., Inc. v. Mineta*, 357 F. Supp. 2d 261 (D.D.C. 2004).

³²⁴ The court ultimately dismissed the lawsuit based on the unsuccessful bidder's lack of standing, without determining whether the microcomputer waiver was properly applied to the fare collection equipment. *Id.*

³²⁵ Complaint, *Cubit Transp. Sys., Inc. v. Mineta*, No. 03 CV 01023 (D.D.C. May 9, 2003).

³²⁶ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Denis Bernardi, CoinCard International Inc. (May 23, 2003).

³¹⁴ 49 C.F.R. § 661.7(c) (2015).

³¹⁵ 49 C.F.R. § 661.7, App. A(b) (2015).

³¹⁶ For a detailed history of the microprocessor waiver, see *NCRRP LRD 1*, *supra* note 3, at 67–69.

³¹⁷ Exemption from Buy America Requirements, 50 Fed. Reg. 18,760 (May 2, 1985).

³¹⁸ Buy American Requirements—Permanent Waiver, 51 Fed. Reg. 36,126 (Oct. 8, 1986).

³¹⁹ Exemption from Buy America Requirements, 50 Fed. Reg. 18,760 (May 2, 1985).

³²⁰ Buy America Requirements—Permanent Waiver for Microcomputers, 64 Fed. Reg. 54,855 (Oct. 8, 1999).

Individual components of CoinCard’s fare collection equipment were covered by the waiver, including the software and selected hardware components, such as command modules and transaction processors, which contained microprocessors, input and output slots, internal storage, operating systems, and memory. However, FTA determined that other hardware components, such as passenger counters, farecard printers, and bill and coin validators, “are not, themselves, microcomputers, although they may each contain embedded microprocessors.”³²⁷ All components of the fare collection systems that were not subject to a general waiver, such as microprocessors or software, had to be manufactured domestically for the fare collection equipment to comply with the FTA Buy America provision. Over the next 15 months, citing its CoinCard determination, FTA ruled that several other manufactured products (including automated passenger and customer information systems³²⁸ and monitoring and diagnostic equipment³²⁹), were not themselves microcomputers eligible for the waiver, although certain components of these products were eligible microcomputers to the extent that they were “capable of processing, storage, programming, and have input/output facilities.”

In 2005 (with SAFETEA-LU), Congress required FTA to issue a rule confirming that the microcomputer waiver “applies only to a device used solely for the purpose of processing or storing data and does not extend to a product containing a microprocessor, computer, or microcomputer.”³³⁰ In November 2005, FTA issued an NPRM, which confirmed that the statutory language “actually reflects current FTA practice with respect to implementing the general waiver for microcomputer, microprocessor, and related equipment.”³³¹ In November 2006, FTA confirmed that the waiver continues to apply to microcomputers, input and output devices, and software.³³²

As a result, FTA grant recipients can acquire software and input and output devices from foreign sources, regardless of whether a microprocessor or

microchip is part of the purchase. Furthermore, when purchasing manufactured products, any components of those products that may fairly be considered computers, microprocessors, storage, input and output devices, or software, may be treated as domestic when evaluating the domestic content of the manufactured product. As recently as 2014, FTA confirmed that system components such as “routers, radios, and processors” qualify for the microcomputer waiver “if used solely for the purpose of processing or storing data.”³³³ No general waiver is available for the remainder of the manufactured product, however, simply because some of its components may be classified as computer equipment or software—the remainder of the product still must be domestic to comply with the FTA Buy America provision.

4. Vans and Minivans

For many years, there was a general waiver for Chrysler passenger vans included in FTA’s regulations that implemented the FTA Buy America provision.³³⁴ Over the years, the van and minivan waiver in its various forms has been repealed, reinstated, and repealed again.³³⁵ FTA reinstated a partial waiver of the FTA Buy America provision for vans and minivans as recently as October 2016.³³⁶

In April 1984, FTA granted a general waiver for 15-passenger Chrysler vans, allowing those vans to be purchased using FTA grant funds despite the fact that they did not satisfy the FTA Buy America provision.³³⁷ Because there were domestic manufacturers of minivans, a Non-Availability waiver was not warranted. Therefore, FTA couched the Chrysler van waiver as a Public Interest waiver, justified on the grounds that it would provide for more competitive pricing in vehicle procurements by FTA grant recipients.³³⁸ FTA noted that the vans contained 74 percent domestic content,³³⁹ which would have qualified them for the rolling stock Domestic Content waiver but for the fact that the final assembly location was in Canada.

³²⁷ *Id.*

³²⁸ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Martin B. Schnabel, MTA New York City Transit (Sept. 23, 2003); Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Kevin Berry, Vansco Electronics Ltd. (Sept. 15, 2003).

³²⁹ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Stephen McKay, Quester Tangent Corp. (Aug. 2, 2004).

³³⁰ *SAFETEA-LU*, *supra* note 108, at § 3023(i)(5)(A).

³³¹ Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246 (Nov. 28, 2005).

³³² Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,414 (Nov. 30, 2006).

³³³ Letter from Dana Nifosi, FTA Deputy Chief Counsel, to Douglas Bauder, Southern California Edison (Apr. 30, 2014), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/southern-california-edison-sce-april-30-2014>.

³³⁴ 49 C.F.R. § 661.7, App. A(b),(c) (2005).

³³⁵ For a detailed history of the Chrysler minivan waiver, see NCRRP LRD 1, *supra* note 3, at 65 66 (2015).

³³⁶ Notice of Buy America Waiver of Domestic Content Requirement for Minivans and Vans, 81 Fed. Reg. 72,667 (Oct. 20, 2016); *see also* Notice of Proposed Buy America Waiver for Minivans, 81 Fed. Reg. 30,602 (May 17, 2016).

³³⁷ Exemption from Buy America Requirements, 49 Fed. Reg. 13,944 (Apr. 9, 1984).

³³⁸ *Id.*

³³⁹ *Id.*

A few years later, FTA concluded that the Public Interest waiver was to “be utilized in extremely limited situations”³⁴⁰ and that improving the competitive position of foreign products does not qualify, as that “is contrary to the clear intent of the statutory provision.”³⁴¹ Accordingly, in 2004, FTA denied a Public Interest waiver requested by Chrysler that would have allowed FTA grant recipients to purchase the chassis and drive train of Chrysler’s smaller 8-to-10-passenger cargo vans.³⁴² In 2005, under SAFETEA-LU, Congress formally repealed the general Public Interest waiver for Chrysler’s 15-passenger vans³⁴³ and imposed heightened notice-and-comment requirements for future Public Interest waivers.³⁴⁴

However, in June 2010, FTA granted a general, nationwide Non-Availability waiver (rather than a Public Interest waiver) for all minivans and minivan chassis because no domestic source was identified.³⁴⁵ This was a blanket waiver that applied to all minivans and minivan chassis from all manufacturers, although the waiver was specifically requested by Chrysler (for both its chassis and for its minivans) and by domestic manufacturers using the Chrysler chassis.³⁴⁶ However, FTA rescinded the minivan/chassis waiver in December 2012, after determining that Vehicle Production Group, manufacturer of the MV-1 wheelchair-lift-equipped minivan, was able to manufacture minivans and minivan chassis that conformed to the FTA Buy America provision.³⁴⁷ In doing so, FTA rejected the argument that a waiver was necessary to provide “increased competition,” concluding that the Price Differential waiver offers protection against one domestic manufacturer abusing a monopoly position.³⁴⁸

³⁴⁰ Determination Concerning Request for Public Interest Waiver of Buy America Requirements, 53 Fed. Reg. 22,418 (Jun. 15, 1988).

³⁴¹ *Id.*

³⁴² Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to W. Alvin Jackson, DaimlerChrysler (Apr. 7, 2004).

³⁴³ SAFETEA-LU, *supra* note 108, at § 3023(i)(4). FTA removed the Chrysler waivers from its regulations in March 2006. Buy America Requirements—Amendments to Definitions, 71 Fed. Reg. 14,112, 14,113 (Mar. 21, 2006).

³⁴⁴ SAFETEA-LU, *supra* note 108, at § 3023(i)(1)(B).

³⁴⁵ Notice of Buy America Waiver for Minivans and Minivan Chassis, 75 Fed. Reg. 35,123, 35,124 (Jun. 21, 2010).

³⁴⁶ *Id.*; *see also* Notice of Buy America Waiver Request by ElDorado National for Minivan Chassis, 74 Fed. Reg. 15,048 (Apr. 2, 2009).

³⁴⁷ Decision To Rescind Buy America Waiver for Minivans and Minivan Chassis, 77 Fed. Reg. 71,673 (Dec. 3, 2012).

³⁴⁸ *Id.* at 71,676 (“If limited competition results in a product ceasing to be available to FTA-funded transit agencies at a competitive price..., the appropriate action would be for the grantee to apply for a waiver based on price-differential.”).

Initially, it appeared that a minivan waiver was no longer necessary. In July 2013, FTA notified two domestic manufacturers that it had determined that their manufacturing processes “to convert an incomplete Chrysler or Dodge minivan into” a domestic minivan “are sufficient to meet the Buy America final assembly requirements.”³⁴⁹ However, in November 2013, FTA granted a project-specific Non-Availability waiver to a public transit agency, allowing it to purchase 25 seven-passenger Chrysler minivans after determining that there were no domestic sources.³⁵⁰ The waiver was justified in part by FTA’s determination that the Chrysler minivans satisfied the domestic content requirement for rolling stock under the FTA Buy America provision, although final assembly did not take place in the United States. In other words, FTA waived only the final assembly requirement and not the domestic content requirement.

However, FTA recently concluded, that “the market for non-ADA accessible minivans has changed since 2013.”³⁵¹ Chrysler and Dodge minivans no longer meet the domestic content requirement for rolling stock under the FTA Buy America provision, and the domestic manufacturer of the MV-1 wheelchair-lift-equipped minivan does not manufacture non-ADA-accessible minivans.³⁵² Therefore, in October 2016, FTA granted a general waiver of only the domestic content requirement for all non-ADA-accessible minivans (typically 7-passenger vehicles) as well as vans (up to 15-passenger vehicles).³⁵³ Under the new partial waiver, final assembly still must take place in the United States.³⁵⁴ The van and minivan waiver is limited to contracts executed by FTA grant recipients “before September 30, 2019 or until a fully-compliant domestic source becomes available, whichever is earlier.”³⁵⁵ However, if history is any indication, and with the domestic content

³⁴⁹ Letter from Peter Rogoff, FTA Administrator, to Andrew Imanse, Thor Industries Group President (Jul. 1, 2013); Letter from Peter Rogoff, FTA Administrator, to Nick Gutwein, BraunAbility President (Jul. 1, 2013).

³⁵⁰ Notice of Buy America Waiver, 78 Fed. Reg. 71,025 (Nov. 27, 2013).

³⁵¹ Notice of Proposed Buy America Waiver for Minivans, 81 Fed. Reg. 30,602, 30,604 (May 17, 2016).

³⁵² *Id.*; *see also* Notice of Buy America Waiver of Domestic Content Requirement for Minivans and Vans, 81 Fed. Reg. 72,667, 72,668 (Oct 20, 2016) (summarizing pre-award audit results for the Dodge Caravan, which “showed a 57.4% domestic content for 2015 model year minivans and a 52% domestic content for model year 2016 minivans”).

³⁵³ Notice of Buy America Waiver of Domestic Content Requirement for Minivans and Vans, 81 Fed. Reg. 72,667, 72,669 (Oct 20, 2016).

³⁵⁴ *Id.* at 72,670.

³⁵⁵ *Id.*

requirement for rolling stock scheduled to increase to 70 percent beginning in October 2019, the van/minivan waiver will remain an issue beyond 2019.

B. Project-Specific Waivers

1. Types of Waivers Available

When a general waiver does not apply, an FTA grant recipient may request a project-specific waiver on one of the following grounds.

a. Non-Availability.—If the FTA grant recipient receives a responsive and responsible bid to provide domestic products in response to an open solicitation, and that bidder certifies compliance with the FTA Buy America provision, then the presumption is that those products are available domestically and a Non-Availability waiver will not be provided later.³⁵⁶ However, if the FTA grant recipient does not receive any bids to supply entirely domestic products, but instead receives only bids that include foreign products (but the bids are otherwise responsive and responsible), then FTA will presume that a Non-Availability waiver is warranted.³⁵⁷

However, if the FTA grant recipient seeks to purchase foreign products via a sole source procurement rather than an open solicitation, then FTA will require its grant recipient to provide evidence that comparable domestic products are truly unavailable in sufficient quantities of satisfactory quality before FTA will grant a Non-Availability waiver.³⁵⁸ There is no express requirement in the FTA Buy America provision for FTA grant recipients to perform an investigation to identify potential sources of comparable domestic goods when using an open solicitation process. However, because a Non-Availability waiver is discretionary,³⁵⁹ FTA grant recipients should provide as much information as possible to support a claim that domestic products are unavailable.

In either open solicitations or sole source procurements, if the FTA grant recipient's contractor or supplier certifies compliance with the FTA Buy America provision in the accepted bid, but after the award seeks to provide foreign materials, the bidder is bound by the Buy America compliance certification submitted with its bid.³⁶⁰ FTA will require its grant recipient to provide evidence that comparable

domestic products are truly not available in sufficient quantities of satisfactory quality before FTA will grant a post-award Non-Availability waiver in that situation.³⁶¹ A Non-Availability waiver will “almost certainly be denied” where there is an available “domestic source of the material.”³⁶²

In 2013, FTA entered into an interagency agreement with the National Institute of Standards and Technology, Manufacturing Extension Partnership (NIST-MEP) of the U.S. Department of Commerce to help it identify potential domestic manufacturing sources.³⁶³ When confronted with a Non-Availability waiver request, FTA may seek out domestic sources by itself or via NIST-MEP before granting the waiver. Furthermore, recent waiver decisions suggest that FTA also expects the FTA grant recipient to seek out domestic sources prior to requesting a Non-Availability waiver.

The level of effort that may be required to support a Non-Availability waiver is illustrated by 2015 waivers of the FTA Buy America provision granted to the Long Island Rail Road (LIRR) for certain turnout components. In February 2014, LIRR issued a competitive solicitation for five turnouts, including movable point frogs, for its East Side Access project.³⁶⁴ The only bidder certified noncompliance with the FTA Buy America provision. In May 2014, LIRR awarded a procurement contract for turnouts to a different supplier for its Jamaica Station Capacity Improvement project.³⁶⁵ After the contract award, LIRR revised its specifications to require movable point frogs at the Jamaica Station project as well, and its contractor advised that it could not certify compliance with the FTA Buy America provision given the revised specifications. Movable point frogs were considered critical due to their durability.³⁶⁶

Therefore, LIRR requested Non-Availability waivers for certain turnout components, including the movable point frogs, steel switch point rail sections, roller assemblies, and plates, for both the East Side Access project and Jamaica Station project.³⁶⁷ In

³⁶¹ 49 C.F.R. § 661.7(c)(3) (2015).

³⁶² *Conti Enters., Inc. v. Se. Pa. Transp. Auth.*, No. 03 CV 05345, 2003 U.S. Dist. LEXIS 19848, at *3 (E.D. Pa. Oct. 14, 2003).

³⁶³ Interagency Agreement Between U.S. Department of Transportation, Federal Transit Administration, and U.S. Department of Commerce, National Institute of Standards and Technology (2013), *available at* http://www.fta.dot.gov/documents/2013-9-24_IAA.pdf.

³⁶⁴ Notice of Buy America Waiver for Track Turnout Components, 80 Fed. Reg. 8,753, 8,754 (Feb. 18, 2015).

³⁶⁵ Notice of Buy America Waiver for Track Turnout Component, 80 Fed. Reg. 52,081, 52,082 (Aug. 27, 2015).

³⁶⁶ *Id.*

³⁶⁷ Notice of Proposed Buy America Waiver for Track Turnout Components, 79 Fed. Reg. 75,857 (Dec. 19, 2014).

³⁵⁶ 49 C.F.R. § 661.15(a) (2015). In the case of rolling stock, however, the FTA grant recipient still has an obligation to perform its own investigation of the bidder's compliance with the FTA Buy America provision. See Section V.B *infra*.

³⁵⁷ 49 C.F.R. § 661.7(c)(1) (2015).

³⁵⁸ 49 C.F.R. § 661.7(c)(2) (2015).

³⁵⁹ A Non-Availability waiver “may” be granted. 49 U.S.C. § 5323(j)(2) (2016); 49 C.F.R. § 661.7(c) (2015).

³⁶⁰ 49 C.F.R. § 661.13(c) (2015).

support of its waiver request, LIRR pointed to a NIST-MEP report that identified potential domestic manufacturers of the components. LIRR had contacted each of the potential domestic manufacturers identified in the NIST-MEP report and concluded that none was willing or capable of producing the components.³⁶⁸ The domestic manufacturers who responded to LIRR did not currently manufacture the components, and it did not appear economically feasible for them to supply the quantities needed by LIRR.³⁶⁹ FTA published a notice of the waiver request in the Federal Register for public comment in December 2014.

In February 2015, before FTA had responded to LIRR's waiver request, LIRR notified FTA that it had become aware of alternate turnout designs that may become available from a domestic source in the future, and accordingly, narrowed its waiver request to only those phases of its projects that were on the critical path to meet the construction schedule.³⁷⁰ On February 18, 2015, based largely on "LIRR's good faith efforts to identify potential domestic manufacturers for these track turnout components," FTA granted LIRR a Non-Availability waiver for the four turnout components for just five turnouts that were on the critical path of the East Side Access project.³⁷¹

In June 2015, LIRR further narrowed its waiver request with respect to the Jamaica Station project, after determining that domestic manufacturers could supply alternatives to the switch point rail sections, roller assemblies, and plates.³⁷² On August 27, 2015, again based on "LIRR's good faith efforts to identify domestic manufacturers for the turnout components and redesign the project," FTA granted LIRR a Non-Availability waiver for just the movable point frog and for just two turnouts that were on the critical path of the Jamaica Station project.³⁷³ The history of this waiver request indicates that Non-Availability waivers will be highly scrutinized, will only be granted to the extent absolutely necessary, and that the FTA grant recipient bears the burden of proving that domestic products are truly unavailable.

In December 2015, with passage of the FAST Act, Congress provided that whenever FTA denies a project-specific waiver request, FTA must certify that the product for which a waiver was requested is available from domestic manufacturers in sufficient

quantities and satisfactory quality, and provide a list of known domestic manufacturers from which the product can be obtained.³⁷⁴ FTA is required to publish its waiver denials and certifications of product availability on the USDOT website. It remains to be seen whether this will result in more project-specific Non-Availability waivers being granted.

b. Price Differential.—The FTA Buy America provision may be waived if "including domestic material will increase the cost of the overall *project* by more than 25 percent."³⁷⁵ The FTA regulations that implement this provision provide that the 25 percent Price Differential is analyzed at the level of the prime contract between the FTA grant recipient and its presumptive contractor or supplier.³⁷⁶ This Price Differential waiver may be requested in order to award a contract in response to a proposal that does not comply with the FTA Buy America provision but is the lowest responsible and otherwise responsive bid (herein, the "low bid").

If the low bid in response to a solicitation by the FTA grant recipient does not comply with the FTA Buy America provision, but the bid is otherwise responsible and responsive, then the FTA grant recipient may apply a 25 percent surcharge (for evaluation purposes only) to the noncompliant low bid to determine whether the procurement qualifies for a Price Differential waiver. This is accomplished by multiplying the bid price for the noncompliant end product by 1.25.³⁷⁷ The price differential or surcharge is applied to the low bid price of the noncompliant end product, not just to the cost of its noncompliant components or subcomponents.³⁷⁸ The FTA grant recipient then compares this surcharged bid price with the lowest responsible and responsive bid to supply a comparable domestic end product. If the surcharged low bid is still lower than the lowest responsive and responsible bid to supply a domestic end product, then the FTA grant recipient may request a Price Differential waiver to contract with the low bidder.³⁷⁹

Note that the 25 percent Price Differential requires that there be a relatively large margin between the price of foreign and domestic end products to justify a waiver. The bid to supply the foreign end product would have to be less than 80 percent of the lowest Buy America-compliant bid to qualify. Accordingly, the

³⁶⁸ *Id.* at 75,858.

³⁶⁹ Notice of Buy America Waiver for Track Turnout Components, 80 Fed. Reg. 8,753, 8,754 (Feb. 18, 2015).

³⁷⁰ *Id.* at 8,753.

³⁷¹ *Id.* at 8,754.

³⁷² Notice of Buy America Waiver for Track Turnout Component, 80 Fed. Reg. 52,081, 52,083 (Aug. 27, 2015).

³⁷³ *Id.*

³⁷⁴ Fixing America's Surface Transportation Act, Pub. L. No. 114 94, § 3011(2)(C), 129 Stat. 1312, 1474 75 (Dec. 4, 2015) (codified at 49 U.S.C. § 5323(j)(6)).

³⁷⁵ 49 U.S.C. § 5323(j)(2)(D) (2016) (emphasis added).

³⁷⁶ 49 C.F.R. § 661.7(d) (2015).

³⁷⁷ 49 C.F.R. § 661.7(d) (2015).

³⁷⁸ *BPPM, supra* note 107, at 45 ("This waiver cannot be applied to components or subcomponents").

³⁷⁹ *Id.*

Price Differential waiver is rarely used, in comparison to the Non-Availability waiver.³⁸⁰ FTA strictly enforces the 25 percent Price Differential standard imposed by Congress and rarely grants waivers based on the cost of domestic goods. In 2010, a motor coach manufacturer requested a Public Interest waiver from FTA on the grounds that there was only one Buy America-compliant manufacturer with a monopoly position, and that it would be in the public interest to allow foreign competition.³⁸¹ FTA denied the request, however, because the domestic supplier made its products available “at a competitive price (measured by a greater than 25 percent differential between foreign-produced and Buy America-compliant vehicles).”³⁸² When there is a compliant domestic product, competitors must try to get a Price Differential waiver (rather than a Public Interest or Non-Availability waiver), which will not be granted unless the domestic product is at least 25 percent more expensive than the foreign product.³⁸³

In *L.B. Foster Co. v. Southeastern Pennsylvania Transportation Authority*,³⁸⁴ the Commonwealth Court of Pennsylvania, construing the statutory language of the FTA Buy America provision, concluded that FTA is under no obligation to grant a Price Differential waiver even when domestic products increase the cost of the overall project by more than 25 percent.³⁸⁵ “Such unusual flexibility in pricing public bidding projects emphasizes the intent of Congress to underscore the importance of encouraging governmental transportation units to buy steel products produced in America whenever available.”³⁸⁶ Although both the statute and FTA’s regulations provide that the Price Differential waiver “may” be granted when domestic goods would increase the price of the project by 25 percent, suggesting that it is discretionary, FTA’s regulations further provide, that it

*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 produced in the United States.*³⁸⁷

³⁸⁰ Buy America Requirements, 60 Fed. Reg. 14,174, 14,178 (Mar. 15, 1995) (“FTA receives Buy America waiver requests for thousands of items, the great majority for reasons of nonavailability...with a few based on price differential...”).

³⁸¹ Decision to Rescind Buy America Waiver for Minivans and Minivan Chassis, 77 Fed. Reg. 71,673, 71,676 (Dec. 3, 2012).

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ 705 A.2d 164 (Pa. Commonw. Ct. 1997), rev. denied, 557 Pa. 633 (1998).

³⁸⁵ *Id.* at 169 n.3.

³⁸⁶ *Id.*

³⁸⁷ 49 C.F.R. § 661.7(d) (2015) (emphasis supplied).

This suggests that a Price Differential waiver is guaranteed to be granted if the conditions are satisfied and if the waiver is requested in a timely fashion. The FTA grant recipient still is generally under no obligation to request a waiver from FTA in that situation and might not (e.g., if state or local Buy America rules attached to the procurement impose a stricter domestic preference than the FTA Buy America provision).

The difficulty of obtaining a Price Differential waiver is illustrated by a 2013 denial to New York MTA’s Metro-North Railroad.³⁸⁸ Metro-North sought to purchase frogs for inventory, using local funds and not FTA funds, but with the intention of using the frogs on future FTA-funded projects. The low bidder, at \$219,950, submitted a certification of noncompliance, whereas the next-lowest bidder, at \$371,152, certified compliance with the FTA Buy America provision. Although the cost of procuring domestic products would increase the cost of this supply procurement by well more than 25 percent, and despite the fact that Metro-North was not using FTA funds for the procurement, FTA denied the Price Differential waiver request. Only once the frogs were to be incorporated in a specific FTA-funded construction project would FTA be able to determine whether the cost of domestic frogs would increase the cost of the overall project by more than 25 percent. Metro-North was left with the choice of either buying domestic frogs at \$371,152 or buying the noncompliant frogs at \$219,950 and ensuring that they are only incorporated into projects that do not receive FTA funding.

FTA grant recipients should be aware that there is older FTA guidance that suggests that the 25 percent Price Differential waiver is not necessarily evaluated at the contract or project level, but rather may be granted for individual foreign “items” offered in the low bid.³⁸⁹ In 1988, in the *Federal Register*, UMTA first stated its position that the 25 percent Price Differential was not to “be applied to the overall contract between the grantee and its supplier but to the comparative costs of each individual item being supplied.”³⁹⁰ In 1991, UMTA issued a final rule confirming that “the price differential waiver is applied only to the comparative costs of the items for which both foreign and domestic bids were received,” and not

³⁸⁸ Letter from Michael L. Culotta, FTA Regional Counsel, to Anthony J. Bombace, Metro-North Railroad, NYMTA, Re: Buy America Waiver Request, Metro-North Railroad Bid Inquiry 1-11623, Frogs (Jul. 5, 2013), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/metro-north-railroad-july-05-2013>.

³⁸⁹ See TCRP LRD 31, *supra* note 2, at 26.

³⁹⁰ Buy America Requirements—Amendments, 53 Fed. Reg. 32,994 (Aug. 29, 1988).

to the overall bid price.³⁹¹ Note that this approach could allow Price Differential waivers to be granted when certain domestic materials are 25 percent more expensive than comparable foreign materials, even though inclusion of the domestic materials would not increase the overall project cost by 25 percent as the FTA Buy America statute appears to require.

In subsequent years, Price Differential waivers were occasionally granted for individual materials without evaluating the impact to the overall project. For example, as recently as 2008, FTA granted the Utah Transit Authority (UTA) a Price Differential waiver for a steel procurement contract to support UTA's Mid-Jordan light rail line project, because the price of foreign steel (\$990/ton) multiplied by 1.25 was less than the price of domestic steel (\$1,300.77/ton).³⁹² The steel procurement contract had been segmented from UTA's overall design-build contract for the Mid-Jordan light rail line project, and FTA did not consider whether domestic steel would have increased the price of the overall project by 25 percent. This appears inconsistent with the approach taken by FTA in its 2013 Metro-North Railroad decision that was previously discussed. In 2016, FTA removed from its Buy America website the 1988–1991 UMTA guidance that suggested that the Price Differential waiver may be applied to individual “items” in a bid rather than the overall bid price. In 2016, FTA also removed from its Buy America website the older Price Differential waiver decisions that did not evaluate the impact of domestic material to the overall project cost. FTA grant recipients should presume that domestic material must increase the cost of the overall project by 25 percent to receive a Price Differential waiver in the future.

For a post-award waiver, the standard may be even stricter than the 25 percent Price Differential. In 2005, in response to SAFETEA-LU, FTA proposed to grant post-award waivers “in those rare instances” in which market conditions change after the contractor certifies compliance at bid time, so that the contractor discovers after contract award that Buy America compliance has become “commercially impossible or impracticable (due to price).”³⁹³ In 2006, FTA appeared to expressly reject suggestions that a post-award “commercial impracticability” waiver is warranted

when the 25 percent Price Differential is satisfied,³⁹⁴ for example, when the bidder's cost of supplying domestic products increases 25 percent after bid time due to changed market conditions, but the bidder could honor its original bid price if allowed to furnish foreign products. In rejecting the 25 percent Price Differential for post-award commercial impracticability waivers, FTA proposed to adopt the definition of “commercial impracticability” expressed in *Raytheon Co. v. White*:³⁹⁵ “A contract is said to be commercially impracticable when, because of unforeseen events, ‘it can be performed only at an excessive and unreasonable cost,’ ...or when ‘all means of performance are commercially senseless.’”³⁹⁶ In its 2007 final rule allowing for post-award commercial impracticability waivers, FTA concluded that the strict standard for commercial impracticability proposed in 2006 “forms a reasonable approach,” but left open the possibility that a post-award waiver could be granted based on a 25 percent Price Differential, to be determined on a case-by-case basis.³⁹⁷

c. Public Interest.—The FTA Buy America provision may be waived when its application “would be inconsistent with the public interest.”³⁹⁸ Neither the FTA Buy America statute nor FTA's regulations provide specific criteria for determining whether a Public Interest waiver is warranted; rather, FTA “will consider all appropriate factors on a case-by-case basis.”³⁹⁹

³⁹⁴ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,416 (Nov. 30, 2006) (FTA expressly disagreeing “with the one commenter who suggested that in determining the monetary value of what constitutes ‘commercial impracticability,’ that the ‘current 25 percent price differential figure...might represent a reasonable benchmark.’”).

³⁹⁵ *Id.* (citing *Raytheon Co. v. White*, 305 F.3d 1354, 1667 (Fed. Cir. 2002)).

³⁹⁶ *Raytheon Co. v. White*, 305 F.3d 1354, 1367 (Fed. Cir. 2002) (internal citation omitted).

³⁹⁷ Buy America Requirements—End Product Analysis and Waiver Procedures, 72 Fed. Reg. 53,688, 53,691 (Sept. 20, 2007). In addressing post-award waiver requests shortly after adopting this final rule, FTA occasionally granted post-award waivers based on changed market conditions using the 25 percent Price Differential standard without determining whether compliance had become commercially impracticable. See Letter from Severn E.S. Miller, FTA Chief Counsel, to John M. English, Utah Transit Authority, Re: Request for Buy America Waiver (May 28, 2008), available at https://web.archive.org/web/20141227065529/http://www.fta.dot.gov/legislation_law/legislation_law_8241.html. Also notable in that case, FTA applied the 25 percent Price Differential surcharge to an individual supply contract, without deciding whether the supplier's price increase would increase the cost of the overall project by 25 percent.

³⁹⁸ 49 U.S.C. § 5323(j)(2)(A) (2016); see also 49 C.F.R. § 661.7(b) (2015).

³⁹⁹ 49 C.F.R. § 661.7(b) (2015).

³⁹¹ Buy America Requirements, 56 Fed. Reg. 926 (Jan. 9, 1991).

³⁹² Letter from Severn E.S. Miller, FTA Chief Counsel, to John M. English, UTA, Re: Request for Buy America Waiver (May 28, 2008), available at https://web.archive.org/web/20150918093227/http://www.fta.dot.gov/legislation_law/legislation_law_8241.html.

³⁹³ Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246, 71,253 (Nov. 28, 2005).

Although the Public Interest waiver may appear to be a broad, catch-all category that could be used to allow foreign purchases under many sets of circumstances, it has not been widely used aside from “small purchases” (as discussed in Section IV.A.1). FTA has historically taken the position that Public Interest waivers should “be utilized in extremely limited situations.”⁴⁰⁰

Nevertheless, as discussed in Section IV.A.4, a Public Interest waiver was issued in 1984 to allow FTA grant recipients to purchase Chrysler minivans.⁴⁰¹ Congress formally repealed that waiver in 2005, however, as part of SAFETEA-LU.⁴⁰² In that legislation, Congress also established a new requirement for FTA to publish in the *Federal Register* a “detailed written explanation” justifying any Public Interest waiver and to allow the public to comment on the proposed Public Interest waiver before its issuance.⁴⁰³

Prior to the new notice-and-comment requirements in 2005, FTA routinely granted Public Interest waivers for prototype vehicles from foreign manufacturers, with the understanding that the remainder of the procurement would be manufactured in the United States.⁴⁰⁴ Due to increased scrutiny of Public Interest waivers since 2005, however, Public Interest waivers appear to be harder to obtain for prototypes.⁴⁰⁵ For example, in October 2008, MBTA requested a Public Interest waiver on behalf of a foreign bidder for 2 prototype locomotives out of a 28-locomotive

⁴⁰⁰ Determination Concerning Request for Public Interest Waiver of Buy America Requirements, 53 Fed. Reg. 22,418, 22,419 (Jun. 15, 1988) (denying Public Interest waiver requested on the basis of increasing market competition).

⁴⁰¹ Exemption from Buy America Requirements, 49 Fed. Reg. 13,944 (Apr. 9, 1984).

⁴⁰² SAFETEA-LU, *supra* note 108, at § 3023(i)(4). FTA removed the Chrysler waivers from its regulations in March 2006. Buy America Requirements—Amendments to Definitions, 71 Fed. Reg. 14,112, 14,113 (Mar. 21, 2006).

⁴⁰³ SAFETEA-LU, *supra* note 108, at § 3023(i)(1) (codified at 49 U.S.C. § 5323(j)(3)).

⁴⁰⁴ TCRP LRD 31, *supra* note 2, at 25 (“Generally, FTA’s policy is to grant a waiver for one prototype vehicle. Anything beyond one prototype will be subject to close scrutiny.”); see also Letter from Patrick W. Reilly, FTA Chief Counsel, to John C. Segerdell, Sacramento Regional Transit District, Re: Light Rail Vehicle Procurement Request for Buy America Waiver for Second Pilot Car File (Oct. 20, 1999) (granting Public Interest waiver for one prototype vehicle but denying as to the second prototype), *available at* https://web.archive.org/web/20141227065635/http://www.fta.dot.gov/legislation_law/legislation_law_763.html.

⁴⁰⁵ See, e.g., Letter from Scott A. Biehl, FTA Chief Counsel, to Frank J. Wilson, Houston METRO (Apr. 14, 2009) (denying a Public Interest waiver for prototype light rail vehicles, and stating that procurement of prototype vehicles “cannot be separated” from the contract for production and assembly of vehicles).

procurement, arguing that the waiver would allow the foreign bidder to “submit a competitive bid with respect to price and schedule,” thus expanding the number of competitive bidders.⁴⁰⁶ The waiver request, published in the *Federal Register* pursuant to the new notice-and-comment requirements, met with considerable public opposition, including opposition from numerous members of Congress.⁴⁰⁷ Shortly thereafter, FTA denied the request, concluding that a Public Interest waiver is not available “to allow for a competitive bid on price and schedule alone.”⁴⁰⁸

In denying MBTA’s waiver request, FTA indicated that a Public Interest waiver request for prototype vehicles might be available for “the introduction of significant new technology.”⁴⁰⁹ For example, also in 2008, FTA granted a Public Interest waiver of the FTA Buy America provision for all projects funded through its Fuel Cell Bus Program, concluding that “the U.S. market for fuel cell bus technology and related infrastructure is not fully developed” and allowing its grant recipients to adopt “foreign technologies” would allow for “[q]uick and successful deployment of fuel cell bus technology and infrastructure... in the public interest.”⁴¹⁰

Aside from the introduction of new technology, Public Interest waivers have been granted in recent years only in rare circumstances that are not widely applicable. For example, in 2011, FTA used a Public Interest waiver to allow a bidder to correct its Buy America certification from noncompliance to compliance.⁴¹¹ In granting the waiver, FTA noted that it

⁴⁰⁶ Notice of Buy America Waiver Request by the Massachusetts Bay Transportation Authority for Final Assembly of Rail Rolling Stock, 73 Fed. Reg. 62,587, 62,588 (Oct. 21, 2008).

⁴⁰⁷ See Notice of Buy America Waiver Request by the MBTA, Docket No. FTA 2008 0047 (Oct. 21, 2008), *available at* <https://www.regulations.gov/docket?D=FTA-2008-0047>.

⁴⁰⁸ Letter from Sherry E. Little, FTA Deputy Administrator, to Daniel A. Grabauskas, MBTA (Nov. 14, 2008), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/massachusetts-bay-transportation-authority-november-14-2008>.

⁴⁰⁹ *Id.*; see also Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Shanker A. Singham, Volvo Bus Corporation (Mar. 16, 2011) (“FTA will deny requests that do not include factors like safety or the introduction of significant new technology.”), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/volvo-bus-corporation-prevost-coach-march-16-2011>.

⁴¹⁰ Notice of Buy America Waiver for the National Fuel Cell Bus Technology Development Program, 73 Fed. Reg. 46,350, 46,352 (Aug. 8, 2008).

⁴¹¹ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Jay H. Walder, NYMTA (Aug. 3, 2011), *available at* <https://www.transit.dot.gov/regulations-and-guidance/buy-america/nymta-august-03-2011>; see also Notice of Proposed Buy America Waiver To Allow Bidder To Certify Compliance, 76 Fed. Reg. 40,447 (Jul. 8, 2011).

was “[u]nlike other requests for public interest waivers,” which typically allow FTA grant recipients to purchase foreign products—rather, this 2011 waiver allowed the FTA grant recipient “to award a contract to a low bidder that will perform wholly in compliance with the substantive Buy America requirements.”⁴¹²

In September 2016, FTA granted partial Public Interest waivers for rolling stock contracts made prior to FY 2017,⁴¹³ so that such contracts are subject to the 60 percent domestic content requirement rather than the heightened FAST Act domestic content criteria. FTA’s justification for the Public Interest waiver is that the short notice and retroactive effective date of the FAST Act created a hardship for FTA grant recipients who had entered into procurement contracts, or solicited procurements, prior to enactment of the FAST Act, with the expectation that the procurement would be subject to the 60 percent domestic content criterion.⁴¹⁴ In the Public Interest waiver published in September 2016, following a notice-and-comment period, FTA determined that the 60 percent domestic content criterion (rather than the heightened FAST Act criteria) will apply to: (1) contracts made prior to December 4, 2015 (the enactment date of the FAST Act); (2) contracts made after December 4, 2015, on the basis of solicitations made prior to December 4, 2015; and (3) contracts made on or before October 31, 2016, on the basis of solicitations made on or after December 4, 2015.⁴¹⁵ Note that this Public Interest waiver is only a partial waiver, as rolling stock subject to the waiver still must satisfy all FTA Buy America requirements that were in effect in FY 2015.

What is clear is that a Public Interest waiver will generally not be granted on the basis of market competition issues, such as the low quality or high price of domestic products. In such cases, the FTA grant recipient’s option is to pursue either a Price Differential or Non-Availability waiver; unless FTA’s criteria for one of those waivers are satisfied, a waiver based on market competition issues will not be granted.⁴¹⁶ The Federal Trade Commission

⁴¹² *Id.*

⁴¹³ Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances, 81 Fed. Reg. 60,278, 60,284–85 (Sept. 20, 2016).

⁴¹⁴ *Id.* at 60,279.

⁴¹⁵ *Id.* at 60,284–85.

⁴¹⁶ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Shanker A. Singham, Volvo Bus Corporation (Mar. 16, 2011) (“FTA will deny requests based on policy considerations—non-availability and price differential—for which other waivers are available.”), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/volvo-bus-corporation-prevost-coach-march-16-2011>.

has taken issue with FTA’s stance, suggesting that a Public Interest waiver should be available when domestic prices are as little as five to 10 percent higher than comparable foreign products.⁴¹⁷ Nevertheless, FTA’s position is that Congress established the criteria for market competition considerations with the Price Differential and Non-Availability waivers, and Congress did not intend for Public Interest waivers to be used to circumvent those criteria.⁴¹⁸

2. Waiver Request Procedure

Generally, only an FTA grant recipient, rather than its potential contractor or supplier, may request a waiver from the FTA Buy America provision,⁴¹⁹ preferably prior to contract award. The potential contractor or supplier who seeks a waiver typically must do so through the FTA grant recipient.⁴²⁰ FTA’s regulations provide that FTA will consider a waiver request “from a potential bidder, offeror, or supplier” only in two cases:⁴²¹ (1) where the waiver request is for a rolling stock component or subcomponent⁴²² (as opposed to a waiver request for the rolling stock end product), or (2) where the waiver request is for “a specific item or material that is used in the production of a manufactured product”⁴²³ (as opposed to a waiver request for the manufactured end product).

The waiver request must be in writing and must include “facts and justification to support the waiver.”⁴²⁴ The written waiver request is “submitted to the [FTA] Administrator through the appropriate [FTA] Regional Office.”⁴²⁵ Prior to 2012, FTA Regional Offices handled Non-Availability and Price Differential waivers from FTA grant recipients, whereas all waiver requests from potential bidders as well as all Public Interest waivers required the approval of FTA Headquarters.⁴²⁶ However, with MAP-21 in 2012, Congress made all waivers of the FTA Buy America

⁴¹⁷ Letter from William E. Kovacic, FTC Commissioner, to Dorval Carter, FTA Chief Counsel, Re: Public Interest Waiver of the Federal Transit Authority’s Buy American Requirements as Applied to Motor Coach Purchase (Dec. 7, 2010), available at <https://www.ftc.gov/public-statements/2010/12/letter-william-e-kovacic-dorval-carter-chief-counsel-federal-transit>.

⁴¹⁸ Determination Concerning Request for Public Interest Waiver of Buy America Requirements, 53 Fed. Reg. 22,418, 22,419 (Jun. 15, 1988) (“It is [F]TA’s position that Congress intended that the public interest waiver provision...be utilized in extremely limited circumstances.”).

⁴¹⁹ 49 C.F.R. § 661.9(c) (2015).

⁴²⁰ 49 C.F.R. § 661.9(b) (2015).

⁴²¹ 49 C.F.R. § 661.9(d) (2015).

⁴²² 49 C.F.R. § 661.7(f) (2015).

⁴²³ 49 C.F.R. § 661.7(g) (2015).

⁴²⁴ 49 C.F.R. § 661.9(c) (2015).

⁴²⁵ *Id.*

⁴²⁶ *TCRP LRD 31*, *supra* note 2, at 21.

provision subject to nationwide notice-and-comment procedures discussed in the following section, effectively making all FTA Buy America waivers subject to approval of FTA Headquarters.

The previously discussed procedures will typically be used for project-specific waivers when the low bidder is unable to certify compliance with the FTA Buy America provision. If all noncompliant products in the low bid are already covered by a general waiver granted by FTA, such as those discussed in Section IV.A, the covered products typically may be considered domestic, the bidder may certify compliance, and there is no need to request a project-specific waiver.⁴²⁷

3. Notice-and-Comment Requirements

Before issuing any waivers of the FTA Buy America provision, FTA must publish its decision to grant a waiver both on the USDOT website and in the *Federal Register*.⁴²⁸ After publication, FTA must allow “a reasonable period of time for notice and comment” before granting the waiver.⁴²⁹ This is a relatively recent requirement, originating in 2012 with MAP-21. Prior to that, beginning with SAFETEA-LU in 2005, FTA was only required to publish its decision to grant Public Interest waivers.⁴³⁰

The statutory publication requirement applies only to waivers that FTA has already decided to grant, not to all waiver requests received. However, FTA has interpreted its statutory notice-and-comment requirement, to consist of a four-step process:⁴³¹

1. FTA will post waiver requests on its Buy America website to solicit public comment.

2. If FTA decides to grant the waiver (based on public comments, information provided by the FTA grant recipient, or FTA’s own investigation), FTA will prepare a written justification detailing its rationale for approving the waiver request.

3. FTA will publish its written justification in the *Federal Register* for notice and comment within a “reasonable time.”

⁴²⁷ See, e.g., Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Dennis R. Slimmer, Kansas DOT, Subject: Buy America (Dec. 21, 2010) (concluding that “the bidders should have certified compliance with Buy America” since they intended to take advantage of the general waiver for Chrysler minivans), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/kansas-coordinated-transit-district-council-december-21-2010>.

⁴²⁸ Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, § 20016, 126 Stat. 405 (Jul. 6, 2012).

⁴²⁹ *Id.*

⁴³⁰ 49 U.S.C. § 5323(j)(3) (2011); *SAFETEA-LU*, *supra* note 108.

⁴³¹ Buy America Requirements—End Product Analysis and Waiver Procedures, 71 Fed. Reg. 69,412, 69,413 (Nov. 30, 2006).

4. FTA will post on its Buy America website its final decision to either grant or deny the waiver.

FTA expects its “total processing time” for waiver requests to take about 30 days.⁴³²

The FAST Act enacted in December 2015 imposes additional publication requirements on FTA for the situation in which it decides to *deny* a waiver. Whenever FTA denies a waiver request, it must provide a written certification that the product for which a waiver was requested is available from domestic manufacturers in sufficient quantities and satisfactory quality, and it must also provide a list of known domestic manufacturers from which the product can be obtained.⁴³³ FTA is to publish its waiver denials and certifications of product availability on its Buy America website.

V. ENFORCEMENT

A. Certification

A contractor or supplier that enters into a contract with an FTA grant recipient is required to execute a Buy America certificate, in which the contractor either certifies compliance with the FTA Buy America provision or if noncompliant, certifies that the contractor believes the bid is eligible for a waiver from the FTA Buy America provision.⁴³⁴ (If all otherwise noncompliant products in the bid are covered by an existing waiver already granted by FTA, such as one of the general waivers discussed in Section V, so that the bidder does not need to request a new waiver, the bidder may certify compliance.⁴³⁵) The certificate is to be incorporated into the contract with the FTA grant recipient. If a contractor has certified compliance with the FTA Buy America provision and later determines that it is unable to comply, the contractor is in breach of contract.⁴³⁶ At that point, the FTA grant recipient may pursue its contractual remedies against the contractor for

⁴³² *Id.*

⁴³³ Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, § 3011(2)(C), 129 Stat. 1312, 1474 75 (Dec. 4, 2015) (codified at 49 U.S.C. § 5323(j)(6)).

⁴³⁴ 49 C.F.R. §§ 661.6, 661.12 (2015); see also Buy America Requirements, 51 Fed. Reg. 22,285 (Jun. 19, 1986) (establishing two separate FTA Buy America certification forms, one certifying compliance and one combining a non-compliance certification with a waiver request).

⁴³⁵ See, e.g., Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Dennis R. Slimmer, Kansas DOT, Subject: Buy America (Dec. 21, 2010) (concluding that “the bidders should have certified compliance with Buy America” since they intended to take advantage of the Chrysler minivan waiver), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/kansas-coordinated-transit-district-council-december-21-2010>.

⁴³⁶ 49 C.F.R. § 661.17 (2015).

breach of contract,⁴³⁷ which may include terminating the contractor or withholding payment pending the contractor either achieving compliance or obtaining a waiver.

If at least one bidder certifies compliance with the FTA Buy America provision, then a compliant bid will typically be accepted, notwithstanding all other noncompliant bidders who indicate that they may be eligible for a waiver. The fact that at least one bidder is able to supply domestic products typically precludes a project-specific Non-Availability waiver for the other bidders (because a domestic source is available), and the circumstances justifying a Price Differential or Public Interest waiver are rare. For example, in 2003, in *Conti Enterprises, Inc. v. Southeastern Pennsylvania Transportation Authority*,⁴³⁸ only one bidder certified compliance, and the U.S. District court for the Eastern District of Pennsylvania agreed with the contracting agency that all other bidders who certified noncompliance were nonresponsive.⁴³⁹ The *Conti* court determined that the contracting agency reasonably concluded that FTA was unlikely to grant a waiver for the bidders who certified noncompliance, and that the contracting agency was not obligated to request a waiver in that situation.⁴⁴⁰ Likewise, in 2012, in *Estes Company v. Rock Island County Metropolitan Mass Transit District*,⁴⁴¹ the U.S. District Court for the Central District of Illinois declined to consider a low bidder's challenge to the Rock Island County Metropolitan Mass Transit District's (MetroLINK's) determination that its bid was nonresponsive, when the low bidder had executed a certificate of noncompliance and MetroLINK had awarded the contract to another bidder that certified compliance with the FTA Buy America provision.

The Buy America certificate is a condition of bid responsiveness, so bids without either certificate *must* be rejected.⁴⁴² In *Seal and Co., Inc. v. Washington Metropolitan Transit Authority*,⁴⁴³ the low bidder to supply a communications system for WMATA failed to execute either Buy America certificate. The U.S. District Court for the Eastern District of Virginia upheld WMATA's disqualification of the bid, concluding that the Buy America certificate is a material requirement due to the "potential for manipulating the process by leaving the Buy

American Certificate unsigned."⁴⁴⁴ The *Seal* court was concerned that bidders would have a noncompetitive advantage if they could decide after bid opening (based on the competing bids) whether to certify compliance or noncompliance with the FTA Buy America provision. Because of similar concerns, a bid is not responsive if the bidder certifies *both* compliance and noncompliance with the FTA Buy America provision.⁴⁴⁵ FTA regulations specifically provide that "failure to sign the certificate, submission of certificates of both compliance and non-compliance, or failure to submit any certification" do not constitute correctible errors.⁴⁴⁶

Due to such concerns about bid manipulation, prior to 1998, FTA refused to allow bidders to amend their certifications in cases of mistake or error.⁴⁴⁷ With the passage of TEA-21, however, Congress amended the FTA Buy America provision to provide that, after bid opening, FTA may allow a bidder to correct "any certification of noncompliance or failure to properly complete the certification" if the bidder establishes that its "incorrect certification [w]as a result of an inadvertent or clerical error," via sworn statement and such other evidence as may be required to satisfy the bidder's burden of proof.⁴⁴⁸ FTA requires the bidder to submit such sworn statement and accompanying evidence within 10 days of bid opening.⁴⁴⁹ The decision as to whether to allow the bidder to correct its certification is to be made by the FTA Chief Counsel.⁴⁵⁰ The FTA Chief Counsel regularly allows bidders to correct their certifications from noncompliance to compliance as long as

⁴⁴⁴ *Id.* at 1159.

⁴⁴⁵ See, e.g., Letter from Dana Nifosi, FTA Chief Counsel, to Pete Dawley, Benson Chrysler Jeep Dodge (Dec. 23, 2014), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/charlotte-area-transit-system-cats-december-23-2014>; Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Chris Brooks, PENTA Building Group (Aug. 10, 2012), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/penta-building-group-lp-august-10-2012>; Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to David L. Ferstendig, Fine Organics Corporation (Jun. 24, 2010), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/fine-organics-corporation-june-24-2010>.

⁴⁴⁶ 49 C.F.R. § 661.13(b)(1) (2015).

⁴⁴⁷ Buy America Requirements—Amendments, 53 Fed. Reg. 32,994 (Aug. 29, 1988) ("To allow such a bidder to modify its certification, would give the bidder the best of both worlds.... [I]f a bidder mistakenly executes the wrong certification, it is bound by that certification.").

⁴⁴⁸ Transportation Equity Act for the 21st Century, Pub. L. No. 105 178, § 3020(b), 112 Stat. 107 (Jun. 9, 1988) (codified at 49 U.S.C. § 5323(j)(10)); see also Buy America Requirements; Amendment of Certification Procedures, 64 Fed. Reg. 8,015 (Feb. 18, 1999).

⁴⁴⁹ 49 C.F.R. § 661.13(b)(1) (2015).

⁴⁵⁰ 49 C.F.R. § 661.13(b)(1)(i) (2015).

⁴³⁷ 49 C.F.R. § 18.36(i) (2015).

⁴³⁸ *Conti Enters., Inc. v. Se. Pa. Transp. Auth.*, No. 03 CV 05345, 2003 U.S. Dist. LEXIS 19848 (E.D. Pa. Oct. 14, 2003).

⁴³⁹ *Id.* at *6.

⁴⁴⁰ *Id.* at *8–9.

⁴⁴¹ *Estes Co. v. Rock Island Metro. Mass Transit District*, No. 12 CV 04087 (C.D. Ill. Sept. 26, 2012).

⁴⁴² 49 C.F.R. § 661.3(b) (2015).

⁴⁴³ 768 F. Supp. 1150 (E.D. Va. 1991).

they submit the sworn statement of inadvertent or clerical error within 10 days after bid opening.⁴⁵¹

Because the statutory language of the FTA Buy America provision allows bidders “to correct after bid opening any certification of non-compliance,”⁴⁵² for many years FTA took the position that it could allow bidders to correct a certificate of noncompliance to a certificate of compliance, but not vice versa, after bid opening.⁴⁵³ In recent years, however, FTA appears to have abandoned its earlier position, and there have been instances in which FTA has allowed a bidder “to change its certification from compliance to non-compliance” by providing the sworn statement of inadvertent or clerical error within 10 days of bid opening.⁴⁵⁴ The opportunity to correct a mistaken certificate of Buy America compliance is significant, because the bidder is otherwise bound by its certificate and is typically unable to obtain a waiver after contract award, even if the conditions that would justify granting a pre-award waiver are satisfied.⁴⁵⁵ However, with the passage of SAFETEA-LU in 2005, Congress provided that FTA *may* permit Non-Availability waivers after contract award, when the contractor made an initial certification of Buy America compliance “in good faith.”⁴⁵⁶

Incorrect certification due to “ignorance of the proper application of the Buy America requirements” is not a correctible error.⁴⁵⁷ The difference

⁴⁵¹ See, e.g., Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Theodore W. Meshover, Universal Security Systems, Subject: Incorrect Buy America Certificate (Jun. 24, 2011), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/universal-security-systems-june-24-2011>; Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Kent I. Jackson, Jenkins Construction, Inc., Re: Clerical Error on Buy America Certificate (Mar. 16, 2011), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/jenkins-construction-inc-march-16-2011>; Letter from Scott A. Biehl, FTA Chief Counsel, to Grover Lee, F.D. Thomas, Inc., Re: Incorrect Buy America Certificate (Jun. 2, 2009).

⁴⁵² Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, § 3020(b), 112 Stat. 107 (Jun. 9, 1988) (codified at 49 U.S.C. § 5323(j)(10)).

⁴⁵³ Buy America Requirements—Amendment to Certification Procedures, 68 Fed. Reg. 9,798, 9,799 (Feb. 28, 2003); see also Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Robin Arthur Stimson, Siemens Transportation (Dec. 29, 2003) (“[T]he statute permits correction of a ‘certificate of noncompliance or failure to properly complete the certification,’ not an incorrect certificate of compliance.”).

⁴⁵⁴ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Ed Woltdt, San Diego Friction Products, Subject: Incorrect Buy America Certificate (Jul. 1, 2011), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/san-diego-friction-products-inc-july-01-2011>.

⁴⁵⁵ 49 C.F.R. § 661.13(c) (2015).

⁴⁵⁶ SAFETEA-LU, *supra* note 108, at § 3032(i)(5)(C).

⁴⁵⁷ 49 C.F.R. § 661.13(b)(3) (2015).

between “inadvertence,” which is correctible, and “ignorance,” which is not, often depends upon whether the bidder follows the instructions provided by the FTA grant recipient. For example, when bidders incorrectly certified that their bids were noncompliant because they intended to take advantage of the Chrysler minivan waiver, FTA determined that this was an “inadvertent or clerical error” and allowed the bidders to correct their certificates from noncompliance to compliance, because the bidders had been incorrectly instructed by the FTA grant recipient to certify noncompliance.⁴⁵⁸ However, when a bidder certified, that its bid to supply signal equipment complied with the FTA Buy America provision (incorrectly applying the manufactured products standard rather than the rolling stock standard to the signal equipment), FTA concluded that the certificate was “based on ignorance” and did not allow it to be corrected, in part because the FTA grant recipient’s solicitation expressly stated that the rolling stock standard applied to the procurement.⁴⁵⁹

In “sealed bid” situations, when the FTA grant recipient “awards on the basis of initial proposals without discussion,” the Buy America certification must be submitted with the initial bid, and is binding on the bidder.⁴⁶⁰ However, in “negotiated procurements,” FTA has long taken the position that the Buy America certification submitted with the initial bid “may be superseded by subsequent certifications submitted with revised proposals, and the certification submitted with the offeror’s final revised proposal (or best and final offer) will control.”⁴⁶¹ With the passage of SAFETEA-LU in 2005, Congress required FTA to update its Buy America regulations to clarify the Buy America certification requirements for negotiated procurements.⁴⁶² Thereafter, in 2006, FTA defined “negotiated procurement” broadly to include any “contract awarded using other than

⁴⁵⁸ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Dennis R. Simmer, Kansas DOT, Subject: Buy America (Dec. 21, 2010), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/kansas-coordinated-transit-district-council-december-21-2010>.

⁴⁵⁹ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Ellen M. O’Neill, Alstom Signaling (Jun. 19, 2003).

⁴⁶⁰ 49 C.F.R. § 661.13(b)(2) (2015).

⁴⁶¹ BPPM, *supra* note 107, at 43; see also Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Robin Arthur Stimson, Siemens Transportation (Dec. 29, 2003) (allowing bidder to change its certification from noncompliance to compliance with a subsequent submission of its best and final offer), available at https://web.archive.org/web/20151120043016/http://www.fta.dot.gov/legislation_law/12316_605.html.

⁴⁶² SAFETEA-LU, *supra* note 108, at §§ 3032(i)(5)(B),(D).

sealed bidding procedures.⁴⁶³ In the case of a negotiated procurement, FTA recognizes that, during the negotiation process, the bidder may make multiple proposals, with or without Buy America certifications, and the bidder may change its certification based on information learned during negotiations. However, the bidder is required to submit one of the Buy America certification forms (either compliance or noncompliance) with its “best and final offer,” and the successful bidder is contractually bound by the certification in its best and final offer just as a sealed-bid contractor is bound by the certification in its proposal.⁴⁶⁴ Any earlier certifications made during the negotiation process are disregarded. For example, FTA has determined that its grant recipients may not reject initial proposals for failing to include a Buy America certification, when the grant recipient intends to allow its bidders to submit best and final offers after a technical evaluation of their proposals.⁴⁶⁵ However, when an FTA grant recipient, “reserves the right to select on initial proposals, and chooses to do so, the [grant recipient] must reject a proposal that does not include a Buy America certificate...as there is no opportunity to change the proposal to comply with the Buy America certification requirement.”⁴⁶⁶

B. Pre-Award and Post-Delivery Audits

For rolling stock procurements, the FTA grant recipient is not entitled to rely on its contractor’s or supplier’s certification of compliance with the FTA Buy America provision—the FTA grant recipient is required to conduct pre-award and post-delivery audits of the manufacturer or contractor to ensure compliance.⁴⁶⁷ The audits are also intended to ensure compliance with applicable Federal Motor Vehicle Safety Standards as well as the contracting agency’s technical specifications;⁴⁶⁸ however, the focus of this discussion will be limited to auditing compliance with the FTA Buy America provision.

A pre-award audit is to be conducted before the FTA grant recipient “enters into a formal contract”

⁴⁶³ 49 C.F.R. § 661.3 (2015); *see also* Buy America Requirements—Amendments to Definitions, 71 Fed. Reg. 14,112 (Mar. 21, 2006).

⁴⁶⁴ 49 C.F.R. § 661.13(b)(2) (2015); *see also* Buy America Requirements—Amendments to Definitions and Waiver Procedures, 70 Fed. Reg. 71,246, 71,253 (Nov. 28, 2005).

⁴⁶⁵ Letter from Gregory B. McBride, FTA Deputy Chief Counsel, to Donna Raney, Palm Beach County (Jul. 27, 2004), *available at* https://web.archive.org/web/20150918093100/http://www.fta.dot.gov/legislation_law/12316_616.html.

⁴⁶⁶ *Id.*

⁴⁶⁷ 49 U.S.C. § 5323(m) (2016).

⁴⁶⁸ *Id.*

for the procurement of rolling stock.⁴⁶⁹ The pre-award audit should generate a pre-award Buy America certification, which the FTA grant recipient is required to keep “on file.”⁴⁷⁰ If FTA has granted a Buy America waiver for “the rolling stock to be purchased” by the grant recipient, that documentation satisfies the Buy America certification requirements for the pre-award audit.⁴⁷¹ Otherwise, the pre-award audit must include an independent review (by the FTA grant recipient or someone independent of the manufacturer) of the manufacturer’s documentation of proposed components and subcomponents “to be purchased,” their anticipated costs, and their country of origin⁴⁷²; the pre-award audit must also include the manufacturer’s documentation of final assembly location, the proposed final assembly activities “that will take place” at that location, and the anticipated cost of final assembly.⁴⁷³ The auditor is to confirm that the manufacturer’s identification of components and subcomponents is consistent with FTA’s published lists of typical rolling stock components.⁴⁷⁴ The auditor is to also confirm that the manufacturer’s calculation of domestic content percentage is consistent with FTA’s regulations, and that the computed domestic content percentage satisfies the applicable rolling stock domestic content criterion (i.e., 60 percent domestic content as of 2016, 65 percent domestic content for vehicle procurements with scheduled delivery of the first production vehicle in FY 2018 or 2019, or 70 percent domestic content for vehicle procurements with scheduled delivery of the first production vehicle in FY 2020 or thereafter).⁴⁷⁵ Finally, the auditor is to confirm that the proposed final assembly location is in the United States, and that the manufacturer’s proposed final assembly activities are consistent with FTA’s published list of minimum requirements for final assembly.⁴⁷⁶

The post-delivery audit is to take place after the rolling stock is delivered to the FTA grant recipient, but “before title to the rolling stock is transferred to the recipient”⁴⁷⁷ and before “the rolling stock is put into revenue service.”⁴⁷⁸ The post-delivery audit should generate a post-delivery Buy America certification, which the FTA grant recipient is required to

⁴⁶⁹ 49 C.F.R. § 663.21 (2015); *see also* 49 C.F.R. § 663.3(a) (2015).

⁴⁷⁰ 49 C.F.R. § 663.25 (2015).

⁴⁷¹ 49 C.F.R. § 663.25(a) (2015).

⁴⁷² 49 C.F.R. § 663.25(b)(1) (2015).

⁴⁷³ 49 C.F.R. § 663.25(b)(2) (2015).

⁴⁷⁴ 49 C.F.R. § 661.11, App. B, C (2015).

⁴⁷⁵ 49 C.F.R. § 661.11 (2015).

⁴⁷⁶ 49 C.F.R. § 661.11, App. D (2015).

⁴⁷⁷ 49 C.F.R. § 663.31 (2015).

⁴⁷⁸ 49 C.F.R. § 663.3(b) (2015).

keep on file.⁴⁷⁹ If FTA has granted a Buy America waiver for the rolling stock that is actually “received” by the grant recipient, that documentation satisfies the Buy America certification requirements for the post-delivery audit.⁴⁸⁰ Otherwise, the post-delivery audit must include an independent review (by the FTA grant recipient or someone independent of the manufacturer) of the manufacturer’s documentation of components and subcomponents of the delivered rolling stock end product, their actual costs, and their country of origin⁴⁸¹; it must also include the manufacturer’s documentation of the actual final assembly location, the final assembly activities “which took place” at that location, and the actual cost of final assembly.⁴⁸² The auditor is to confirm that the manufacturer’s identification of components and subcomponents is consistent with FTA’s published lists of typical rolling stock components.⁴⁸³ The auditor is to also confirm that the manufacturer’s calculation of domestic content percentage is consistent with FTA’s regulations, and that the computed domestic content percentage based on the actual cost of components and subcomponents satisfies the applicable rolling stock domestic criterion (i.e., 60 percent domestic content as of 2016, 65 percent domestic content for vehicle procurements with scheduled delivery of the first production vehicle in FY 2018 or 2019, or 70 percent domestic content for vehicle procurements with scheduled delivery of the first production vehicle in FY 2020 or thereafter).⁴⁸⁴ Finally, the auditor is to confirm that the actual final assembly location is in the United States, and that the manufacturer’s actual final assembly activities were consistent with FTA’s published list of minimum requirements for final assembly.⁴⁸⁵

With respect to procurements of standard model vehicles, such as minivans for vanpool programs, it seems inefficient to require each FTA grant recipient to conduct pre-award and post-delivery audits of the same vehicle model. In May 2016, in the *Federal Register*, FTA questioned “whether manufacturers would consider submitting to a pre-award and post-delivery audit process that was conducted by FTA on each new model year, as opposed to requiring audits for each individual procurement.”⁴⁸⁶ In October 2016, following a notice-and-comment period, FTA concluded that its

“proposal has merit and will take this recommendation into consideration in a *future action* that FTA may take to address pre-award and post-delivery audits for minivan procurements.”⁴⁸⁷ It remains to be seen whether vehicle manufacturers will submit their standard models to annual Buy America audits conducted by FTA, although such a streamlined procedure would relieve FTA grant recipients of the audit responsibility and would avoid duplicative audit efforts. However, until such action is taken by FTA or Congress, it remains the responsibility of each FTA grant recipient to conduct pre-award and post-delivery audits of all of its rolling stock procurements.

In May 1995, FTA issued two separate handbooks for conducting audits for rail procurements⁴⁸⁸ and bus procurements.⁴⁸⁹ In June 2015, in the *Federal Register*,⁴⁹⁰ FTA published notice of availability of a new draft handbook for conducting audits of both rail and bus procurements,⁴⁹¹ which is proposed to replace the 1995 guidance, and solicited public comments on the draft handbook.⁴⁹² As of this publication, the handbook remains in draft form.

C. FTA Investigations

FTA may conduct an investigation of FTA Buy America compliance on any FTA-funded project.⁴⁹³ FTA’s investigation may include “site visits of manufacturing facilities and final assembly locations.”⁴⁹⁴

⁴⁸⁷ Notice of Buy America Waiver of Domestic Content Requirement for Minivans and Vans, 81 Fed. Reg. 72,667, 72,670 (Oct. 20, 2016) (emphasis supplied).

⁴⁸⁸ FTA, CONDUCTING PRE-AWARD AND POST-DELIVERY REVIEWS FOR RAIL VEHICLE PROCUREMENTS, Report No. FTA-DC-90-7713-94-1, Rev. B (1995), available at https://web.archive.org/web/20150918092503/http://www.fta.dot.gov/legislation_law/12921_5424.html.

⁴⁸⁹ FTA, CONDUCTING PRE-AWARD AND POST-DELIVERY REVIEWS FOR BUS PROCUREMENTS, Report No. FTA-DC-90-7713-93-1, Rev. B (May 1, 1995), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/conducting-pre-award-and-post-delivery-audits-bus-procurements>.

⁴⁹⁰ Buy America Handbook—Conducting Pre-Award and Post-Delivery Audits for Rolling Stock Procurements, 80 Fed. Reg. 34,487 (Jun. 16, 2015).

⁴⁹¹ FTA, CONDUCTING PRE-AWARD AND POST-DELIVERY AUDITS FOR ROLLING STOCK PROCUREMENTS, Report No. FTA DC-90-7713-93-1, Rev. C (2015), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/buy-america-handbook-conducting-pre-award-and-post-delivery>.

⁴⁹² See Guidance for Industry and Staff, Docket No. FTA 2015 0020 (Jun. 16, 2015), available at <https://www.regulations.gov/docket?D=FTA-2015-0020>.

⁴⁹³ 49 C.F.R. § 661.15(c) (2015); see also 49 U.S.C. § 5325(g) (2016) (granting FTA “the right to examine and inspect all records, documents, and papers, including contracts, related to a project for which a grant is made” by FTA).

⁴⁹⁴ 49 C.F.R. § 661.15(i) (2015).

⁴⁷⁹ 49 C.F.R. § 663.35 (2015).

⁴⁸⁰ 49 C.F.R. § 663.35(a) (2015).

⁴⁸¹ 49 C.F.R. § 663.35(b)(1) (2015).

⁴⁸² 49 C.F.R. § 663.35(b)(2) (2015).

⁴⁸³ 49 C.F.R. § 661.11, App. B, C (2015).

⁴⁸⁴ 49 C.F.R. § 661.11 (2015).

⁴⁸⁵ 49 C.F.R. § 661.11, App. D (2015).

⁴⁸⁶ Notice of Proposed Buy America Waiver for Minivans, 81 Fed. Reg. 30,602, 30,604 (May 17, 2016).

Pre-award or post-delivery audits conducted by the FTA grant recipient do not preclude FTA from conducting its own investigation.⁴⁹⁵

In practice, however, FTA does not routinely initiate investigations; most investigations are prompted by disappointed bidders challenging the Buy America certifications of the successful bidders.⁴⁹⁶ “Any party may petition FTA to investigate the compliance of a successful bidder or offeror with the bidder’s or offeror’s certification.”⁴⁹⁷ In that case, the bidder’s certification of Buy America compliance is presumed to be true.⁴⁹⁸ The petitioner seeking an investigation must overcome that presumption by presenting an adequate “statement of the grounds of the petition and any supporting documentation.”⁴⁹⁹

If the petition for investigation is made before award of a contract, the award typically must be postponed pending FTA’s resolution of the matter.⁵⁰⁰ If the FTA grant recipient elects to proceed with the project while a petition for investigation is unresolved, the FTA grant recipient must make a finding that failure to proceed will result in undue delay or undue harm, or that the procurement is otherwise urgently required.⁵⁰¹ If the FTA grant recipient elects to proceed with award in that situation, FTA may elect not to participate in funding the project.⁵⁰²

If the evidence forecast by the petitioner is sufficient for FTA to initiate an investigation, the burden of proof shifts to the successful bidder to prove that it is in compliance with the FTA Buy America provision. FTA will notify its grant recipient of the information and documentation to be requested from the successful bidder. The grant recipient typically must furnish a response on behalf of the successful bidder (including the requested documentation) within 15 business days of FTA’s request.⁵⁰³ The petitioner has an opportunity to comment on the submission within 10 business days after receipt, and then the grant recipient has one last opportunity to reply within 5 days after receipt of the petitioner’s comments.⁵⁰⁴

FTA will issue a written decision.⁵⁰⁵ The petitioner, successful bidder, or FTA grant recipient may request reconsideration within 10 business days after the decision, if the party “submits new matters

of fact or points of law that were not known or available to the party during the investigation.”⁵⁰⁶ If FTA determines that sufficient new information has been submitted to reconsider its decision, the investigation process may effectively restart, with FTA again submitting a request for information and documentation and the other parties having opportunities to respond, comment, and reply as necessary.⁵⁰⁷

FTA’s 2010 investigation⁵⁰⁸ of a light rail vehicle procurement by the Metropolitan Transit Authority of Harris County (Houston METRO) offers a sample investigation timeline.

To provide some background, in August 2007, Houston METRO had issued a solicitation for a light rail vehicle procurement that stated that the FTA Buy America provision did not apply.⁵⁰⁹ After being informed by FTA that the FTA Buy America provision did apply, Houston METRO amended its solicitation in April 2008 to include the FTA Buy America provision.⁵¹⁰ A Spanish bidder, Construcciones y Auxiliar de Ferrocarriles (CAF), submitted a Buy America certification with its bid in June 2008, certifying compliance with the FTA Buy America provision.⁵¹¹ In March 2009, at CAF’s request, however, Houston METRO requested a Public Interest waiver from FTA for assembly of two prototype vehicles in Spain.⁵¹² In April 2009, FTA denied the waiver request on the basis of CAF’s binding certificate of compliance and also notified Houston METRO that it could not segment the prototype vehicle procurement from the production-and-assembly procurement for purposes of the FTA Buy America provision.⁵¹³ Nevertheless, in April 2009, Houston METRO entered into two separate contracts with CAF: a federally funded contract for 103 light rail vehicles subject to the FTA Buy America provision and a locally funded contract for two prototype vehicles to be assembled in Spain.⁵¹⁴

On April 23, 2010, after learning that Houston METRO had entered into the separate contract with CAF for noncompliant prototype vehicles 1 year

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* (“A request for reconsideration will be subject to the [investigation] procedures...consistent with the need for prompt resolution of the matter.”).

⁵⁰⁸ Memorandum from Kerry L. Miller, FTA Assistant Chief Counsel, to Dorval R. Carter, FTA Chief Counsel, Re: Report of Investigation: Houston METRO—Buy America & Procurement (Sept. 3, 2010) [hereinafter, Houston METRO Investigation Report], available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/report-investigation-houston-metro-buy-america-and-procurement>.

⁵⁰⁹ *Id.* at 11.

⁵¹⁰ *Id.* at 14.

⁵¹¹ *Id.*

⁵¹² *Id.* at 16.

⁵¹³ *Id.*

⁵¹⁴ *Id.* at 17.

⁴⁹⁵ 49 C.F.R. § 663.13 (2015).

⁴⁹⁶ *TCRP LRD 31*, *supra* note 2, at 3.

⁴⁹⁷ 49 C.F.R. § 661.15(b) (2015).

⁴⁹⁸ 49 C.F.R. § 661.15(a) (2015).

⁴⁹⁹ 49 C.F.R. § 661.15(b) (2015).

⁵⁰⁰ 49 C.F.R. § 661.15(m) (2015).

⁵⁰¹ 49 C.F.R. § 661.15(m) (2015).

⁵⁰² 49 C.F.R. § 661.15(n) (2015).

⁵⁰³ 49 C.F.R. § 661.15(e) (2015).

⁵⁰⁴ 49 C.F.R. § 661.15(g) (2015).

⁵⁰⁵ 49 C.F.R. § 661.15(o) (2015).

earlier, FTA initiated an investigation on its own accord, without a formal petition by a disappointed bidder.⁵¹⁵ Because FTA initiated the investigation, the burden of proof was on Houston METRO to demonstrate compliance. FTA made several requests for documents over the next 3 months, finding that Houston METRO's "responses were sporadic and incomplete at times."⁵¹⁶ On July 26, 2010, Houston METRO certified that it had produced all investigation-related documents to FTA.⁵¹⁷

On September 7, 2007, FTA notified Houston METRO of its decision that Houston METRO and CAF violated the FTA Buy America provision by entering into the locally funded contract to produce two prototype vehicles.⁵¹⁸ Key to its decision were FTA's findings that "FTA forced METRO to include the Buy America requirements in its solicitation" in 2008, that CAF certified Buy America compliance on the assumption that a waiver would be available for prototype vehicles, and that METRO segmented the procurement by entering into a separate contract with CAF to manufacture the prototypes in Spain after "FTA denied its request for that waiver."⁵¹⁹ As a result, FTA required Houston METRO to either terminate its contracts with CAF (both the prototype vehicle contract and the larger federally funded procurement) and rebid the procurement or forego an anticipated \$250 million in federal funding.⁵²⁰

⁵¹⁵ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Frank J. Wilson, Houston METRO President, Re: Buy America Investigation (Apr. 23, 2010), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/houston-metro-caf-parsons-transportation-group-april-23-2010>.

⁵¹⁶ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Paula J. Alexander, Houston METRO Chief Counsel, Re: Decision Letter—Buy America & Procurement Investigation (Sept. 7, 2010), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/houston-metro-caf-decision-letter-september-07-2010>.

⁵¹⁷ *Houston METRO Investigation Report*, supra note 508, at 7.

⁵¹⁸ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Paula J. Alexander, Houston METRO Chief Counsel, Re: Decision Letter—Buy America & Procurement Investigation (Sept. 7, 2010), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/houston-metro-caf-decision-letter-september-07-2010>.

⁵¹⁹ *Houston METRO Investigation Report*, supra note 508, at 19.

⁵²⁰ Letter from Peter Rogoff, FTA Administrator, to Gilbert Andrew Garcia & George Greanias, Houston METRO (Sept. 7, 2010), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/letter-houston-metro-buy-america-and-procurement-investigation>. Anticipated federal funding for Houston METRO's light rail vehicle procurement included \$64 million under ARRA and \$141 million under FTA's Major Capital Investment Program (New Starts). Houston METRO Investigation Report, supra note 508, at 3 n.9.

CAF requested reconsideration 10 days later, on September 17, 2010. However, FTA upheld its decision on October 1, 2010, because it determined that "CAF has submitted no new matters of fact or points of law that were not known or available to it during the investigation."⁵²¹ Thus, the investigation procedure was concluded within 6 months of its initiation by FTA.

D. Penalties

1. Termination of Funding by FTA

Procurements that do not comply with the FTA Buy America provision are not eligible to receive FTA funds unless a waiver has been granted.⁵²² Accordingly, violations of the FTA Buy America provision can result in loss of FTA funding for a project. If the FTA grant recipient learns prior to contract award that its contractor is either not in compliance with the FTA Buy America provision or that FTA has not granted a waiver of the contractor's noncompliance, the FTA grant recipient may not award the contract obligating FTA funds.⁵²³ If the FTA grant recipient elects to proceed with contract award while an FTA Buy America investigation is pending (as discussed in Section V.C), FTA reserves the right not to participate in the funding of that contract.⁵²⁴ In the case of a rolling stock procurement, if the FTA grant recipient fails to comply with its audit responsibilities (as discussed in Section V.B), FTA may withhold funds or even require the FTA grant recipient to repay funds previously received from FTA.⁵²⁵

2. Termination of Contract by FTA Grant Recipient

The FTA Buy America provision is to be a material term of any FTA-funded contract between an FTA grant recipient and its contractor. The FTA grant recipient must include a notice of the applicability of the FTA Buy America provision in its solicitation or request for bids.⁵²⁶ As discussed in Section V.A, the FTA grant recipient must require bidders to certify compliance or noncompliance with the FTA Buy America provision as a condition of bid responsiveness. The FTA grant recipient's contractor is

⁵²¹ Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to James J. Maiwurm & Shanker A. Singham, Squire, Sanders & Dempsey, LLP, Re: Request for Reconsideration—Buy America & Procurement Investigation (Oct. 1, 2010), available at <https://www.transit.dot.gov/regulations-and-guidance/buy-america/caf-houston-metro-october-01-2010>.

⁵²² 49 C.F.R. § 661.5(a) (2015).

⁵²³ 49 C.F.R. § 661.17 (2015).

⁵²⁴ 49 C.F.R. § 661.15(n) (2015).

⁵²⁵ 49 C.F.R. § 663.15 (2015).

⁵²⁶ 49 C.F.R. § 661.13(b) (2015).

bound by its Buy America certificate.⁵²⁷ If the FTA grant recipient has awarded a contract, and the contractor is unable to comply with its Buy America certificate, the contractor is in breach of the contract.⁵²⁸ A wide variety of legal and equitable remedies may be available under the contract,⁵²⁹ including requiring the contractor to get into compliance at no additional cost to the FTA grant recipient,⁵³⁰ terminating the contract for default,⁵³¹ and even the filing of a lawsuit by the FTA grant recipient against its contractor for damages (e.g., for the additional costs associated with hiring a replacement contractor).

The FTA regulations do not provide similar remedies for the FTA grant recipient's contractor whose subcontractor or supplier fails to comply with the FTA Buy America provision. The contractor must ensure that its subcontract document puts the subcontractor on notice that the FTA Buy America provision applies to the subcontract, and that the subcontract provides appropriate remedies for the contractor in the event that the subcontractor fails to comply with the FTA Buy America provision. For example, in *Albert M. Higley Co. v. N/S Corp.*,⁵³² the U.S. Court of Appeals for the Sixth Circuit allowed a contractor to maintain a breach of contract action in federal court against its subcontractor for failing to comply with the FTA Buy America provision, when Buy America compliance was a material term of the subcontract.

Knowledge of the applicability of the FTA Buy America provision will not be imputed to subcontractors, however, when the FTA grant recipient's contractor fails to expressly flow down the Buy America requirements in its subcontracts. In *Energy Labs, Inc. v. Edwards Engineering, Inc.*,⁵³³ the U.S. District Court for the Northern District of Illinois allowed a subcontractor to maintain a breach of contract action in federal court against a prime contractor for the CTA. Although the prime contractor was required to certify compliance with the FTA

Buy America provision to CTA, the subcontract agreement did not impose the FTA Buy America requirements on the subcontractor and did not provide that the subcontract could be terminated for the subcontractor's failure to comply with the FTA Buy America provision. Therefore, the subcontractor could sue the prime contractor for breach of contract, when the prime contractor cancelled the subcontract and retained a replacement domestic contractor to comply with the FTA Buy America provision.

3. Contractor Suspension or Debarment by FTA

A contractor's "willful refusal" to comply with its Buy America certificate can subject the contractor to debarment or suspension.⁵³⁴ Suspension will prevent the contractor from participating in the FTA-funded contract pending completion of FTA's investigation "and any judicial or administrative proceedings that may ensue."⁵³⁵ Debarment will exclude the contractor from participating in future FTA-funded contracts for a fixed period of time,⁵³⁶ and typically would be imposed by FTA as a result of a criminal conviction or civil judgment imposed by a court. If FTA or a court determines that a contractor has intentionally falsified its Buy America certification, by falsely representing that products are domestic when they are not, the contractor is ineligible to receive FTA grant funds.⁵³⁷

FTA's regulations authorize FTA, and not FTA grant recipients, to suspend or debar contractors for violations of the FTA Buy America provision. This probably precludes state or local transit agencies from suspending or debarring their contractors for violations of the FTA Buy America provision. In *CF&I Steel, L.P. v. Bay Area Rapid Transit District*,⁵³⁸ a steel manufacturer filed suit against the San Francisco Bay Area Rapid Transit District (BART) after BART resolved to refrain from purchasing or using steel from the manufacturer over concerns about "foreign content" as well as labor standards. A steelworkers union had notified BART that the manufacturer was not in compliance with the FTA Buy America provision and certain labor laws. BART conducted an investigation, and although it found no violations of the FTA Buy America

⁵²⁷ 49 C.F.R. § 661.13(c) (2015).

⁵²⁸ 49 C.F.R. § 661.17 (2015).

⁵²⁹ 49 C.F.R. § 663.39(a) (2015) ("The [FTA grant] recipient may exercise any legal rights it has under the contract or at law.").

⁵³⁰ See, e.g., 49 C.F.R. § 663.39(b) (2015) (allowing an FTA grant recipient to conditionally accept rolling stock pending the manufacturer achieving compliance with the FTA Buy America provision "within a reasonable period of time").

⁵³¹ See, e.g., 49 C.F.R. § 663.39(a) (2015) (allowing an FTA grant recipient to reject a rolling stock delivery if it does not comply with the FTA Buy America provision).

⁵³² 445 F.3d 861 (6th Cir. 2006).

⁵³³ No. 14-CV-07444, 2015 U.S. Dist. LEXIS 71058 (N.D. Ill. Jun. 2, 2015).

⁵³⁴ 49 C.F.R. § 661.19 (2015). Although FTA's regulations provide that the suspension or debarment proceeding is to be conducted according to 49 C.F.R. Part 29, those procedures have been superseded and replaced by the suspension and debarment proceedings for federal grant-funded projects at 2 C.F.R. Part 180.

⁵³⁵ 2 C.F.R. § 180.1015 (2015).

⁵³⁶ 2 C.F.R. § 180.925 (2015).

⁵³⁷ 49 U.S.C. § 5323(j)(8) (2016).

⁵³⁸ No. 00-CV-00529, 2000 U.S. Dist. LEXIS 13810 (N.D. Cal. Sept. 19, 2000).

provision, it issued the resolution to encourage the manufacturer to resolve its labor dispute with the union, based in part on an agreement from the union to stop raising questions about the domestic content of the steel. The U.S. District Court for the Northern District of California found that BART had effectively debarred the manufacturer. The court further determined that BART exceeded its authority by debarring the manufacturer on the basis of federal labor laws, because the federal government has preempted that field, and “[s]tate and local governments are precluded from adding supplemental penalties for violations of these federal laws.”⁵³⁹ Likewise, a state or local transit agency probably cannot suspend or debar its contractor for violating the FTA Buy America provision, because federal regulations authorize FTA (and not the FTA grant recipient) to suspend or debar noncompliant contractors.⁵⁴⁰ There may be state and local procedures allowing the state or local transit agency to suspend or debar contractors for violations of state and local requirements, however, including state Buy America requirements that are similar to or even more stringent than the FTA Buy America provision (as discussed in Section I.C.4).

4. False Claims Act Liability

Under the Federal False Claims Act, anyone who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval” may be liable to the federal government for a civil penalty, as well as treble the government’s actual damages resulting from the false or fraudulent claim.⁵⁴¹ For many years, it was questionable as to whether a false Buy America compliance certification might qualify as a false or fraudulent claim for purposes of the False Claims Act. The FTA Buy America provision does not expressly provide for liability under the False Claims Act for false Buy America compliance certifications. However, as a result of 2009 revisions made by Congress to the False Claims Act, it is likely that false certifications of compliance with the FTA Buy America provision can subject a contractor, supplier, or manufacturer to civil liability under the False Claims Act.

In 2004, in *United States ex rel. Totten v. Bombardier Corp.*,⁵⁴² the U.S. Court of Appeals for the D.C. Circuit concluded that a compliance certification made

by a rail rolling stock manufacturer to a USDOT grant recipient was not a claim made to the federal government for purposes of the False Claims Act, even if the claimant was seeking to be paid with USDOT grant funds. The *Totten* court’s opinion was based on statutory construction of the language of the False Claims Act, which at the time applied to claims presented “to an officer or employee of the United States Government or a member of the Armed Forces of the United States,”⁵⁴³ and the court concluded that compliance certification made to a federal grant recipient is not a claim made to the federal government.⁵⁴⁴ Although the U.S. Supreme Court in 2008 disagreed that the False Claims Act only applies to claims presented directly to the federal government, it agreed with the *Totten* court that the False Claims Act does not apply to all false claims made to federal grant recipients,⁵⁴⁵ and thus concluded that the False Claims Act is applicable only when the false claimant specifically intends to defraud the federal government and not merely a federal grant recipient (such as a state or local transit agency).

At the time of the *Totten* decision, another *qui tam* case was pending in federal court, this time alleging that false certifications of compliance with the FTA Buy America provision constituted false claims for purposes of the False Claims Act. In *United States ex rel. Sanders v. North American Bus Industries, Inc.*,⁵⁴⁶ the relator alleged that North American Bus Industries (NABI) understated the cost of bus shells that it imported from Hungary, in order to qualify for a rolling stock Domestic Content waiver from the FTA Buy America provision for buses sold to WMATA, the Maryland Transit Administration, and MDT. As with the defendant manufacturer in *Totten*, however, NABI argued that the False Claims Act did not apply because NABI made its Buy America certifications to the local transit agencies rather than to FTA and sought payment from the local transit agencies rather than FTA. FTA paid funds to the local transit agencies rather than to NABI, and would have done so with or without NABI’s allegedly false Buy America certificate (argued NABI).⁵⁴⁷ In 2008, the U.S. Court of Appeals

⁵⁴³ 31 U.S.C. § 3729(a)(1) (2008).

⁵⁴⁴ *Totten*, 380 F.3d at 502 (D.C. Cir. 2004) (“[C]laims were presented only to Amtrak for payment or approval, and Amtrak is not the Government.”).

⁵⁴⁵ *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, 553 U.S. 662, 669, 128 S. Ct. 2123, 2128, 170 L. Ed. 2d 1030, 1038 (2008) (quoting *Totten* for the proposition that Congress did not intend for False Claims Act liability to attach to all false claims made to federal grant recipients such as colleges and universities).

⁵⁴⁶ 546 F.3d 288 (4th Cir. 2008).

⁵⁴⁷ Brief of Appellees at 41–43, *U.S. ex rel. Sanders v. North American Bus Indus., Inc.*, No. 07-1773 (4th Cir. Nov. 20, 2007).

⁵³⁹ *Id.*, at *1.

⁵⁴⁰ 49 C.F.R. § 661.19 (2015); see also 2 C.F.R. § 180.930 (2015) (authorizing the federal agency to debar contractors of federal grant recipients); 2 C.F.R. § 180.1010 (2015) (authorizing the federal agency to suspend contractors of federal grant recipients).

⁵⁴¹ 31 U.S.C. § 3729(a)(1).

⁵⁴² 380 F.3d 488, 363 U.S. App. D.C. 180 (D.C. Cir. 2004).

for the Fourth Circuit declined to decide whether the False Claims Act applied to Buy America certifications made by contractors to FTA grant recipients, ruling instead that the *Sanders* relator did not file suit within the statutory limitations period for the False Claims Act.⁵⁴⁸

Shortly thereafter, in May 2009, Congress revised the False Claims Act to clarify that it applies to false claims made to federal grant recipients by their contractors.⁵⁴⁹ In congressional debate on the revision, one justification offered for the legislation was to allow the federal government to pursue recovery from contractors who make false claims to federal grant recipients rather than directly to the federal government, specifically citing the *Totten* case.⁵⁵⁰ As a result, the False Claims Act now specifically applies to claims made to federal grant recipients by their contractors (or to the contractors by their subcontractors) if the federal government “provides or has provided any portion of the money or property requested or demanded,” or if the federal grant recipient or its contractor will be reimbursed by the federal government “for any portion of the money or property which is requested or demanded.”⁵⁵¹

Thereafter, in 2012, in *United States ex rel. King v. Novum Structures, Inc.*,⁵⁵² a qui tam relator alleged that her former employer supplied foreign materials to FTA-funded projects, including a streetcar expansion project for the New Orleans Regional Transit Authority and the Miami Intermodal Center project for the Florida Department of Transportation, in violation of the FTA Buy America provision. The relator alleged that Novum’s applications for payment therefore constituted false claims under the False Claims Act. The federal government intervened on December 31, 2015.⁵⁵³ In January 2016, the U.S. Department of Justice announced that Novum agreed to pay \$2.5 million to settle the False

Claims Act allegations.⁵⁵⁴ U.S. Secretary of Transportation Anthony Foxx stated, “The U.S. Department of Transportation considers compliance with Buy America to be a fundamental requirement when a company is involved in federal projects. As we work to be good stewards of limited federal resources, the department applauds the Department of Justice and our own Office of Inspector General for the successful prosecution of this case.”⁵⁵⁵ There is no longer any serious disagreement that the False Claims Act applies to false certifications of compliance with the FTA Buy America provision.

5. Criminal Penalties

If a contractor’s Buy America certification is “knowingly and willfully...false, fictitious, or fraudulent,” the contractor or the individual who made the certification is subject to criminal fines and imprisonment of up to 5 years.⁵⁵⁶ The FTA Buy America provision is unique among the federal transportation grant Buy America provisions by expressly providing for criminal liability.

In March 2016, in the *Novum* case previously discussed, the defendant contractor pleaded guilty to falsifying, concealing, and covering up material facts from the federal government, based on charges that it falsely certified compliance with the FTA Buy America provision on multiple projects, including the Miami Intermodal Center and the New Orleans bus canopy project.⁵⁵⁷ Novum was thus ordered to pay a \$500,000 criminal fine,⁵⁵⁸ in addition to its \$2.5 million payment to settle civil claims.

E. Legal Action by Disappointed Bidders

Historically, a disappointed bidder who disputed an FTA grant recipient’s application of the FTA Buy America provision was generally not permitted to maintain a lawsuit in federal court to prevent a contract award to its competitor. As a result of 2005 revisions by Congress as part of SAFETEA-LU, however, disappointed bidders may be able to bring suit in federal court to challenge decisions by FTA

⁵⁴⁸ *Sanders*, 546 F.3d at 296 (dismissing FCA action as untimely based on the statute of limitations, and not reaching the question of whether a false certification of compliance with the FTA Buy America provision constitutes a false claim under the FCA).

⁵⁴⁹ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111 21, § 4, 123 Stat. 1617 (May 20, 2009).

⁵⁵⁰ 155 CONG. REC. S2,424–25 (Feb. 24, 2009) (statement of Sen. Grassley); 155 CONG. REC. S2,428 (Feb. 24, 2009) (statement of Sen. Durbin).

⁵⁵¹ 31 U.S.C. § 3729(b)(2)(A)(ii) (2016).

⁵⁵² Complaint, *U.S. ex rel. King v. Novum Structures, Inc.*, No. 12-CV-00860 (E.D. Wis. Aug. 23, 2012).

⁵⁵³ The Government’s Notice of Election to Intervene in Part and Decline to Intervene in Part, *U.S. ex rel. King v. Novum Structures, Inc.*, No. 12 CV 00860 (E.D. Wis. Dec. 31, 2015).

⁵⁵⁴ U.S. Dep’t of Justice, Wisconsin Architectural Firm to Plead Guilty and Pay \$3 Million to Resolve Criminal and Civil Claims (Jan. 5, 2016), available at <https://www.justice.gov/opa/pr/wisconsin-architectural-firm-plead-guilty-and-pay-3-million-resolve-criminal-and-civil-claims>.

⁵⁵⁵ *Id.*

⁵⁵⁶ 18 U.S.C. § 1001 (2016); see also 49 U.S.C. § 5323(l)(1) (2016) (making a certificate of compliance with the FTA Buy America provision subject to 18 U.S.C. § 1001).

⁵⁵⁷ Information, *United States v. Novum Structures, Inc.*, No. 16 CR 00001 (E.D. Wis. Jan. 5, 2016).

⁵⁵⁸ Judgment in a Criminal Case, *United States v. Novum Structures, Inc.*, No. 16-CR-00001 (E.D. Wis. Mar. 7, 2016).

that influence contract award. Relief may also be available in state court, as discussed herein.

In the late 1980s, in *Ar-Lite Panelcraft, Inc. v. Siegfried Constr. Co., Inc.*,⁵⁵⁹ a product supplier sued the Niagara Frontier Transportation Authority (NFTA) and a number of its potential contractors on a station construction project after FTA granted NFTA a Buy America waiver for the project. The waiver allowed contractors to offer foreign products instead of the plaintiff's domestic product, which had failed testing to determine whether it satisfied the project's technical specifications. The U.S. District Court for the Western District of New York dismissed the plaintiff's Buy America contentions for failure to state a claim, due to the absence of a private cause of action in the FTA Buy America provision. The court stated that the FTA Buy America provision "does not create a federal right in favor of [noncompliant domestic manufacturers], and there is no indication of legislative intent to create such a right."⁵⁶⁰

In a similar manner, a disappointed bidder has historically not had standing to maintain a federal lawsuit seeking declaratory or injunctive relief when the disappointed bidder disputes the FTA grant recipient's application of the FTA Buy America provision. In the early 2000s, in *Conti Enterprises, Inc. v. Southeastern Pennsylvania Transportation Authority*,⁵⁶¹ a low bidder who certified Buy America noncompliance challenged SEPTA's decision to not seek a waiver from FTA and instead award a contract to the only bidder who certified compliance with the FTA Buy America provision. In a decision based on Pennsylvania law, the U.S. District Court for the Eastern District of Pennsylvania concluded that the disappointed bidder did not have standing to challenge SEPTA's decision. In contrast with FTA or state governments who fund transit projects and have "direct interests in overseeing the expenditure of tax revenues," the Court concluded that a bidder's interest is typically too remote and indirect to maintain suit to enforce federal procurement regulations.⁵⁶²

One exception in which a federal court did allow a disappointed bidder to bring an action seeking injunctive relief that involved the FTA Buy America provision was *Seal and Company, Inc. v. Washington Metropolitan Area Transit Authority*⁵⁶³ in 1991. In

Seal, a low bidder challenged WMATA's decision that its bid was nonresponsive for failure to submit a Buy America certificate with the bid, and sought an injunction preventing the award of a contract to its competitor. The U.S. District Court for the Eastern District of Virginia concluded that the plaintiff had standing as an "aggrieved bidder," because "Congress intended WMATA to conduct its procurements as a federal agency would, and to be subject to suits by aggrieved bidders for procurement activities in violation of" applicable procurement regulations.⁵⁶⁴

The *Seal* decision had limited precedential authority outside of WMATA procurements, as most bidders typically deal directly not with FTA or a federally chartered transit authority, but rather with a state or local transit agency not chartered by Congress. In the typical situation, where an FTA-funded contract was let by a state or local transit agency, a disappointed bidder could not manufacture standing by asserting its claim for declaratory or injunctive relief against FTA directly. In 2004, in *Cubic Transportation Systems, Inc. v. Mineta*,⁵⁶⁵ a disappointed bidder seeking to supply fare collection systems to MBTA filed suit against the FTA Administrator and USDOT Secretary, in their official capacities, challenging the low bidder's compliance with the FTA Buy America provision. The plaintiff had previously requested an FTA investigation, but FTA concluded that the low bidder complied with the FTA Buy America provision, and the plaintiff sought a declaratory judgment that the low bidder did not comply. The U.S. District Court for the District of Columbia concluded that the plaintiff did not have standing to challenge FTA's decision, because the plaintiff was not aggrieved by any action taken by FTA: "FTA did not make the final decision awarding the MBTA contract to [the low bidder], and a finding by FTA that [the low bidder] was not compliant with the Buy America regulations would not have necessarily resulted in awarding the contract to [plaintiff]."⁵⁶⁶

Shortly after the *Conti* and *Cubic* decisions, with passage of SAFETEA-LU in 2005,⁵⁶⁷ Congress provided that a "party adversely affected by an agency action under" the FTA Buy America provision "shall have the right to seek review" under the Federal Administrative Procedure Act (APA).⁵⁶⁸ The APA entitles the adversely affected party to judicial review by a federal court in an action against the United States seeking "relief other than money damages," such as an injunction against contract

⁵⁵⁹ No. 86-CV-00525, 1989 U.S. Dist. LEXIS 6394 (W.D.N.Y. Mar. 10, 1989). For a detailed discussion of the *Ar Lite* case, see *TCRP LRD 31, supra* note 2, at 28.

⁵⁶⁰ *Id.*

⁵⁶¹ No. 03-CV-05345, 2003 U.S. Dist. LEXIS 19848 (E.D. Penn. Oct. 14, 2003).

⁵⁶² *Id.* at *5.

⁵⁶³ 768 F. Supp. 1150 (E.D. Va. 1991).

⁵⁶⁴ *Id.* at 1157.

⁵⁶⁵ 357 F. Supp. 2d 261 (2004).

⁵⁶⁶ *Id.* at 263 n.2.

⁵⁶⁷ *SAFETEA-LU, supra* note 108, at § 3023(i).

⁵⁶⁸ 49 U.S.C. § 5323(j)(11) (2016).

award.⁵⁶⁹ Federal courts have routinely held that a disappointed bidder for a federal contract constitutes a party “adversely affected by agency action” for purposes of the APA.⁵⁷⁰ “Agency action” for purposes of the APA, however, refers to action by a federal agency such as FTA,⁵⁷¹ and generally does not refer to action taken by a state or local transit agency. Potentially, FTA’s decision to grant or deny a waiver could constitute “agency action” that would allow a disappointed bidder to bring suit against the federal government if FTA’s decision results in loss of a contract award. Furthermore, disappointed bidders should consider their options to request an FTA investigation, as discussed in Section V.C, which will delay contract award if the request is timely. Potentially, disappointed bidders could then bring suit in federal court under the APA, using FTA’s final decision in the investigation as the “agency action” that triggers their right to judicial review.

Absent FTA action, the disappointed bidder typically does not have access to federal courts to prevent a contract award to its competitor. The FTA grant recipient will typically have a bid protest procedure, however, which will usually have strict deadlines under which a disappointed bidder can protest the application of the FTA Buy America provision. The FTA grant recipient may be subject to suit in state court, by way of the disappointed bidder either appealing the FTA grant recipient’s final decision on the bid protest, requesting a declaratory judgment that the FTA grant recipient improperly applied the FTA Buy America provision, requesting injunctive relief to prevent contract award while a Buy America protest is considered, or some combination of the above claims. For example, in *Estes Company v. Rock Island County Metropolitan Mass Transit District*,⁵⁷² the low bidder on a construction project for MetroLINK brought suit in Illinois state court, seeking declaratory and injunctive relief, when MetroLINK determined that the low bidder failed to comply with the FTA Buy America provision and awarded the construction contract to its competitor. MetroLINK attempted to have the case removed to federal court, contending that the declaratory and injunctive relief sought by the low bidder “necessarily depends on the interpretation and application of the Buy America provision of the STAA—or the resolution of a substantial question of federal law.” The U.S. District Court

⁵⁶⁹ 5 U.S.C. § 702 (2016).

⁵⁷⁰ *Seal & Co., Inc. v. Wash. Metro. Area Transit Auth.*, 768 F. Supp. 1150, 1154 (E.D. Va. 1991).

⁵⁷¹ 5 U.S.C. § 701(b)(1) (2016).

⁵⁷² No. 12-CV-04087 (C.D. Ill. Sept. 26, 2012).

for the Central District of Illinois disagreed, and remanded the case back to Illinois state court:

While that determination will necessarily entail an analysis of whether Plaintiff complied with the [FTA Buy America provision] and if Plaintiff’s Buy America Certification Form constituted a material variance, the Court finds that the Plaintiff’s complaint alleges a state law cause of action and that the interpretation and application of the Buy America provision of the STAA in this context does not require the resolution of a substantial question of federal law.⁵⁷³

In short, although a disappointed bidder’s options are limited, there will typically be some avenue by which the disappointed bidder can seek judicial review of a given agency’s application or interpretation of the FTA Buy America provision. As this could delay contract award, FTA grant recipients should closely coordinate with FTA on the state or local transit agency’s application of the FTA Buy America provision, to ensure that the grant recipient’s interpretation is consistent with FTA’s interpretation, so that the grant recipient’s contract award will withstand judicial review.

VI. CONCLUSIONS

Over the course of nearly 40 years, the FTA Buy America provision has become a mainstay of FTA grant-funded procurements. Although the text of the FTA Buy America statute can appear deceptively simple, a review of FTA’s regulations that implement the statute leaves no question that compliance is not a simple matter.

Over the years, FTA has been required to adapt its regulations and policies to apply the general statutory requirements to situations not specifically addressed by Congress, such as rolling stock overhauls and utility relocation contracts. In particular, FTA’s 2007 final rule in response to SAFETEA-LU, which adopted lists of representative end products and the “non-shift” rule (whereby end products, components, and subcomponents are always considered end products, components, and subcomponents from one contract to the next), resulted in much less uncertainty and more consistency in how the FTA Buy America provision is applied.

The 2007 final rule, combined with FTA’s earlier adoption of representative lists of components and final assembly activities, actually streamlines application of the FTA Buy America provision, even though these and other rulemakings have expanded FTA’s Buy America regulations. FTA grant recipients may not always like the application of the FTA Buy America rules, which can sometimes appear harsh (as seen in some of the waiver denials

⁵⁷³ *Id.*

discussed herein). However, FTA grant recipients now have greater assurance of fair, predictable, and consistent treatment, especially with the heightened notice-and-comment requirements applicable to the FTA Buy America provision in recent years.

With the domestic content requirements for rolling stock scheduled to increase in FY 2018, and again in

FY 2020, the FTA Buy America provision will continue to present challenges to FTA, its grant recipients, and their contractors and manufacturers for the foreseeable future. If history is any indication, the FTA Buy America provision will continue to be refined through the rulemaking process, to address compliance challenges faced by FTA grant recipients.

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