

Buy America

Overview of the New Build
America/Buy America (BABA)
Requirements

Daniel G. Smith
Director of Technical Program Management
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Agenda

- I. Introduction
- II. Review of 49 CFR Part 661: Buy America Requirements before BABA
 - I. Manufactured Goods/Construction/Revenue Vehicle Mid-life Rehabilitation
- III. Waivers
- IV. Certification Errors
- V. Build America/Buy America: Expansion of the Requirements
- VI. Questions and Discussion

What is Buy America?

- A body of federal regulations that require steel, iron, and manufactured goods purchased with federal tax dollars for use in a transit project be produced in the United States
- *Buy America* applies to purchases of steel, iron, and manufactured goods--including rolling stock and capital leases that are supported with FTA funding
- Buy *American*a and Buy *America*a are not the same thing

Buy American

- An act passed by Congress in 1933 as part of the government's response to the Great Depression
- Prohibits the federal government from acquiring an article, material or supply for public use within the United States that is not a domestic end product and allows only domestic construction materials to be used for public use
- Only applies to purchases made directly by the federal government

Buy American regulations do not apply to METRO

Buy America

- 1982 Surface Transportation Assistance Act
- The Secretary of Transportation “*shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act...unless steel, iron, and manufactured products used in such projects are produced in the United States*”
- Implemented in 1983 and only applies when FTA funding is used to support the transaction

METRO must comply with Buy America requirements

49 CFR Part 661

Part 661 applies to:

- Construction Activities
- Materials and Manufactured Goods
- Revenue Vehicle Midlife Rehabilitation Activities
- Anything not covered in Part 663: *Revenue Vehicles*

We will *not* be reviewing 49 CFR Part 663 today

49 CFR Part 661.5: General Requirements

- (a) Except as provided in Section 661.7 (waivers) and Section 661.11(rolling stock) of this part, no funds may be obligated by FTA for a grantee project unless all iron, steel, and manufactured products used in the project are produced in the United States
- (b) All steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives

49 CFR Part 661.5: General Requirements

- (c) The steel and iron requirements apply to all construction materials made primarily of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams and columns, running rail and contact rail. These requirements do not apply to steel or iron used in *components or subcomponents* of other manufactured products or rolling stock, or to bimetallic power rail incorporating steel or iron components.

FTA Terminology

End Products
Components
Subcomponents

These three terms are used by FTA to categorize products. Categorizing the product allows us to apply the correct standard and determine compliance.

What is an End Product?

FTA's definition (661.3)

- An End Product means any vehicle, structure, product, article, material, supply, or system which directly incorporates constituent components at the final assembly location that is acquired for public use under a federally-funded third-party contract and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s)

End Products: Examples

- Buses, vans, cars, railcars, locomotives, trolley cars, ferry boats and vehicles used for support services. Train control, communication, and traction power equipment are also considered end products
- Steel and iron end products include structures, bridges, and track work; running rail, contact rail, and turnouts
- Manufactured end products include structures (terminals, depots, garages, and bus shelters) ties and ballast; contact rail not made primarily of steel or iron, fare collection systems; computers; information systems; security systems; data processing systems; mobile lifts, hoists, and elevators

Components and Subcomponents

FTA's definitions:

- *Component* means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location
- *A subcomponent* is any article, material, or supply, whether manufactured or unmanufactured, that is one step removed from a component in the manufacturing process and that is incorporated directly into the component

Hierarchy

- *End products* are a collection of components, which are a collection of subcomponents

For example:

- A transit bus is classified as an end product (whole)
- Engines, exhaust systems, and HVAC systems are classified as components of a transit bus (large systems or pieces)
- Spark plugs, tailpipes, and headlamps are classified as subcomponents (small pieces)

Determining Compliance

For a manufactured product to be considered produced in the United States:

- (1) All of the manufacturing processes for the product must take place in the United States; and
- (2) All of the components of the product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents

Procurement Responsibilities

- Include the Buy America contract clause in all federally funded purchases for construction, materials and supplies that exceed \$150,000
- Make sure the Buy America certification is correctly completed by the vendor immediately upon opening bids and proposals

Part 661.7 Waivers

This section sets out the conditions for the three types of statutory waivers

Public Interest
Non-Availability
Price Differential

661.7 (b) Public Interest Waivers

- Granted by the FTA Administrator if the Administrator finds their application would be inconsistent with the public interest
- Must issue a detailed written statement justifying why the waiver is in the public interest
- Must publish this justification in the Federal Register, providing the public with a reasonable time for notice and comment of not more than seven calendar days

Examples: Exemption of purchases with a value less than \$150,000
 Microprocessors and software

661.7 (c) Non-Availability Waiver

- The Administrator may waive the requirement if they find that the materials for which a waiver is requested are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality
- If a waiver request is denied, FTA must identify a domestic supplier and product of comparable quality

661.7 (d) Price Differential Waiver

- The Administrator may waive the requirements if they find that the inclusion of a domestic item or material will increase the cost of the contract between the grantee and its supplier of that item or material by more than 25%
- To determine eligibility, multiply the low foreign offer (price) by 1.25. If the product is still lower than the domestic bid price, it satisfies the eligibility requirement for a price differential waiver
- It is the grantee's decision (i.e. Metro) to determine whether a waiver will be submitted. The vendor cannot compel the grantee to apply for a waiver.

Certification Errors

What happens when a vendor fails to correctly complete or submit the Buy America certification with their response?

What happens if they:

- Check both boxes indicating compliance and non-compliance?

- Leave it blank?

- Fail to sign the certificate?

- Fail to include the certificate with their response?

Certification Errors

- Correctly completing the Buy America certificate is a matter of *responsiveness*. If it is wrong, the bid is non-responsive and cannot be considered.
- It is not a minor informality. It cannot be resolved or repaired by requesting a new certificate from the vendor.

Certification Errors

- 661.13 (B)(1) A bidder or offeror who has submitted an incomplete Buy America certificate or an incorrect certificate of noncompliance through inadvertent or clerical error (but not including failure to sign the certificate, submission of certificates of both compliance and non-compliance, or failure to submit any certification), may submit to the FTA Chief Counsel within ten (10) days of bid opening of submission or a final offer, a written explanation of the circumstances surrounding the submission of the incomplete or incorrect certification in accordance with 28 U.S.C 1746, sworn under penalty of perjury, stating that the submission resulted from inadvertent or clerical error

Certification Errors

- For negotiated procurements, compliance with Buy America requirements shall be determined on the basis of the certification submitted with the final offer or final revised proposal. However, where a grantee awards on the basis of initial proposals without discussion, the certification submitted with the initial proposals shall control.
- Certification based on ignorance of the proper application of the Buy America requirements is not an inadvertent or clerical error

Certification Errors

- Whether or not a bidder or offeror certifies that it will comply with the applicable requirement, such bidder or offeror is bound by its original certification (in the case of a sealed bidding procurement) or its certification submitted with its final offer (in the case of a negotiated procurement) and is not permitted to change its certification after bid opening or submission of a final offer. Where a bidder or offeror certified that it will comply with the applicable Buy America requirements, the bidder, or offeror, or grantee is not eligible for a waiver of those requirements.

The New Requirements

- On November 15, 2021, the Bipartisan Infrastructure Law, which included the *Build America, Buy America* (BABA) provisions was signed into law
- BABA expands the coverage and application of Buy America requirements in federal financial assistance programs for infrastructure
- BABA requires all iron, steel, manufactured products and **construction materials** purchased with federal funding be produced in the United States

The New Requirements

- The *Infrastructure Investment and Jobs Act* was signed on 11/15/2021
- Build America/Buy America requirements went into effect on 5/14/2022
- A temporary public interest waiver was issued on 5/19/22 (180 days)
- That waiver expired on 11/10/2022

Caveat

The guidance that has been issued to date is broad and general. FTA is still developing guidance for their grantees to address unique situations that innovative procurement processes such as *progressive design build* present.

There are some questions we are unable to address at this juncture and will provide program updates as we receive them.

New Definition: Construction Materials

- Includes an article, material, or supply—other than an item primarily iron or steel, a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives---that consist primarily of:
 - Non-ferrous metals
 - Plastic or polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
 - Glass (including optic glass)
 - Lumber
 - Drywall

1. Non-Ferrous Metals

Ferrous metals contain iron and non-ferrous metals do not

- Examples of ferrous metals include iron and steel, which were already subject to Buy America requirements before BABA was enacted
- Examples of non-ferrous metals include copper, tin, bronze, aluminum, zinc, etc.

All metals must now comply with Buy America

2. Plastics and Polymer-based Products

- These include polyvinylchloride (PVC), composite building materials, and polymers used in fiber optic cables
- Examples of polymers commonly used during construction include plastics, rubber, thermoplastic elastomers, adhesives, foams, paints, and sealants
- Applications include areas such as flooring, windows, cladding, rainwater pipes, membranes, seals, glazing, insulation, and signage

2. Plastics and Polymer-based Products

- Composite building materials include concrete, plywood, fiberglass, ceramic tiles, reinforced plastics, cement, steel-reinforced concrete, and composite wooden beams
- The list is not limited to the examples presented above

3. Glass

All glass, optical glass, lenses, windows, station canopies, etc.

4. Lumber

- Lumber is wood that has been processed into uniform sizes and includes beams, planks, and boards
- Used in framing and finishing; floors, wall panels, window frames, etc.
- Note: Railroad ties are treated as a manufactured product and not a building material

5. Drywall

- Drywall (also known as plasterboard, dry lining, wallboard, sheet rock, gypsum board) used in the construction of interior walls and ceilings

These five categories cover just about everything needed to build something

Exclusions

- These new requirements only apply to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project
 - They *do not* apply to tools, equipment, and supplies, such as temporary scaffolding brought to the construction site and removed at or before the completion of the infrastructure project
 - They *do not* apply to equipment and furnishings, such as moveable chairs, desks, and portable computer equipment that are used at or within the finished infrastructure project but are not an integral part of or permanently affixed to the structure

Determining Compliance

The implementation guidance states that an article, material, or supply should be classified into one of the following categories:

Iron and Steel

A Manufactured Product

A Construction Material

An article or supply should not be considered to fall into multiple categories

Determining Compliance

Items consisting of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process should be treated as a manufactured product, rather than a construction material

Determining Compliance

For a manufactured product to be considered produced in the United States:

- (1) All of the manufacturing processes for the product must take place in the United States; and
- (2) All of the components of the product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.

Waivers for Existing Projects

DOT has issued a general public interest waiver of BABA's domestic construction materials requirement for;

1. Any contract entered into before November 10, 2022, (date of waiver expiration)
2. Any contract entered into before March 10, 2023 if the solicitation was published prior to May 14, 2022

Waivers for Existing Projects

For contracts executed after May 14, 2022, the waiver does not apply to any construction materials that a contractor or subcontractor takes delivery of on or after October 1, 2024

Contract Modifications

- The program guidance has not addressed modifications to existing contracts
- Our colleagues in Grants Management have been informally advised by FTA that contract modifications will be required to comply with the new requirements, but guidance to support their advice has not yet been issued

This is one of the “loose ends” that will require additional consideration

Round Up

- Contract clauses and templates are being updated
- Project estimators and the vendor community need to consider these requirements when developing estimates and proposals
- COTRs and Project Managers need to expand the pool of materials they review to ensure vendor compliance

FTA is still developing guidance to support the new requirements

End of Section