

DEPARTMENT OF TRANSPORTATION**Federal Transit Administration****49 CFR Part 661**

[Docket No. FTA-95-471]

RIN 2132-AA42

Buy America Requirements

AGENCY: Federal Transit Administration, DOT.

ACTION: Final rule.

SUMMARY: This final rule implements section 1048 of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), which amends the Federal Transit Administration's (FTA) Buy America requirements, and makes other amendments intended to update and clarify FTA's Buy America regulation.

EFFECTIVE DATE: February 16, 1996.

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SUPPLEMENTARY INFORMATION:**I. The Notice of Proposed Rulemaking**

On September 12, 1995, FTA issued a notice of proposed rulemaking (NPRM) seeking to implement section 1048 of the Intermodal Surface Transportation Efficiency Act (Pubic Law 102-240) (ISTEA), which amended its Buy America requirements. FTA requested comments on this proposal and on other proposed amendments intended to update and clarify its Buy America regulation, 49 CFR Part 661.

FTA received four comments: two from public transit agencies; one from a State department of transportation; and one from an organization representing mass transit systems, manufacturers and suppliers. All of the commenters supported the proposed amendments, although some suggested minor modifications, which are discussed below.

II. The ISTEA Amendments**A. Addition of "Iron" (§ 661.5(a)-(c))**

In the NPRM, FTA explained that section 1048 of ISTEA amends 49 U.S.C. 5323(j) by adding "iron" to the products covered, and by inserting two new subsections concerning waivers of the Buy America requirements. By adding the word "iron," Congress extended Buy America protection to iron and iron products, in addition to steel and manufactured products, which were previously protected. FTA proposed to

amend 49 CFR 661.5 (a) and (b) to reflect this statutory amendment. FTA also proposed to amend 49 CFR 661.5(c) to specify that both the iron and steel requirements apply to items made primarily from those materials and used in construction and rail projects. The NPRM proposed that these items include, but not be limited to, structural steel or iron, steel or iron beams and columns, running rail, and contact rail. The requirements would not apply to iron used as components or subcomponents of other manufactured products or rolling stock.

Two commenters opined that the use of the qualifier "primarily" may lead to confusion in the absence of greater specificity. They suggested that "primarily" may mean close to one hundred percent, and stated that some additional discussion or guidance on this issue might be appropriate. They also stated that the phrase "primarily steel and iron" should read "primarily steel or iron" to avoid an unintended implication that only products made primarily of both steel and iron are covered.

FTA believes that it is not appropriate to attach a percentage to the definition of section 661.5(c), since the percentage of steel or iron in a particular item may vary according to an individual producer's refinement or manufacturing processes. Generally, the definition refers to construction or building materials made either principally or entirely from either steel or iron. All other manufactured products, even though they may contain some steel or iron elements, would not be covered. Therefore, steel girders would fall within the definition while buses with frames made partially from steel, would not be covered. To clarify this point, FTA will modify the proposed definition to specify that it is intended to apply to construction materials used in infrastructure projects, such as transit or maintenance facilities, rail lines, or bridges. FTA will also adopt the commenters' suggestion that these items be described as made of "primarily steel or iron."

B. Intentional Violations (§ 661.18)

Section 1048(b) amends 49 U.S.C. 5323(j) by inserting subsection (5), which states that any person determined by a Federal agency or court to have affixed a false "Made in America" label to or misrepresented the origin of a foreign product, shall be ineligible to receive contracts funded under ISTEA. In the NPRM, FTA proposed to add new section 661.18, which would bar such persons from Federal assistance under ISTEA "pursuant to suspension and

debarment proceedings under [49 CFR Part 29]."

Two commenters expressed the view that the wording of proposed section 661.18 could lead to a situation in which a person convicted of fraudulent misrepresentation under criminal statutes, but not processed through an administrative debarment/suspension proceeding, would remain eligible to receive ISTEA funds, contrary to Congressional intent. According to these commenters, the reference to debarment and suspension proceedings is unnecessary and should be removed. They stated that the remaining ineligibility under 49 CFR Part 29 is sufficient to implement Congress' intent without causing undue confusion.

FTA agrees that the use of the term "proceeding" in section 661.8 may create confusion since it could imply that only persons who have been suspended or debarred through a formal administrative process or hearing would be ineligible to receive ISTEA funds. In order to make it clear that any person suspended or debarred under 49 CFR Part 29, whether through a formal administrative hearing or under the general procedures of the regulation, will be so ineligible, FTA will delete its reference to "proceedings."

C. Limitation of the Applicability of Waivers (§ 661.7(h))

Section 1048(b) also amends 49 U.S.C. 5323(j) by adding subsection (4), which provides that if a foreign country is party to an agreement with the United States under which the Buy America requirements are waived, and the foreign country violates the agreement by discriminating against U.S. goods, products from that country shall not be eligible for waivers under 49 U.S.C. 5323(j). In the NPRM, FTA noted that there is currently no agreement between the United States and a foreign country which waives the Buy America requirements. FTA therefore stated that it considered this provision inoperative at the present time. FTA proposed to amend 49 CFR 661.7 to add a new subsection that will reflect this statutory change, and sought comment on whether its conclusion that 49 U.S.C. 5323(j)(4) is not applicable at this time requires further discussion or expansion.

Two commenters agreed that the provision should be adopted as proposed, but suggested that it be amended to provide clarification or guidance in the event that the type of international agreement contemplated in section 1048(b) should be concluded. Accordingly, FTA will adopt proposed subsection 661.7(h), subject to eventual

amendment, should the United States become party to such an agreement.

III. Amendments to Update and Clarify the Buy America Regulation

In the NPRM, FTA also sought to update the regulation by removing provisions that are no longer applicable, and to clarify certain other provisions.

A. Definition of "Component" (§ 661.3)

The FTA Buy America regulation, 49 CFR Part 661, consistent with the Surface Transportation Assistance Act of 1982 (STAA) and the Surface Transportation and Uniform Relocation Assistance Act (STURAA), establishes separate requirements for rolling stock. To be considered domestic, rolling stock must be assembled in the United States and 60 percent of its components, by cost, must be of U.S. origin. For a manufactured product to be considered domestic, all manufacturing processes must take place in the United States and all of its components must be of U.S. origin. In both cases, then, to determine compliance with the Buy America requirements, it is necessary to identify those parts of a product which may be considered components.

Section 661.11 which sets out the separate requirements for rolling stock, defines, at subsection (e), component as "any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location." However, many suppliers of manufactured products have pointed out to FTA that neither section 661.3 (general definitions) nor section 661.5 (requirements for manufactured products) contains a similar definition of component. They have therefore asked FTA for guidance in determining what constitutes a component of a manufactured product.

FTA notes that the definition of component of subsection 661.11(e) parallels that of the Federal Acquisition Regulations implementing the Buy American Act of 1933 (51 U.S.C. 10(a)-(d)), which applies to manufactured products generally. FTA therefore considers that it is appropriate to apply this definition to components of manufactured products as well as to components of rolling stock. Accordingly, FTA proposed in the NPRM to add it to the definitions provision of the regulation, section 661.3. All comments on this issue were favorable, and FTA is adopting the definition as proposed.

B. Component Requirement for Manufactured Products (§ 661.5(d)(2))

Section 165(b)(3) of the STAA, as amended by section 337 of STURAA, imposes domestic preference requirements on the subcomponents of components of rolling stock and associated equipment. No such similar statutory changes were made to section 165(a) for manufactured products. Therefore, the agency concluded that a manufactured product is of domestic origin if it is manufactured in the United States. In other words, in determining the origin of a component of a manufactured product governed by section 165(a), FTA will look only to where the product is manufactured, and will not look to the origin of the various materials included in the product during the manufacturing process. However, subsection 661.5(d)(2) of the regulation provides that for a manufactured product to be considered of U.S. origin, "all items or material used in the product must be of United States origin."

In FTA's experience, the language of this provision has often created the incorrect assumption that in determining the origin of a manufactured product, FTA will consider all of its material content, even at the subcomponent level and below. In order to correct this misunderstanding, FTA proposed to amend subsection 661.5(d)(2) to state that for a manufactured product to be considered of domestic origin, all of its components must be of United States origin. FTA also proposed to treat a component as being of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents. All of the commenters agreed that the proposal would correct the confusion and misunderstanding created by the current language of subsection 661.5(d)(2). FTA is amending this subsection as proposed.

C. Determination of Grandfathered Companies (§ 661.10)

Section 337 of the STURAA provided for a gradual increase in the domestic content requirements for buses and other rolling stock from 50 percent to 60 percent. Section 337(a)(2)(B) of STURAA stated that these revised requirements would not apply to any contract entered into prior to April 1, 1992, with any supplier or contractor or any successor in interest or assignee which had complied with the previous domestic content requirements. Section 661.10 of the regulation sets out the criteria for determining whether a company could qualify for grandfather

treatment. Since the April 1, 1992, deadline has elapsed, and since there is little likelihood that contracts for rolling stock executed prior to that date are still outstanding, FTA will delete this grandfather provision from its Buy America regulation.

D. Domestic Content Requirements for Rolling Stock (§§ 661.11(a)-(d))

As indicated above, section 337 of STURAA provided for a gradual increase in the domestic content for rolling stock from the previous 50 percent level to 55 percent for contracts entered into after October 1, 1989, and to 60 percent for contracts entered into after October 1, 1991, and after April 1, 1992, for grandfathered companies. Subsections 661.11 (b) and (c) of Part 49 implemented these statutory provisions. Since the 60 percent domestic content requirement is now in effect for all contracts executed after April 1, 1992, FTA will delete subsections 661.11(a) to reflect this change. Subsections (k) and (n) will also be revised to indicate that the 60 percent domestic content requirements also apply to components of rolling stock. The remaining subsections of 49 CFR 661.11 will be re-numbered accordingly.

IV. Regulatory Impacts

A. Executive Order 12866

FTA has determined that this action is not significant under Executive Order 12866 or Department of Transportation regulatory policies and procedures. Since this final rule makes only technical amendments to current regulatory language, it is anticipated that the economic impact of this rulemaking will be minimal; therefore, a full regulatory evaluation is not required.

B. Regulatory Flexibility Act

In accordance with 5 U.S.C. 603(a), as added by the Regulatory Flexibility Act, Pub. L. 96-354, FTA certifies that this rule will not have a significant impact on a substantial number of small entities with the meaning of the Act.

C. Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, et seq.

D. Executive Order 12612

This action has been reviewed under Executive Order 12612 on Federalism and FTA has determined that it does not have implications for principles of Federalism that warrant the preparation of a Federalism Assessment. If

promulgated, this rule will not limit the policy making or administrative discretion of the States, nor will it impose additional costs or burdens on the States, nor will it affect the States' abilities to discharge the traditional State governmental functions or otherwise affect any aspect of State sovereignty.

List of Subjects in 49 CFR Part 661

Buy America, Domestic preference requirement, Government contracts, Grant programs—Transportation, Mass transportation.

Amendment of 49 CFR Part 661

Accordingly, for the reasons described in the preamble, Part 661 of Title 49 of the Code of Federal Regulations is amended as follows:

PART 661—[AMENDED]

1. By revising the authority citation to read as follows:

Authority: 49 U.S.C. 5323(j) (formerly sec. 165, Pub. L. 97-424; as amended by sec. 337, Pub. L. 100-17 and sec. 1048, Pub. L. 102-240); 49 CFR 1.51.

2. By adding in alphabetical order a definition of "Component" to § 661.3 to read as follows:

§ 661.3 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.

* * * * *

3. By revising § 661.5 to read as follows:

§ 661.5 General requirements.

(a) Except as provided in § 661.7 and § 661.11 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.

(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 as components or subcomponents of other manufactured products or rolling stock.

(d) 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.

4. By adding new 661.7(h) to read as follows:

§ 661.7 Waivers.

* * * * *

(h) The provisions of this section shall not apply to products produced in a foreign country if the Secretary, in consultation with the United States Trade Representative, determines that:

(1) That foreign country is party to an agreement with the United States pursuant to which the head of an agency of the United States has waived the requirements of this section; and

(2) That foreign country has violated the terms of the agreement by discriminating against products covered by this section that are produced in the United States and are covered by the agreement.

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5. By removing § 661.10.

§ 661.10 [Removed]

6. By revising § 661.11 to read as follows:

§ 661.11 Rolling stock procurements.

(a) The provisions of § 661.5 do not apply to the procurement of buses and other rolling stock (including train control, communication, and traction power equipment), if the cost of components produced in the United States is more than 60 percent of the cost of all components and final assembly takes place in the United States.

(b) The domestic content requirements in paragraph (a) of this section also apply to the domestic content requirements for components set forth in paragraphs (i), (j), and (l) of this section.

(c) A component is any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an end product at the final assembly location.

(d) A component may be manufactured at the final assembly location if the manufacturing process to produce the component is an activity separate and distinct from the final assembly of the end product.

(e) A component is considered to be manufactured if there are sufficient

activities taking place to advance the value or improve the condition of the subcomponents of that component; that is, if the subcomponents have been substantially transformed or merged into a new and functionally different article.

(f) Except as provided in paragraph (k) of this section, a subcomponent is any article, material, or supply, whether manufactured or unmanufactured, that is one step removed from a component (as defined in paragraph (c) of this section) in the manufacturing process and that is incorporated directly into a component.

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

(h) A subcomponent is of domestic origin if it is manufactured in the United States.

(i) If a subcomponent manufactured in the United States is exported for inclusion in a component that is manufactured outside the United States and it receives tariff exemptions under the procedures set forth in 19 CFR 10.11 through 10.24, the subcomponent retains its domestic identity and can be included in the calculation of the domestic content of an end product even if such a subcomponent represents less than 60 percent of the cost of a particular component.

(j) If a subcomponent manufactured in the United States is exported for inclusion in a component manufactured outside the United States and it does not receive tariff exemption under the procedures set forth in 19 CFR 10.11 through 10.24, the subcomponent loses its domestic identity and cannot be included in the calculation of the domestic content of an end product.

(k) Raw materials produced in the United States and then exported for incorporation into a component are not considered to be a subcomponent for the purpose of calculating domestic content. The value of such raw materials is to be included in the cost of the foreign component.

(l) If a component is manufactured in the United States, but contains less than 60 percent domestic subcomponents, by cost, the cost of the domestic subcomponents and the cost of manufacturing the component may be included in the calculation of the domestic content of the end product.

(m) For purposes of this section, except as provided in paragraph (o) of this section:

(1) The cost of a component or a subcomponent is the price that a bidder or offeror must pay to a subcontractor or supplier for that component or subcomponent. Transportation costs to the final assembly location must be included in calculating the cost of foreign components and subcomponents.

(2) If a component or subcomponent is manufactured by the bidder or offeror, the cost of the component is the cost of labor and materials incorporated into the component or subcomponent, an allowance for profit, and the administrative and overhead costs attributable to that component or subcomponent under normal accounting principles.

(n) The cost of a component of foreign origin is set using the foreign exchange rate at the time the bidder or offeror executes the appropriate Buy America certificate.

(o) The cost of a subcomponent that retains its domestic identity consistent with paragraph (j) of this section shall be the cost of the subcomponent when last purchased, f.o.b. United States port of exportation or point of border crossing as set out in the invoice and entry papers or, if no purchase was made, the value of the subcomponent at the time of its shipment for exportation, f.o.b. United States port of exportation or point of border crossing as set out in the invoice and entry papers.

(p) In accordance with 49 U.S.C. 5323(j), labor costs involved in final assembly shall not be included in calculating component costs.

(q) The actual cost, not the bid price, of a component is to be considered in calculating domestic content.

(r) Final assembly is the creation of the end product from individual elements brought together for that purpose through application of manufacturing processes. If a system is being procured as the end product by the grantee, the installation of the system qualifies as final assembly.

(s) An end product means any item subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract.

(t) Train control equipment includes, but is not limited to, the following equipment:

- (1) Mimic board in central control
- (2) Dispatcher's console
- (3) Local control panels
- (4) Station (way side) block control relay cabinets
- (5) Terminal dispatcher machines
- (6) Cable/cable trays
- (7) Switch machines
- (8) Way side signals
- (9) Impedance bonds
- (10) Relay rack bungalows
- (11) Central computer control
- (12) Brake equipment
- (13) Brake systems

(u) Communication equipment includes, but is not limited to, the following equipment:

- (1) Radios
- (2) Space station transmitter and receivers
- (3) Vehicular and hand-held radios
- (4) PABX telephone switching equipment
- (5) PABX telephone instruments
- (6) Public address amplifiers
- (7) Public address speakers
- (8) Cable transmission system cable
- (9) Cable transmission system multiplex equipment
- (10) Communication console at central control
- (11) Uninterruptible power supply inverters/rectifiers
- (12) Uninterruptible power supply batteries
- (13) Data transmission system central processors
- (14) Data transmission system remote terminals
- (15) Line printers for data transmission system
- (16) Communication system monitor test panel
- (17) Security console at central control

(v) Traction power equipment includes, but is not limited to the following:

- (1) Primary AC switch gear
- (2) Primary AC transformer rectifiers
- (3) DC switch gear
- (4) Traction power console and CRT display system at central control
- (5) Bus ducts with buses (AC and DC)
- (6) Batteries
- (7) Traction power rectifier assemblies
- (8) Distribution panels (AC and DC)
- (9) Facility step-down transformers
- (10) Motor control centers (facility use only)
- (11) Battery chargers
- (12) Supervisory control panel

- (13) Annunciator panels
- (14) Low voltage facility distribution switch board
- (15) DC connect switches
- (16) Negative bus boxes
- (17) Power rail insulators
- (18) Power cables (AC and DC)
- (19) Cable trays
- (20) Instrumentation for traction power equipment
- (21) Connectors, tensioners, and insulators for overhead power wire systems
- (22) Negative drainage boards
- (23) Inverters
- (24) Traction motors
- (25) Propulsion gear boxes
- (26) Third rail pick-up equipment
- (27) Pantographs

(w) The power or third rail is not considered traction power equipment and is thus subject to the requirements of 49 U.S.C. 5323(j) and the requirements of § 661.5.

(x) A bidder on a contract for an item covered by 49 U.S.C. 5323(j) who will comply with section 165(b)(3) and regulations in this section is not required to follow the application for waiver procedures set out in § 661.9. In lieu of these procedures, the bidder must submit the appropriate certificate required by § 661.12.

7. By adding § 661.18 to read as follows:

§ 661.18 Intentional violations.

A person shall be ineligible to receive any contract or subcontract made with funds authorized under the Intermodal Surface Transportation Efficiency Act of 1991 pursuant to part 29 of this title if it has been determined by a court or Federal agency that the person intentionally—

(a) Affixed a label bearing a "Made in America" inscription, or an inscription with the same meaning, to a product not made in the United States, but sold in or shipped to the United States and used in projects to which this section applies, or

(b) Otherwise represented that any such product was produced in the United States.

Issued on: February 9, 1996.

Gordon J. Linton,
Administrator.

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