

BUY AMERICA & FRA'S HIGH-SPEED INTERCITY PASSENGER RAIL PROGRAM: ANSWERS TO FREQUENTLY ASKED QUESTIONS

Introduction

The Passenger Rail Investment and Improvement Act of 2008 (PRIIA) (Division B of Public Law 110-432, 122 Stat. 4907) authorized the appropriation of funds to establish several new passenger rail grant programs, including capital investment grants to support intercity passenger rail service (§301), high-speed corridor development (§501), and congestion grants (§302). FRA consolidated these and other closely related programs into the High-Speed Intercity Passenger Rail (HSIPR) program, as funded through the American Recovery and Reinvestment Act of 2009 (ARRA) (Public Law 111-5, 123 Stat. 115) as detailed in FRA's High-Speed Intercity Passenger Rail (HSIPR) Interim Guidance (74 Fed. Reg. 29900 (June 23, 2009)) and as further funded through the Transportation, Housing and Urban Development and Related Agencies Appropriations Act for 2010 (Div A of the Consolidated Appropriations Act, 2010 (Pub. L. 111-17)) (FY 2010 DOT Appropriations Act) as detailed in a second set of HSIPR interim program guidance governing the distribution of fiscal year 2010 funding (75 Fed. Reg. 38344 and 38365 (July 1, 2010)). Spending authorized under PRIIA is subject to the Buy America provision of 49 U.S.C. § 24405(a).

In 2009, President Obama, together with Vice President Biden and Secretary of Transportation LaHood, articulated a new "Vision for High-Speed Rail in America" (available on FRA's website). The HSIPR program implements that vision, which includes a goal to bolster American passenger rail expertise and resources. The Buy America requirements reinforce this goal, and aid in encouraging a domestic market in the rail sector.

1. Which Buy America statute applies to the High-Speed Intercity Passenger Rail (HSIPR) program?

The Buy America provision at 49 U.S.C. § 24405(a) applies to all PRIIA authorized spending, including all ARRA funds and FY 2010 DOT Appropriations Act funds. This means 49 U.S.C. §24405(a) applies to projects funded under Track 1 (Projects) and Track 2 (Programs), as outlined in FRA's HSIPR Interim Guidance (74 Fed. Reg. 29900 (June 23, 2009)) and to Service Development Programs and Individual Projects, as outlined in FRA's second set of HSIPR Interim Program guidance issued on July 1, 2010 and applicable to programs and projects funded under the FY 2010 DOT Appropriations Act (75 Fed. Reg. 38344 and 38365 (July 1, 2010)).

A separate statute governs Amtrak's direct purchases (49 U.S.C. § 24305(f)); however, except where explicitly noted, these Answers to Frequently Asked Questions do not apply to Amtrak's expenditures.

FRA's HSIPR program also includes projects funded through the FY 2008 and 2009 Department of Transportation and Related Agencies Appropriations Acts in Tracks 3 (Planning) and Track 4 (FY-2009 Appropriations Projects), as outlined in FRA's first HSIPR Interim Guidance. These funds were not authorized through PRIIA. Therefore, the PRIIA Buy America requirements of section 24405(a) do not apply. Instead, these projects (primarily Track 4 projects since Track 3 projects involve planning grants) must comply with the Buy American Act (see response to question 18 below).

2. What does Buy America Section 24405(a) require?

Section 24405(a) provides that the Secretary of Transportation (authority delegated to the Federal Railroad Administrator) may obligate an amount to carry out a PRIIA funded project only if the steel, iron, and manufactured goods used in the project are produced in the United States.

3. How is FRA handling Buy America requirements, particularly with regard to materials or technology that are not readily available domestically?

FRA believes that high-speed and intercity rail passenger equipment can and should be manufactured in the United States. FRA will do everything it can to ensure that its grant funds are spent domestically, and where there is not currently domestic production, will do what it can to encourage domestic production.

Where it is impossible for a grantee to find a fully complying bidder/offeror (and therefore a waiver from Buy America is requested), the grantee is encouraged to choose (as long as this choice is consistent with applicable procurement practices) as its contract awardee the bidder/offeror with the proposal containing domestic manufacture and the highest domestic content.

FRA will apply the statutory Buy America provision strictly and will issue a waiver only when the bidder/offeror has demonstrated by clear evidence that it has met the requirements for a waiver. Moreover, FRA considers the need to grant waivers under these circumstances as strictly temporary because it expects that achieving domestic manufacture and 100% domestic component content can and will occur in the very near future. By encouraging grantees to use manufacturers or suppliers who maximize domestic content, FRA hopes to achieve its goal of 100% domestic content in the near future. More information on requesting a waiver can be found in FAQ no. 15.

FRA has also entered into an Interagency Agreement with the U.S. Department of Commerce's National Institute of Standards and Technology's Hollings Manufacturing Extension Partnership (MEP). MEP works with partners at the state and federal levels on programs that put manufacturers in position to develop new customers, expand into new markets, and create new

products. FRA may use MEP to scout for products where an assertion is made that a domestic product is unavailable.

4. Does FRA have regulations on Buy America?

No. PRIIA authorized the first grant program to be administered by FRA that incorporated a Buy America requirement (other than the buy American preference that applies to Amtrak), and FRA has not yet implemented regulations. In the interim to aid grantees who must immediately apply Section 24405(a) to funds granted them by FRA, FRA is releasing these FAQs describing its procedures for applying the Buy America provision in the HSIPR program.

5. Will FRA use the FTA’s Buy America exception, allowing for a waiver from the Buy America requirements, “when procuring rolling stock (including train control, communication, and traction power equipment) under this chapter— ... the cost of components and subcomponents produced in the United States is more than 60 percent of the cost of all components of the rolling stock; and ... final assembly of the rolling stock has occurred in the United States.”?

No. FRA cannot use statutory authority it does not have. As a long-standing grant-making entity, FTA has its own Buy America statute, which in many respects is identical to FRA’s statute. However, the FTA’s Buy America statute, at 49 U.S.C. § 5323(j)(2)(C)(i) and (ii), includes the specific additional waiver regarding a 60% component and American assembly allowance for rolling stock that 49 U.S.C. 24405(a) (FRA’s HSIPR Buy America statute) does not. Had Congress intended for FRA to apply a “60 percent component but American-assembled” exception to rolling stock procurements made by its grantees, presumably it would have included such a provision in FRA’s statute, especially since the remainder of the FRA and FTA statutes are nearly identical.

6. How will FRA handle the question of what constitutes a “manufactured good” produced in the United States and a “component” for the purposes of determining that the steel, iron, and manufactured goods used in the project are produced in the United States?

Except for the FTA provision regarding a 60 percent component waiver for rolling stock, the general FTA and FRA Buy America provisions regarding the steel, iron, and manufactured goods used in its grant-funded projects are nearly identical. Both 49 U.S.C. §§ 5323(j)(1) and 24405(a)(1) state: “The Secretary of Transportation may obligate an amount that may be appropriated to carry out this chapter for a project only if the steel, iron, and manufactured goods used in the project are produced in the United States.” The FTA, throughout the 30 years it has administered its own Buy America statute, has implemented regulations and changes to those regulations which have resulted in a very detailed set of rules, guidance documents, and

enforcement strategies. See 49 C.F.R. Part 661; see also http://www.fta.dot.gov/laws/leg_reg_178.html .

The definitions and provisions at 49 C.F.R. §§ 661.3, and 661.5 implement FTA's Buy America general requirements covering steel, iron, and manufactured goods, except where 661.11 applies, which is FTA's regulation covering the procurement of rolling stock (including train control, communication, and traction power equipment). See 61 Fed. Reg. 6300 (February 16, 1996) (for a discussion of FTA's rulemaking).

FRA is developing its own regulations; however, in the interim, FRA has concluded that it is reasonable and appropriate to use applicable FTA rules for purposes of providing guidance to FRA's grantees, specifically 49 C.F.R. § 661.3, 661.5, and applicable parts of 661.11 – and use them as guidance for both FRA-funded manufactured goods procurement generally and rolling stock, where appropriate.

FRA also believes this makes sense from the perspective of FRA's grantees, who are often the same or same kind of entities as those receiving FTA grants, e.g., State departments of transportation or State-sponsored transportation authorities and their subgrantees or contractors (who in many cases are the same firms competing to build rail systems, whether commuter, high speed or passenger rail). These entities are already familiar with applying the FTA provisions, which will facilitate the process. In addition, not doing so would result in a substantial administrative burden to FRA, its grantees, subgrantees, and contractors. If these provisions were not used as guidance, many HSIPR projects over \$100,000 would require a Buy America waiver, since it is unlikely that the tiniest of subcomponents would or could all be of United States origin.

General Requirements:

For manufactured goods, including rolling stock, to be considered produced in the United States: (1) All of the manufacturing processes for the end product must take place in the United States; and (2) All of the components of the end 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. (See FTA regulation: 49 C.F.R. § 661.5(d)).

For consistency sake with industry-understood FTA rules for rolling stock, FRA has determined that the “manufacturing process” applicable to end product rolling stock is “final assembly.” Final assembly is the creation of the end product from individual elements brought together for that purpose through application of manufacturing processes. (See FTA Regulation: 49 C.F.R. § 661.11(r)).

For all other manufactured end products, including the components of rolling stock, the applicable “manufacturing process” is “manufacturing.” “Manufacturing” means the application of processes to alter the form or function of materials or of elements of the product in a manner

adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials. (See FTA Regulation: 661.3).

A component, including a rolling stock component, is considered to be manufactured in the United States if there are sufficient activities taking place in the United States to advance the value or improve the condition of the subcomponents of that component; that is, if the subcomponents have been substantially transformed into a new and functionally different article. (See FTA regulation: 49 C.F.R. § 661.11(e)).

The key element of the definition of “manufacturing” is the transformation of subcomponents to form a new product. The processes of transformation may include forming, extruding, material removal, welding, soldering, etching, plating, material deposition, pressing, permanent adhesive joining, shot blasting, brushing, grinding, lapping, finishing, vacuum impregnating, and, in electrical and electronic pneumatic, or mechanical products, the collection, interconnection, and testing of various elements.

Mere assembly of the subcomponents does not constitute substantial transformation.

FRA has developed various lists of items FRA considers to be components of rolling stock for use by grantees that will be procuring rolling stock. Grantees should consult with FRA before issuing procurement notices for rolling stock.

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. (See FTA regulation: 49 C.F.R. § 661.3)

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). (See FTA regulation: 49 C.F.R. § 661.3)

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 a component. (See FTA regulation: 49 C.F.R. § 661.11(f)).

7. How will FRA utilize FTA regulations 49 C.F.R. § 661.5(b) and (c) regarding the use of steel and iron used in FRA-funded projects?

This section is under construction.

8. Do the North American Free Trade Agreement (NAFTA), the World Trade Organization’s Government Procurement Agreement (GPA), or other Free Trade Agreements apply to the FRA Buy America provision?

No. The international agreements are not applicable to FRA’s Buy America provision. Chapter 10 and the Statement of Administrative Action that accompanied the NAFTA Implementation Act specifically exempts from its application certain kinds of purchases by the U.S. government, among them procurements funded by Federal grants, such as those made by FRA grantees. Therefore, manufacture in either Mexico or Canada is NOT considered domestic manufacture by FRA. In addition, the Annexes to the World Trade Organization’s Government Procurement Agreement (GPA) and the various Free Trade Agreements contain exceptions for Federal grants for mass transportation projects, which include FRA’s high-speed and intercity rail passenger program.

9. If there are no FRA funds involved in the project, do FRA’s Buy America requirements apply?

No. Though if other Federal funding is involved, other Buy America(n) statutes may apply. In addition, there may be applicable state or local domestic spending preferences.

Individual States are not precluded under 49 U.S.C. § 24405(a)(8) from adopting their own more stringent Buy American preference statutes. That section provides: “the Secretary may not impose any limitation on assistance provided under this chapter that restricts a State from imposing more stringent requirements than this subsection on the use of articles, materials, and supplies mined, produced, or manufactured in foreign countries in projects carried out with that assistance or restricts a recipient of that assistance from complying with those State-imposed requirements.” However, where Federal funds are involved, pursuant to 49 C.F.R. § 18.36(c)(2), States are precluded from imposing in-State or local geographical preferences.

10. What is the minimum project cost to which I must apply Buy America?

As provided in 49 U.S.C. § 24405(a)(11), the PRIIA Buy America requirements apply only to projects for which the costs exceed \$100,000.

In calculating a component’s cost for purposes of determining whether the \$100,000 project threshold has been met, labor costs involved in final assembly should not be included. The term “component” is defined above in FAQ no. 6.

11. What are specific grantee/bidder/offeror responsibilities with regard to Buy America?

Grantees shall adhere to the Buy America clause set forth in the grant or cooperative agreement with FRA. Grantees shall include an appropriate notice of the Buy America provision in solicitations or requests for proposals. As a condition of responsiveness, such solicitations should require that the bidder or offeror submit with the bid or offer a completed Buy America certificate in accordance with the suggested format below. If upon being awarded a particular contract, a successful bidder or offeror fails to demonstrate that it is in compliance with its certification, the bidder or offeror should be required to take the necessary steps in order to achieve compliance. If a bidder or offeror takes these necessary steps, it should not be allowed to change its original bid price or the price of its final offer. If a bidder or offeror does not take the necessary steps to achieve compliance and the contract has not yet been awarded, it should not be awarded the contract. If a contract has been awarded and the bidder or offeror does not take the necessary steps to achieve compliance, it may be considered in breach of the contract.

Where the bidder or offeror believes it may qualify, pursuant to Section 24405(a)(2), for a waiver from the Buy America requirements, it should submit, along with the required certificate, a written justification detailing the reasons it believes it meets the particular waiver exception(s). As part of its waiver justification, the bidder or offeror should include a statement detailing the percentage of U.S. content in each component or end product, as applicable. FRA will apply the statutory Buy America provision strictly and will issue a waiver only when the bidder/offeror has demonstrated by clear evidence that it has met the requirements for a waiver. Moreover, FRA considers the need to grant waivers under these circumstances as strictly temporary because it expects that achieving domestic manufacture and 100% domestic component content can and will occur in the very near future. Where no bidder or offeror can fully comply with the Buy America requirement, FRA grantees are encouraged to consider most favorably (consistent with applicable procurement practices), when choosing among bidders or offerors, the bid or offer that includes the highest percentage of U.S. steel, iron, and manufactured goods. By encouraging grantees to use manufacturers or suppliers who maximize domestic content, FRA hopes to achieve its goal of 100% domestic content in the near future.

Certificate of Compliance with Buy America Requirements

The bidder or offeror hereby certifies that it will comply with the FRA Buy America requirements of 49 U.S.C. Section 24405(a)(1).

Date _____

Signature _____

Company _____

Name _____

Title _____

Certificate of Non-Compliance with Buy America Requirements

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. Section 24405(a)(1), but it may qualify for an exception to the requirement pursuant to 49 U.S.C. Section 24405(a)(2).

Date _____

Signature _____

Company _____

Name _____

Title _____

12. What happens when a bidder or offeror violates the Buy America provision or has submitted incorrect Buy America certification documents?

In accordance with 49 U.S.C. 24405(a)(7), a person or entity is ineligible to receive any contract or subcontract made with FRA grant funds if a court or department, agency, or instrumentality of the Government decides the person intentionally—(A) affixed a “Made in America” label, or a label with an inscription having the same meaning, to goods sold in or shipped to the United States that are used in a project to which this subsection applies but not produced in the United States; or (B) represented that goods described in subparagraph (A) of this paragraph were produced in the United States.

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 certifies that it will comply with the applicable Buy America requirements, the bidder, offeror, or grantee is not later eligible for a waiver of those requirements.

13. What happens if the Buy America certification requirements are not followed?

When a project is likely to meet the \$100,000 cost threshold, procurement officers need to be aware of the Buy America requirements and review the certificates of compliance and non-compliance prior to awarding contracts. Grantees should review all Buy America certifications before contract award and request a waiver, if one is necessary, before award in order to ensure FRA participation in funding for the contract. However, FRA will apply the Buy America provision strictly and will issue a waiver only when the bidder/offeror has demonstrated that waiver is absolutely necessary and that there is clear evidence that the requirements for a waiver have been met. Whether procurements are by sealed bids or by requests for proposals, awards

may be made only to parties whose compliance has been certified, unless the grantees request and receive waivers from FRA. Should this review not be properly done by grantees and a contract awarded a bidder/offeror in error, the FRA may be forced to withdraw its participation in funding the project.

14. To whom do the individual waivers apply?

Except where a waiver for a class of goods may have been granted, individual waiver requests are always required. In the uncommon instance where a waiver would be granted, it would be non-precedential and apply only to the party and procurement referenced in the particular waiver. Grantees, manufacturers and suppliers should be aware that FRA granting a waiver in one instance is no indication that waiver for the same goods would be issued if a subsequent request for a waiver were made. FRA considers the need to grant waivers as a temporary activity because it expects that its goal of achieving domestic manufacture and 100% domestic component content can and will occur in the very near future.

15. How do I request a waiver?

Application for a waiver from FRA's Buy America requirement is made by submitting in writing a detailed justification, along with supporting documentation to:

FRA Administrator
Federal Railroad Administration
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590

Waiver requests should include at least the following information: 1) description of the project; 2) description of the steel, iron, or manufactured good not meeting the Buy America requirement, including percentages of U.S. material versus foreign; 3) description of the efforts made to secure complying steel, iron, or manufactured goods; 4) description of the bidding process; 5) cost differentials; 6) citation to the specific 49 U.S.C. § 24405(a)(2) waiver category(ies) under which the waiver is sought; 7) justification supporting the application of the waiver category(ies) cited; and 8) contact information for the responsible party, if FRA needs further information.

The Administrator may waive Section 24405(a)(1) only if he or she finds that: A) applying the statute would be inconsistent with the public interest; B) the steel, iron, and goods produced in the United States are not produced in a sufficient and reasonably available amount or are not of a satisfactory quality; C) rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time; or D) including domestic material will increase the cost of the overall project by more than 25 percent. In calculating the components' costs for

purposes of determining whether including domestic material will increase the cost of the overall project by more than 25 percent, labor costs involved in final assembly should not be included. “Component” is defined in FAQ no. 6.

The FRA’s Buy America statute requires that: if the Secretary determines that it is necessary to waive the application of the Buy America requirements on the basis of one of the statutory exemptions, the Secretary shall, before the date on which such finding takes effect—publish in the Federal Register a detailed written justification as to why the waiver is needed; and provide notice of such finding and an opportunity for public comment on such finding for a reasonable period of time not to exceed 15 days. FRA will comply with this requirement by posting a notice of its intent to grant a waiver on FRA’s public website (at www.fra.dot.gov) and in the Federal

Register with an open docket available for posting comments (at www.regulations.gov).

Following a 15-day comment period, FRA will consider any comments and then make a final decision on the waiver. The waiver will not become final until the decision is signed by the FRA Administrator or his/her designee. In some instances, FRA may publish waiver requests before any decision has been reached; for example, in order to assist the FRA in determining whether a domestic manufacturer exists for particular manufactured goods.

16. Will the information submitted to FRA from grantees or bidders/offerors in order to comply with Buy America be made public?

Yes. The information provided to FRA may become public. First, as noted in FAQ no. 15, the Buy America provision requires that a notice of the FRA’s intent to grant a waiver be published in the Federal Register. In some instances, FRA would also publish a request for comment before making a determination on whether to grant a waiver. In addition, as a Federal agency, FRA is subject to the Freedom of Information Act (FOIA), which generally provides that any person has a right, enforceable in court, to obtain access to Federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of nine exemptions or by one of three special law enforcement record exclusions. 5 U.S.C. § 552.

Materials submitted by grantees under the HSIPR Program become Federal agency records and are thus subject to the FOIA and to public release in response to individual FOIA requests.

Certain information submitted by a grantee or a stakeholder could be exempt from public release under FOIA. FOIA Exemption 4, for instance, protects trade secrets and commercial or financial information obtained from a person if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

49 C.F.R. § 209.11 discusses FRA’s existing procedures for requesting confidential treatment of documents filed with FRA in connection with the agency’s safety activities. However, the principles are the same for the FRA grant programs, and any entity seeking confidential treatment for documents submitted to the agency should follow the outlined procedures.

Grantees seeking exempt treatment must provide a detailed statement supporting and justifying their request. See 49 C.F.R. § 209.11(c)-(d). The burden is on the entity requesting confidential treatment to identify all information for which exempt treatment is sought and to persuade the agency that the information should not be disclosed as consistent with existing law. See also 49 C.F.R. § 7.17 (describing the Department of Transportation's submitter consultation process as a part of the agency's FOIA implementing regulation). The final decision as to whether the information meets the standards of Exemption 4 and is exempt from release rests with FRA. 49 C.F.R. § 209.11(e). FRA will notify the submitter of any decision to release a document over the objection of the submitter (49 C.F.R. § 7.17(b)).

17. I have a question not answered here, whom do I contact?

Please submit your question or inquiry to Linda.Martin@dot.gov.

18. Is there a difference between Buy America, Buy American, and Amtrak's buy American preference statute?

Yes. Buy America (49 U.S.C. § 24405(a)) is applicable to most FRA HSIPR program grant funds and is the primary subject of this guidance. The Buy American Act (41 U.S.C. § 8302 (formerly §10a - 10d)) and 48 C.F.R. Part 25) is a different statute and regulation that is applicable to purchases by Federal agencies and departments, and to certain Department of Transportation and Related Agencies Appropriations Acts funded projects, including HSIPR projects funded through Track 4.

Amtrak also is required to adhere to domestic buying preference requirements. However, either 49 U.S.C. § 24305(f) or another statute could apply to Amtrak projects, depending on the source of funds. 49 U.S.C. §24405(a) applies when Amtrak is operating under a HSIPR program grant or performing a contract for another HSIPR program grantee applying 49 U.S.C. §24405(a). However, 49 U.S.C. § 24305(f) applies when Amtrak is spending funds from its own capital or operating grant from the FRA.

Generally, Amtrak administers its own domestic buying preference program, except that interpretations of applicability are decided by FRA's Chief Counsel and any waivers are decided by the FRA Administrator.

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