U.S. DOT Federal Railroad Administration

Office of Passenger and Freight Programs

Monitoring Procedure 36 – Buy America

# PURPOSE

This Monitoring Procedure (MP) describes FRA requirements for the Monitoring and Technical Assistance Contractor (MTAC) when evaluating the Grantee’s compliance with Buy America.

# KEY PRINCIPLES

FRA’s rail program includes a goal to increase the use of domestic resources in FRA-funded rail projects. The Buy America requirement reinforces this goal and helps to grow domestic manufacturing of materials and products used in railroad projects.

FRA encourages domestic sourcing of all materials used regardless of the statutory requirements attached to a particular grant.

1. Projects authorized under the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) and funded by ARRA or FY 2010 appropriations are subject to the Buy America provision of 49 USC § 24405(a) - (Intercity Passenger Rail Service Corridor Capital Assistance, Grant conditions). 49 USC §24405(a) is also often applied through the grant agreement to many Tiger grants.
2. Amtrak projects are required to adhere to a Domestic Buying Preference through 49 USC § 24305(f) (Amtrak General Authority) or 49 USC § 24405(a), depending upon whether Amtrak is funding the project through its own capital or operating grants/funds or is acting as a contractor/subgrantee under another grant.
3. The Buy American Act of 1933 in 41 U.S.C. § 8302 also requires domestic sourcing of materials and manufactured goods and typically applies to Rail Line Relocation Grants.

The requirement that should be applied to the particular project would be found in the applicable grant agreement and should be carried forward into any subgrants or contracts/subcontracts funded by the grant.

# REQUIRED DOCUMENTS

The MTAC will obtain and review the following project documents from the Grantee:

* Grantee’s grant agreement with FRA
* Design standards and criteria
* Design and construction drawings, outline, and final specifications
* Solicitations for construction bids and other RFPs, contracts, and purchase agreements
* Certificates of Compliance and Non-Compliance with Buy America Requirements (see Appendix A for examples)
* Buy America requirement waiver granted by FRA, if applicable
* Rolling stock audit material and/or reports

# background

The following are descriptions of domestic sourcing statutes that, depending on the fund source used, apply to procurements for FRA projects. Note that Buy America requirements cannot be bypassed by using only non-federal funds to purchase a project component/material that is not made in America. If the component/material is being used as part of the FRA-funded project, it must meet the respective Buy America requirement, regardless of the funding source for the component/material.

## 49 USC § 24405(a) - PRIIA “Buy America”

## For Passenger Rail Investment and Improvement Act (PRIIA)-authorized projects costing $100,000 or more, the requirements apply to materials in end products and components but not in subcomponents (see definitions below). Materials may be new or used if used materials are repurposed in a project.

For manufactured products to be considered “manufactured” in the United States, all of the manufacturing processes must take place in the United States and the components of the products must be of U.S. origin (a component is considered to be of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents).

For locomotives, railcars, and other rolling stock, all components must be manufactured in the United States and final assembly of the end product (e.g., railcar) must take place in the United States. FRA has developed lists of items it has determined to be components of various railcar types. The grantee should have used one of these lists in procurements for rolling stock.

Additional requirements apply to steel and iron used in projects. For end products or components made predominantly of steel or iron (e.g., rail or grab bars) , manufacturing of the steel or iron used in those end products or components must also take place in the United States, except for metallurgical processes (including refinement of steel additives).

### Definitions

* *End products.*  Incorporate components at the final assembly location and are acquired ready to provide the intended end function without further manufacturing or assembly.
* *Components.* Directly incorporated into end products at the final assembly location.
* *Subcomponents.* One step removed from a component in the manufacturing process – they are incorporated into components during manufacturing.
* *Manufacturing.* The application of processes to substantially transform and add value to components or subcomponents and to create a functionally different product.
* *Final assembly.* The creation of an end product from individual elements brought together for that purpose through the application of manufacturing processes.

### Waivers

FRA may waive PRIAA Buy America requirements if the FRA Administrator finds that either (1) their application would be inconsistent with the public interest, or (2) 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, or (3) that domestically manufactured rolling stock or power train equipment cannot be bought and delivered within a reasonable timeframe, or (4) that the inclusion of a domestic item or domestic material will increase the cost of the overall project by more than 25 percent.

All waivers must be approved by the FRA Administrator or designee following a public comment period. In practice, waiver applications are usually reviewed by the Department of Transportation (DOT) Deputy Secretary. Waiver applications are likely to take six months or more to process. Any waivers granted will be time limited and contingent on grantee agreement to continue to look for materials that meet Buy America requirements for future procurements.

## 41 U.S.C. § 8302 - Buy American Act

FRA has determined that Rail Line Relocation projects and projects funded from FY 2008 and FY 2009 Appropriations are subject to the requirements of the Buy American Act of 1933.

The Buy American Act requires that “only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all [determined to mean greater than 50%] from articles, materials, or supplies mined, produced, or manufactured in the United States, shall be acquired for public use unless the head of the department or independent establishment concerned determines their acquisition to be inconsistent with the public interest or their cost to be unreasonable.”

FRA generally may waive the Buy American Act requirements using the same justification as the PRIIA Buy America statute, with one exception: if the cost of a domestic item or domestic material will increase the cost of the contract between the Grantee and the supplier of that item or material by more than 6 percent.

Other exceptions to the Buy American Act exist where items are not 1) produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality” and 2) “procured under any contract with an award value that is not more than the micro-purchase threshold,” which is currently set at $3,000.

# Scope of work

The MTAC should ensure that the Grantee understands that failure to comply with Buy America/n requirements can jeopardize its FRA grant. The MTAC will evaluate the Grantee’s compliance with Buy America/n and will make recommendations if the Grantee encounters any difficulties. The MTAC will perform this work as directed by FRA, usually at completion of PE and FD for infrastructure, and when specifications are written and before bidding for vehicles.

## Compliance Requirements for Grantees

The Grantee is responsible for showing compliance by taking the following actions:

1. Ensure that the design, detailing, and specification of materials and manufactured end products and components are done with domestic sourcing in mind.
2. Perform Buy America reviews before releasing construction documents for bid or specifications for manufacture; verify references to the applicable statutes and regulations are in solicitations and requests for proposals (RFPs)
   1. Verify that all iron, steel, end products and components are called to be manufactured domestically unless a waiver is obtained from FRA
   2. Include provisions in procurement contracts to ensure that the applicable statutory requirements flow down to suppliers, contractors, and sub-contractors
3. After the award, confirm that contractors/manufacturers understand they are responsible for complying with Buy America/n, and evaluate whether they are capable of complying.
4. Inspect manufacturer’s facilities to verify domestic sourcing.
5. Obtain signed certifications from suppliers and contractors when construction materials are installed or during the manufacturing process.
6. Perform formal pre and post award audits for rolling stock procurements

## MTAC Evaluation of Compliance

1. Ensure Grantees take the actions noted above. MTAC to perform the following:
   1. During design:
      1. Check that Grantee’s procedures will ensure early detection of any deficiencies in procurement regulations
      2. Guide Grantees when manufacturers are found to be deficient in Buy America or other related requirements
   2. Before solicitation:
      1. Review the Grantee’s bid documents for requirements that could impact the ability of contractors or manufacturers to comply
      2. Oversee pre-award reviews conducted by the Grantee before entering into a contract for construction or purchase for manufactured goods
      3. Encourage the Grantee to conduct intermediate reviews for rolling stock procurements
   3. After the award:
      1. Oversee the Grantee’s post-award audit and its confirmation that contractors and manufacturers are responsible for and capable of complying
      2. Confirm the Grantee has verified the manufacturer’s bid specifications comply
   4. During construction and manufacturing:
      1. Evaluate data provided to the Grantees by contractors and manufacturers
      2. Verify final assembly sites along with tangible information and references to FRA regulations to enable Grantees to accurately evaluate Buy America review results
      3. Monitor compliance before manufactured end products are delivered and placed into service
      4. Confirm the Grantee has obtained signed certifications for all iron, steel, and manufactured end products (including rolling stock)
      5. Confirm that the Grantee has obtained signed Buy America certifications for manufactured end products and their components (See Appendix A of this MP for examples of certifications)
      6. Check that the Grantee’s certification includes the most up-to-date language requiring compliance with Buy America. MTACs should consult the FRA Buy America website at <https://www.fra.dot.gov/Page/P0185> for recent changes
      7. Review the Grantee’s certifications and supporting documents in detail. Ensure the Grantee’s Buy America team has “drilled down” to the lowest level required to demonstrate that claims of U.S. origin content are valid
      8. Ensure that component manufacturing requirements are met. If there is doubt (for instance when major sub-assemblies of a component are made out-of-country but incorporated during the domestic vehicle final assembly) bring these to the Grantee’s attention for clarification. If the Grantee cannot justify the discrepancy, the MTAC should report this finding to the FRA for further action.
   5. Throughout the entire process:
      1. Intervene at the appropriate time if it appears that Buy America might not be met or the Grantee’s audit is inadequate; request FRA intervention when deficiencies are uncovered; provide reporting protocols for the Grantee to adopt
2. The MTAC should discuss recommendations and possible corrective actions with the FRA and concurrently with the Grantee. Examples:
   1. Advise revision of Grantee’s procurement documents to include Buy America
   2. Advise performance of a procurement review by the Grantee to verify compliance; where faults exist, to modify language and procedures for future procurements.
   3. Advise explanation of circumstances that have led to a manufacturer’s noncompliant process that includes partial assembly outside of the U.S.

# REFERENCES – See MP 01

# CERTIFICATES (samples)

# These certificates are required for Buy America compliance, <https://www.fra.dot.gov/Page/P0185>

**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).

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**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).

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