Buy America

What’s New?

FTA Region IV Conference
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Buy America: What’s New?

Final Rule Part I
a. Administrative Review
b. Definition of Negotiated Procurement
c. Definition of Contractor
d. Repeal of Chrysler Waiver
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f. Pre- and Post-Award Rolling Stock Reviews
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Final Rule Part II
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a. Administrative Review

FTA implemented the SAFETEA-LU requirement that parties adversely affected by an agency action may seek judicial review under the Administrative Procedure Act, 5 U.S. C. 702 et seq.
b. Definition of Negotiated Procurement

FTA adopted the definition of negotiated contracts used in the Federal Acquisition Regulation:

Negotiated Procurement means a contract awarded using other than sealed bidding procedures.
c. Definition of Contractor

FTA adopted a definition of contractor based on the Contract Disputes Act:

Contractor means any party to a third party government contract other than the government.
d. Repeal of Chrysler Waiver

SAFETEA-LU directed FTA to repeal the general waiver for 15 passenger vans and wagons produced by Chrysler Corporation.
e. Certification under Negotiated Procurement

For negotiated procurements, compliance with the 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 proposal shall control.
f. Pre-Award and Post-Delivery Review of Rolling Stock Purchases

SAFETEA-LU amended 49 U.S.C. 5323(m) by mandating that rolling stock procurements of 20 vehicles or fewer that serve rural (other than urbanized areas), or urbanized areas of 200,000 people or fewer, are subject to the same post-delivery certification requirements that apply to procurements of “10 or fewer buses,” i.e. no resident factory inspector is required.
g. Miscellaneous Issues

1. FTA deleted references to an older version of FTA’s implementing statute and replaced them with references to SAFETEA-LU;

2. FTA added the word “iron,” after the word “steel” in the certification requirement for procurement of steel or manufactured products; and

3. FTA added the term “offeror” and “offer” where appropriate throughout the regulations to reflect the use of negotiated procurement methods in FTA funded projects.
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Final Rule Part II

a. Public Interest Waivers
b. Microprocessor Waivers
c. Post Award Waivers
d. End Products
   1. Definition of End Product
   2. System as End Product
   3. Representative List of End Products
e. Definition of Final Assembly
f. Communication Equipment
a. Public Interest Waivers

FTA implemented the following process to meet requirements specified in SAFETEA-LU:

1. Post notification of a public interest waiver request on FTA’s website and solicit comments on the request;
2. Based on the comments received, prepare a justification that explains the rationale for approving or denying a waiver request;
3. Publish the justification in the Federal Register for notice and comment within a reasonable time (of not more than seven days); and
4. Publish the final decision on FTA’s website regarding the waiver request, based on comments received in response to the published justification.
b. Microcomputer/Microprocessor Waivers

FTA implemented the SAFETEA-LU requirement to “clarify” that any waiver of the Buy America requirements for a microprocessor, computer, or microcomputer, applies “only to a device used solely for the purpose of processing or storing data” and does not extend to the product or device containing a microprocessor, computer, or microcomputer.

Note: FTA has interpreted the waiver to include software.
c. Post Award Waivers

Under FTA’s prior regulations, a bidder or offeror was bound by its original certification and was not eligible for a waiver. FTA’s current regulations allow grantees to request a non-availability waiver after contract award where a bidder or offeror had originally certified compliance with the Buy America requirements, but can no longer comply with its certification and contractual obligations due to commercial impossibility or impracticability.
d. End Products

1. SAFETEA-LU directed FTA to define the term “end product.”

2. In defining the term, FTA was to “address the procurement of systems under the definition to ensure that major system procurements are not used to circumvent the Buy America requirements.”

3. In addition, SAFETEA-LU directed FTA to develop a list of representative end products that are subject to the Buy America requirements.
1. Definition of End Product

FTA based its definition of End Product on that found in the Federal Acquisition Regulation at 48 CFR part 25 implementing the Buy American Act, 41 U.S.C. 10a-10d.

Under this definition, end products do not shift and components and subcomponents retain their designation.

The new rule’s application of the “manufactured product” standard to replacement parts is different from the former regulation’s application of the rolling stock standard to such parts.
2. System as an End Product

FTA defined “system” as “a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function.

FTA believes a fare collection system, in toto, meets the definition of an “end product.”
3. Representative List of End Products

The following is a list of representative end products that are subject to the requirements of Buy America. This list is representative, not exhaustive.

(1) Rolling stock end products: All individual items identified as rolling stock in §661.3 (e.g., buses, vans, cars, railcars, locomotives, trolley cars and buses, ferry boats, as well as vehicles used for support services); train control, communication, and traction power equipment that meets the definition of end product at §661.3 (e.g., a communication or traction power system).

(2) Steel and iron end products: Items made primarily of steel or iron such as structures, bridges, and track work, including running rail, contact rail, and turnouts.

(3) Manufactured end products: Infrastructure projects not made primarily of steel or iron, including 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; and mobile lifts, hoists, and elevators.
e. Definition of Final Assembly

FTA amended the definition of “final assembly” for rolling stock procurements by incorporating the minimum requirements for final assembly as outlined in FTA’s March 18, 1997, Dear Colleague letter.

This definition includes long-standing precedent that reflects industry input and consensus.
f. Communication, Train Control, and Traction Power Equipment

FTA determined that the rolling stock requirement for communication, train control, and traction power equipment would continue to apply to wayside equipment, i.e., communication equipment that is not in or on a vehicle, but on the adjacent tracks or right of way.

Issue pending new rulemaking: aluminum composite conducting rail, otherwise known as Bimetallic Power Transmission.