



“Buy America Act”¹ requires all federal governments – and by extension state and local governments receiving federal funds – to use United States (U.S.) made steel, components and manufactured products in all rolling stock, iron, and rail infrastructure. Under Buy America, 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 project are produced in the United States.”

Policy

Buy America clearly favors U.S. made goods. In a recent waiver based upon non-availability, the Secretary stated that Buy America ensures that Federal-aid funds are used to support and create domestic jobs.²

Requirements

100 percent rule: 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.

An exception to the 100 percent rule for rolling stock exists where the cost of components (and



subcomponents) produced in the U.S. are more than:

- 60 percent for FY2016 and FY2017
- more than 65 percent for FY2018 and FY2019
- more than 70 percent for FY2020 and beyond

and final assembly takes place in the United States.³

Exceptions to the 100 percent rule are provided by statute where: (1) The application of the requirement would be inconsistent with the public interest; (2) where materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) the inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent. 23 U.S.C. 313(b).

Thresholds for Buy America for public transportation projects were raised from 100,000 to \$150,000 in 2015.

International Non-Discrimination and Trade

Because taxpayers are the source of funds, non-discrimination prohibitions such as the World Trade

Organization (WTO) and treaties (General Agreement on Tariffs and Trade (GATT)) are less effective and may not apply, at all. International law restricts discrimination between domestic producers and foreign suppliers, and among foreign suppliers based in different countries. Where the U.S. is the contractor, using U.S. funds, international discrimination provisions are at their weakest.

Executive Order

Although Buy America has been the law since 1982, President Trump issued Executive Order 13788 Apr. 18, 2017) significantly strengthening Buy America. President Trump’s Executive Order makes clear – Transportation Officials are to be ‘scrupulous’ in enforcing Buy America, and maximize goods, products and services made in the U.S.

How do I get my foreign goods to U.S. Market?

The policy is clear – invest in U.S. manufacturing and assembly. A brief review of the process demonstrates how self-certifications ensure compliance.

Certifications: Suppliers must certify materials and components are U.S. sourced, through a pre-audit developed with the Federal Transit Administration. 49 CFR § 661.12.

¹ 23 U.S.C. § 313, incorporated into the Surface Transportation Assistance Act of 1982.

² Buy America Waiver Notification, 82 FR 46882-01 (FHWA, Oct. 6, 2017)

³ Fixing America’s Surface Transportation (FAST) Act (P.L. 114-94), December 2015; 49 C.F.R. Part 662, 661.11.



What “Buy America” Means for International Rolling Stock and Rail David M. Moore, Smith Gambrell & Russell, LLP

Recipients of funds must develop four possible certifications are required: (1) Pre-award Buy America Certification, (2) Purchaser’s Requirement Certification, and the (3) FMVSS Certification (if applicable) or the (4) Pre-Award Certification of FMVSS Inapplicability.

The Pre-award Buy America Certification requires that the recipient itself reviews source and manufacture information, or a third party has done so.

A post-award audit ensures that the Buy America origination provisions are respected.

Waivers

While waivers are available, they are uncertain and short-lived. Waivers can be obtained where similar components or manufactured items are unavailable, domestic source equivalents are available at costs greater than 25% (following detailed cost formulas), or where in the public interest.

Buy America Impacts

The Government Accounting Office (GAO) stated that assessing the economic effects of Buy America on the steel industry is difficult due to the lack of relevant data. According to one industry estimate, the size of the U.S. market for new street, subway, and transit cars, which would represent only a portion of the Buy America public transportation market, was at least \$2.6 billion in

2017. Foreign-based manufacturers build essentially all intercity passenger rail cars and rail transit vehicles produced in the United States. Buy America has required them to establish assembly plants in the United States, rather than import finished vehicles, according to GAO.

Conclusion

Buy America represents a serious policy supporting U.S. sourced materials and components for rolling stock, steel and infrastructure.

While waivers and exceptions exist, the Trump Administration has made clear that the spirit of Buy America will be protected through contracting, procurement, audits, and enforcement of Buy America provisions.

Smith, Gambrell & Russell can assist with Buy America certifications, waivers, or facility and manufacture development and siting.

For additional information on International siting, markets, and regulatory matters, contact Hans-Michael Kraus at Smith, Gambrell & Russell, LLP at (404)815-3754, mkrause@sgrlaw.com.

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