



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 661

[Docket No. FTA-2012-0019]

Application of Buy America Waivers to Rolling Stock Overhauls and Rebuilds

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of proposed statement of policy and request for comment.

SUMMARY: This notice proposes a statement of policy regarding the application of the Federal Transit Administration's Buy America rules to procurements for the overhaul and rebuilding of rolling stock, and seeks comment from all interested parties.

DATES: Comments must be received by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Please submit your comments by only one of the following means, identifying your submissions by docket number FTA-2012-0019. All electronic submissions must be made to the U.S. Government electronic site at <http://www.regulations.gov>. Commenters should follow the instructions below for mailed and hand-delivered comments:

Federal e-Rulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

U.S. Mail: U.S. Department of Transportation, Docket Operations, West Building, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590.

Hand Delivery: U.S. Department of Transportation, Docket Operations, West Building, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Fax: (202) 493-2251.

Instructions: All submissions must make reference to the “Federal Transit Administration” and include docket number FTA-2012-0019. Due to security procedures in effect since October 2001, mail received through the U.S. Postal Service may be subject to delays. Parties making submissions responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand. Note that all submissions received, including any personal information therein, will be posted without change or alteration to <http://www.regulations.gov>. For more information, you may review DOT’s complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477), or visit <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Jayme L. Blakesley at (202) 366-0304 or jayme.blakesley@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

The purpose of this notice is to propose a statement of policy that will clarify how to apply FTA's Buy America requirements to procurements for the overhaul and rebuilding of rolling stock. Until now, the practice of FTA grantees has been to apply the statutory waiver of 49 U.S.C. 5323(j)(2)(C) to all rolling stock procurements, including the purchase of new vehicles, overhauls, and rebuilds. The waiver allows up to 40 percent foreign content per vehicle. This practice has continued despite FTA's intention in its latest rulemaking, for which the final rule was published at 72 FR 53688 on September 20, 2007, to start requiring 100 percent U.S. content for all rolling stock components purchased as part of an overhaul. To bring industry practices in line with the 2007 rulemaking, FTA proposes this statement of policy, the purpose of which is to clarify what FTA intended in 2007—to apply the manufactured products standard of 49 CFR 661.5 to the purchase of all components for rolling stock overhauls.

II. Background

A. Buy America's Requirements

With few exceptions, Buy America prohibits FTA from funding a project unless “the steel, iron, and manufactured goods used in the project are produced in the United States.” 49 U.S.C. 5323(j)(1). These general requirements are waived for the procurement

of rolling stock if the cost of the components produced in the United States is more than 60 percent of the cost of all components of the rolling stock and final assembly takes place in the United States. 49 U.S.C. 5323(j)(2)(C) (implemented at 49 CFR 661.11).

There is no direct law and little guidance on how to apply Buy America requirements to overhauls and rebuilds. The statutory provision on Buy America, 49 U.S.C. 5323(j), and implementing regulations, 49 CFR part 661, do not include the terms overhaul or rebuild. At least one FTA Circular discusses rebuilds and overhauls, but lacks explicit instructions for how to apply the Buy America requirements to each level of activity. FTA's Grant Management Circular 5010.1D discusses rebuilds and overhauls in the context of determining the useful life of a vehicle:

Rebuild. A rolling stock rebuild is a reconditioning at the end of a vehicle's useful life that creates additional useful life. A vehicle to be rebuilt should have already reached the end of its minimum useful life. An eligible rail car rebuild must extend the vehicle's useful life by a minimum of ten years, and a bus rebuild must extend the vehicle's life by a minimum of four years. FTA Circular 5010.1D, ch. I section 5.bbb, ch. IV section 3.g.

Overhaul. A rolling stock overhaul (sometimes called a refurbishment) is a form of preventative maintenance involving "systematic replacement or upgrade of systems whose useful life is less than the useful life of the entire vehicle in a programmed manner. Overhaul is performed as a planned or concentrated preventative maintenance activity and is intended to enable the rolling stock to perform to the end of the original useful life." Id. at ch. I section 5.qq. In contrast to a rolling stock rebuild, an overhaul does not extend the useful life of the vehicle itself. Rather, it focuses on the useful lives

of the systems that comprise the vehicle, enabling the entire vehicle to perform to the end of its original useful life. Id. at ch. I section 5.qq, ch. IV section 3.h.

B. FTA's 2007 Buy America Rulemaking

In 2007, as part of its Final Rule on Buy America, FTA published in the Federal Register a description of how to apply Buy America to certain end products and components, including rolling stock. 72 FR 53688, Sept. 20, 2007; 72 FR 55102, Sept. 28, 2007 (making a minor correction to 72 FR 53688). Although that rulemaking did not address rolling stock rebuilds and overhauls specifically, it did provide instructions for applying Buy America rules to the purchase of rolling stock replacement parts. With the purpose of simplifying country-of-origin rules for the procurement of replacement parts, FTA adopted “non-shifting” characterizations of replacement parts as components or sub-components and stated that a procurement of a replacement part for rolling stock would be considered consistent with the requirements for manufactured products:

Under the new approach, procurements for replacement parts, whether components or subcomponents of the original end product, would retain their characterization and the requirements applicable to manufactured products would apply. This new approach would apply consistently to the procurement of replacement parts for rolling stock as well as to manufactured products.

72 FR 53688, 53692, Sept. 20, 2007. The Buy America requirements for manufactured goods are found at 49 CFR 661.5.

Through this statement, FTA intended to treat rolling stock overhauls as procurements of replacement parts, and therefore, to be subject to the domestic content rules that require 100 percent U.S. content for manufactured product components.

However, FTA's rulemaking document was insufficiently clear on this point and the industry has continued its longstanding practice of treating overhauls as procurements of rolling stock, and thus eligible for the waiver of 49 U.S.C. 5323(j)(2), as implemented at 49 CFR 661.11, that allows up to 40 percent foreign components.

C. Application to Rebuilds and Overhauls

The rebuild and overhaul processes are conducted for different purposes and must meet different standards to be eligible for FTA funding. A rebuild results in additional useful life of the vehicle that did not exist before, whereas an overhaul is performed to maintain a vehicle and enables it to achieve the useful life it was expected to provide when it was first purchased.

It is this purchase of new useful life that makes a rebuild sufficiently like the procurement of new rolling stock to be able to apply the statutory waiver of 49 U.S.C. 5323(j)(2)(C) that allows up to 40 percent foreign content per vehicle. In contrast, an overhaul is primarily the purchase of replacement parts plus labor, and is for the purpose of maintaining a vehicle, not the acquisition of new useful life. As such, FTA views the purchase of replacement parts for an overhaul the same as it views the purchase of individual replacement parts—the manufactured product requirements of 49 CFR 661.5 apply; all components must be produced in the United States.

III. Proposed Policy

Based on the foregoing, FTA proposes to limit the application of the statutory rolling stock waiver of 49 U.S.C. 5323(j)(2)(C), as implemented at 49 CFR 661.11, to the purchase of new rolling stock and to a rebuild that adds useful life. New purchases and rebuilds may include up to 40 percent foreign components. In contrast, all components purchased as part of a rolling stock overhaul are subject to the manufactured products requirements of 49 CFR 661.5 and must be produced in the United States.

FTA seeks comment from all interested parties. After consideration of the comments, FTA will publish a second notice in the Federal Register with a response to comments and a justification for the final statement of policy.

ISSUED this 13th day of April, 2012.

Dorval R. Carter, Jr.

Chief Counsel

Federal Transit Administration

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