



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2024-0104]

Notice of Final Nonavailability Waiver of Buy America Requirements for Certain High-Speed Rail Products for the California Inaugural High-Speed Rail Service Project

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice.

SUMMARY: The Federal Railroad Administration (FRA) is issuing a waiver of its Buy America requirements to the California High-Speed Rail Authority (the Authority) to use certain products that are not produced in the United States for use in the California Inaugural High-Speed Rail Service Project between Merced, California and Bakersfield, California (Project). FRA is funding the Project under the Federal-State Partnership for Intercity Passenger Rail Program (FSP Program); therefore, FRA's Buy America requirements apply to the Project. FRA's Buy America requirements include both FRA's statutory requirements, which require 100 percent of the manufactured products and steel and iron used in an FRA-funded project to be produced in the United States, and the Build America, Buy America Act (BABA), which requires that all construction materials used in the FRA-funded project be produced in the United States. FRA is not waiving the applicable BABA requirements for construction materials used in the Project. The final waiver would apply to the aluminum car shells, signal systems, high-speed rail turnouts and fire alarm systems based on the domestic nonavailability of such products, as identified by the Authority. The Authority estimates that over 98 percent of the total direct dollar expenditures for the Project would be spent on domestically sourced products and labor, including 100 percent of the civil infrastructure costs.

DATES: This waiver is effective [INSERT DATE 5 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Please submit all comments electronically to the Federal eRulemaking Portal. Go to <https://www.regulations.gov> and follow the instructions for submitting comments.

Instructions: All submissions must refer to the Federal Railroad Administration and the docket number in this notice (FRA-2024-0104). Note that all submissions received, including any personal information provided, will be posted without change and will be available to the public on <https://www.regulations.gov>. You may review DOT's complete Privacy Act Statement in the *Federal Register* published April 11, 2000 (65 FR 19477), or at <https://www.transportation.gov/privacy>.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Shreyas Bhatnagar, Regional Supervisor, Office of Regional Outreach & Project Delivery, Office of Railroad Development, FRA, telephone: (202) 495-8630, email: Shreyas.Bhatnagar@dot.gov or Ryan Arbuckle, Chief, Program Coordination and Strategy, Office of Railroad Development, FRA, telephone: (202) 617-0212, email: Ryan.Arbuckle@dot.gov. For legal questions, please contact Faris Mohammed, Attorney-Adviser, Office of the Chief Counsel, FRA, telephone: (202) 763-3230, email: Faris.Mohammed@dot.gov.

SUPPLEMENTARY INFORMATION:

I. Project History and Background

On December 7, 2022, FRA published a Notice of Funding Opportunity (NOFO) announcing application requirements and procedures to obtain grant funding under the FSP Program for projects not located on the Northeast Corridor for Fiscal Year 2022. The FSP Program provides a federal funding opportunity to improve passenger rail service. On February 3, 2023, FRA published a notice adding funding and extending the application period for the FSP Program NOFO. On March 22, 2023, FRA published a notice (March Notice) inviting high-speed rail project sponsors to voluntarily submit, in advance of being selected to receive FRA funding, a domestic sourcing and workforce plan (DSWP) to demonstrate how the sponsor will

maximize the use of domestic goods, products and materials, consistent with FRA's Buy America requirements.¹

The Authority applied for FSP Program funding expressing its intent to advance the California High-Speed Rail System through completion of the Inaugural High-Speed Rail Service Project between the cities of Merced and Bakersfield in the Central Valley of California.² Consistent with FRA's March Notice, the Authority submitted a DSWP,³ which included an initial request for a waiver of FRA's Buy America requirements for certain products that the Authority concluded are not produced in the United States. The DSWP also provides the Authority's justification for seeking a waiver based on nonavailability of the requested products. The Authority describes its coordination with potential suppliers and consideration of alternate products. In addition to the Authority's market research and coordination, the Authority also refers to market research conducted by Brightline West for the Brightline West High-Speed Train Project, as the Authority anticipates using the same or substantially similar products for the Project. In December 2023, FRA selected the Project to receive \$3,073,600,000 in funding under the FSP Program. In a letter dated September 13, 2024, the Authority requested a waiver from FRA's Buy America requirements consistent with the Authority's DSWP.

The Authority is responsible for developing product specifications and procuring materials for use in the Project and expects to use FSP Program funds for costs associated with those procurements. The Authority's procurement process is separate from FRA's review of the Authority's request for a waiver of Buy America requirements, and FRA is not involved in the development of product specifications or the Authority's procurement process. FRA's role is limited to reviewing the Authority's request for a waiver and making certain statutory findings,

¹ Advancing High-Speed Rail Projects Intended for Operations Over 160 Miles Per Hour Through Domestic Sourcing Plans and Buy America Compliance, 88 Fed. Reg. 17289 (March 22, 2023).

² The California High-Speed Rail System is a multi-phase effort that is planned to provide service between San Francisco and Los Angeles and to provide a competitive transportation mode with estimated speeds capable of 186 (or greater) miles per hour.

³ The DSWP contains proprietary information that FRA has determined is confidential business information. As such, FRA is not making the DSWP available to the public at this time; however, pertinent non-proprietary information provided in the DSWP is discussed in this notice.

consistent with 49 U.S.C. 22905(a)(2). FRA plays no role in the business decisions the Authority makes with respect to procurement of the best products for its project.

In August 2023, the Authority issued a Request for Qualifications (RFQ) to procure six trainsets for the Project that could meet FRA's Passenger Equipment Safety Standards governing Tier III equipment (Tier III Rule), which establishes safety standards for high-speed rail equipment and operations that travel at speeds above 125 mph.⁴ Two Original Equipment Manufacturers (OEMs) responded to the Authority's RFQ. Neither OEM indicated that they would be able to supply a fully Buy America-compliant trainset in their responses as both OEMs indicated they would need a waiver from FRA's Buy America requirements for the aluminum car shells (shell, structure, and vehicle paintwork), as the car shells are not produced in the United States. In April 2024, the Authority issued a Request for Proposals for the six trainsets. In addition to trainsets, the Authority identified additional products that are not produced domestically, which would also require a waiver. The Authority expects to complete its procurement process for the trainsets and other contracts later this year.

Based on information gathered through the procurement process and through market research, the Authority revised its initial DSWP, which further explains how the Authority will meet FRA's Buy America requirements and identifies any necessary waivers for noncompliant products. FRA reviewed the DSWP, including the market research conducted by the Authority.

On September 20, 2024, FRA published for a 30-day public comment period a proposed waiver for the Project based on the domestic nonavailability of certain components. FRA received 11 unique comments, which are discussed below. This notice summarizes FRA's Buy America requirements, the Authority's request for a waiver, and FRA's findings and final waiver.

II. FRA's Buy America Requirements and Policy

⁴ See 49 CFR part 238.

Projects that receive funding under FRA's FSP Program are subject to FRA's Buy America requirements. FRA's Buy America requirements include both: (i) FRA's statutory requirements for steel, iron, and manufactured goods at 49 U.S.C. 22905(a); and (ii) requirements under the Build America, Buy America Act (BABA) and related guidance at 2 CFR 184.6 for construction materials. This means that FRA can fund a project only if the steel, iron, and manufactured goods used in the project are produced in the United States. 49 U.S.C. 22905(a). In addition, FRA-funded projects must also comply with the relevant provisions of BABA, including the requirement that all construction materials used in the project must also be produced in the United States. Pub. L. 117-58, 70914(a); 2 CFR 184.6.

FRA strictly enforces compliance with its Buy America requirements to ensure that FRA-funded projects maximize the use of materials produced in the United States. FRA expects recipients to work with suppliers to conduct thorough market research and adequately consider, where appropriate, qualifying alternate items, products, or materials that can also meet the recipient's technical specifications. Compliance with FRA's Buy America requirements supports domestic industry and well-paying jobs.

III. FRA's Authority to Waive Buy America Requirements

There are limited circumstances in which FRA can waive its Buy America requirements under 49 U.S.C. 22905(a) and BABA. FRA will grant a waiver request only after making the requisite findings consistent with the statutory criteria for a waiver and where a project sponsor has adequately justified the need for a waiver.

FRA may waive its Buy America requirements if FRA determines that: applying the Buy America requirements would be inconsistent with the public interest; 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; rolling stock or power train equipment cannot be bought and delivered in the United States within a reasonable time; or including domestic material will increase the cost of the overall project by more than 25 percent. 49 U.S.C. 22905(a)(2); *see also*

Pub. L. 117-58, 70914(b) (prescribing similar statutory conditions for waivers); and 2 CFR 184.7 (doing the same).

Specifically, when determining whether 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 pursuant to 49 U.S.C. 22905(a)(2)(B), FRA considers whether the recipient has used appropriate due diligence, such as market research or by soliciting proposals through an open procurement process, to identify domestic products or domestically available alternative products that meet the recipient's specifications. A comparable product that performs a similar function is not necessarily a domestic alternative; the product must also meet the recipient's specific requirements. FRA's statutory requirements do not require recipients to change product specifications in order to utilize domestic products that do not meet the recipient's original specifications. If there are no domestically produced products that also meet the recipient's specifications, and the recipient has exercised appropriate diligence, FRA may waive its Buy America requirements based on nonavailability, consistent with 49 U.S.C. 22905(a)(2)(B).

IV. Summary of the Proposed Waiver

On September 20, 2024, FRA issued the Notice of Proposed Nonavailability Waiver of Buy America Requirements for Certain High-Speed Rail Products for the California Inaugural High-Speed Rail Service Project, at 89 FR 77224. Based on the information provided by the Authority, FRA concluded that the following products were not available in the United States:

- Car Shells (shell structure, frame, vehicle paintwork) for six trainsets;
- Eurobalises and Euroloops;⁵
- Counting Heads and Axle Counter Sensors;
- Truck Press (test stand);

⁵ Eurobalise and Euroloops are products installed between the rails of a railway that are part of the European train control system. These products store infrastructure data (e.g., position reference, speed limits, track grade, and maintenance zones) and can send this information to the train.

- Turnout Systems including Derailers; and
- Fire Alarm Systems.

At the time of the proposed waiver, the Authority had not selected an OEM for the trainsets and had not completed its procurement process for the Project, but neither OEM indicated that they would be able to supply a fully Buy America-compliant trainset, as both OEMs would require aluminum car shells that are not produced in the U.S. The Authority's procurement process is separate from FRA's consideration of nonavailability under 49 U.S.C. 22905(a)(2)(B). FRA expects the Authority to make its procurement decision based on the needs for the Project and to select products that meet the Authority's specifications. In a letter dated October 24, 2024, the Authority requested FRA finalize the waiver as proposed. The Authority noted that it will continue its procurement process and review and evaluate proposals based on the needs of the Project. If, based on the final procurement, there are changes to the items described in the final waiver, the Authority may need to request additional waivers from FRA.

V. Discussion of Public Comments

Comments on the waiver were due October 7, 2024. FRA received 11 comments that generally supported the proposed waiver, and no comments that generally opposed the proposed waiver. Commenters did not raise significant concerns or provide new information relevant to FRA's proposed waiver. As such, FRA is not modifying the proposed waiver in response to comments.

VI. NIST-MEP Supplier Scouting Results

Consistent with section 70916 of BABA, FRA will request that recipients consult with the National Institute of Standards and Technology's Manufacturing Extension Partnership (NIST-MEP) through the NIST-MEP's supplier scouting program, prior to issuing a final waiver. The NIST-MEP supplier scouting opportunity allows agencies, manufacturers, and project sponsors to identify potential manufacturers from across the nation to assist in market research on

domestic availability. As the products included in this final waiver are the same as the products described in the Final Nonavailability Waiver for the Brightline West Project, FRA is relying on the results of NIST-MEP's supplier scouting effort for the Brightline West Project. As of January 26, 2024, the NIST-MEP was not able to identify a domestic manufacturer for the products listed within the Brightline West waiver through the supplier scouting program.⁶ This further supports FRA's conclusion that the products listed in the proposed waiver are not produced in the United States.

VII. Final Waiver

Based on its review of the waiver request and DSWP, and in consideration of comments received on the proposed waiver, FRA is waiving its Buy America requirements for the following products:

- Car Shells (shell structure, frame, vehicle paintwork) for six trainsets;
- Eurobalises and Euroloops;
- Counting Heads and Axle Counter Sensors;
- Truck Press (test stand);
- Turnout Systems including Derailers; and
- Fire Alarm Systems.

The waiver would apply only to products listed in Section IV for use in the Project. FRA is not proposing to waive any requirements under BABA, as the waiver does not apply to any construction materials used in the Project. The waiver would not apply to other FRA recipients or to other grants that might be made to the Authority for other projects (including any future phases related to the Project). This waiver will expire upon the end of the period of performance and closeout of the grant agreement for the Project.

Issued in Washington D.C.

⁶ 89 FR 45934 (May 24, 2024).

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