

individuals' access to or amendment of records. When such access or amendment would cause the identity of a confidential source to be revealed, it would impair the future ability of the Department to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. In addition, the system should be exempt from 5 U.S.C. 552a(e)(1) which requires that an agency maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or executive order. The Department believes that to fulfill the requirements of 5 U.S.C. 552a(e)(1) would unduly restrict the agency in its information gathering inasmuch as it is often not until well after the investigation that it is possible to determine the relevance and necessity of particular information.

In a notice, to be published separately in the **Federal Register**, the Department proposes to revise Treasury/IRS 34.022. The purpose of the notice is to make certain alterations to the notice including changing the title from "Treasury/IRS 34.022—National Background Investigations Center Management Information System" to "Treasury/IRS 34.022—Automated Background Investigations System (ABIS)."

As required by Executive Order 12866, it has been determined that this proposed rule is not a significant regulatory action, and therefore, does not require a regulatory impact analysis.

The regulation will not have a substantial direct effect on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this Proposed rule does not have federalism implications under Executive Order 13132.

Pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601–612, it is hereby certified that these regulations will not significantly affect a substantial number of small entities. The proposed rule imposes no duties or obligations on small entities.

In accordance with the provisions of the Paperwork Reduction Act of 1995, the Department of the Treasury has determined that this proposed rule would not impose new record keeping, application, reporting, or other types of information collection requirements.

List of Subjects in 31 CFR Part 1

Privacy.

Part 1 subpart C of Title 31 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1—[AMENDED]

1. The authority citation for part 1 continues to read as follows:

Authority: 5 U.S.C. 301, 31 U.S.C. 321, subpart A also issued under 5 U.S.C. 552, as amended. Subpart C also issued under 5 U.S.C. 552a.

2. Section 1.36 of subpart C is amended as follows:

a. Paragraph (c)(1)(viii) is amended by removing "IRS 34.022—National Background Investigations Center Management Information System" from the table.

b. Paragraph (m)(1)(viii) is amended by adding the following text to the table in numerical order:

§ 1.36 Systems exempt in whole or in part from provisions of 5 U.S.C. 522a and this part.

Number	Name of system
(m) * * *	
(1) * * *	
(viii) * * *	
* * * * *	
IRS 34.022	Automated Background Investigations System (ABIS)
* * * * *	
* * * * *	

Dated: October 3, 2005.

Sandra L. Pack,
Assistant Secretary for Management and Chief Financial Officer.
 [FR Doc. E5–6577 Filed 11–25–05; 8:45 am]
BILLING CODE 4830–01–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 661

[Docket No. FTA–2005–23082]

RIN 2132–AA80

Buy America Requirements; Amendments to Definitions and Waiver Procedures

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Safe, Accountable, Flexible, Efficient Transportation Equity

Act: A Legacy for Users (SAFETEA–LU) requires the Federal Transit Administration (FTA) to make certain changes to our Buy America requirements. Accordingly, this Notice of Proposed Rulemaking (NPRM) would clarify the Buy America requirements with respect to microprocessor waivers, remove two general waiver categories, allow for post-award waivers, require greater detail for public interest waivers, and specify that final decisions by FTA are subject to judicial review. In addition, this NPRM would clarify the definitions of end product, negotiated agreement, and contractor, and provide a list representative of those items. The NPRM also proposes addressing the procurement of systems under the definition of end product, negotiated agreement, and contractor to ensure that major system procurements are not used to circumvent the Buy America requirements. Finally, the NPRM would make a minor clarification to pre-award and post-delivery review of rolling stock purchases.

DATES: Comments requested by January 27, 2006. Late filed comments will be considered to the extent practicable.

ADDRESSES: You may submit comments [identified by DOT DMS Docket Number FTA–2005–23082] by any of the following methods:

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

Web site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.

Fax: 202–493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, PL–401, Washington, DC 20590–0001. Hand Delivery: Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name (Federal Transit Administration and Docket number (FTA–2005–23082) or the Regulatory Identification Number (RIN) for this rulemaking at the beginning of your comments. You should submit two copies of your comments if you submit them by mail. If you wish to receive confirmation that FTA received your comments, you must include a self-addressed stamped postcard. Note that all comments received will be posted, without change, to <http://dms.dot.gov> including any personal information provided and will be available to

internet users. Please see the Privacy Act section of this document.

Docket: For access to the docket to read background documents and comments received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Joseph Pixley, Chief Counsel's Office, Federal Transit Administration, 400 Seventh Street SW., Room 9316, Washington, DC 20590, (202) 366-4011 or Joseph.Pixley@fta.dot.gov.

SUPPLEMENTARY INFORMATION:

I. Background

In section 401 of the Surface Transportation Assistance Act of 1978 (STAA) (Pub. L. 95-594, 92 Stat. 2689), Congress first enacted the Buy America legislation applicable to the expenditure of Federal funds by recipients under FTA grant programs. This legislation established a domestic preference for "articles, materials, supplies mined, produced, or manufactured" in the United States and costing more than \$500,000. In January 1983, Congress repealed section 401 and substituted section 165 of the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424, 96 Stat. 2097), which eliminated the \$500,000 threshold and created four waiver exceptions. Section 165 is codified at 49 U.S.C. 5323(j). Congress further amended 49 U.S.C. § 5323 (j) in a series of enactments between 1984 and 2003. *See generally* section 227 of the Surface Transportation Assistance and Uniform Relocation Act of 1987 (STURAA) (Pub. L. 100-17, 101 Stat. 165); section 1048 of the Intermodal Surface Transportation Efficiency Act (ISTEA) (Pub. L. 102-240); Section 3020(b) of the Transportation Equity Act for the Twenty-First Century (TEA-21) (Pub. L. 105-178).

Pursuant to 49 U.S.C. 5323 (j), FTA promulgated regulations to implement and administer the Buy America requirements at 49 CFR 661.

SAFETEA-LU amends Section 5323(j) by redesignating paragraphs (3) through (7) as paragraphs (4) through (8) and by inserting after paragraph (2) and (8), respectively. Section 5323(j)(6) (as so redesignated) is also amended by striking "Intermodal Surface Transportation Efficiency Act of 1991 (Public Law 102-240, 105 Stat. 1914)" and inserting "Federal Public Transportation Act of 2005".

Furthermore, SAFETEA-LU repeals the general waiver found in Appendix A

of 49 C.F.R 661.7 subsections (b) and (c) for 15 passenger vans and wagons produced by Chrysler Corporation.

In addition, SAFETEA-LU requires that the Secretary issue a rule that clarifies the microprocessor waiver, defines end product, negotiated procurement, and contractor, allows for a post-award waiver, and includes a certification under a negotiated procurement process. Each of these legislative changes and requirements will be discussed in further detail, below.

II. Written Justification for Public Interest Waiver

FTA's Buy America regulations provide for public interest waivers if the Administrator finds that the application of the Buy America requirements would be inconsistent with the public interest.

The new provision in section 5323(j)(3) requires that the Secretary issue a detailed written justification, explaining why the waiver is in the public interest, and requiring that such justifications be published in the **Federal Register** for notice and comment by the public for a reasonable period of time. FTA considers this requirement to be self-explanatory. To implement the change in 5323(j)(3), therefore, FTA proposes to add the following language: "When granting a public interest waiver, the Administrator shall issue a detailed written statement justifying why the waiver is in the public interest. The Administrator shall publish this justification in the **Federal Register**, providing the public with a reasonable period of time for notice and comment."

Note that this proposed language in the regulation requires written justification and publication in the **Federal Register** only in cases where the Administrator approves a waiver request, rather than denies such a request. FTA makes this distinction for two reasons. First, the statutory language indicates that only waiver approvals are required to be published in the **Federal Register**. *See* Section 5323(j)(3) ("shall issue a detailed written justification as to why the waiver is in the public interest"). Second, for some time FTA has placed all requests for public interest waivers on the Buy America section of its web site, http://www.fta.dot.gov/legal/buy_america/14328_ENG_HTML.htm, and has requested comment from the public. In addition, FTA notifies the American Public Transportation Association (APTA) when a waiver request is posted and APTA sends out a notice to all of its members, which include transit authorities and transit

industry members. This process functions well. The relevant industries and grantees actively respond and provide valuable information to FTA. Following receipt of such comments, the FTA Office of Chief Counsel, through authority delegated by the Administrator, then issues "detailed written statements" either approving or disapproving public interest waiver requests. FTA proposes maintaining this in-house "notice and comment" process in cases where public interest waiver requests are denied. FTA requests public comment on whether we should continue with this process or whether there are other, more effective means, for accomplishing this task.

III. Administrative Review

FTA's Buy America regulations provide for "Rights of Third Parties" to petition FTA for review of a decision and to pursue any other additional right at law or equity.

The new Section 5323(j)(9) states that "a party adversely affected by an agency action under this subsection shall have the right to seek review under section 702 of title 5 [the Administrative Procedure Act (APA)]." FTA considers this provision to be self-explanatory. Moreover, FTA has always believed that its final agency actions are subject to judicial review under the APA. To clarify this, however, FTA proposes striking the word "Third" from the title heading "Rights of Third Parties" in section 661.20, to reflect that all parties have the right to judicial review under the APA. A new subsection (a) will be added as follows: "(a) A party adversely affected by an FTA action under this subsection shall have the right to seek review under the Administrative Procedure Act (APA), 5 U.S.C. 702 *et seq.*"

In addition, the existing provision in section 661.20, pertaining to the rights of third parties, will be designated as paragraph (b), with the following highlighted clause added at the beginning, to read: "(b) *Except as provided in section 661.20(a)*, the sole right of any third party under the Buy America provision is to petition FTA under the provisions of Sec. 661.15 of this part. No third party has any additional right, at law or equity, for any remedy including, but not limited to, injunctions, damages, or cancellation of the Federal grant or contracts of the grantee."

FTA seeks comment on whether this proposed change is sufficient to clarify a party's appeal rights under the Buy America regulations.

IV. Repeal of General Waiver for Chrysler Vans

Appendix A to section 661.7 provides for general waivers for 15 passenger Chrysler vans and wagons. SAFETEA-LU repeals these two general waivers for Chrysler vehicles in Appendix A. Accordingly, subsections (b) and (c) of Appendix A, 49 CFR 661.7, will be stricken and subsection (d), the general waiver pertaining to microcomputers, will be re-designated as subsection (b).

V. Microprocessor Waiver

FTA's existing regulations provide for a general waiver of microcomputer equipment. SAFETEA-LU requires that the Secretary issue a rule to "clarify" the microcomputer/microprocessor waiver as follows:

(A) *Microprocessor waiver.*—To clarify that any waiver from the Buy America requirements issued under section 5323(j)(2) of such title [49 U.S.C.A. 5323(j)(2)] 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 a product containing a microprocessor, computer, or microcomputer.

This "clarification" in SAFETEA-LU actually reflects current FTA practice with respect to implementing the general waiver for microcomputer, microprocessor, and related equipment. For example, FTA has previously defined a "microcomputer" as

A computer system whose processing unit is a microprocessor. A basic microcomputer includes a microprocessor, storage, and input/output facility, which may or may not be on one chip. The same source defines computer system as: A functional unit consisting of one or more computers and associated software, that uses common storage for all or part of a program and also for all or part of the data necessary for the execution of the program executes user-written or user-designated programs; performs user-designated data manipulation, including arithmetic operations and logic operations; and that can execute programs that modify themselves during their executions. A computer system may be a stand-alone unit or may consist of several interconnected units. Synonymous with ADP system, computing system.

50 FR 18760 (May 2, 1985).

Applying this definition, FTA determined that a manufacturer may use foreign microcomputer equipment without violating the Buy America requirements. For example, FTA determined that a Mobile Data Communication System was covered by the microcomputer waiver, and found that "[a]ll this equipment and associated software is linked together to a computer system at your headquarters with additional interfaces to other

CDTA computer systems." Capital District Transportation Authority letter, August 30, 2001. Following that decision, FTA withdrew an outstanding advance notice of proposed rulemaking on the microcomputer waiver, and stated as follows:

It should be noted that FTA does not apply the waiver to an entire product because it contains a microcomputer. The parameters of the waiver as it currently exists are that if the end product is itself a microcomputer or software as defined above, Buy America is waived. If, however, the end product contains a microcomputer (e.g., a fare card system), that microcomputer is exempt from the requirements of Buy America, but the rest of the end product must be in compliance.

68 FR 9810 (Feb. 28, 2003).

FTA applied this reasoning to subsequent Buy America decisions, finding for example, that some components of a fare collection system were subject to the waiver, but others were not. Specifically, FTA found that "[t]he bill and coin validator, and the printer, are not, themselves, microcomputers, although they may each contain embedded microprocessors." CoinCard letter, May 23, 2003. See also, MTA letter, September 23, 2003, and Vansco Electronics letter, September 15, 2003. All of these letters are available on FTA's Web site at <http://fta.dot.gov>. In FTA's most recent Buy America decision addressing the microcomputer waiver in a procurement for Monitoring and Diagnostic equipment, FTA stated:

Some of the Monitoring and Diagnostic system is microcomputer equipment subject to the waiver; however, some of it is not. As discussed in the definition, a microcomputer is a computer based on a microprocessor. A microprocessor is a computer whose central processing unit is contained on one or a small number of integrated circuits. Microcomputers may be stand-alone units or they may be embedded in other equipment. They must have, or be, controllers or communication processors and be capable of processing, storage, programming, and have input/output facilities. Microcomputers may be grouped within larger systems or equipment, consisting of several interconnected units each functioning as either stand-alone units or embedded equipment, or a mix of both. Related hardware and equipment that may be controlled by a microprocessor is not covered by the microcomputer waiver.

Questor Tangent Letter, August 2, 2004.

To reflect FTA's current understanding of this general waiver and to implement the specific requirements of SAFETEA-LU, is clarified to read as follows: "(b) Under the provisions of Sec. 661.7 (b) and (c) of this part, a general public interest waiver from the Buy America

requirements applies to microprocessors, computers, microcomputers, or software, or other such devices, which are used solely for the purpose of processing or storing data. This general waiver does not extend to a product or device which merely contains a microprocessor or microcomputer, or is controlled by a microprocessor, and is not used solely for the purpose of processing or storing data." FTA seeks comment on whether this change adequately clarifies the microprocessor waiver.

VI. Proposed Revisions to Buy America Definitions

A. Negotiated Procurement

SAFETEA-LU requires that the Secretary issue a rule to define the term "negotiated procurement." In public contracting two basic methods of procurement are used: sealed bidding and negotiated procurement. Generally, sealed bidding is a formal process marked by five phases: (1) Preparation of the Invitation for Bids (IFB) by the contracting agency; (2) Publicizing the IFB; (3) Submission of bids by interested contractors; (4) Evaluation of bids by the contracting agency; and (5) Contract award. In sealed bidding, contract specifications are clear, complete and definite. There are no "discussions" or "negotiations" between the parties, other than what is contained in the IFB and submitted bids. There are strict requirements that bids comply in all material respects with the invitation for bids, to include the method and time of bid submission. A contracting agency may only accept a responsive bid from a responsible bidder. A bid is considered "responsive" if it unequivocally offers to provide the requested supplies or services at a firm, fixed price, in accordance with the terms of the IFB. Finally, contracting agencies evaluate bids on price and non-price-related factors, but with award generally made on the basis of lowest price offered.

By contrast, negotiated procurements are marked by greater flexibility and variety than sealed bid solicitations. Generally, in negotiated contracting the contracting agency issues a Request for Proposal (RFP). RFPs include a description of the work to be performed, a section describing the information that offerors need to provide in their proposals, and a section describing how the agency will evaluate proposals. Interested contractors, called offerors, submit offers or proposals in response to the RFP. Unlike in sealed bidding, negotiated procurements may include "discussions" or "negotiations"

between agency and offerors, if the agency so chooses. Also, unlike in sealed bidding, which is marked by a one-time, all or nothing submission of bids, negotiated procurements may include multiple offers by each contractor, with the "best and final" offer or "final revised" offer controlling, unless award is to be made on receipt of initial proposals. In addition, negotiated procurements may be either competitive or non-competitive, as in the case of sole-source procurements. In negotiated procurements, contracting officers generally have discretion to weigh non-price factors to a greater extent than in sealed bidding. In so-called "best value" contracting, price may even be the low ranking factor.

Because negotiated procurements are marked by so much variety and provide contracting officials with great discretion to implement different procurement mechanisms (e.g. award with discussions versus award without discussions), the term "negotiated procurement" is difficult to define. See e.g., Gallagher, *The Law of Federal Negotiated Contract Formation* at p. 39 (CGA Publications, Inc., 1981) ("Providing a nutshell description of 'negotiation' is much more difficult [than sealed bidding].") For this reason, contract law scholars have defined negotiated procurement by what it is not. For example, Professors Nash and Cibinic describe a negotiated contract as one that is awarded without the use of a sealed bid. See *Formation of Government Contracts*, Second Edition, George Washington University, 1986. The drafters of the Federal Acquisition Regulation (FAR), which governs direct Federal procurement, have adopted a similar definition. FAR Part 15—Contracting By Negotiation, defines negotiated procurement as follows: "A contract awarded using other than sealed bidding procedures is a negotiated contract." 48 CFR 15.000.

There is no FTA requirement that grantees use a specific procurement method such as sealed bidding or negotiated procurement, or a particular methodology of negotiations, for any particular procurement. Indeed, the Buy America regulations in 49 CFR Part 661 refer to both "bids" and "bidders" and "offers" and "offerors," reflecting the two basic methods of procurement available to grantees.

Recognizing that procurement practices are established locally, and to define "negotiated procurement" in such a way as not to overtly contradict or limit local practices of grantees, FTA proposes adopting the "flexible" definition of negotiated contracts in FAR Part 15. The proposed definition to

be added would be as follows:

"Negotiated Procurement means a contract awarded using other than sealed bidding procedures."

FTA seeks comment on whether this definition sufficiently captures the concept of negotiated procurement and whether there are other definitions available that more accurately capture this concept.

B. Contractor

SAFETEA-LU requires that the Secretary issue a rule to define the term "contractor." To implement this requirement, FTA proposes two alternative definitions adopted from direct Federal procurement. The first proposed definition to be added would state as follows: "Contractor means any individual or other legal entity that directly or indirectly (e.g., through an affiliate), submits bids or offers for or is awarded, or reasonably may be expected to submit bids or offers for or be awarded, a federally funded third party contract or subcontract under a federally funded third party contract; or, conducts business, or reasonably may be expected to conduct business, with an FTA grantee, as an agent or representative of another contractor." This proposed definition comes from the definition of "contractor" in FAR 9.403 (suspension & debarment section). The term contractor could also be defined as follows: "Contractor means any party to a third party government contract other than the government." This definition is based on the definition of "contractor" in the Contract Disputes Act (CDA), 41 U.S.C. 601(4).

FTA seeks comment on the relative merits and demerits of selecting one of the above definitions over the other. FTA would also like to receive information on whether there are other definitions available for this situation that would better serve our purpose. If a commenter proposes an alternative definition, please include as much supporting information as possible for the alternative definition.

C. End Product

SAFETEA-LU requires that the Secretary issue a rule to define the term "end product," and to develop a list of representative items that are subject to the Buy America requirements. To implement this requirement, FTA proposes two alternative definitions of "end product." The first is based on the definition of end product currently used by FTA. To examine this current definition, FTA will first review its history in Buy America practice.

FTA's first regulatory implementation of the Surface Transportation Assistance Act of 1978 (STAA) (Pub. L. 95-594, 92 Stat. 2689) made clear that "[t]he legislative history of the Buy America provision indicates that Congress intended it to be interpreted in the light of the Buy American Act of 1933, 41 U.S.C. 10a-10d, to the extent the Act is applicable." The Buy American Act (BAA), in fact, is an entirely different statute from Buy America, applicable to direct purchases by federal agencies and departments. As implemented in FAR Part 25, the BAA establishes a preference for "domestic end products," which are defined as follows:

An unmanufactured end product which has been mined or produced in the United States, or an end product manufactured in the United States if the cost of its components mined, produced and/or manufactured in the United States exceeds 50 percent of the cost of all its components.

The STAA of 1978 and its implementing regulation retained this "preference" for "domestic end products" from the BAA, but tailored the requirements to FTA's grant making process. FTA's first Buy America regulation issued in December 1978 defined "end product" as follows: "(e) 'End product' means an article, material or supply, whether manufactured or unmanufactured, that is to be acquired by the grantee, with financial assistance derived from UMTA, and that is to be delivered to the grantee, as specified by the third party contract. (f) 'Foreign end product' means an end product other than a domestic end product." Like the FAR Part 25 provisions implementing the BAA, the original Buy America regulation also included a "50 percent" requirement for domestic components. (See section 660.22 Determination of Origins stating: "(a) In order for a manufactured end product to be considered a domestic end product—(1) the cost of the domestic components must exceed 50 percent of the cost of all its components; and (2) the final assembly of the components to form the end product must take place in the United States.")

Subsequently, Congress eliminated the "preference" for domestic products in Buy America and the "50 percent" domestic component requirement, making compliance with Buy America an absolute "requirement" (unless a waiver applies) and increasing the domestic content threshold to 100 percent in the case of steel and iron products and manufactured products, and 60 percent in the case of rolling stock. Over the years, FTA modified its Buy America regulations to reflect these

changes. Nevertheless, from December 1978 to this day, FTA has retained some variation of “end product” as originally defined in the first Buy America regulation: “‘End product’ means an article, material or supply * * * that is to be delivered to the grantee, as specified by the third party contract.” Section 660.13. This definition comes from case law interpreting the Buy American Act. For example, in *Brown Boveri Corp.*, the then U.S. General Accounting Office [now the U.S. Government Accountability Office] (GAO) defined “end product” as follows: “As to a given contract the end product is the item to be delivered to the Government as specified in the contract.” B-187252, 56 Comp. Gen. 596, May 10, 1977 (emphasis in original).

Consistent with this precedent, FTA currently defines “end product,” in part, as “any item subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract.” (Emphasis added). 49 CFR 661.11(s). In the current version of the Buy America regulations, this definition of “end product” migrated from the definition section at 661.3 to the rolling stock section at 661.11, creating some confusion that the term “end product” is only relevant to rolling stock procurements. Nevertheless, the term “end product” remains in the definition of “component” in section 661.3, indicating the general applicability of the term in Buy America analysis. See 49 CFR 661.3: “Component means any article, material, or supply * * * that is directly incorporated into the end product at the final assembly location.”

Moreover, although section 661.11 applies specifically to rolling stock procurements, FTA has consistently applied the definition at section 661.11(s) and similar definitions of “end product” to steel and iron and manufactured products as well. In a letter to the Santa Clara Valley Transportation Authority dated October 18, 2001, for example, FTA addressed whether a “cable trough” was an end product in a procurement for a section of the Tasman Corridor East light rail construction project. The letter stated, in part, as follows:

FTA has consistently applied the following reasoning to the end product question: “[A]n end product is ‘any item’ * * * that is to be acquired by a grantee, as specified in the overall project contract. The key determinant is the grantee’s specification. For example, if a grantee is procuring a new rail car, the car is the end product and the propulsion motor would be a component of the end product. If that same grantee is procuring a

replacement propulsion motor for an existing rail car, that propulsion motor would be the end product.” 56 FR 928 (Jan. 9, 1991). (Emphasis added.)

Similarly, in 1981 FTA determined that “the procurement of construction is treated as procurement of a manufactured product in that the deliverable of the construction contract is considered as the end product and the construction materials used therein are considered components of the end product.” 46 FR 5808 (Jan. 19, 1981). Further, when asked to clarify the definition of “end product,” FTA concluded that, “the deliverable item specified in the contract is the end product. For example, in a contract for 10 buses that must contain 500 h.p. engines, the 10 buses are the end-products.” Id. (Emphasis added.)

Under FTA’s long standing “end product” analysis, where the end product of a procurement is the deliverable item specified by the grantee in the third party contract, not only the “end product,” but also the components, subcomponents, and even the applicable Buy America standard are subject to “shift,” for lack of a better term, depending on the article being procured. In the earlier example, cited above, if a grantee is procuring a new rail car, the car is the end product and the propulsion motor would be a component of the end product. For this hypothetical rail car end product, the rolling stock standard (e.g. 60 percent domestic components by cost) at 661.11 would apply. However, if that same grantee is procuring a replacement propulsion motor for an existing rail car, that propulsion motor would be the end product (with different resulting components), and the manufactured products standard (100 percent U.S. content) would apply.

Again, this so-called “shifting” end product analysis is long-standing at FTA, beginning with the original implementation of Buy America in 1978. Moreover, this methodology is based on decisions interpreting the Buy American Act. In the case of *Brown v. Boveri*, cited previously, GAO recognized a similar “shifting” analysis of end product under the BAA:

We have held that there is no inconsistency between a given article’s classification as an end product under a particular procurement and its subsequent classification as a component under another contract under which that article will be incorporated into a different end product.

56 Comp. Gen. 596 (1977). In a decision letter from April 2000, FTA explained the advantages of this “shifting” end product methodology as avoiding having to classify literally thousands of parts, due to the enormous administrative burden:

Depending on the particular procurement at issue, literally thousands of individual manufactured items, themselves made up of many thousand more manufactured sub-items, may go into the ultimate product being procured by an FTA grant recipient. Indeed, the question is one of perspective: any given item, from a screw to a maintenance garage, may be viewed as an end product, a component, a subcomponent, or less. Accordingly, FTA’s rule looks at the end product being acquired in a given case. Here, the procurement contract was for the garage; accordingly, the vehicle lift to be installed in the garage was a component. Further, the end product must be the result of a manufacturing process. In this case, the hoist will ultimately be a fixture of the garage, and installation of the hoist is part of the manufacturing process. The construction of the garage as a whole, is the subject of the procurement and the end product.

June 8, 2000 decision letter to Macton-Joyce and Whiting Corporation.

Based on this long standing “end product” methodology and precedent, FTA proposes moving its existing definition of end product at 661.11(s) to the definition section of Part 661.3, for universal applicability. In keeping with the Congress’s mandate to include a “representative list” of end product items, FTA proposes the following general definition: “End product means any item subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract. A list of representative end product items is included at Appendix A.” FTA seeks public comment on this proposal.

FTA proposes an alternative definition of “end product” as follows:

End product means any article, material, supply, or system, whether manufactured or unmanufactured, that is acquired for public use under a federally funded third party contract. A list of representative end products is included at Appendix A.

FTA bases this alternative definition on the definition of end product under the Buy American Act in FAR Part 25. What FTA proposes under this second, alternative version is to abandon its long standing “shifting” end product methodology described earlier, in favor of one where the end products do not “shift.” In other words, where a bus, rail car, or other major procurement items are always designated as end products—and their components are always designated as components, even if purchased as replacement parts. In the earlier example, cited above, if a grantee is procuring a new rail car, the car is the end product and the propulsion motor would be a component of the end product. Again, for this hypothetical rail car end product, the rolling stock standard (e.g. 60 percent domestic components by cost) at 661.11 would

apply. However, under the new end product definition and methodology, if that same grantee is procuring a replacement propulsion motor for an existing rail car, which propulsion motor would still be a component of the rail car end product, and the rolling stock standard applicable to the rail car would apply to its component. Such a new methodology would necessarily place greater reliance on the accompanying list of end product items. In addition, procurements under this new Buy America methodology may result in multiple end products or components. In such instances, each distinct end product or component procured with federal funds must separately and independently comply with applicable Buy America standards.

FTA seeks comment on which approach should be adopted and why one approach is favored over the other.

D. End Product as System

In defining terms like “end product,” SAFETEA-LU requires that the Secretary issue a final rule addressing “the procurement of systems * * * to ensure that major system procurements are not used to circumvent the Buy America requirements.” FTA has long considered “systems” as definable end products. For example, in decisions dating from 1994, 1995, and 2002, FTA has taken the position that automated fare collection systems (AFC) systems constitute end products. Indeed, section 661.11(s) states, in part, that “[i]f a system is being procured as the end product by the grantee, the installation of the system qualifies as final assembly.” (Emphasis added). In 1991, FTA also issued a **Federal Register** notice describing the procurement of an entire system under a design-build, or turn-key procurement:

One commenter questioned how UMTA applies the Buy America requirements when a grantee procures an entire system (a turn-key project). In purchasing systems, it is industry practice to have a contract broken down by sub-systems. As just mentioned, UMTA has defined end product as “any item or items * * * to be acquired by a grantee, as specified in the overall project contract.” (Emphasis supplied.) (See § 661.11(u).) Accordingly, each sub-system identified in the contract is an end product and subject to the Buy America requirement.

For example, UMTA has determined in the past that an entire people mover system has six sub-systems to be supplied by the contractor (under the terms of a particular contract) and that each sub-system is an individual end product. The six sub-systems are: the guideway surfaces and equipment; the vehicles; the traction power system; the command and control system; the communications system; and the maintenance facility and equipment. This

means that six separate products must meet the Buy America requirements.

56 FR 926.

Furthermore, decisions interpreting the Buy American Act have also recognized “systems” as end products. In *Brown Boveri Corp.*, the “end product” to be delivered was a sodium pump-drive system in a nuclear power plant. 56 Comp. Gen. 596 (1997). Similarly, in *Matter of: Dictaphone Corp.*, B-191,383, May 8, 1978, 78-1 CPD 343, GAO held that where an agency purchased a “Central Dictation System” the various elements of the system, such as transcribers and recorders, were not independent end products, but rather components of a system. Furthermore, in the case of *Bell Helicopter Textron, Inc. v. Adams*, the U.S. District Court for the District of Columbia held that complete helicopters were not individual end products but components of a system (“Short Range Recovery (SRR) Helicopter System . . . define[d] the contract end product of this procurement”). 493 F. Supp. 824, 833 (D.C. D.C. 1980). There is thus a long standing precedent both within the agency and without indicating that procurement of “systems” constitute end product items. Beginning in the mid-1990’s and today, especially, transit projects are increasingly automated and have integrated “systems” of various types within their core functionality. For these reasons, FTA proposes to retain this application of “systems” in the end product definition adopted in this rule. Nevertheless, to better implement Congress’s mandate in SAFETEA-LU to “address the procurement of systems under the definition [of end product] to ensure that major system procurements are not used to circumvent the Buy America requirements,” FTA proposes defining the term “system.”

In *Bell Helicopter Textron, Inc. v. Adams*, cited previously, the U.S. District Court acknowledged that “presently [in 1980] there are no uniform guidelines interpreting such critical terms as * * * ‘system.’” 493 F. Supp. 824, 831 (D.D.C. 1980). However, within law applicable to the Customs Service, analogous principles support characterizing individual machines or pieces of equipment integrated together to provide a single defined function as a single system. For example, the Customs Service in a case in New York concluded that a “Flexipark Parking System” consisting of entry machines, exit machines, automated cashier stations, and “pay on foot” automated paying machines represented a single

system under a single tariff heading, and not separately classified components. NY H88649, 2002 U.S. Customs NY Lexis 2030 (March 8, 2002). Treas. Dec., 2002 U.S. CUSTOM NY LEXIS 2030; NY H88649 (Mar. 8, 2002).

Moreover, the Harmonized System of tariff classification used by the United States specifically recognizes that fare machines, cash registers and similar calculating devices may be combined with other units to comprise a single system. See Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. 1202, heading 8470. The explanatory notes that govern Chapter 84 expressly require that machines which work in combination to perform a specific function are to be classified as a single system under a single tariff heading. These notes provide:

Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electrical cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 * * *, then the whole falls to be classified in the heading appropriate to that function.

HTSUS, Section XVI, Note 4. Based on this “functional test” for interconnected systems from customs law, FTA proposes a definition of “system,” as follows:

System means 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.

Under this proposed new definition the system would be the end product and the individual machines, products, or devices that constitute the system would be components. Certainly some equipment designated as part of a “system” in a third party contract may, in fact, prove to be ancillary to the core functionality of the system, and would be a separate end product. Using the proposed “functional” definition of system, above, therefore, FTA will carefully review system procurements to determine whether a system exists and if so, which items of equipment constitute the system.

End product systems may be proprietary, where connections and interfaces between devices are marked by proprietary rights or license. Or, depending on the requirements of the grantee, system procurements may require open architecture that permits interface between non-proprietary devices. FTA seeks comment as to

whether the Buy America requirements should apply equally for these two types of system end products, or whether different Buy America standards should apply to proprietary versus open architecture systems. FTA seeks comment on its proposed approach for defining system.

In keeping with the Congress's mandate to include a "representative list" of end product items, FTA proposes the following list:

The following is a list of items, as specified by grantees in third party contracts, that are representative end products that are subject to the requirements of Buy America. This list is not all-inclusive.

(1) Rolling stock end products: All individual items identified as rolling stock in Section 661.3 (buses, vans, cars, railcars, locomotives, trolley cars, ferry boats, as well as vehicles used for support services); train control equipment or systems; communication equipment or systems; traction power equipment or systems.

(2) Steel and iron end products: Products and infrastructure projects made primarily of steel or iron or involving track work, including bridges; steel or iron structures; running rail and contact rail; turnouts.

(3) Manufactured end products: Fare collection equipment [non-system equipment] or systems; computers and computer systems; information, security, and data processing equipment or systems; lifts, hoists, and elevators; 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.

This proposed list is not meant to be all-inclusive, but rather describes general categories of end product items. Some of these items are easy to identify as discreet end products, such as buses. Other products are not so easily categorized. For example, the proposed list identifies the following types of equipment as either discreet end products or as system end products: Train control equipment or systems; communication equipment or systems; traction power equipment or systems; information, security, and data processing equipment or systems. This approach is meant to be flexible, to account for a range of procurement requirements. To illustrate this, if a grantee procures hand-held radios, which are one of the items enumerated in 49 CFR 661.11(u)(3), the radios would be discreet end products, under the category of "communication equipment." However, if the grantee procures a hypothetical, wayside "surveillance system," which includes interconnected video cameras, microcomputers, alarms, and remote relay capability, then the "surveillance system" would be the end product, and the individual items that make up the

system would constitute components. At this stage, it is not practical to pre-define what type of equipment would go into such systems, as transit operators may seek to mix and match different types of system equipment to obtain different functionalities. Therefore, a grantee's specifications in the third party contract will continue to remain important in determining what constitutes discreet end product "equipment" or system end products.

FTA considers any proposed list of representative end products to be very important in future Buy America determinations. FTA seeks comment on this proposed list.

E. Final Assembly

FTA proposes amending the definition of "final assembly" in Part 661 to incorporate agency guidance. Under FTA's Buy America requirements for rolling stock, 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. 661.11, 60 percent of all components, by cost, must be of U.S. origin, and final assembly must take place in the U.S. "Final assembly" is defined as follows: "Final Assembly is the creation of the end product from individual elements brought together for that purpose through application of manufacturing processes. If a system is being procured as the end product by the grantee, the installation of the system qualifies as final assembly." This definition of "final assembly" in the regulation proved to be insufficiently detailed in practice. Grantees and contractors frequently sought FTA guidance on what constituted "final assembly" in rolling stock procurements. For this reason, FTA created a Dear Colleague letter of March 18, 1997, which described the minimum requirements for final assembly of rail car vehicles and buses. Section 3035 of the Transportation Equity Act for the 21st Century incorporated these requirements into law. The March 18, 1997 letter states, in part, the following:

In the case of the manufacture of a new rail car, final assembly would typically include, as a minimum, the following operations: Installation and interconnection of propulsion control equipment, propulsion cooling equipment, brake equipment, energy sources for auxiliaries and controls, heating and air conditioning, communications equipment, motors, wheels and axles, suspensions and frames; the inspection and verification of all installation and interconnection work; and the in-plant testing of the stationary product to verify all functions. In the case of a new bus, final assembly would typically include, at a minimum, the installation and interconnection of the engine, transmission, axles, including the cooling and braking systems; the installation and interconnection

of the heating and air conditioning equipment; the installation of pneumatic and electrical systems, door systems, passenger seats, passenger grab rails, destination signs, wheelchair lifts; and road testing, final inspection, repairs and preparation of the vehicles for delivery.

The letter also provides that "[i]f a manufacturer's final assembly processes do not include all the activities that are typically considered the minimum requirements, it can request an FTA determination of compliance." *Id.*

Subsequent to the publication of the March 19, 1997 Dear Colleague letter, FTA still frequently received requests for guidance from grantees and contractors on "final assembly." These requestors either were not aware of the Dear Colleague letter, or had questions about fabrication processes which did not fit within the parameters of the 1997 letter. For these reasons, FTA proposes amending the definition of "final assembly" in section 661.11, to incorporate the "minimum requirements" of final assembly in the March 18, 1997 letter, and to further clarify those requirements. FTA proposes to do this by creating an additional appendix that would state the following:

Rail Cars: In the case of the manufacture of a new, remanufactured, or overhauled rail car, final assembly would typically include, as a *minimum*, the following operations: Installation and interconnection of car bodies or shells, propulsion control equipment, propulsion cooling equipment, brake equipment, energy sources for auxiliaries and controls, heating and air conditioning, communications equipment, pneumatic and electrical systems, door systems, passenger seats, passenger interiors, destination signs, wheelchair lifts, motors, wheels, axles, and gear units, suspensions, frames, and chassis; the inspection and verification of all installation and interconnection work; and the in-plant testing of the stationary product to verify all functions.

Buses: In the case of a new, remanufactured, or overhauled bus, final assembly would typically include, at a *minimum*, the installation and interconnection of car bodies or shells, the engine and transmission (drive train), axles, chassis, and wheels, including the cooling and braking systems; the installation and interconnection of the heating and air conditioning equipment; the installation of pneumatic and electrical systems, door systems, passenger seats, passenger grab rails, destination signs, wheelchair lifts; and road testing, final inspection, repairs and preparation of the vehicles for delivery.

FTA seeks public comment on whether this appendix sufficiently clarifies what FTA considers "final assembly."

VII. Post-Award Non-Availability Waiver

Under FTA's current Buy America regulations, grantees are required to ensure that contractors certify in their bids, as a condition of responsiveness, that they will comply with Buy America. 49 CFR 661.13(b). The regulations specifically provide that a bidder or offeror that certifies compliance with Buy America is "bound by its original certification" and "is not eligible for a waiver of those requirements." 49 CFR 661.13(c). These regulatory provisions, in effect, eliminated so-called "post-award" waivers—waivers issued after contract award.

SAFETEA-LU requires that the Secretary issue a rule to "permit a grantee to request a non-availability waiver * * * after contract award in any case in which the contractor has made a certification of compliance with the requirements in good faith." This requirement will allow FTA the flexibility to consider non-availability waivers in those rare instances where materials or supplies become unavailable, through no fault of the contractor or grantee, after contract award, to the extent that complying with the terms of the third party contract becomes commercially impossible or impracticable (due to price).

Such a post-award waiver could be subject to abuse, however. To guard against this, and to limit approval of post-award waivers to legitimate situations, FTA will require evidence of bidders' and offerors' good faith in originally certifying compliance. Such evidence may include price quotes indicating the availability of domestic material at the time the contractor certified compliance. Bidders or offerors who negligently certify compliance, for example, by not adequately researching the availability of domestic material or by mistakenly concluding that domestic supplies are available, prior to certifying, would be denied a post-award waiver. FTA will also require grantees to produce evidence of changed market conditions, demonstrating the non-availability of materials or supplies after contract award, and the impossibility or impracticability of completing the third party contract. FTA will also consider the status of other bidders or offerors who participated in the procurement and the effect of any waiver on them. For example, a post award waiver will not be granted where other bidders or offerors who certified compliance are

able to supply domestic products or material.

To implement the requirement for post-award waivers in SAFETEA-LU, FTA proposes to add the following clause to non-availability waivers: "In those situations where materials become unavailable after contract award due to unforeseen circumstances beyond the control of the contractor or grantee, the Administrator may grant a non-availability waiver under section 661.7c, in any case in which a contractor has originally certified compliance with the Buy America requirements in good faith, but can no longer comply with its certification and contractual obligations due to commercial impossibility or impracticability. In making such a waiver request, the grantee will submit evidence of the contractor's good faith and evidence justifying the post-award waiver, such as information about the origin of the product or materials, invoices, and other relevant solicitation documents to the FTA Chief Counsel, as requested. In determining whether the conditions exist to grant this post-award non-availability waiver, the Administrator will consider all appropriate factors, including the status of other bidders or offerors in the procurement and the effect of any waiver on them, on a case-by-case basis." To reflect this change, and to clarify the distinctions in Buy America certification between sealed bidding and negotiated procurements, FTA proposes to add paragraph (c) that would state: "A bidder or offeror certifies that it will comply with the applicable requirement and such bidder or offeror is bound by its original certification (in the case of a sealed bidding procurement) or its certification submitted with its final offer (in the case of a negotiated procurement) and is not permitted to change its certification after bid opening or submission of a final offer, except for inadvertent or clerical error, as described in section 661.13(b)(1). Where a bidder or offeror certifies that it will comply with the applicable Buy America requirements, the bidder, offeror, or grantee is not eligible for a waiver of those requirements, except as provided in section 661.7(c)(3) in the case of a post-award non-availability waiver." FTA seeks comment on these proposed changes.

VIII. Certification Under Negotiated Procurement

As stated previously, under FTA's current Buy America regulations, grantees are required to ensure that contractors certify in their bids, as a condition of responsiveness, that they will comply with Buy America. 49 CFR

661.13(b). Moreover, contractors are not permitted to change their certifications "after bid opening." 49 CFR 661.13(c). However, FTA allows bidders or offerors to correct an incomplete Buy America certificate or an incorrect certificate of noncompliance made through inadvertent or clerical error.

Reflecting the practice in public contracting that offerors may submit multiple offers in negotiated procurement processes, unlike in sealed bidding, FTA has issued the following guidance on its public Buy America Web site:

In competitive negotiated procurements (*i.e.*, requests for proposals), certifications submitted as part of an initial proposal may be superseded by subsequent certifications submitted with revised proposals, and the certification submitted with the offeror's final revised proposal (or best and final offer) will control. However, where the grantee awards on the basis of initial proposals without discussion, the certification submitted with the initial proposal will control.

See "Buy America: Frequently Asked Questions" # 6 http://www.fta.dot.gov/legal/buy_america/14422_17793_ENG_HTML.htm

Consistent with FTA's current guidance, SAFETEA-LU requires that the Secretary issue a rule reflecting that, "in any case in which a negotiated procurement is used, compliance with the Buy America requirements shall be determined on the basis of the certification submitted with the final offer." To implement this requirement, FTA proposes adding the following provision: "(2) In the case of a negotiated procurement, a certification submitted as part of an initial proposal may be superseded by a subsequent certification(s) submitted with a revised proposal or offer. 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." FTA seeks comment on this proposal.

IX. Pre-Award and Post-Delivery Review of Rolling Stock Purchases

Under FTA's regulations at 49 CFR 663.37, generally, for purchases of more than 10 buses or rail vehicles, grantees must certify that an onsite inspector was present throughout the manufacturing process and that the grantee has received an inspector's report that accurately records all vehicle construction activities and explains how construction and operation of the vehicle meets specifications. However,

for orders of 10 or fewer buses, there is no requirement for a resident factor inspector, pursuant to 49 CFR 663.37(c). Under this provision, a grantee is only required to certify that it has visually inspected and road tested the vehicles and has determined that the vehicles meet contract specifications.

SAFETEA-LU amends section 5323(m) by mandating, in effect, that for rolling stock procurements of 20 vehicles or less serving rural (other than urbanized) areas, or urbanized areas of 200,000 people or less, then the same post-delivery certification requirements which apply to procurements of "10 or fewer buses," *i.e.* no resident factory inspector, shall likewise apply. FTA considers this requirement to be self-explanatory. To implement the change in section 5323(m), therefore, FTA proposes the following amendment: "For procurements of (1) Ten or fewer buses; or (2) procurements of 20 vehicles or fewer serving rural (other than urbanized) areas, or urbanized areas of 200,000 people or fewer; or (3) any number of primary manufacturer standard production and unmodified vans, after visually inspecting and road testing the vehicles, the vehicles meet the contract specifications." FTA seeks comment on this proposed change.

X. Miscellaneous

In addition to the requirements mandated in SAFETEA-LU, FTA proposes several changes to the Buy America regulations. The first of these involve minor corrections and clarifications. The second involve substantive changes.

A. Corrections and Clarifications

In Section 661.3 "Definitions" for the term "act," FTA proposes deleting the clause "section 337 of the Surface Transportation and Uniform Relocation Assistance of 1987 (Pub. L. 100-17)," which follows "as amended by," and replacing this with the clause "the Safe Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (Pub. L. 109-59). Similarly, under Section 661.3, FTA proposes deleting the phrase "STURRA means the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. No. 100-17) and replacing this with "SAFETEA-LU means the Safe Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (Pub. L. 109-59)."

In Section 661.6 "Certification requirement for procurement of steel or manufactured products," FTA proposes adding the word "iron," after the word "steel" to reflect that iron, as well as steel and manufactured products, are subject to the certification requirement.

Moreover, the word "offeror" is a term of art for contractors who participate in negotiated procurements. The words "or offeror" are added after "bidder," wherever it appears in Part 661, to reflect that grantees may elect to use negotiated methods of procurement on FTA funded projects. The term "or offeror," is added, therefore, as follows: (1) In the example "Certificate of Compliance With Section 165(a) and the "Certificate for Non-Compliance With Section 165(a) in section 661.6; (2) in section 661.9(b) and (d); (3) in the example "Certificate of Compliance With Section 165(b)(3) and the "Certificate for Non-Compliance With Section 165(b)(3) in Section 661.12; (4) in section 661.13(b)(1), and in subparagraph (b)(1) a(i) (as redesignated); (4) in section 661.15(a), (b), (d), and (g); in section 661.17—in addition, the clause "or the price of its final offer" is added after "original bid price" in the second sentence; (5) in section 661.19.

Similarly, the words "or offer" are added after "bid" in Part 661, as follows: (1) in section 661.7(c)(1) and (d). In section 661.13(b), the clause "or request for proposal (RFP)" is added after the word "bid" in the first sentence. The words "or offer" are added after the word "bid" in the second sentence. In section 661.13(b)(1), the words "of submission of a final offer," are added after the words "bid opening" in the first sentence. These proposed changes are made to reflect that grantees may elect to use negotiated methods of procurement on FTA funded projects. FTA seeks comment on these proposed changes.

B. Substantive Change Proposals

Communication Equipment

49 U.S.C. 5323(j)(2)(C) states that rolling stock includes "train control, communication, and traction power equipment." (Emphasis added). Pursuant to this requirement, FTA drafted representative examples of train control, communication, and traction power equipment in the rolling stock section of the Buy America regulations as follows:

Train control equipment includes, but is not limited to, the following equipment:

- (1) Mimic board in central control
- (2) Dispatcher's console
- (3) Local control panels
- (4) Station (way side) block control relay cabinets
- (5) Terminal dispatcher machines
- (6) Cable/cable trays
- (7) Switch machines
- (8) Way side signals
- (9) Impedance bonds
- (10) Relay rack bungalows

- (11) Central computer control
- (12) Brake equipment
- (13) Brake systems

Communication equipment includes, but is not limited to, the following equipment:

- (1) Radios
- (2) Space station transmitter and receivers
- (3) Vehicular and hand-held radios
- (4) PABX telephone switching equipment
- (5) PABX telephone instruments
- (6) Public address amplifiers
- (7) Public address speakers
- (8) Cable transmission system cable
- (9) Cable transmission system multiplex equipment
- (10) Communication console at central control
- (11) Uninterruptible power supply inverters/rectifiers
- (12) Uninterruptible power supply batteries
- (13) Data transmission system central processors
- (14) Data transmission system remote terminals
- (15) Line printers for data transmission system
- (16) Communication system monitor test panel
- (17) Security console at central control

Traction power equipment includes, but is not limited to the following:

- (1) Primary AC switch gear
- (2) Primary AC transformer rectifiers
- (3) DC switch gear
- (4) Traction power console and CRT display system at central control
- (5) Bus ducts with buses (AC and DC)
- (6) Batteries
- (7) Traction power rectifier assemblies
- (8) Distribution panels (AC and DC)
- (9) Facility step-down transformers
- (10) Motor control centers (facility use only)
- (11) Battery chargers
- (12) Supervisory control panel
- (13) Annunciator panels
- (14) Low voltage facility distribution switch board
- (15) DC connect switches
- (16) Negative bus boxes
- (17) Power rail insulators
- (18) Power cables (AC and DC)
- (19) Cable trays
- (20) Instrumentation for traction power equipment
- (21) Connectors, tensioners, and insulators for overhead power wire systems
- (22) Negative drainage boards
- (23) Inverters
- (24) Traction motors
- (25) Propulsion gear boxes
- (26) Third rail pick-up equipment
- (27) Pantographs

In years past, FTA offered guidance on a proposed federally funded contract for a public address/customer information screen (PA/CIS) to be awarded to the New York City Transit Authority (NYCT), which generated some controversy. In that case, FTA opined:

The Buy America provisions for rolling stock (which includes buses, rail cars, and ferries) require that at least 60 percent of the cost of all components and subcomponents

be of domestic origin and that final assembly of vehicles occur in the United States. The statutory provisions of Buy America expressly define rolling stock to include "communication equipment." FTA regulations further provide a nonexhaustive listing of certain communication equipment considered to be rolling stock components, including public address amplifiers and speakers.

It is our understanding that the PA/CIS equipment will be placed in fixed transit stations, rather than on vehicles. However, pursuant to statute and regulation, communications equipment need not be on a vehicle, and is procured under the "rolling stock" rule not the "manufactured products" rule.

FTA's decision on the PA/CIS equipment procurement is consistent with longstanding agency precedent, including a **Federal Register** Notice from September 1983 which indicated that the particular equipment listed in section 661.11 "include[s] both on-board and wayside equipment." 48 FR 41562. Nevertheless, FTA seeks public comment on whether the agency should continue to interpret the items listed in 661.11 as including wayside equipment. FTA also seeks public comment as to whether any items of equipment listed in section 661.11(t) (u) and (v), should be deleted, and whether any new items should be added to these lists, to reflect new technology.

In addition, FTA seeks public comment as to what constitutes "communication equipment" within the meaning of 5323(j)(2)(c) and section 661.11, and whether these terms should be defined in the regulation. FTA's concern on this matter arises as the technology utilized in the transit industry becomes more complex and sophisticated, and as categorical distinctions between product functions become increasingly blurred. To illustrate this point, it undoubtedly raises little or no dispute that an on-board radio or public address system constitutes "communication equipment."

However, FTA has also been called on to review for Buy America compliance such procurements as: a "Mobile Data Communication System," "Monitoring and Diagnostic equipment," a "Service Management and Customer Information System," "on-board and wayside LED signage systems," "Automated Passenger Information System," etc. Such equipment often includes sophisticated networked microcomputers, processors, data screens, and other devices which "communicate" information to customers or transit personnel (such as for fares or schedules) in a broad sense—but also serves other functions

such as counting passengers, tabulating revenues, and then "communicating" such information automatically by remote transmission to stakeholders for later processing and storage.

A review of this prior FTA guidance reveals instances where equipment which has as its primary function communication "with or between people," such as for radios, constituted "communication equipment" under the rolling stock standard. Other cases demonstrate that where "machine to machine" interface constituted the primary function of the equipment, the manufactured product standard at section 661.7 applied. In determining what constitutes communication equipment, FTA believes that this distinction in the primary purpose of the equipment (e.g. "with or between people" versus "machine to machine" interface) should be maintained, with the former constituting communication equipment under the rolling stock standard. Nevertheless, to foster clarity in this area, FTA invites public comment and opinion on what constitutes "communication equipment."

XI. Regulatory Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This NPRM is authorized under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109–59) amended Section 5323(j) and (m) of Title 49, United States Code and requires FTA to revise its regulations with respect to Buy America requirements.

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This NPRM is a nonsignificant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This NPRM is also nonsignificant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). This NPRM imposes no new compliance costs on the regulated industry; it merely clarifies terms existing in the Buy America regulations and adds terms consistent with SAFETEA–LU.

C. Executive Order 13132

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This NPRM does not include any regulation that has substantial direct effects on the States, the relationship between the national

government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

D. Executive Order 13175

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this NPRM does not have tribal implications and does not impose direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

E. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601–611) requires each agency to analyze regulations and proposals to assess their impact on small businesses and other small entities to determine whether the rule or proposal will have a significant economic impact on a substantial number of small entities. This NPRM imposes no new costs. Therefore, FTA certifies that this proposal does not require further analysis under the Regulatory Flexibility Act. FTA requests public comment on whether the proposals contained in this NPRM have a significant economic impact on a substantial number of small entities.

F. Unfunded Mandates Reform Act of 1995

This NPRM does not propose unfunded mandates under the Unfunded Mandates Reform Act of 1995. If the proposals are adopted into a final rule, it will not result in costs of \$100 million or more (adjusted annually for inflation), in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

G. Paperwork Reduction Act

This NPRM proposes no new information collection requirements.

H. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document may be used to cross-reference this action with the Unified Agenda.

I. Environmental Assessment

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321–4347), requires Federal agencies to consider the consequences of major federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. There are no significant environmental impacts associated with this NPRM.

J. Privacy Act

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit <http://dms.dot.gov>.

List of Subjects in 49 CFR Part 661

Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements.

Amendment of 49 CFR Part 661

Accordingly, for the reasons described in the preamble, part 661 of Title 49 of the Code of Federal Regulations is proposed to be amended as follows:

PART 661—[AMENDED]

1. The authority citation for part 661 is revised to read as follows:

Authority: 49 U.S.C. 5323(j) (formerly sec. 165, Pub. L. 97–424; as amended by sec. 337, Pub. L. 100–17, sec. 1048, Pub. L. 102–240, sec. 3020(b), Pub. L. 105–178, and sec. 3023(i) and (k), P.L. 109–59); 49 CFR 1.51.

2. Revise § 661.3 to read as follows:

§ 661.3 Definitions.

As used in this part:

Act means the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424), as amended by the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (Pub. L. 109–59).

Administrator means the Administrator of FTA, or designee.

Component means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.

Contractor means:

(1) Any individual or other legal entity that directly or indirectly (*e.g.*, through an affiliate), submits bids or offers for or is awarded, or reasonably may be expected to submit bids or offers for or be awarded, a federally funded

third party contract or subcontract under a federally funded third party contract; or, conducts business, or reasonably may be expected to conduct business, with an FTA grantee, as an agent or representative of another contractor; or

(2) Any party to a third party government contract other than the government.

End Product means:

(1) Any item subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract; or

(2) Any article, material, supply, or system, whether manufactured or unmanufactured, that is acquired for public use under a federally funded third party contract. A list of representative end products is included at Appendix A to this section.

FTA means the Federal Transit Administration.

Grantee means any entity that is a recipient of FTA funds.

Manufactured product means an item produced as a result of manufacturing process.

Manufacturing process means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.

Negotiated Procurement means a contract awarded using other than sealed bidding procedures

Rolling stock means transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services.

SAFETEA-LU means the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (Pub. L. 109–59).

Subcomponent means any article, material, or supply, whether manufactured or unmanufactured, that is one step removed from a component in the fabrication process and that is incorporated directly into a component.

United States means the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

Appendix A to § 661.3—Representative End Products

The following is a list of items, as specified by grantees in third party contracts, which are representative end products that are

subject to the requirements of Buy America. This list is not exclusive.

(1) *Rolling stock end products:* All individual items identified as rolling stock in § 661.3 (buses, vans, cars, railcars, locomotives, trolley cars, ferry boats, as well as vehicles used for support services); train control equipment or systems; communication equipment or systems; traction power equipment or systems.

(2) *Steel and iron end products:* Products and infrastructure projects made primarily of steel or iron or involving track work, including bridges; steel or iron structures; running rail and contact rail; turnouts.

(3) *Manufactured end products:* Fare collection equipment [non-system equipment] or systems; computers and computer systems; information, security, and data processing equipment or systems; lifts, hoists, and elevators; 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.

3. Revise § 661.6 to read as follows:

§ 661.6 Certification requirements for procurement of steel or manufactured products.

If steel, iron, or manufactured products (as defined in §§ 661.3 and 661.5 of this part) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder or offeror in accordance with the requirement contained in § 661.13(b) of this part.

Certificate of Compliance With Section 165(a)

The bidder or offeror hereby certifies that it will comply with the requirements of section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, and the applicable regulations in 49 CFR part 661.

Date _____

Signature _____

Company Name _____

Title _____

Certificate for Non-Compliance With Section 165(a)

The bidder or offeror hereby certifies that it cannot comply with the requirements of section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, but it may qualify for an exception to the requirement pursuant to section 165 (b)(2) or (b)(4) of the Surface Transportation Assistance Act of 1982 and regulations in 49 CFR 661.7.

Date _____

Signature _____

Company Name _____

Title _____

4. In § 661.7:

a. Revise paragraphs (b), (c)(1), and (d) and add new paragraph (c)(3) to read as set forth below; and

b. Amend appendix A to § 661.7 by removing paragraphs (b) and (c) and adding new paragraph (b) to read as set forth below.

§ 661.7 Waivers.

* * * * *

(b) Under the provision of section 165(b)(1) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that their application would be inconsistent with the public interest. In determining whether the conditions exist to grant this public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis, unless a general exception is specifically set out in this part. When granting a public interest waiver, the Administrator, as delegated, shall issue a detailed written statement justifying why the waiver is in the public interest. The Administrator shall publish this justification in the **Federal Register**, providing the public with a reasonable period of time for notice and comment.

(c) * * *

(1) It will be presumed that the conditions exist to grant this non-availability waiver if no responsive and responsible bid or offer is received offering an item produced in the United States.

* * * * *

(3) In those situations where materials become unavailable after contract award due to unforeseen circumstances beyond the control of the contractor or the grantee, the Administrator may grant a non-availability waiver under this paragraph (c), in any case in which a contractor has originally certified compliance with the Buy America requirements in good faith, but can no longer comply with its certification and contractual obligations due to commercial impossibility or impracticability. In making such a waiver request, the grantee will submit evidence of the contractor's good faith and evidence justifying the post-award waiver, such as information about the origin of the product or materials, invoices, or other relevant solicitation documents to the FTA Chief Counsel, as requested. In determining whether the conditions exist to grant this post-award non-availability waiver, the Administrator will consider all appropriate factors, including the status of other bidders or offerors in the procurement and the effect of any waiver on them, on a case-by-case basis.

(d) Under the provision of section 165(b)(4) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that the inclusion of a domestic item or domestic material will increase the cost of the contract between the grantee and its supplier of that item or material by more than 25 percent. The

Administrator will grant this price-differential waiver if the amount of the lowest responsive and responsible bid or offer offering the item or material that is not produced in the United States multiplied by 1.25 is less than the amount of the lowest responsive and responsible bid or offer offering the item or material produced in the United States.

* * * * *

Appendix A to § 661.7—General Waivers

* * * * *

(b) Under the provisions of § 661.7 (b) and (c) of this part, a general public interest waiver from the Buy America requirements applies to microprocessors, computers, microcomputers, or software, or other such devices, which are used solely for the purpose of processing or storing data. This general waiver does not extend to a product or device which merely contains a microprocessor or microcomputer and is not used solely for the purpose of processing or storing data.

* * * * *

5. In § 661.9, revise paragraphs (b) and (d) to read as follows:

§ 661.9 Application for waivers.

* * * * *

(b) A bidder or offeror who seeks to establish grounds for an exception must seek the exception, in a timely manner, through the grantee.

* * * * *

(d) FTA will consider a request for a waiver from a potential bidder, offeror, or supplier only if the waiver is being sought under § 661.7 (f) or (g) of this part.

* * * * *

6. In § 661.11, remove and reserve paragraph (s) and add a new Appendix D to read as follows:

§ 661.11 Rolling stock procedures.

* * * * *

Appendix D to § 661.11—Minimum Requirements for Final Assembly

(a) *Rail Cars:* In the case of the manufacture of a new, remanufactured, or overhauled rail car, final assembly would typically include, as a minimum, the following operations: Installation and interconnection of car bodies or shells, propulsion control equipment, propulsion cooling equipment, brake equipment, energy sources for auxiliaries and controls, heating and air conditioning, communications equipment, pneumatic and electrical systems, door systems, passenger seats, passenger interiors, destination signs, wheelchair lifts, motors, wheels, axles, and gear units, suspensions, frames, and chassis; the inspection and verification of all installation and interconnection work; and the in-plant testing of the stationary product to verify all functions.

(b) *Buses:* In the case of a new, remanufactured, or overhauled bus, final assembly would typically include, at a minimum, the installation and interconnection of car bodies or shells, the engine and transmission (drive train), axles, chassis, and wheels, including the cooling and braking systems; the installation and interconnection of the heating and air conditioning equipment; the installation of pneumatic and electrical systems, door systems, passenger seats, passenger grab rails, destination signs, wheelchair lifts; and road testing, final inspection, repairs and preparation of the vehicles for delivery.

7. Revise § 661.12 to read as follows:

§ 661.12 Certification requirement for procurement of buses, other rolling stock and associated equipment.

If buses or other rolling stock (including train control, communication, and traction power equipment) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder in accordance with the requirement contained in Sec. 661.13(b) of this part.

Certificate of Compliance With Section 165(b)(3)

The bidder or offeror hereby certifies that it will comply with the requirements of section 165(b)(3), of the Surface Transportation Assistance Act of 1982, as amended, and the regulations of 49 CFR 661.11.

Date _____
 Signature _____
 Company Name _____
 Title _____

Certificate for Non-Compliance with Section 165(b)(3)

The bidder or offeror hereby certifies that it cannot comply with the requirements of section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, but may qualify for an exception to the requirement consistent with section 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act, as amended, and regulations in 49 CFR 661.7.

Date _____
 Signature _____
 Company Name _____
 Title _____

7. In § 661.13, revise paragraphs (b) introductory text, (b)(1), (b)(2), and (c), add new paragraph (b)(1)(i), and add and reserve paragraph (b)(1)(ii) to read as follows:

§ 661.13 Grantee responsibility.

* * * * *

(b) The grantee shall include in its bid or request for proposal (RFP) specification for procurement within the scope of this part an appropriate notice of the Buy America provision. Such specifications shall require, as a condition of responsiveness, that the bidder or offeror submit with the bid or

offer a completed Buy America certificate in accordance with §§ 661.6 or 661.12 of this part, as appropriate.

(1) A bidder or offeror who has submitted an incomplete Buy America certificate or an incorrect certificate of noncompliance through inadvertent or clerical error (but not including failure to sign the certificate, submission of certificates of both compliance and non-compliance, or failure to submit any certification), may submit to the FTA Chief Counsel within ten (10) days of bid opening of submission of a final offer, a written explanation of the circumstances surrounding the submission of the incomplete or incorrect certification in accordance with 28 U.S.C. 1746, sworn under penalty of perjury, stating that the submission resulted from inadvertent or clerical error. The bidder or offeror will also submit evidence of intent, such as information about the origin of the product, invoices, or other working documents. The bidder or offeror will simultaneously send a copy of this information to the FTA grantee.

(i) The FTA Chief Counsel may request additional information from the bidder or offeror, if necessary. The grantee may not make a contract award until the FTA Chief Counsel issues his/her determination, except as provided in § 661.15(m).

(ii) [Reserved]

(2) In the case of a negotiated procurement, a certification submitted as part of an initial proposal may be superseded by a subsequent certification(s) submitted with a revised proposal or offer. 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 will control.

(c) Whether or not a bidder or offeror certifies that it will comply with the applicable requirement, such bidder or offeror is bound by its original certification (in the case of a sealed bidding procurement) or its certification submitted with its final offer (in the case of a negotiated procurement) and is not permitted to change its certification after bid opening or submission of a final offer. Where a bidder or offeror certifies that it will comply with the applicable Buy America requirements, the bidder, offeror, or grantee is not eligible for a waiver of those requirements, except as provided in section 661.7(c)(3) in the case of a post-award non-availability waiver.

8. In § 661.15, revise paragraphs (a), (b), (d), and (g) to read as follows:

§ 661.15 Investigation procedures.

(a) It is presumed that a bidder or offeror who has submitted the required Buy America certificate is complying with the Buy America provision. A false certification is a criminal act in violation of 18 U.S.C. 1001.

(b) Any party may petition FTA to investigate the compliance of a successful bidder or offeror with the bidder's or offeror's certification. That party ("the petitioner") must include in the petition a statement of the grounds of the petition and any supporting documentation. If FTA determines that the information presented in the petition indicates that the presumption in paragraph (a) of this section has been overcome, FTA will initiate an investigation.

* * * * *

(d) When FTA determines under paragraph (b) or (c) of this section to conduct an investigation, it requests that the grantee require the successful bidder or offeror to document its compliance with its Buy America certificate. The successful bidder or offeror has the burden of proof to establish that it is in compliance. Documentation of compliance is based on the specific circumstances of each investigation, and FTA will specify the documentation required in each case.

* * * * *

(g) The grantee's reply (or that of the bidder or offeror) will be transmitted to the petitioner. The petitioner may submit comments on the reply to FTA within 10 working days after receipt of the reply. The grantee and the low bidder or offeror will be furnished with a copy of the petitioner's comments, and their comments must be received by FTA within 5 working days after receipt of the petitioner's comments.

* * * * *

9. Revise § 661.17 to read as follows:

§ 661.17 Failure to comply with certification.

If a successful bidder or offeror fails to demonstrate that it is in compliance with its certification, it will be required to take the necessary steps in order to achieve compliance. If a bidder or offeror takes these necessary steps, it will not be allowed to change its original bid price or the price of its final offer. If a bidder or offeror does not take the necessary steps, it will not be awarded the contract if the contract has not yet been awarded, and it is in breach of contract if a contract has been awarded.

10. Revise § 661.19 to read as follows:

§ 661.19 Sanctions.

A willful refusal to comply with a certification by a successful bidder or offeror may lead to the initiation of debarment or suspension proceedings under part 29 of this title.

11. Revise § 661.20 to read as follows:

§ 661.20 Rights of parties.

(a) A party adversely affected by an FTA action under this subsection shall have the right to seek review under the Administrative Procedure Act (APA), 5 U.S.C. section 702 *et seq.*

(b) Except as provided in paragraph (a) of this section, the sole right of any third party under the Buy America provision is to petition FTA under the provisions of § 661.15 of this part. No third party has any additional right, at law or equity, for any remedy including, but not limited to, injunctions, damages, or cancellation of the Federal grant or contracts of the grantee.

Issued in Washington, DC this 18th day of November, 2005.

David B. Horner,

Acting Deputy Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[I.D. 111505C]

Fisheries off West Coast States and in the Western Pacific; Bottomfish Fisheries; Overfishing Determination on Bottomfish Multi-Species Stock Complex; Hawaiian Archipelago

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of intent to prepare a supplemental environmental impact statement; notice of scoping meetings; request for comment.

SUMMARY: Pursuant to the National Environmental Policy Act (NEPA) and regulations published by the Council on Environmental Quality (40 CFR part 1505), NMFS, in coordination with the Western Pacific Fishery Management Council (Council), is preparing a Supplemental Environmental Impact Statement (SEIS). The SEIS will supplement the Final Environmental Impact Statement (FEIS) Bottomfish and Seamount Groundfish Fishery of the