

project and whether a compatible replacement could be obtained through competition. FTA, however, considers changes to seating, fabrics, and colors, exterior paint schemes, signage, and floor covering, and other similar changes to be permissible changes.

*Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances IV, 81 Federal Register 60278 (September 1, 2016)*

The right to exercise an option does not create a contractual obligation until that contract is actually signed. Thus, assigning contract options to a third party will result in a new contract between that third party and the transit vehicle manufacturer, negating commenters' concerns that an increase in domestic content might be viewed as a "cardinal change." Third parties seeking the assignment of procurement options (a/k/a "piggybacking") have no contractual or statutory right to that option, and FTA considers that procurement to be a "new" contract and therefore subject to the applicable FAST Act standard based upon the scheduled delivery date of the first production vehicle under the new contract.

For contracts entered, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract may contain a domestic content of more than 60 percent, per the pre-FAST Act requirements. Recipients who are not direct parties to a contract executed, however, may not exercise assigned options (a/k/a "piggybacking") on such contracts.

*Public interest waiver for contracts entered.* FTA grants a general public interest waiver for contracts entered into between the FAST Act's effective date and date of enactment. For these contracts, the increased domestic content requirements for FY2018 and beyond will not apply, regardless of when the first production vehicle is delivered. However, consistent with FTA's policy statement above, parties to the contracts may exercise options under the contract, but recipients will not be permitted to piggyback on the contracts.

*Public interest waiver for contracts entered as a result of solicitations advertised.* FTA grants a general public interest waiver for contracts entered into as a result of solicitations for bids or requests for proposals that were advertised (i.e., published or distributed to potential bidders in a manner that constitutes constructive notice). Under these circumstances, the increased domestic content requirements for FY2018 and beyond will not apply, regardless of when the first production vehicle is delivered. However, consistent with FTA's policy statement above, parties to the contracts may exercise options under the contract, but recipients will not be permitted to piggyback on the contracts.

---

---

**P18. Question removed from the FY22 Contractor Manual.**

---

---

**P19. If the recipient procured buses with FTA funds, did it comply with requirements for bus testing reports?**

#### **BASIC REQUIREMENT**

For bus procurements, the recipient must have in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle.

#### **APPLICABILITY**

All recipients

## **DETAILED EXPLANATION FOR REVIEWER**

The recipient must have in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle. Testing applies to buses and modified vans used in transit service, including, but not limited to, new bus and van models using alternative fuels such as methanol, ethanol, compressed natural gas (CNG), hydrogen, and electricity (if stored and/or generated on-board the vehicle).

FTA does not require a vehicle manufacturer to test its model before bidding. However, recipients of FTA funds acquiring any bus model must certify that an example of that model will have been tested and the recipient will have received a copy of the resulting test report prepared on the bus model before the final acceptance of the first vehicle. Effective October 31, 2016, the effective date of the revision to 49 CFR part 665, recipients must certify that the bus models submitted to Altoona following the effective date received a passing score before FTA funds can be spent on that vehicle.

Bus testing is not required for unmodified mass-produced vans (provided they are only offered to FTA recipients in the 4-year/100,000-mile service life category). Unmodified mass-produced vans are vehicles manufactured as complete, fully assembled vehicles as provided by the original equipment manufacturer (OEM). This category includes vans with raised roofs or wheelchair lifts or ramps that are installed by the OEM or by someone other than the OEM, provided that the installation of these components is completed in strict conformance with the OEM modification guidelines.

## **INDICATORS OF COMPLIANCE**

- a. Were the bus models that the recipient purchased during the review period tested?*
- b. Did the recipient obtain the bus testing report showing the bus model met FTA's bus testing requirements prior to acceptance of the first vehicle?*

## **INSTRUCTIONS FOR REVIEWER**

Prior to the site visit, examine the make and models of all buses procured since the last Comprehensive Review. Review the Altoona Bus Research and Testing Center Database at <http://altoonabustest.psu.edu/> to determine if a bus report has been issued for that model. For bus models tested subsequent to October 31, 2016, determine if the bus model received a passing score.

During the site visit, examine selected bus procurement files to ensure that the recipient had in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle and that, subsequent to October 31, 2016, any new bus model tested received a passing score.

## **POTENTIAL DEFICIENCY DETERMINATIONS**

The recipient is deficient if the bus model purchased with FTA funds was not tested, or for new bus models tested after October 31, 2016, the bus model did not receive a passing score.

DEFICIENCY CODE P19-1: Deficiency with bus model testing requirements

**SUGGESTED CORRECTIVE ACTION:** The recipient must submit procedures for only accepting vehicles that were tested and received a passing score. For the next procurement, the recipient must submit documentation that the required process was implemented.

NOTE TO REVIEWER: The reviewer is to coordinate with the FTA regional office to determine the appropriate corrective action for this deficiency.

The recipient is deficient if a copy of the Altoona Bus Test Report is not in the recipient's procurement files.

DEFICIENCY CODE P19-2: Missing documentation of bus model testing

SUGGESTED CORRECTIVE ACTION: The recipient must obtain the Altoona Bus Test Report for the specific make/model purchased and submit a copy of it and procedures for obtaining the report for future bus purchases.

## GOVERNING DIRECTIVE

### 49 CFR 665.7 Certification of compliance

(a) In each application to FTA for the purchase or lease of any new bus model, or any bus model with a major change in configuration or components to be acquired or leased with funds obligated by the FTA, the recipient shall certify that the bus was tested at the Bus Testing Facility and that the bus received a passing test score as required in this part. The recipient shall receive the appropriate full Bus Testing Report and any applicable partial testing report(s) before final acceptance of the first vehicle.

---

---

**P20. If the recipient procured rolling stock with FTA funds, did it comply with the requirements of 49 CFR Part 663, including pre-award and post-delivery Buy America audit requirements, resident inspector requirements, and purchaser's certifications?**

## BASIC REQUIREMENT

A recipient purchasing revenue service rolling stock with Federal funds must conduct pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser's requirements, resident inspector requirements, and Federal Motor Vehicle Safety Standards (FMVSS).

## APPLICABILITY

All recipients

## DETAILED EXPLANATION FOR REVIEWER

A recipient purchasing revenue service rolling stock with Federal funds must conduct pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser's requirements, resident inspector requirements, and FMVSS. The recipient is required to keep records, including pre-award and post-delivery certifications, which show that the regulations have been followed. The audits require the recipient to complete two certifications (Buy America and Purchaser's Requirements) at the pre-award stage and three certifications (Buy America, Purchaser's Requirements, and FMVSS) at the post-delivery stage. The regulations do not require that these five certifications have a human signature to be effective, however the certifications must convey that requirements have been reviewed and met.

Although procurements of rolling stock of \$150,000 or less are not subject to Buy America requirements, these contracts still must comply with the pre-award and post-delivery purchaser's requirements and FMVSS audits required by 49 CFR Part 663.

## Pre-Award Audits and Certifications

Recipients may purchase vehicles in several groups over several years using either vehicle procurement contracts with options or multi-year vehicle procurement contracts. FTA requires that each group of vehicles purchased, i.e., each “order” of vehicles, have a pre-award audit before the order is placed. One pre-award audit may suffice, provided that there is no change in vehicle configuration, i.e., no change that is expected to have a significant impact on vehicle handling and stability or structural integrity, between successive deliveries of vehicles.

If a recipient is using another recipient's procurement contract for purchasing revenue vehicles (i.e., “piggybacking”) the purchaser may rely on the pre-award audit completed prior to the original contract. However, the recipient must review the audit and prepare its own certification. (Note: This requirement also applies to purchases off a State or GSA-type contract.).

Compliance with purchaser's specifications: The recipient must complete a pre-award purchaser's requirements certification verifying that the manufacturers bid specifications comply with the recipient's solicitation requirements and that the proposed manufacturer is responsible and capable of building the bus to the solicitation specifications. The pre-award certification may be based on the recipient's determination that the vendor is responsive and responsible. The requirement to conduct an audit for compliance with purchaser's requirements and complete a certification applies to all purchases of revenue rolling stock, even those below the Federal Simplified Acquisition Threshold. The pre-award audit is required before a recipient enters into a formal contract with a supplier.

Compliance with Buy America: If the procurement is more than \$150,000, at the pre-award stage, the recipient must complete:

- A compliance certification verifying that the rolling stock will contain the required minimum percent domestic components, by cost, and that final assembly will take place in the United States; or
- An exemption certification indicating that the recipient has a letter from FTA granting a waiver from the Buy America requirement.

The recipient or an independent third party must conduct the Buy America audit. The audit may be based on information provided by the manufacturer; however, certification by the manufacturer is not adequate.

For rolling stock contracts entered into, the domestic content must exceed 60 percent. For rolling stock contracts entered into, the applicable domestic content percentage under 49 U.S.C. § 5323(j)(2)(C) will be based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding. Thus, if a recipient or group of recipients as part of a joint procurement enter into a contract for rolling stock, then the new FAST Act provisions applicable for the date of delivery of the first production vehicle shall apply. Accordingly, if the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent. If the scheduled delivery date is delayed such that the domestic content requirement is increased, recipients must comply with FTA's policy guidance on the implementation of the phased increase in domestic content.

Compliance with FMVSS: The recipient must receive a certification from the vehicle manufacturer at the pre-award stage that the vehicles being procured comply with FMVSS issued by the National Highway Traffic Safety Administration (49 CFR Part 571).

## **Post Delivery Audits and Certifications**

Compliance with purchaser's specifications: The recipient must complete a post-delivery purchaser's requirements certification verifying that the buses delivered meet the contract specifications. This must be completed before a bus title is transferred to the recipient or before a bus is placed into revenue service, whichever is first. The post-delivery certification is based on the recipient's visual inspections and road tests and, if required, the resident inspector's monitoring of the final assembly process and final report of manufacturing activities. The requirement to conduct an audit for compliance with purchaser's requirements and complete a certification applies to all purchases of revenue rolling stock, even those below the Federal Simplified Acquisition Threshold.

Recipients are required to have a resident inspector during final assembly process if they meet the following criteria:

- Recipient is purchasing any number of rail vehicles.
- Recipient is in an urbanized area with a population of more than 200,000 and is purchasing more than 10 buses.
- Recipient is in an area with a population of 200,000 or less and is purchasing more than 20 buses.

FTA does not require in-plant inspectors for unmodified vans manufactured by the automobile companies. FTA requires only a visual inspection and road test after delivery for such procurements.

In the case of consolidated procurements on behalf of multiple subrecipients, the in-plant inspection requirement is triggered only if any single subrecipient will receive more than 10 or more than 20 vehicles, depending on area size. One in-plant inspector can meet the requirement for multiple recipients. The inspector may not be an agent or employee of the manufacturer. The inspector must prepare a report providing accurate records of all vehicle construction activities and summarize how the construction and operational characteristics of the vehicles met (or did not meet) the contract specifications.

Compliance with Buy America: Required post-delivery certification includes disclosure by the manufacturer of the final assembly location; a listing of the component and subcomponent parts, the cost (actual or percent of total) of such components and subcomponents and the country of origin; a description of final assembly activities; and the cost of final assembly. Final assembly costs are not to be included when calculating the percent of domestic content of the vehicle.

The recipient or an independent third party must conduct the Buy America audits. The audit may be based on information provided by the manufacturer; however, certification by the manufacturer is not adequate.

Compliance with FMVSS: The recipient must complete, at the post-delivery stage, a certification that the recipient has received from the vehicle manufacturer at both the pre-award and post-delivery stages a copy of the manufacturer's self-certification information that the vehicle complies with the FMVSS issued by the National Highway Traffic Safety Administration (49 CFR Part 571). The requirement to conduct an audit for compliance with FMVSS and complete a certification applies to all purchases of revenue rolling stock, even those below the Federal Simplified Acquisition Threshold.

## **INDICATORS OF COMPLIANCE**

- a. *For rolling stock procurements, did the recipient include the appropriate Buy America domestic content requirements in its solicitation?*

- b. *For rolling stock purchases, did the recipient conduct pre-award and post-delivery audits to ensure the manufacturer(s) complied with contract specifications and Buy America?*
- c. *Did the recipient document its pre-award and post-delivery audits by completing and maintaining written certifications?*

## INSTRUCTIONS FOR REVIEWER

Prior to the site visit, review the recipient's list of rolling stock procurements to determine which Buy America domestic content percentage is required. Onsite, review contract documents to ensure that the appropriate domestic content requirements are met.

- For contracts entered into, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract must contain a domestic content of more than 60 percent.
- The FAST Act amendments regarding increasing domestic content do not apply to contracts entered into, even if the contract provides for the delivery of the first production vehicle after FY2017.
- For rolling stock contracts entered into, the applicable domestic content percentage is based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding.
- If the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent.
- If the delivery date of the first production vehicle is delayed such that it will be delivered in a year with a higher domestic content, FTA will address those situations on a case-by-case basis.

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with pre-award and post-delivery audits and audit certifications for rolling stock purchases. During the site visit, examine selected rolling stock procurement files to ensure that, for each group of vehicles purchased, the recipient conducted the following audits and included in their files the following certifications:

- Pre-award Buy America
- Pre-award Purchaser's Requirements (required even if procurement is below \$150,000)
- Post-delivery Buy America
- Post-delivery Purchaser's Requirements (required even if procurement is below \$150,000)
- Post-delivery FMVSS (required even if procurement is below \$150,000)

Pre-award and post-delivery certifications do not need to be signed to be considered valid certifications. However, a blank certification that does not indicate requirements have been met would not be "complete" and could still result in a deficiency. A blank form without language, a checkbox, a signature,

or other indication that requirements are met, could still result in a deficiency (e.g., a form with unchecked boxes for compliance and noncompliance). This differs from the Buy America certification noted in Question 12 of this section, which is to be signed.

## **POTENTIAL DEFICIENCY DETERMINATIONS**

The recipient is deficient if it did not include the appropriate Buy America domestic content requirements in its rolling stock procurements.

DEFICIENCY CODE P20-1: Buy America domestic content deficiencies

**SUGGESTED CORRECTIVE ACTION:** The recipient must stop work on the contract until FTA determines the appropriate corrective action for non-compliant vehicles already delivered and paid for under the contract and for future orders of non-compliant vehicles.

The recipient is deficient if it did not conduct all of the required audits for revenue rolling stock procurements. The recipient is deficient if it ordered a group of vehicles from a multi-year procurement before the pre-award audit was conducted.

DEFICIENCY CODE P20-2: Pre-award and/or post-delivery audits not performed

**SUGGESTED CORRECTIVE ACTION:** If no vehicles have been delivered under the contract, the recipient must conduct within 30 days the equivalent of a Buy America pre-award audit. If the vehicles are in the process of being delivered or have been delivered, the recipient must conduct a Buy America post-delivery audit within 30 days. The recipient must submit procedures for pre-award and post-delivery review and inspection. For the next procurement, the recipient must submit documentation that the required process was implemented.

The recipient must submit procedures for conducting pre-award audits for options and/or multi-year contracts so that future procurements will comply with this requirement. For the next procurement, the recipient must submit documentation that the required process was implemented.

The recipient is deficient if its pre-award and/or post-delivery certifications for applicable rolling stock procurements are not complete or in compliance with 49 CFR Part 663.

DEFICIENCY CODE P20-3: Pre-award and/or post-delivery certifications lacking

**SUGGESTED CORRECTIVE ACTION:** If no vehicles have been delivered under the contract, the recipient must submit a compliant pre-award audit within 30 days. If the vehicles are in the process of being delivered or have been delivered, the recipient must submit a compliant pre-award audit and/or post-delivery audit within 30 days. The recipient must submit the certifications for the procurement reviewed and procedures for completing the applicable pre-award and post-delivery audits certifications for future revenue rolling stock procurements. If the recipient cannot certify compliance, it must confer with the FTA regional office for the appropriate corrective action. For the next procurement, the recipient must submit documentation that the required process was implemented.

For the next revenue rolling stock procurement, the recipient must submit pre-award audit information and certifications before awarding the contract and the post-delivery audit information and certifications before drawing FTA funds.

## **GOVERNING DIRECTIVE**

49 U.S.C. 5323(j)

49 CFR 663 Pre-award and Post-delivery Audits of Rolling Stock Purchases “Subpart B—Pre-Award Audits

49 CFR 663.21 Pre-award audit requirements

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a pre-award audit under this part is complete before the recipient enters into a formal contract for the purchase of such rolling stock.

49 CFR 663.23 Description of pre-award audit

A pre-award audit under this part includes—(a) A Buy America certification as described in §663.25 of this part; (b) A purchaser's requirements certification as described in §663.27 of this part; and (c) Where appropriate, a manufacturer's Federal Motor Vehicle Safety Standards certification information as described in §663.41 or §663.43 of this part.

49 CFR 663.25 Pre-award Buy America certification

For purposes of this part, a pre-award Buy America certification is a certification that the recipient keeps on file that—(a) There is a letter from FTA which grants a waiver to the rolling stock to be purchased from the Buy America requirements under section 165(b)(1), (b)(2), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or (b) The recipient is satisfied that the rolling stock to be purchased meets the requirements of section 165(a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or through an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—(1) Component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and (2) The location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.

49 CFR 663.27 Pre-award purchaser's requirements certification

For purposes of this part, a pre-award purchaser's requirements certification is a certification a recipient keeps on file that— (a) The rolling stock the recipient is contracting for is the same product described in the purchaser's solicitation specification; and (b) The proposed manufacturer is a responsible manufacturer with the capability to produce a vehicle that meets the recipient's specification set forth in the recipient's solicitation.

49 CFR 663.31 Post-delivery audit requirements

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a post-delivery audit under this part is complete before title to the rolling stock is transferred to the recipient.

49 CFR 663.33 Description of post-delivery audit

A post-delivery audit under this part includes—(a) A post-delivery Buy America certification as described in §663.35 of this part; (b) A post-delivery purchaser's requirements certification as described in §663.37 of this part; and (c) When appropriate, a manufacturer's Federal Motor Vehicle Safety Standard self-certification information as described in §663.41 or §663.43 of this part.



#### 49 CFR 663.35 Post-delivery Buy America certification

For purposes of this part, a post-delivery Buy America certification is a certification that the recipient keeps on file that—(a) There is a letter from FTA which grants a waiver to the rolling stock received from the Buy America requirements under sections 165 (b)(1), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or (b) The recipient is satisfied that the rolling stock received meets the requirements of section 165 (a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or by means of an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—(1) Components and subcomponent parts of the rolling stock identified by manufacturer of the parts, their country of origin and costs; and (2) The actual location of the final assembly point for the rolling stock including a description of the activities which took place at the final assembly point and the cost of the final assembly.

#### 49 CFR 663.37 Post-delivery purchaser's requirements certification

For purposes of this part, a post-delivery purchaser's requirements certification is a certification that the recipient keeps on file that—(a) Except for procurements covered under paragraph (c) in this section, a resident inspector (other than an agent or employee of the manufacturer) was at the manufacturing site throughout the period of manufacture of the rolling stock to be purchased and monitored and completed a report on the manufacture of such rolling stock. Such a report, at a minimum, shall—(1) Provide accurate records of all vehicle construction activities; and (2) Address how the construction and operation of the vehicles fulfills the contract specifications. (b) After reviewing the report required under paragraph (a) of this section, and visually inspecting and road testing the delivered vehicles, the vehicles meet the contract specifications. (c) For procurements of: (1) Ten or fewer buses; or (2) Procurements of twenty 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.

#### 49 CFR 663.39 Post-delivery audit review

(a) If a recipient cannot complete a post-delivery audit because the recipient or its agent cannot certify Buy America compliance or that the rolling stock meets the purchaser's requirements specified in the contract, the rolling stock may be rejected and final acceptance by the recipient will not be required. The recipient may exercise any legal rights it has under the contract or at law.

(b) This provision does not preclude the recipient and manufacturer from agreeing to a conditional acceptance of rolling stock pending manufacturer's correction of deviations within a reasonable period of time.

#### 49 CFR 663.41 Certification of compliance with Federal motor vehicle safety standards

If a vehicle purchased under this part is subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, a recipient shall keep on file its certification that it received, both at the pre-award and post-delivery stage, a copy of the manufacturer's self-certification information that the vehicle complies with relevant Federal Motor Vehicle Safety Standards.

#### 49 CFR 663.43 Certification that Federal motor vehicle standards do not apply

(a) Except for rolling stock subject to paragraph (b) of this section, if a vehicle purchased under this part is not subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, the recipient shall keep on file its certification that it received a

statement to that effect from the manufacturer. (b) This subpart shall not apply to rolling stock that is not a motor vehicle.

---

---

**P21. Does the recipient perform oversight of its subrecipients' FTA-funded procurement activities as described in its policies and procedures?**

**BASIC REQUIREMENT**

The recipient is responsible for ensuring that subrecipients administer FTA-funded procurements in accordance with the requirements in 2 CFR part 200 and FTA Circular 4220.1F.

**APPLICABILITY**

Recipients with subrecipients

**DETAILED EXPLANATION FOR REVIEWER**

When a recipient passes through funding to a subrecipient, procurement requirements apply to the subrecipient. In such circumstances, the procurement process of the subrecipient must meet Federal requirements contained in the Uniform Administrative Requirements and the FTA Master Agreement, including Buy America, debarment and suspension, and lobbying requirements. The recipient needs to have a mechanism to ensure subrecipient compliance.

Some recipients provide written guidelines or standard terms and conditions to subrecipients for direct procurements. Some recipients review subrecipients' direct procurements, particularly for vehicles, equipment, and construction. Such reviews, which generally focus on bid/offer evaluation and selection, may be used to ensure that FTA (and state) requirements are met.

Monitoring of compliance with FTA third party contracting requirements will require a review of procurement procedures, either through site visits or a periodic review of written procurement manuals and transactions. The recipient is not required to review each subrecipient's procurement to ensure compliance with Federal requirements. The recipient may review selected procurements on a periodic basis in conjunction with a site visit or other general review of compliance with Federal requirements.

**INDICATORS OF COMPLIANCE**

- a. Does the recipient implement oversight procedures of its subrecipients for FTA-funded procurements?*
  
- b. Do subrecipient procurement files reviewed demonstrate adequate oversight by the recipient?*

**INSTRUCTIONS FOR REVIEWER**

Request and review the recipient's oversight procedures, State Management Plans, and any procurement requirements that have been included in subrecipient agreements. Discuss with the recipient onsite and determine who monitors the subrecipients' procurement processes. Examine written reports or audit reports of the process to determine if the recipient is monitoring in accordance with its documented procedures. Ensure that the recipient's oversight procedures address the following, either through review of the recipient's procedures or oversight files, or during the subrecipient site visit.

- Confirm that the subrecipient has written procurement policies and procedures that comply with 2 CFR part 200.
- Confirm the subrecipient has written standards of conduct for those involved in its procurement and contract administration actions.
- Select one procurement that has been reviewed by the recipient. If multiple procurements are identified, select the one which presents the most risk (considering factors such as complexity, size, etc.) to FTA.
  - Verify that a written responsibility determination was made for the successful bidder prior to award and that consideration was given to matters such as:
    - Contractor integrity
    - Compliance with public policy
    - Record of past performance
    - Financial and technical resources
  - Verify that the subrecipient is determining that bidders were not excluded or disqualified before entering into any third-party contracts. Document that the subrecipient makes this verification by:
    - Checking System for Award Management (SAM) Exclusions (at SAM.gov); or
    - Collecting a certification; or
    - Adding a clause or condition to the covered transaction.
  - Confirm that the subrecipient maintains records sufficient to detail the history of procurement actions.
  - Confirm that contract administration and oversight procedures are being implemented as described in the subrecipient's procurement policies and procedures.
  - Confirm that the subrecipient is not using geographic preferences or misusing prequalification lists.
  - Verify that the subrecipient used the appropriate method of procurement as described in its policies and procedures and in compliance with 2 CFR part 200.
  - If reviewing an A&E procurement, determine that A&E services were procured using a qualifications-based process in accordance with the Brooks Act, where firms are ranked based only on their qualifications and price is then negotiated with the most qualified firm.
  - Confirm the subrecipient developed an independent estimate prior to receipt of bids or proposals for procurements above the Federal Simplified Acquisition Threshold.
  - Confirm that a cost analysis was performed in accordance with the recipient's policies and procedures for: (1) procurements which require that offerors submit detailed elements of direct and indirect costs; (2) procurements where adequate price competition is lacking; and/or (3) sole-source non-competitive procurements. If a cost analysis was not required, confirm the subrecipient documented a price analysis.

- Verify that the subrecipient included the applicable FTA clauses in its bid solicitation documents.
- Confirm the subrecipient included all applicable certifications in its bid solicitation documents and received signed certifications from the bidders/proposers. These certifications may include:
  - Transit Vehicle Manufacturer (TVM) certification
  - Lobby certification
  - Buy America certification
- Determine that liquidated damages in contracts were administered correctly, if assessed.
- If the reviewed procurement included options, confirm that the subrecipient based the number of options on its reasonably foreseeable need and evaluated the option price prior to awarding the contract.
- If the subrecipient procured bus or rail rolling stock or replacement parts with FTA funds, verify that it adhered to the time limitations on placing orders against the contracts.
- If the subrecipient purchased FTA-funded assets through an assignment of options (a/k/a “piggyback”), confirm the underlying contract complied with applicable Federal requirements regarding excessive options, inclusion of Federal requirements, assignability, and price; and no cardinal changes.
- For bus procurements, ensure the subrecipient complied with bus testing report requirements.
- For rolling stock procurements, determine that the subrecipient complied with pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser’s requirements, resident inspector requirements, and Federal Motor Vehicle Safety Standards (FMVSS).

#### **POTENTIAL DEFICIENCY DETERMINATION**

The recipient is deficient if 1) it is not providing oversight of its subrecipients’ procurement processes as described in its written documents, 2) it does not monitor subrecipients making direct procurements with FTA assistance for compliance with the requirements, and/or 3) during a review of subrecipient procurements, deficiencies are found.

DEFICIENCY CODE P21-1: Insufficient oversight of subrecipient procurements

SUGGESTED CORRECTIVE ACTION: The recipient must submit documentation that it has implemented a procurement monitoring program.

NOTE TO REVIEWER: Reviewers should refer to questions P1 – P20 for additional corrective action language, if needed for specific procurements with identified deficiencies.

#### **GOVERNING DIRECTIVE**

2 CFR 200.332 Requirement for pass-through entities

All pass-through entities must:

(d) Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of

the subaward; and that subaward performance goals are achieved. Pass-through entity monitoring of the subrecipient must include:

- (1) Reviewing financial and performance reports required by the pass-through entity.
- (2) Following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and written confirmation from the subrecipient, highlighting the status of actions planned or taken to address Single Audit findings related to the particular subaward.
- (3) Issuing a management decision for applicable audit findings pertaining only to the Federal award provided to the subrecipient from the pass-through entity as required by § 200.521.
- (4) The pass-through entity is responsible for resolving audit findings specifically related to the subaward and not responsible for resolving crosscutting findings. If a subrecipient has a current Single Audit report posted in the Federal Audit Clearinghouse and has not otherwise been excluded from receipt of Federal funding (e.g., has been debarred or suspended), the pass-through entity may rely on the subrecipient's cognizant audit agency or cognizant oversight agency to perform audit follow-up and make management decisions related to cross-cutting findings in accordance with section § 200.513(a)(3)(vii). Such reliance does not eliminate the responsibility of the pass-through entity to issue subawards that conform to agency and award-specific requirements, to manage risk through ongoing subaward monitoring, and to monitor the status of the findings that are specifically related to the subaward.

---

---

## **ISSUES/AREAS OF CONCERN FOR FTA AWARENESS**

Did background research and/or onsite observations support any of the concerns below:

- Have any oversight reviews/audits, or investigations of the recipient conducted since the last Comprehensive Review (including Procurement System Reviews (PSRs), Buy America audits, Financial Management Oversight Reviews (FMOs), and the most recent Comprehensive Review) identified significant deficiencies, material weaknesses and/or repeat deficiencies in the area of procurement?
- Are any oversight reviews/audits, or investigations scheduled during this Federal fiscal year?
- Did the recipient experience difficulty resolving or closing any oversight review, investigation, or audit findings?
- Are any oversight review, investigation, or audit findings currently open?
- If a PSR has been requested for the upcoming year, what triggered the review request (e.g., new recipient, known procurement)? (Information on scheduled PSRs can be found in OTrak under the "Review Oversight Activities" quick link.)
- Are any issues related to procurement indicated in the Oversight Assessment Tool (OAT)?
- Does the recipient appear to have an appropriate organizational structure, including sufficient staff levels, for procurement? Does the recipient provide technical training to procurement employees?
- How does the recipient organize and structure procurement functions and personnel to support FTA-funded procurements (e.g., separate department within organization; split responsibility between transit staff and procurement office; etc.)?

- If the procurement function is decentralized, how does the recipient ensure that FTA-funded procurements are in compliance with FTA requirements?
- How do procurement personnel collaborate with users in the development of specifications and concur choosing the method for procurement?
- Any potential issues or concerns about the management or implementation of the procurement process not covered previously in this section?

## References

### Procurement

1. 49 U.S.C. Chapter 53, Federal Transit Laws
2. 2 CFR Part 1201, incorporating 2 CFR Part 200, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards"
3. 49 CFR Part 18, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments"
4. FTA Circular 4220.1F, "Third Party Contracting Guidance"
5. FTA Circular 5010.1E, "Award Management Requirements"
6. FTA Circular 9030.1E, "Urbanized Area Formula Program: Program Guidance and Grant Application Instructions"
7. FTA Master Agreement

### Buy America

#### *1.1.a. INFRASTRUCTURE INVESTMENT AND JOBS ACT (IIJA)*

On November 15, 2021, the IIJA, Pub. L. No. 117-58, div. G §§ 70901-17, became law. The legislation reauthorized surface transportation programs for FY 2022 through FY 2026. Sections 70901-52 of the legislation addressed the new Build America, Buy America Act (BABA) requirements which added construction materials to the list of items used in a federally funded project that must be produced in the United States. BABA's domestic preference for construction materials applies only to procurements funded by Federal awards obligated on or after November 10, 2022. If a procurement occurs under a Federal award that was obligated before November 10, 2022, BABA does not apply, even if the procurement occurs on or after that date. A procurement funded by a Federal award obligated on or after November 10, 2022, must comply with the Build America, Buy America Act (BABA) requirements in the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, div. G §§ 70901-27, as implemented at 2 CFR Part 184.

For many years, FTA's Buy America statute at 49 U.S.C. 5323(j) has, with some exceptions, required all steel, iron, and manufactured products used in a federally funded project to be produced in the United States. A principal effect of BABA is to add construction materials to this list of items. BABA does not change FTA's Buy America standards for steel, iron, or manufactured products including rolling stock (e.g., FTA *does not apply* the 55% cost-of-components standard to procurements).

When BABA Applies:

BABA's domestic preference for construction materials applies only to procurements funded by Federal awards obligated on or after November 10, 2022. If a procurement occurs under a Federal award that was obligated before November 10, 2022, BABA does not apply, even if the procurement occurs on or after that date. Additionally, to ease the transition to complying with BABA, on January 30, 2023, DOT announced a limited Waiver of Buy America Requirement for Construction Materials for Certain Contracts and Solicitations, available on DOT's website. Contracts and solicitations meeting the terms of the waiver are also exempt from the BABA construction materials requirement.

#### What BABA Standard Applies:

On April 18, 2022, OMB issued memorandum M-22-11, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure," to guide federal agencies' initial implementation of BABA. OMB subsequently codified final guidance, with an effective date of October 23, 2023, at 2 CFR Part 184. Awards may be subject to either the Initial or Final BABA guidance based on the date of award execution:

- Federal awards obligated on or after October 23, 2023, will apply 2 CFR Part 184.
- Federal awards obligated on or after May 14, 2022 (the date BABA became effective by statute), and before October 23, 2023, will continue to apply OMB's Initial Implementation Guidance.
- If a project that previously received a Federal award obligated on or after May 14, 2022, and before October 23, 2023, receives an additional Federal award obligated before October 23, 2024, the additional Federal award also will apply OMB's Initial Implementation Guidance.
- Any Federal award obligated on or after October 23, 2024, will apply 2 CFR Part 184, regardless of whether 2 CFR Part 184 applied to previous awards for the project.

For procurements reviewed that contain deficiencies related to statutory or regulatory requirements that may deem the procurements ineligible for Federal funding, discuss the appropriate corrective action with the FTA regional office.

8. 49 U.S.C 5323(j)

9. 49 CFR Part 661, "Buy America Requirements"

10. 49 CFR Part 663, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases"

11. FTA September 16, 2016, Chief Counsel issued a Dear Colleague Letter regarding the small purchase waiver

#### **Federal Motor Vehicle Safety Standards**

12. 49 CFR Part 571, "Federal Motor Vehicle Safety Standards"

#### **Bus Testing**

13. 49 CFR Part 665, "Bus Testing"

#### **Suspension/Debarment**

14. 2 CFR Part 180, "OMB Guidelines to Agencies on Government-wide Debarment and Suspension"

15. 2 CFR Part 180, "Non-procurement Suspension and Debarment"

#### **Lobbying**

16. 49 CFR Part 20, “New Restrictions on Lobbying”

**USEFUL WEBLINKS**

1. FTA Procurement Frequently Asked Questions
2. FTA Buy America Website
3. Bus Testing Website
4. System for Award Management
5. Coronavirus Aid, Relief, and Economic Security Act
6. FTA’s Frequently Asked Questions From FTA Grantees Regarding Coronavirus Disease 2019
7. Notice of Concurrence
8. Emergency Relief rule
9. OMB Memorandum M-20-17, Appendix A
10. OMB Memorandum M-20-26