

The small-purchase waiver applies only to domestic preferences established by 49 U.S.C. 5323(j). In other words, the small-purchase waiver applies only to steel, iron, and manufactured products. It does not apply to construction materials, the domestic preference for which is established under a separate authority, the Build America, Buy America Act.

In August 2023, the U.S. Department of Transportation published a Department-wide *Waiver of Buy America Requirements for De Minimis Costs and Small Grants*, 88 Fed. Reg. 55817 (Aug. 16, 2023). This waiver is separate from the small purchase waiver. It applies to FTA awards obligated on or after August 16, 2023. The waiver waives Buy America requirements for steel, iron, manufactured products, and construction materials under a single financial assistance award for which:

- Costs of non-compliant products are de minimis (meaning, the total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total applicable costs for the project); or
- The total amount of Federal financial assistance applied to the project, through awards or subawards, is less than \$500,000.

The De Minimis Costs waiver does not apply to products for which FTA or DOT has issued a product-specific waiver. This includes, for example, vehicles addressed by FTA's *Partial Buy America Waiver for Vans and Minivans*, 87 Fed. Reg. 64534 (Oct. 25, 2022).

Additionally, to ease the transition to applying Buy America to construction materials, DOT has issued multiple waivers of the construction materials requirement that may apply based on the date FTA obligated funding for a project or the date a recipient solicited or awarded a contract for construction materials:

- Under DOT's *Temporary Waiver of Buy America Requirements for Construction Materials*, 87 Fed. Reg. 31931 (May 25, 2022), the construction materials requirement begins applying only with FTA financial assistance obligated on or after November 10, 2022.
- DOT's *Waiver of Buy America Requirements for Construction Materials for Certain Contracts and Solicitations* (Jan. 30, 2023) (available on DOT's website) waives the construction materials requirement for certain contracts a recipient entered into between May 14, 2022, and March 10, 2023, depending on when FTA awarded assistance for the project and when the recipient solicited the contract. In all cases, waived construction materials must be delivered before October 1, 2024.
- DOT's *Waiver of Buy America Requirements for the Pacific Island Territories and the Freely Associated States* (April 29, 2024) (available on DOT's website) waives the domestic preferences for iron, steel, manufactured products, and construction materials used in projects in the Pacific Island Territories (Commonwealth of the Northern Mariana Islands, Guam, and American Samoa) and the Freely Associated States (the Republic of Palau, the Republic of the Marshall Islands, and the Federated States of Micronesia). The waiver applies to all FTA awards obligated from April 29, 2024, to March 1, 2025.

Buy America applies to:

- All purchases of steel, iron, manufactured products, and construction materials, unless a waiver applies;
- Contractors and subcontractors,
- Purchases made using an intergovernmental agreement and jointly purchased manufactured products, and
- Purchases of used items.

For all procurements not covered by the Small Grant waiver, or Pacific Island Territories waiver, the recipient shall include in its bid or request for proposal 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 49 CFR 661.6 or 661.12, as appropriate. Recipients should include only the applicable Buy America certification. Inclusion of certifications for both rolling stock and non-rolling stock procurements is discouraged and may result in confusion on the part of the contractor as to the applicable Buy America requirements.

Recipients may not obtain signed Buy America certifications after contract award for its own contracts or contracts of other recipients to make the contracts eligible for Federal funding. Recipients may, however, obtain signed Buy America certifications before buying off state GSA-type contracts to make them eligible for Federal funding.

If a bidder or offeror cannot certify compliance with Buy America requirements, the recipient must seek a waiver of the Buy America statute before it may award the contract to the bidder or offeror. Buy America waivers are available on one of the following grounds: applying Buy America requirements would be inconsistent with the public interest; the goods produced in the United States are not produced in a sufficient and reasonably available quantity or are not of a satisfactory quality (i.e., non-availability waiver); or including domestic material will increase the cost of the overall project by more than 25 percent.

FLEXIBILITIES AND ADMINISTRATIVE RELIEF

Eligible Operations or Maintenance Expenses

Under the authority of the Emergency Relief program to set the necessary terms and conditions of an award (49 USC 5324 (d)(1)), FTA permits funds to be used for operations and maintenance expenses incurred after January 20, 2020, even if the original contract did not meet all Federal requirements. The procurement of any new contracts would need to follow all Federal requirements.

INDICATORS OF COMPLIANCE

- a. *For FTA-funded vehicle procurements including procurements of remanufactured vehicles, did the recipient include the required DBE TVM certifications in solicitations and receive and verify signed certifications as part of bid responsiveness?*
- b. *Did the recipient include required lobbying certifications in solicitations and receive signed certifications from contractors as part of bid responsiveness in procurements over \$100,000?*

- c. *Did the recipient include required Buy America provisions and certifications in solicitations for iron, steel, manufactured products, or construction materials, and receive signed certifications from contractors as part of bid responsiveness, unless the procurement was subject to a waiver?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures. During the site visit, examine procurement files for inclusion of the following required certifications and receipt of signed certifications from bidders at the time of submitting bids or proposals:

- DBE TVM certifications;
- Lobbying certifications; and
- Buy America certifications.

For transit vehicle purchases, determine if, prior to award, the recipient documented that it verified TVM certifications received by either consulting FTA's Office of Civil Rights TVM website or contacting the Office of Civil Rights directly. If the bidder is not listed on the website, confirm that recipient contacted FTA's Office of Civil Rights to verify bidder's or proposer's eligibility to bid at the time the bid or proposal was submitted.

Examine procurement files for inclusion of required Lobbying certifications in solicitations and receipt of signed certifications from bidders in agreements, contracts, and subcontracts exceeding \$100,000.

Examine procurement files for inclusion of required Buy America certifications in solicitations and receipt of signed certifications from bidders for all purchases of steel, iron, manufactured products, or construction materials unless a waiver applies.

If a bidder or offeror did not certify compliance with Buy America requirements, document if the recipient received a waiver of the Buy America statute before it awarded the contract to the bidder or offeror.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not include, where applicable, a provision in its bid specifications requiring TVM certifications, or if the files do not contain TVM certifications from successful bidders. The recipient is deficient if it cannot provide evidence that it ensured that the manufacturer was an eligible TVM at the time it submitted its bid or proposal.

DEFICIENCY CODE P12-1: No TVM certification

SUGGESTED CORRECTIVE ACTION: The recipient must submit procedures for obtaining signed TVM certifications and for ensuring that manufacturers are eligible TVMs at the time of bid or proposal submission. The recipient must submit an updated TVM certification template to be used in future transit vehicle procurements. The recipient must submit a copy of the signed form with the next applicable rolling stock procurement.

The recipient is deficient if it has not included the lobbying certification in its procurement solicitations that exceed \$100,000 or if it has not obtained the proper certifications from contractors awarded contracts that exceed \$100,000.

DEFICIENCY CODE P12-2: Lobbying certifications not included in procurement solicitations or signed by bidders

SUGGESTED CORRECTIVE ACTION: The recipient must submit procedures for obtaining signed lobbying certifications. The recipient must submit a copy of the signed lobbying certification with the next applicable procurement.

The recipient is deficient if it did not include applicable Buy America provisions in its solicitation documents.

DEFICIENCY CODE P12-3: Buy America provisions not in solicitation and/or contract

SUGGESTED CORRECTIVE ACTION: The recipient must submit revised procurement procedures that require the recipient to include Buy America provisions in solicitation documents and to obtain signed certifications from vendors when procuring steel, iron, manufactured products, or construction materials not subject to a general waiver. For the next procurement, submit documentation that the required process was implemented.

For procurements for which a Buy America certification was not obtained, the recipient must provide information documenting that the procurement complies with the Buy America provisions.

For procurements in progress for which bids have not been received, the recipient must submit documentation that it included, via an addendum, Buy America requirements in the solicitation.

The recipient must submit a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

The recipient is deficient if it did not obtain signed Buy America certifications from vendors as part of the vendor's bid or proposal.

DEFICIENCY CODE P12-4: Contract files lacking signed Buy America certifications

SUGGESTED CORRECTIVE ACTION: The recipient must submit revised procurement procedures that require the recipient to obtain signed certifications from vendors when procuring steel, iron, manufactured products, or construction materials not subject to a waiver. For the next procurement, submit documentation that the required process was implemented.

For procurements for which a Buy America certification was not obtained, the recipient must submit information documenting that the procurement complies with the Buy America provisions.

For procurements in progress for which bids have not been received, the recipient must submit documentation that it included, via an addendum, Buy America requirements in the solicitation.

The recipient must submit a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

The recipient is deficient if it awarded the contract to a contractor who certified non-compliance with Buy America and did not obtain a waiver from FTA or it awarded the contract to a contractor who certified both compliance and non-compliance.

DEFICIENCY CODE P12-5: Contract awarded without Buy America waiver

SUGGESTED CORRECTIVE ACTION: The recipient must submit revised procurement procedures that require obtained signed certifications from vendors when procuring steel, iron,

manufactured products, or construction materials not subject to a waiver. For the next procurement, 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 must submit a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

GOVERNING DIRECTIVE

49 CFR 26.49 (a)

If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section.

Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards. (I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)

Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

49 CFR 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.

49 CFR 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 §661.13(b) of this part.

FTA Circular 9030.1E Chapter V 11.

- h. The recipient is obligated to determine, by checking the TVM listing on FTA's website or by checking with FTA's Office of Civil Rights at the time of bid opening, that the manufacturer likely to receive the contract is in compliance with 49 CFR Part 26.

FTA Master Agreement (30), Section 15(b)

Build America, Buy America Act. Construction materials used in the Project are subject to the domestic preference requirement of the Build America, Buy America Act, Pub. L. 117-58, div. G, tit. IX, §§ 70911 –

70927 (2021), as implemented by the U.S. Office of Management and Budget, the U.S. Department of Transportation, and FTA. The Recipient acknowledges that this agreement is neither a waiver of § 70914(a) nor a finding under § 70914(b).

P13. If the recipient included liquidated damages in its procurements, did it do so appropriately?

BASIC REQUIREMENT

If recipients include liquidated damages in procurements, any recovered damages should be credited back to the project account.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

Recipients are allowed to use liquidated damage clauses when there is a reasonable expectation of damages (increased costs on the project involved) from late completion or if requirements are exceeded and the extent or amount of such damages would be difficult or impossible to determine. Liquidated damage clauses may not be punitive. They may not be used to impose a penalty or limit or restrict competition, or used in situations where delayed performance will not affect the recipient adversely. The rate and measurement of liquidated damages must be specified in the solicitation and contract. Any liquidated damages recovered may be credited to the project account provided that the recipient receives FTA's prior written concurrence.

Liquidated damages should not be utilized as a substitute for other contract performance requirements. Recipients are required to maintain a contract administration system to ensure that they and their contractors comply with the terms, conditions, and specifications of their contracts or purchase orders.

INDICATORS OF COMPLIANCE

- a. *If the recipient included liquidated damages in its procurements, did it specify the rate in the contract?*

- b. *If the recipient recovered liquidated damages in its FTA-funded procurements, did it appropriately account for those damages with FTA?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient determines if it will use liquidated damages in contracts.

During the site visit, examine selected contract files, in accordance with records sampling procedures, for liquidated damage clause(s). Determine if the dollar value of liquidated damages was documented in the procurement file and presented in the solicitation documents as a specific rate. Examine selected contract files and correspondence in TrAMS to determine if any liquidated damages recovered were credited to the project account involved or if FTA allowed the recipient to handle the recovered damages in a different manner.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if it assessed liquidated damages, but did not credit these funds back to the project account or account for them as directed by FTA.

DEFICIENCY CODE P13-1: Improper accounting for recovered liquidated damages

SUGGESTED CORRECTIVE ACTION: The recipient must submit procedures for appropriately accounting for recovered liquidated damages. For liquidated damages collected, submit an accounting of those funds retained/collected so that FTA can provide appropriate instructions.

GOVERNING DIRECTIVE

Master Agreement (30), Section 39(c)

Federal Interest in Recovery. The Federal Government retains the right to a proportionate share of any proceeds recovered from any third party, based on the percentage of the federal share for the Underlying Agreement. Notwithstanding the preceding sentence, the Recipient may return all liquidated damages it receives to its Award Budget for its Underlying Agreement rather than return the federal share of those liquidated damages to the Federal Government, provided that the Recipient receives FTA's prior written concurrence.

P14. Did the recipient approve, evaluate, and document change orders to procurements as described in its policies and procedures?

BASIC REQUIREMENT

The recipient is responsible for issuing, evaluating, and making necessary decisions involving any change to its third party contracts, and any change orders, or modifications it may issue.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

Recipients use their own procurement procedures that reflect applicable recipient regulations, provided that the process ensures competitive procurement and the procedures conform to applicable Federal law, including 2 CFR Part 200, and FTA guidance Circular 4220.1F, "Third Party Contracting Guidance."

A change order is an order authorized by the recipient directing the contractor to make changes, pursuant to contract provisions for such changes, with or without the consent of the contractor. Because change orders may require competition if they go beyond the original scope of a contract, or cause a contract to exceed dollar thresholds at which different Federal requirements are triggered, FTA recommends that change orders be approved only by authorized recipient officials. If project managers can approve change orders with minimal or no oversight, outside of normal procurement channels, potential problems may arise.

Recipients must develop an ICE and perform a cost or price analysis in connection with every contract modification or change order over the Simplified Acquisitions Threshold. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation.

FLEXIBILITIES AND ADMINISTRATIVE RELIEF

Eligible Operations or Maintenance Expenses

Under the authority of the Emergency Relief program to set the necessary terms and conditions of an award (49 USC 5324 (d)(1)), FTA permits funds to be used for operations and maintenance expenses

incurred after January 20, 2020, even if the original contract did not meet all Federal requirements. The procurement of any new contracts would need to follow all Federal requirements.

Modification of Third Party Contracts

Recipients may modify a third-party contract to require the payment of administrative leave as administrative leave is an eligible expense for operations and maintenance personnel whether those personnel are in-house or employed by contractors. In addition, recipients may modify contracts to pay for eligible operating/maintenance expenses required to retain readiness or eligible fixed operations/maintenance expenses such as rent, even if service is reduced.

INDICATORS OF COMPLIANCE

- a. *Did the recipient ensure that executed change orders were within the scope of the original contract?*

- b. *Did the recipient evaluate and document change orders?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, receive and review the recipient's policies and procedures to determine how the recipient describes:

1. Management of change orders;
2. Evaluations of change orders; and
3. Thresholds and responsibilities for change order approvals.

During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that had significant change orders issued.

Determine if selected change orders were within the scope of the recipient's original award and reasonable for the completion of the project scope. A change to a contract that is beyond the scope of that contract, must be justified under the provisions for non-competitive procurements.

Determine if documentation for selected change orders included a cost or price analysis, if above the Federal Simplified Acquisition Threshold.

FLEXIBILITIES AND ADMINISTRATIVE RELIEF

Discuss with the recipient if it modified a third-party contract to include the payment of administrative leave for operations and maintenance personnel, to pay for eligible operating/maintenance expenses required to retain readiness or eligible fixed operations/maintenance expenses.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if it executed change orders to contracts that were not within the scope of the original contract, or did not evaluate the cost of the change, if required.

DEFICIENCY CODE P14-1: Insufficient documentation to support change orders

SUGGESTED CORRECTIVE ACTION: The recipient must submit compliant change order procedures. For the next change order, submit documentation that the required process was implemented.

GOVERNING DIRECTIVE

2 CFR 200.319

(a) All procurement transactions for the acquisition of property or services required under a Federal award must be conducted in a manner providing full and open competition consistent with the standards of this section and § 200.320.

(b) In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements.

2 CFR 200.324(a)

The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

FTA Circular 4220.1F Chapter VI 3. i. (1) (b)

When the recipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the recipient has made a sole source award that must be justified.

Frequently Asked Questions (FAQ) Regarding Coronavirus Disease 2019 (COVID-19), CE2

Under the authority of the Emergency Relief program to set the necessary terms and conditions of a grant (49 USC 5324 (d)(1), FTA will permit funds to be used for operations and maintenance expenses incurred after January 20, 2020, even if the original contract did not meet all Federal requirements. Any new contracts would need to follow all federal requirements.

Frequently Asked Questions (FAQ) Regarding Coronavirus Disease 2019 (COVID-19), CA16

Administrative leave is an eligible expense for operations and maintenance personnel whether those personnel are in-house or employed by contractors. Recipients may also modify contracts to pay for eligible operating/maintenance expenses required to retain readiness or eligible fixed operations/maintenance expenses such as rent, even if service is reduced.

P15. If the recipient included options in an FTA-funded procurement, did it base the number of options on its reasonably foreseeable need and evaluate the option price prior to awarding the contract?

BASIC REQUIREMENT

Recipients that include options in FTA-funded contracts must ensure that options reflect their reasonably foreseeable need and are evaluated prior to contract award.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

Recipients may include options in contracts that reflect reasonably foreseeable needs. If a recipient chooses to use options, the option quantities or periods in the solicitation must be evaluated in order to determine contract award. The price associated with exercising the option needs to be defined at the outset, either as a specific price, or as a percentage increase of the base price, or some other calculable method. If the options were not evaluated as part of the award, the exercise of the options is considered must be justified under the provisions for non-competitive procurements.

If the option quantities on a rolling stock or replacement parts purchase exceed the recipient's reasonably foreseeable needs, the recipient may not assign those options to other recipients.

INDICATORS OF COMPLIANCE

- a. *Did the recipient base the quantity or amount of options on its reasonably foreseeable need?*

- b. *Did the recipient evaluate option prices included in solicitations prior to contract award?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient described the use of options. During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that included options. Determine if the recipient documented that the inclusion of options in the solicitation represented its foreseeable need. Determine if the recipient documented its evaluation of the option prices prior to contract award if it intended to exercise the option(s) at a later date. If the documentation does not appear to be sufficient, provide this information to the FTA regional office for their further review and action.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if the contract quantities were not based on the recipient's foreseeable needs.

DEFICIENCY CODE P15-1: Contract quantities not based on need

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit procedures for complying with FTA requirements when including options in solicitations.

The recipient is deficient if it exercised options that were not evaluated with the initial bid.

DEFICIENCY CODE P15-2: Options exercised not evaluated

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit procedures for complying with FTA requirements when evaluating contracts which included options and for exercising options. For the next applicable procurement, the recipient must submit documentation that the required process was implemented.

The recipient must submit a written assurance that it will not exercise the options unless FTA approval is granted for instances where the options that may violate the requirements have not been exercised. The recipient may not assign the options to any other FTA recipients.

GOVERNING DIRECTIVE

2 CFR 200.318(d)

The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

FTA Circular 4220.1F Chapter IV. 1.b. Necessity

.... requires the recipient to establish procedures to avoid the purchase of unnecessary property and services (including duplicative items and quantities or options it does not intend to use or whose use is unlikely).

FTA Circular 4220.1F Chapter VI 7. b. (1). Evaluation Required

In general, FTA expects the recipient to evaluate bids or offers for any option quantities or periods contained in a solicitation if it intends to exercise those options after the contract is awarded.

P16. If the recipient procured bus or rail rolling stock or replacement parts with FTA funds, did it adhere to the time limitations on placing orders against the contracts?

BASIC REQUIREMENT

Contracts, inclusive of options, for the procurement of buses or replacement parts must not extend for more than five years after the date of the original contract or seven years for rail rolling stock. For cooperative procurement contracts, the contract duration can be for no more than a two-year initial term, with no more than three optional extensions of not more than one year each.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

Recipients must not enter into contracts for revenue rolling stock and replacement parts with an ordering window exceeding five years for bus procurements inclusive of options, extensions, or renewals, and seven years for rail procurements. The five- and seven-year rules do not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. The recipient may not order buses or replacement parts later than five years (bus) or seven years (rail) after the date of its original contract. The maximum quantity specified in such multi-year contracts must represent the recipient's reasonably foreseeable need.

For cooperative procurement contracts, the contract duration can be for no more than a two-year initial term, with no more than three optional extensions of not more than one year each. A cooperative procurement contract means a contract between a state or an eligible nonprofit entity and one or more vendors under which the vendors agree to provide an option to purchase rolling stock and related equipment to multiple recipient participants.

INDICATOR OF COMPLIANCE

- a. *If the recipient procured bus or rail rolling stock or replacement parts did it ensure that the contracts met the contract term restriction?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient describes management of options in light of contract terms for rolling stock purchases. During the site visit, examine selected rolling stock and replacement part contracts to ensure that these met the contract term restriction. Confirm that the recipient has not exercised the option to acquire buses or replacement parts later than five years (bus) or seven years (rail) after the date of its original contract.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if it exercised rolling stock options outside of the five- or seven-year period.

DEFICIENCY CODE P16-1: Contract(s) period of performance exceeds limitation

SUGGESTED CORRECTIVE ACTION: The recipient must submit revised procurement procedures that include appropriate contract term restrictions on the period of performance for rolling stock and replacement part contracts supported with FTA funds. The recipient must submit an assurance that unexecuted options will not be executed on an existing contract that exceeds contract term restrictions. 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.

GOVERNING DIRECTIVE

49 USC 5325(e) Multiyear rolling stock

(1) Contracts. A recipient procuring rolling stock with Government financial assistance under this chapter may make a multiyear contract to buy the rolling stock and replacement parts under which the recipient has an option to buy additional rolling stock or replacement parts for:

- (A) not more than 5 years after the date of the original contract for bus procurements; and
- (B) not more than 7 years after the date of the original contract for rail procurements, provided that such option does not allow for significant changes or alterations to the rolling stock.

FTA Circular 4220.1F Chapter IV 2. e. (10) Time Limits for Options on Rolling Stock Contracts

MAP-21 amended 49 U.S.C. Section 5325(e)(1) by adding subsections (A) and (B), retaining the five (5) year option for the procurement of buses, while extending the option for rail procurements to seven (7) years. Consequently: (a) Buses. A recipient: 1. May enter into a multi-year contract to acquire buses or replacement parts, with an option not exceeding five (5) years to buy additional buses or replacement parts, 49 U.S.C. Section 5325(e)(1)(A), but 2. May not exercise the option to acquire buses or replacement parts later than five (5) years after the date of its original contract. (b) Rail. A recipient: May enter into a multi-year contract to acquire railcars or replacement parts, with an option not exceeding five (5) years to buy additional railcars or replacement parts, 49 U.S.C. Section 5325(e)(1)(B), but 2. May not

exercise the option to acquire railcars or replacement parts later than seven (7) years after the date of its original contract.

FTA interprets these five and seven-year periods as covering the recipient's "material requirements" for rolling stock and replacement needs from the first day when the contract becomes effective to its "material requirements" at the end of the fifth or seventh year, as applicable. In the case of rolling stock, which frequently cannot be delivered expeditiously, FTA recognizes that a recipient's "material requirements" for rolling stock will necessarily precede its actual need to put that rolling stock to use in public transportation service. This means that the contract may not have options for more rolling stock and replacement parts than a recipient's material requirements for the applicable five or seven-year period. This does not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. Instead it means only that FTA limits a contract to purchasing no more than the recipient's material requirements for rolling stock or replacement parts for five or seven years based on the effective date of the contract.

FAST Act, Section 3019 (b)(1)(B)(i)

PROCUREMENT NOT LIMITED TO INTRASTATE PARTICIPANTS. A grantee may participate in a cooperative procurement contract without regard to whether the grantee is located in the same State as the parties to the contract. (ii) **VOLUNTARY PARTICIPATION.** Participation by recipient in a cooperative procurement contract shall be voluntary. (iii) **CONTRACT TERMS.** The lead procurement agency or lead nonprofit entity for a cooperative procurement contract shall develop the terms of the contract. (iv) **DURATION.**—A cooperative procurement contract— (I) subject to subclauses (II) and (III), may be for an initial term of not more than 2 years; (II) may include not more than 3 optional extensions for terms of not more than 1 year each; and (III) may be in effect for a total period of not more than 5 years, including each extension authorized under subclause (II).

- P17. If the recipient purchased FTA-funded assets through an assignment of options (a/k/a "piggyback"), did the underlying contract comply with applicable Federal requirements regarding excessive options, inclusion of Federal requirements, assignability, price, and no cardinal changes?**

BASIC REQUIREMENT

Recipients may use another recipient's contract rights if the original contract was procured in compliance with Federal requirements, contained required Federal provisions, does not contain excessive options, the optioned vehicles do not include cardinal changes to the original vehicles, and the contract price is fair and reasonable. The underlying contract must include an assignability clause clearly describing the assignor-recipient's right to assign contract rights to the assignee-recipient; or, that the vendor be made a party to the assignment.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

For reasons of economy, FTA permits the assignment of unneeded contract rights or options. This practice is sometimes called "piggybacking." FTA discourages the assignment of another recipient's contract rights as a substitute for a stand-alone procurement. Assignments are intended to be used only when a recipient has inadvertently acquired contract rights in excess of its needs due to changed circumstances or honest mistakes.

Intentionally procuring excessive quantities using Federal money is a violation of Federal regulations. Furthermore, to the extent that an improper assignment of contract rights enables an assignee to avoid

otherwise required procurement procedures, it also undermines the requirement for full and open competition in federally assisted procurements.

While it is popular for recipients to acquire vehicles through this method of procurement, piggybacking can also occur for purchases of services and property. A recipient that obtains contractual rights through assignment may use them after first determining that the contract price remains fair and reasonable, and the contract provisions are adequate for compliance with all Federal requirements. The recipient need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the recipient to determine whether the contract price or prices originally established are still fair and reasonable before using those rights.

FTA expects the recipient seeking the assignment to review the original contract to be sure that the quantities the assigning recipient acquired, coupled with the quantities the acquiring recipient seeks, do not exceed the amounts available under the assigning recipient's contract. Otherwise, the purchase is a "tag-on" (as defined below) and is considered an improper sole source procurement.

Any changes in the vehicle when assigned must be within the original scope (i.e., no major changes in configuration or design). FTA has not developed a finite list of acceptable contract changes. In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change includes a change from a high-floor to a low-floor vehicle. Changing an engine might result in a cardinal change depending on the circumstances surrounding the project and whether a compatible replacement could be obtained through competition. FTA, however, considers changes to seating, fabrics, colors, exterior paint schemes, signage, floor covering, and other similar items to be permissible changes.

For purposes of Buy America, the domestic content of the option vehicles is determined based on the delivery date of the first production option vehicle. If the domestic content percentage is lower than the domestic content percentage requirement the assignee-recipient would be subject to if it conducted a competition in the open market, the options exercised by the assignee-recipient will be ineligible for Federal reimbursement. A manufacturer may not agree to amend the contract to provide for a higher domestic content in order to permit a recipient to piggyback on an existing contract. Such an amendment is considered a cardinal change to the original contract.

Vehicles added to the base or option amounts originally specified are called "tag-ons." Tag-ons are not permitted. A tag-on is defined as the adding on to the contracted quantities (base or option) as originally advertised, competed, and awarded, whether for the use of the buyer or for others, and then treating the add-on portion as though it met the requirements of competition.

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 certifications to verify compliance with Buy America.

INDICATORS OF COMPLIANCE

- a. *For "piggyback" procurements, did the recipient ensure that the underlying contract was solicited and awarded in accordance with Federal and FTA requirements?*

- b. *For "piggyback" procurements, did the recipient ensure that the original contract contained an assignability clause and that the quantities it used were available?*

- c. *For “piggyback” procurements, did the recipient document that the price of assignments acquired was fair and reasonable?*
- d. *For “piggyback” procurements, did the recipient make cardinal changes to the vehicle ordered under the option (e.g., ordered a different size vehicle, fuel option, etc.)?*
- e. *Did the recipient exercise an assigned option for delivery of vehicles in FY2020 and beyond and did the original contract include a provision for domestic content of more than 70 percent?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient’s policies and procedures to determine how the recipient describes compliance with “piggyback” purchases. Examine the recipient’s listing of procurements to identify any piggyback procurements.

During the site visit, examine selected “piggyback” procurement files to:

- Ensure that the recipient files include sufficient documentation that the underlying contract was solicited and awarded in compliance with Federal and FTA requirements and included required contract provisions.
- Determine if the recipient verified that:
 - the original contract contained an assignability provision, and
 - the quantities acquired, coupled with the quantities already assigned, did not exceed the amounts available under the assigning recipient’s contract
- Ensure that the recipient files include sufficient documentation that the original contract price remained fair and reasonable.
- Ensure that the recipient files include sufficient documentation that the vehicle ordered under the option is substantially the same as the original vehicle in the contract.

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 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 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 (e.g. contracts with domestic content of 60 percent). Identify any piggyback procurements entered into. Onsite, review the date of the underlying contract on which the recipient is piggybacking and confirm that the exercised option conforms with FTA’s policy guidance on the implementation of the phased increase in domestic content for rolling stock.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it cannot document that:

- the original award met Federal requirements,
- the original award contained an assignability clause,
- assigned quantities did not exceed contract allowable amounts,
- the price was determined to be fair and reasonable, and
- the option vehicle did not contain a cardinal change to the original vehicle.

DEFICIENCY CODE P17-1: Improper piggyback purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit piggyback procedures that comply with FTA requirements. For the next procurement, submit documentation that the required process was implemented.

The recipient is deficient if, it acquired options through piggybacking and the base contract did not have the correct FY2020 and beyond domestic content requirement of 70 percent

DEFICIENCY CODE P17-2: Domestic content requirements not met in piggyback purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit piggybacking procedures that comply with FTA requirements. For the next procurement, submit documentation that the required process was implemented.

GOVERNING DIRECTIVE

FTA Circular 4220.1F Chapter V (7)(2) Assignment of Contract Rights

...The recipient may assign those contract rights to other recipients if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions. Some refer to this process as "piggybacking..." "...A recipient that obtains contractual rights through assignment may use them after first determining that the original contract price remains fair and reasonable, and the original contract provisions are adequate for compliance with all Federal requirements. The recipient need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the recipient to determine whether the contract price or prices originally established are still fair and reasonable before using those rights.

FTA Circular 4220.1F Chapter V 7. a. (1) (b). Exercise of Options

A recipient may use contract options held by another recipient with the following limitations: The recipient may not exercise an option unless it has determined that the option price is better than prices available in the market, or that when it intends to exercise the option, the option is more advantageous.

FTA Circular 4220.1F Chapter V, Section 7. b. (2) (d)

In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change would, at this time, include a change from a high-floor to a low-floor vehicle. Changing an engine might result in a cardinal change depending on the circumstances surrounding the