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USDOT Federal Transit Administration Office of Program Management
1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12-140
Washington, DC 20590-0001
Attention: Mr. Patrick M. Centolanzi, PE
(202) 366-0234, Patrick.Centolanzi@dot.gov, <http://www.regulations.gov>

RE: Agency/Docket Number FTA-2015-0020 - Proposed Buy America Handbook and Request for Comments

Dear Mr. Centolanzi,

In response to Agency/Docket Number FTA-2015-0020 - Proposed Buy America Handbook and Request for Comments issued June 16, 2015, Diversity Matters 2 US, LLC ("DM2US"), an independent consulting firm specializing in Buy America compliance, respectfully submits the following comments:

Introduction

As a consultant to both public and private transit industry organizations and former Buy America and DBE Manager for one of the industry's largest Transit Vehicle Manufacturers (i.e., ALSTOM Transport), I've learned what business practices bring together Grantees, vehicle manufacturers, and suppliers toward improving administration of the Buy America program. During my 20-year career, I have managed the Buy America compliance of more than \$1 billion in contract awards and provided Buy America and DBE training to more than 1,000 transit officials worldwide.

The comments stated below pertain to USDOT's FTA and may contain excerpts from the author's previous written statements to USDOT, FTA, FTA Recipients, APTA, and/or other transit-related and/or U.S. manufacturing-focused organizations.

Executive Summary

DM2US thanks USDOT FTA for issuing its proposed new Buy America Handbook. Although the 1995 version has served the industry well for two decades, many of the proposed changes should improve the interpretation and consistency among Grantees, vehicle manufacturers, and suppliers.

Proposed major improvements include:

- Emphasis on conducting mandatory timely audits
- Scrutiny on vehicle manufacturers and suppliers near the 60% minimum material requirement
- Inclusion of a standard Supplier Buy America certificate

Major issues include:

- Sample vehicle worksheet of 110 rail components (88 bus) vs. FTA Rule 661.11 “typical” Component list of 28-30 significantly impacts transit industry suppliers’ compliance
- Component Supplier Buy America compliance certificates should be more user friendly
- Delivery period should be clearly defined
- Only pertinent final assembly costs to be audited should be re-defined (e.g., craft labor, PM, Engineering, Testing, etc.).
- NREs in section 4.4.1 not pertaining to Buy America compliance violates the vehicle manufacturer’s legal right to protect proprietary data (e.g. Overhead, Profit or Gross Margin).
- The 1995 Handbook Q&A #11 regarding the vehicle manufacturer’s legal right to protect proprietary data must be incorporated into today’s Handbook.

Clerical Notes

In order to comply with 49 CFR Part 661.11(a), please change the term “60%” to “*more than 60%*” on the following proposed Handbook sections: B.2.1., B.3.1., Pre-Award Audit Report Table of Contents (page 129), Post-Delivery Audit Report Table of Contents (page 138), and Post-Delivery Audit Report 3.1 (page 141).

The terms “*Grantee*” (referenced in 49 CFR Parts 661 and 663) and “*Recipient*” (referenced in the Handbook) are to be considered interchangeable.

Section by Section Analysis

Section 1.1. Scope – page 3

While acknowledging this Handbook does not address compliance for rolling stock End Products 661.11 (t) through (v), FTA should:

- Clarify that Wayside Equipment purchased by a Grantee on the same contract containing Rolling Stock vehicles must be audited separately (e.g., charging stations). Wayside Equipment is not part of Rolling Stock vehicles cost value
- Update 661.11 (t), (u) and (v) to reflect today’s technological advances in equipment (e.g. positive train control)
- Clarify whether individual material items numbered underneath 661.11 (t), (u) and (v) are End Products or Components (or provide a written example when an item could be either)

³ FTA also defines rolling stock end products as off-vehicle train control, communication, and traction power equipment. See, e.g., Appendix A to 49 CFR § 661.3. This handbook’s guidance is limited to vehicles and does not address Buy America compliance for rolling stock end products (e.g., off-vehicle elements such as train control, communication, and traction power equipment) described in Buy America regulations in 49 CFR § 661.11 (t) through (w).

Section 1.1 Scope – page 4

FTA should place additional emphasis on the requirements that a pre-award audit must be completed before the Grantee enters into a formal contract to purchase vehicles. Too often, transit agencies perform the pre-award audit after they’ve issued Notice of Award.

Grantees and their auditors should provide at least three weeks written notice to all End Product manufacturers and suppliers prior to all Buy America audits.

Recipients purchasing vehicles must ensure that a pre-award audit as described in 49 CFR §§ 663.21 – 27 is completed **before the recipient enters into a formal contract** to purchase vehicles. Similarly, those recipients purchasing vehicles must also ensure that a post-delivery audit as prescribed in 49 CFR §§ 663.31 – 39 is completed **before the title to the vehicle is transferred** to the recipient. In 1995, FTA published two separate handbooks on this subject, one for rail vehicles, and one for buses.

Section 2.1. Requirements for the Pre-Award Audit – page 13

If a Component supplier is contracting directly with a Grantee, that Component supplier is now supplying an End Product. FTA should confirm whether the 661.11 “No shift / Once a Component, always a Component” rule applies

- Whether a vehicle is overhauled, refurbished or remanufactured at any level or stage, FTA must clarify that the 661.11 Rolling Stock Requirements rule is applied (i.e., 661.5 General requirements are *not* applied).
- FTA should issue follow-up clarification to their 2007 and 2010 Federal Register notices, especially confirming “once a Component, always a Component” applies. If a Buy America compliant original Rolling Stock End Product contained a foreign Component, that same Component should not be required to be domestic later, whether purchased alone or as part of a larger End Product.

A **component supplier** may be required to submit a Certification of Compliance (or Non-Compliance) with Buy America Rolling Stock Requirements if it is contracting **directly with the recipient**. When the component supplier is a contractor for the rolling stock manufacturer, *i.e.*, a subcontractor for the recipient, the recipient or manufacturer **may request** that a component supplier provide this certification if it will further compliance with the pre-award audit requirements.

Section 2.2.3. Best Practices for Pre-Award Buy America Certifications – page 16

FTA’s examples of conditions that could pose Buy America compliance challenges is a helpful tool that should help inexperienced auditors, vehicle manufacturers and suppliers. If any of these conditions do apply, they should be included in the *Section 2.2.3.1 Solicitation Phase Table 2. Recommended Discussion Topics During the Solicitation Phase of the Procurement* on page 17. Throughout the vehicle procurement process recipients should be alert to conditions that could pose challenges for Buy America compliance. Examples of these conditions include:

- Manufacturers who are inexperienced with the U.S. market and regulations.
- A new major subcontractor/component supplier.
- Vehicles with the domestic content close to the 60 percent minimum threshold.
- Major components with the domestic content close to the 60 percent minimum threshold.
- Manufacturers creating new U.S. final assembly facilities.
- Engineering changes, field modifications or contract change orders causing changes in project scope (completed projects must comply with Buy America requirements after all change orders have been implemented for all vehicles).

Section 2.2.3.1. Solicitation Phase - Table 2. Recommended Discussion Topics During the Solicitation Phase of the Procurement – page 17

Vehicle Manufacturers should submit their Non-Disclosure Agreement to the auditors during the discussion stage in order to prevent potential delays during the audit.

Table 2. Recommended Discussion Topics During the Solicitation Phase of the Procurement.

| Recommended Discussion Topics During the Solicitation Phase of the Procurement |
|--|
| Buy America requirements, e.g., manufacturer's certification, etc. |
| Recipient & Manufacturer or Supplier's (Bidder or Offeror) monitoring responsibilities of the status of compliance during production (e.g., the Resident Inspector program). |
| Recipient's processes for conducting Pre-Award, Intermediate and Post-Delivery Audit reviews. |
| Manufacturer's procedures for collecting, reviewing, and maintaining supporting documentation. |
| Recipient's role for collecting, reviewing, and maintaining supporting documentation. |
| Recipient's procedures for managing requests for waivers from Buy America requirements. |
| Recipient's process for selecting a Buy America auditor. |

Section 2.2.3.1. Solicitation Phase – page 18

USDOT should mandate to all Grantees to include only a Buy America 661.11 Rolling Stock certificate referencing U.S.C. 5323 (j)(2)(c). Grantees should not include a 661.5 certificate referencing U.S.C. 5323 (j)(1) unless the bid/contract includes both Rolling Stock vehicles and separate non-vehicle Manufactured End Products. If not, the 661.13(b)(1) inadvertent or clerical error rule should be amended to include signing the incorrect certificate when a Grantee includes both 661.5 and 661.11 certificates on a bid/contract.

certification with the bid. **If a bidder submits the wrong certification**, or certifies both compliance and non-compliance, the bid generally will be deemed non-responsive.¹⁶

Section 2.2.3.4. Supplier Buy America Certificate at Pre-Award – page 20

Presuming a Component's domestic manufacturing and more than 60% domestic Subcomponents is confirmed, a vehicle manufacturer "counts" that Component's entire selling price toward the vehicle's material cost. FTA should clarify auditors cannot arbitrarily disallow individual line item foreign Subcomponents.

2.2.3.4. Supplier Buy America Certificate at Pre-Award

The manufacturer is responsible for ensuring that suppliers and subcontractors comply with Buy America requirements. As a best practice, manufacturers should require **all** of its suppliers for the vehicle procurement to provide sufficient documentation to demonstrate compliance with pre-award audit requirements. This **may require** some additional follow-up with, or a request for additional information from, the supplier.²⁰

It is also **recommended, but not required**, that manufacturers obtain executed (signed and dated) certifications from **all** its suppliers for the pre-award audit. A suggested

²⁰ While **not required**, to ensure compliance with the pre-award audit and Buy America requirements, the **manufacturer** may consider conducting supplier qualification reviews (e.g., via site visits), detailed reviews of supplier documents, first article inspections, qualification testing, and source/pre-shipment inspections to verify suppliers' certifications.

Section 3. Post-Delivery Audit – page 25

DM2US thanks USDOT FTA for stating all parties (i.e., vehicle manufacturers and Component/Subcomponent suppliers) have a responsibility to insure compliance.

- Every different vehicle type must meet Buy America domestic content on its own equipment configuration. Railcar types include cab, trailer, locomotive, baggage, dining, bistro, with/without toilet, various wheelchair equipment, etc. Bus types include, diesel, electric, hybrid, articulated, various wheelchair equipment, etc. If prototype vehicles differ from production vehicles, each type must be calculated separately.
- Every individual railcar in a trainset or train consist must meet Buy America domestic content on its own as an individual End Product. Furthermore, Grantees should not consider an entire Trainset as one End Product.

During post-delivery, recipients continue to have the ultimate responsibility for ensuring compliance with all Federal requirements. As discussed in Section 2, Buy America requirements flow down from the FTA recipients to the manufacturers through the contract documents.

The manufacturer has the responsibility to document the domestic content and the responsibility to maintain documentation that demonstrates compliance with Buy America regulations.²⁶

Post-delivery, a manufacturer certifies that the requirements of the Buy America provisions were satisfied for the total vehicle(s) and all of its components, which includes collecting and evaluating its suppliers' documentation. The manufacturer should ensure that the **Supplier Buy America Certificates** (See [Appendix C.5](#)) are valid and be ready to provide auditors the supplier information necessary to demonstrate compliance.

Because all parties have a responsibility to ensure compliance by verifying domestic content percentages and domestic manufacturing locations, manufacturers should communicate Buy America requirements to their component suppliers and expect suppliers to perform due diligence of their subcomponent suppliers.

Section 3.1.2. Documentation for Post-Delivery Buy America Certification – page 28

FTA should clarify that vehicle manufacturers are not required to provide the auditor with hard copies of proprietary documents. The 1995 Handbook Q&A #11 regarding the vehicle manufacturer's legal right to protect proprietary data must be incorporated into today's Handbook documents in order to verify compliance. The Post-Delivery Audit Report should not include confidential data provided to the recipient or an auditor.

Section 3.1.3.3. Supplier Buy America Certificate Documentation for Buy America Certification at Post-Delivery – page 30

DM2US thanks USDOT FTA for stating vehicle manufacturers and Component supplier should conduct due diligence when documenting the manufacturing location of Component and Subcomponent suppliers.

Manufacturers should conduct due diligence when documenting the location of a supplier's manufacturing facility for each component (and ideally for each subcomponent). Manufacturers may perform supplier qualifications, which include site visits, detailed reviews of supplier documents, first article inspections, qualification testing, and source/pre-shipment inspection to verify suppliers' certifications.

Component suppliers executing the certificate have additional responsibility to ensure that subcomponents conform to specified standards.

Major Issue

Section 4.3. Domestic Content Worksheet – page 44

Since FTA's Buy America Rule 49 CFR Part 661 takes precedence over the Handbook, FTA must issue clear directions of whether vehicle manufacturers must now "break down" 25-30 "typical components" of 661.11 Appendices B & C into the 110 railcar (88 bus) separate components stated in the Appendix A - Domestic Content Calculation Worksheets on pages 70 – 100 of this Handbook.

- Since the proposed list of 110 railcar (88 bus) will significantly impact the existing vehicle manufacturer and Component supplier established material compliance, allowing individual auditors to decide the correct method will create inconsistency and, in some instances, non-compliance. (see page 70)
- Auditors must scrutinize the labor and materials costs of Components internally manufactured by the bidder or offeror or contractor to insure foreign manufacturing costs/markup aren't under-valued and domestic manufacturing costs/markup aren't over-valued.
- In light of the technical and computer advances in today's vehicles, FTA should update the "typical components" list and publish a request for comment directly from railcar/bus manufacturers and publishing a Federal Register notice.

4.3. Domestic Content Worksheet

[Appendix A](#) provides sample Domestic Content Calculations Worksheet templates for buses and rail vehicles for rolling stock manufacturers.

These templates are intended to allow a standard presentation of domestic content calculations for bus and rail vehicles as well as facilitate verification of the following:

- Compliance with 49 CFR § 661.11 Appendices B and C – Typical Components of Bus and Rail Rolling Stock list.
- All components are accounted for in the domestic content calculation and there is a complete total of the vehicle domestic and foreign content.
- Manufacturer's confidential dollar value for the vehicle domestic content can be assessed by the auditor.
- Each component has been correctly identified as either domestic or foreign based on the supplier identification and the manufacturing location.

As a minimum, the manufacturer's list of components should include items listed in Appendix C to 49 CFR Part § 661.11 – Typical Components of Rail Rolling Stock, which states:

"The following is a list of items that typically would be considered components of rail rolling stock. This list is not all-inclusive.

Car shells, engines, main transformer, pantographs, traction motors, propulsion gear boxes, interior linings, acceleration and braking resistors, propulsion controls, low voltage auxiliary power supplies, air conditioning equipment, air brake compressors, brake controls, foundation brake equipment, articulation assemblies, train control systems, window assemblies, communication equipment, lighting, seating, doors, door actuators and controls, wheelchair lifts and ramps to make the vehicle accessible to persons with disabilities, couplers and draft gear, trucks, journal bearings, axles, diagnostic equipment, and third rail pick-up equipment."

Section 4.3.3. Domestic Content Worksheet Instructions – page 46

All Component transportation costs to the final assembly location, including domestic, should be counted toward the cost of components. Otherwise, you're discouraging Vehicle Manufacturers from exceeding the minimum 50% US Flagship requirement. If "Freight-In Costs" are part of a Component's costs, then domestic freight costs must be included – if not, where are those domestic Component freight costs accounted for? It's certainly not part of the End Product vehicle final assembly costs. Every auditor has "counted" domestic Component freight costs in every audit I've managed for the vehicle manufacturer.

Section 5.2.8 on page 67 defining Component cost makes no distinction between domestic and foreign "...cost of transporting the component." It's time to correct this inconsistency. attributable to that component or subcomponent under normal accounting principles. In addition, transportation costs to the final assembly location must be included in calculating the cost of **foreign components and subcomponents** (if components using foreign subcomponents are manufactured by the vehicle manufacturer at the vehicle final assembly location).

Section 4.3.3. Domestic Content Worksheet Instructions – page 46

On the bottom row of the railcar "Totals" table, replace the term "manufacturing" with "final assembly." Although the table is primarily for illustrative purposes, a railcar's final assembly costs (even without profit) will exceed 10% of the total contract price. Therefore, the \$20,000 sample amount is unrealistically low.

| | | | | |
|---|----------------|-------------|--------|--------|
| Totals | | | | |
| Vehicle Material Subtotal | \$1,480,000.00 | \$20,000.00 | 74.00% | 25.00% |
| Vehicle Material Total Cost | \$1,500,000.00 | | | |
| Vehicle Total Cost (including Profit & Manufacturing) | \$1,520,000.00 | | | |

Section 4.3.3. Domestic Content Worksheet Instructions, Step 5 – page 48

An additional row and dollar value for each Component's manufacturing, overhead and profit should be inserted above the "Component Total Cost" row instead of assuming readers will figure it out on their own. (See page 70)

STEP 5

In *Component Total Cost (including Profit & Manufacturing)* row, fill in the component total cost, which includes overhead and manufacturing costs.

| System (or Group of Components) | Supplier Name | Manufacturing Location (U.S. or Foreign) | Manufacturing Location (If U.S. - City & State; If Foreign - City & Country) | Component and Subcomponent Material Costs | | Subcomponent % of Component and Component Total % | | U.S. Content (If U.S. % < 60%, enter 60% component cost is accounted) | Component % of Vehicle | |
|---|--------------------|--|--|---|-------------|---|---------|---|------------------------|---------|
| Component | | | | U.S. | Foreign | U.S. | Foreign | | U.S. | Foreign |
| Subcomponent | | | | | | | | | | |
| System 1 | | | | | | | | | | |
| Component 1 | Component Supplier | U.S. | Any town, State | | | | | | | |
| Subcomponent 1.1 | Sub Supplier 1.1 | U.S. | Any town, State | \$25,000.00 | \$0.00 | 8.3% | 0.0% | | | |
| Subcomponent 1.2 | Sub Supplier 1.2 | U.S. | Any town, State | \$35,000.00 | \$0.00 | 11.3% | 0.0% | | | |
| Subcomponent 1.3 | Sub Supplier 1.3 | U.S. | Any town, State | \$65,000.00 | \$0.00 | 21.0% | 0.0% | | | |
| Subcomponent 1.4 | Sub Supplier 1.3 | Foreign | Any city, Country | \$0.00 | \$75,000.00 | 0.0% | 24.2% | | | |
| Subcomponent 1.5 | Sub Supplier 1.4 | U.S. | Any town, State | \$110,000.00 | \$0.00 | 35.5% | 0.0% | | | |
| | | | | \$235,000.00 | \$75,000.00 | 75.8% | 24.2% | | | |
| Component 1 Total Cost (including Profit & Manufacturing) | | | | \$360,000.00 | | | | \$360,000.00 | 18.00% | 0.00% |

Section 4.3.3. Domestic Content Worksheet Instructions, Step 8 – page 52

Please change "a)" to read "If the component is U.S. manufactured and the domestic material percentage of the component is greater than 60%"

a) If the component is U.S. and the U.S. percentage of the component is greater than 60%

Section 4.3.3. Domestic Content Worksheet Instructions, Step 8 – page 52

Please change "b)" to read "If the component is U.S. manufactured and the domestic material percentage of the component is less than 60%"

b) If the component is U.S. and the U.S. percentage of the component is less than 60%

Section 4.3.3. Domestic Content Worksheet Instructions, Step 8 – page 53

Please change “c)” to read “*If the component is foreign and the U.S. subcomponents being incorporated into the foreign component receive a tariff exemption*”

- c) If the component is foreign and the U.S. components being incorporated into the foreign component receive a tariff exemption

Section 4.3.3. Domestic Content Worksheet Instructions, Step 8 – page 53

Please change “d)” to read “*If the component is foreign and the U.S. subcomponents being incorporated into the foreign component did not receive a tariff exemption.*”

See page 56 example.

- d) If the component is foreign



Major Issue

Section 4.4.1. Special Considerations – NREs – page 57

The NREs Section is the most troubling aspect of the entire Handbook. Although 8 of the NREs listed may be considered part of a vehicle's final assembly costs, the 4 line items identified as NREs should be deleted from this list.

- A Vehicle Manufacturer's Profit/Gross Margin (or loss) and Overhead is proprietary information and irrelevant to calculating compliance.
- Auditors, whether independent or the Grantee's, should never have access to this proprietary data because neither Profit/Gross Margin nor Overhead are costs.
- FTA should explain the term "Rolling Stock Manufacturer miscellaneous labor (other than final assembly)" with examples because it's unclear.
- FTA should explain the term "Freight or shipping cost from overseas plant" because Component freight is counted toward the Component's costs. End Product vehicles will ship from the U.S. (unless FTA grants a complete vehicle waiver to a Grantee).
- Many Pre-Award and Post-Delivery audits may be stalled or postponed by the vehicle manufacturers' legal counsel if the FTA's Handbook lists Profit/Gross Margin and Overhead as a rolling stock manufacturer's "*ready evidence to support verification...by the auditor.*"
- FTA should clarify and/or provide examples of which specific documents auditors can and cannot remove from vehicle manufacturer's premises (e.g., "Yes" to a vehicle summary spreadsheet and Component suppliers' Buy America certificates, "No" to Component suppliers' line-item costed quotes/ subcontracts/P.O.s, calculations of proprietary final manufacturing costs.

4.4.1. NREs

The following is a list of typical, but not all inclusive, Non-Recurring Expenses (NRE) that will be incurred by the rolling stock manufacturer and for which the manufacturer **may** provide a breakdown of NREs –

- Mobilization
- Project management
- Procurement
- Engineering
- Design
- Testing
- Quality Assurance
- Rolling Stock Manufacturer miscellaneous labor (other than for final assembly)
- **Overhead**
- **Profit or Gross Margin**
- Warranty
- As-built drawings
- Freight or shipping cost from overseas plant
- Miscellaneous

The rolling stock **manufacturer should** have **ready evidence** to support verification of each of the above NRE item by the auditor.

Major Issue

Why is 1995 Handbook Question # 11 protecting Vehicle Manufacturer's proprietary hard copies missing from this 2015 proposed Handbook?

The 1995 Handbook (http://www.fta.dot.gov/legislation_law/12921_5433.html) Question # 11 states:

“11. What if the manufacturer is concerned about releasing proprietary information?”

If the manufacturer is concerned about releasing proprietary information, the recipient may contract with an external consultant to conduct the manufacturer’s Buy America certification review. After the consultant has reviewed the component and subcomponent documentation, the consultant will inform the recipient whether or not the Buy America requirements have been fulfilled. Once the recipient, or consultant, has reviewed the Buy America information, the manufacturer has fulfilled the requirements of the Buy America certification assuming that compliance has been established. The manufacturer is not required to provide the recipient with hard copies of the Buy America calculations. A manufacturer may require the external consultant to sign a proprietary information disclosure statement.”

The 1995 Handbook Question # 11 protecting Vehicle Manufacturer’s proprietary hard copies is a crucial statement vehicle manufacturers must use to defend themselves from overzealous auditors threatening to deem the builder non-compliant if they don’t cave into the auditor’s demands.

Section 4.4.3. Special Considerations – Transportation Costs – page 58

All Component transportation costs, including domestic, should be counted. Otherwise, you’re discouraging Vehicle Manufacturers from exceeding the minimum 50% US Flagship requirement. In “Freight-In Costs” are part of a Component’s costs, then domestic freight costs must be included – if not, where are those domestic Component freight costs accounted for?

- “...even if a U.S. shipping company vessel is used” is new language not in statute.

4.4.3. Transportation Costs

Transportation costs to the U.S. final assembly location must be included in calculating the cost of components and subcomponents. If a component/subcomponent is manufactured outside the U.S., its cost for transportation counts as foreign content (even if a U.S. shipping company or vessel is used).³¹

Section 4.5. Sample Supplier Domestic Content Certification – Step 2 – page 59

Please replace the term “contractor” with “vehicle manufacturer.”

STEP 2

Fill in the contractor’s name and contract/purchase order number that connects this certificate to the specific procurement project.

Contractor: _____
Contract/Purchase Order: _____

Section 4.5. Sample Supplier Domestic Content Certification – Step 4 – page 61

Delete “/or” because a mere part number with no Component name is indecipherable once the Auditor and the Auditor’s report leaves the Vehicle Manufacturer’s site. (See page 113)

STEP 4

List each component and its (major) subcomponents on the designated rows. Identify Components by name and/or part number traceable to the subject procurement.

Major Issue

F.A.Q. Section 5.1.3. When should Buy America post-delivery audit be conducted? – page 63

FTA and its vehicle manufacturers should develop a standard for a calendar delivery schedule and number and type of vehicles instead of relying upon Recipients (with various budget constraints and Buy America expertise/concern) and independent Auditors (competing against each other on lowest firm-fixed bid price) to make that decision based upon their individual interests. (See page 68)

The recipient should consider several factors in determining the appropriate time to verify that all material and work performed for the entire contract (including the last vehicle and all change orders) meets the Buy America requirements. A post-delivery audit is often performed just prior to the transfer of title or entry into revenue service of the first vehicle. For small procurements with short delivery periods, an audit conducted at that time may be sufficient. However, the recipient should determine if an audit conducted on the first vehicle is sufficient to verify the actual domestic material content for the entire order. If the post-delivery audit is conducted on the first vehicle, the recipient may need to conduct additional verifications to confirm that the full order satisfies the Buy America requirements particularly if there are changes made in materials or scope after the first post-delivery audit. In certain cases, particularly on large orders with multi-year delivery schedules, recipients may find it appropriate to conduct intermediate audits to minimize the risk that subsequent vehicles the order may not meet Buy America Requirements.

F.A.Q. Section 5.2.11. Can systems be components for domestic content calculations? – page 67

DM2US thanks FTA for specifying that multiple separate Components are grouped into “Systems.”

5.2.11. Can systems be components for domestic content calculations?

(Examples would be truck assemblies, propulsion system, and brake system.)

No. To assist in identifying components and subcomponents in the context of rolling stock procurements, recipients should refer to Appendices B and C to 49 CFR § 661.11 for a list of components for rolling stock. For components that are not readily identifiable from these Appendices, recipients should contact FTA for clarification.

F.A.Q. Section 5.3.2. Purchaser’s Requirements Certification – Where the contract provides for more than one delivery period, must the recipient conduct a post-delivery audit for each delivery period? – page 68

As stated earlier, FTA and its vehicle manufacturers should develop a standard for a calendar delivery schedule and number and type of vehicles instead of relying upon Recipients (with various budget constraints and Buy America expertise/concerns) and independent Auditors (competing against each other on lowest firm-fixed bid price) to make that decision based upon their individual interests. (See page 63)

5.3.2. Where the contract provides for more than one delivery period, must the recipient conduct a post-delivery audit for each delivery period?

Yes. This question addresses the circumstances where a contract provides for multiple deliveries and the delivery periods are scheduled at substantially different time intervals, such as 6 months or 1 year apart. When a contract for vehicles provides for separately scheduled delivery periods, the recipient should complete a post-delivery audit for each period. This does not mean that a separate audit is required for each vehicle within a delivery period.

Major Issue

Appendix A, Domestic Content Calculation Worksheets – pages 70-100

As stated earlier (Section 4.3. Domestic Content Worksheet), since FTA's Buy America Rule 49 CFR Part 661 takes precedence over the Handbook, FTA must issue clear directions of whether vehicle manufacturers must now "break down" 25-30 "typical components" of 661.11 Appendices B & C into the 110 railcar (88 bus) separate components stated in the Appendix A - Domestic Content Calculation Worksheets on pages 70 – 100 of this Handbook. Since the proposed list of 110 railcar (88 bus) will significantly impact the existing vehicle manufacturer and Component supplier established material compliance, allowing individual auditors to decide the correct method will create inconsistency and, in some instances, non-compliance. (See page 44)

- As stated earlier (Section 4.3.3. Step 5), an additional row and dollar value for each Component's manufacturing, overhead and profit should be inserted above the "Component Total Cost" row instead of assuming readers will figure it out on their own. (See page 48).
- Although the table is primarily for illustrative purposes, it's rare for a Component to contain only one Subcomponent. In most cases, a Component will contain at least 2 subcomponents.
- If these proposed Domestic Content Calculation Worksheets become part of the Final Handbook, then the place-holders "*Subcomponent 1.1, Subcomponent 1.2, etc.*" should be replaced with actual Subcomponent names.
- Since some miscellaneous categories (e.g., hardware, small electrical, small metal fabricated parts, etc.) are purchased from a wide mix of many domestic and foreign suppliers within each category, the domestic content of those miscellaneous categories should be counted at actual value, even when it exceeds 60% of that miscellaneous category's total material value.

SAMPLE BUY AMERICA DOMESTIC CONTENT WORKSHEET FOR RAIL ROLLING STOCK
to calculate domestic and foreign material content for Buy America Audits

| System (or Group of Components) | Supplier Name | Manufacturing Location (U.S. or Foreign) | Manufacturing Location (F.O.B. - City & State; # Foreign - City & Country) | Component and Subcomponent Material Costs | | Subcomponent % of Component and Component Total % | | U.S. Content (# U.S. % = 60%, with 60% component cost is counted) | Component % of Vehicle | |
|--|----------------------------------|---|--|---|-------------|---|---------|--|------------------------|---------|
| Component | | | | U.S. | Foreign | U.S. | Foreign | | U.S. | Foreign |
| Subcomponent | | | | | | | | | | |
| * COMPONENTS DEFINED IN 49 CFR 661 APPENDIX C - TYPICAL COMPONENTS OF RAIL ROLLING STOCK * | | | | | | | | | | |
| Friction Brake System | | | | | | | | | | |
| Supply Reservoir | Component Supplier | U.S. | Any town, State | | | | | | | |
| Subcomponent 2.1 | Sub Supplier 2.1 | U.S. | Any town, State | \$3,564.00 | \$0.00 | 100.0% | 0.0% | | | |
| Supply Reservoir Material Subtotal | | | | \$3,564.00 | \$0.00 | 100.0% | 0.0% | | | |
| Supply Reservoir Total Cost | Including Profit & Manufacturing | | | \$3,920.40 | | | | \$3,920.40 | 0.19% | 0.00% |
| Disc Brake Unit | Component Supplier | U.S. | Any town, State | | | | | | | |
| Subcomponent 2.1 | Sub Supplier 2.1 | U.S. | Any town, State | \$1,779.90 | \$0.00 | 100.0% | 0.0% | | | |
| Disc Brake Unit Material Subtotal | | | | \$1,779.90 | \$0.00 | 100.0% | 0.0% | | | |
| Disc Brake Unit Total Cost | Including Profit & Manufacturing | | | \$1,951.29 | | | | \$1,951.29 | 0.09% | 0.00% |
| Gauges | Component Supplier | U.S. | Any town, State | | | | | | | |
| Subcomponent 2.1 | Sub Supplier 2.1 | U.S. | Any town, State | \$997.20 | \$0.00 | 100.0% | 0.0% | | | |
| Gauges Material Subtotal | | | | \$997.20 | \$0.00 | 100.0% | 0.0% | | | |
| Gauges Total Cost | Including Profit & Manufacturing | | | \$1,096.92 | | | | \$1,096.92 | 0.05% | 0.00% |
| Speed Sensor | Component Supplier | U.S. | Any town, State | | | | | | | |
| Subcomponent 2.1 | Sub Supplier 2.1 | U.S. | Any town, State | \$696.60 | \$0.00 | 100.0% | 0.0% | | | |
| Speed Sensor Material Subtotal | | | | \$696.60 | \$0.00 | 100.0% | 0.0% | | | |
| Speed Sensor Total Cost | Including Profit & Manufacturing | | | \$766.26 | | | | \$766.26 | 0.04% | 0.00% |
| * Articulation Assemblies * | | | | | | | | | | |
| Joint Assembly | Component Supplier | Foreign | Any city, Country | | | | | | | |
| Articulation Joint | Sub Supplier 2.1 | Foreign | Any city, Country | \$0.00 | \$12,000.00 | 0.0% | 54.5% | | | |
| Deck Plates | Sub Supplier 2.2 | Foreign | Any city, Country | \$0.00 | \$5,000.00 | 0.0% | 22.7% | | | |
| Pistons | Sub Supplier 2.3 | Foreign | Any city, Country | \$0.00 | \$5,000.00 | 0.0% | 22.7% | | | |
| Joint Assembly Material Subtotal | | | | \$0.00 | \$22,000.00 | 0.0% | 100.0% | | | |
| Joint Assembly Total Cost | Including Profit & Manufacturing | | | \$24,534.43 | | | | \$0.00 | 0.00% | 1.05% |
| Bellows | Component Supplier | Foreign | Any city, Country | | | | | | | |
| Bows | Sub Supplier 2.1 | Foreign | Any city, Country | \$0.00 | \$5,000.00 | 0.0% | 45.5% | | | |
| Fabric | Sub Supplier 2.2 | Foreign | Any city, Country | \$0.00 | \$6,000.00 | 0.0% | 54.5% | | | |
| Bellows Material Subtotal | | | | \$0.00 | \$11,000.00 | 0.0% | 100.0% | | | |
| Bellows Total Cost | Including Profit & Manufacturing | | | \$12,423.51 | | | | \$0.00 | 0.00% | 0.53% |

Appendix C, Certifications and Forms, C.5 Sample Buy America Certification – page 113

Within the **Instructions, 2.**, please change the term “*Contractor*” to “*End Product Vehicle Manufacturer*.”

Instructions for Completing the Buy America Supplier Certificate

Buy America Supplier Certificate should be filled out for any item for which domestic content is being claimed. The Buy America Supplier Certificate is the supplier’s legal attestation of their domestic content and location of manufacturing for the products being provided for this procurement.

1. Fill in the supplier’s contact information in the designated space at the top part of the form.
2. Fill in the contractor’s name and contract/purchase order number that connects this certificate to the specific procurement project.

Appendix C, Certifications and Forms, C.5 Sample Buy America Certification – page 113

Delete “/or” because a mere part number with no Component name is indecipherable once the Auditor and the Auditor’s report leaves the Vehicle Manufacturer’s site. (See page 61)

4. List each component and its (major) subcomponents on the designated rows. Components should be identified by name **and/or part number** traceable to the subject procurement.

Major Issue

Appendix C, Certifications and Forms, C.5. (not labeled) Sample Buy America certification – page 114

While I support the intent of a standardized supplier certificate, FTA's proposed Sample Buy America Supplier Certification form will likely cause misinterpretation, inaccurate calculation and potential non-compliance. DM2US respectfully submits the suggested edits listed below.

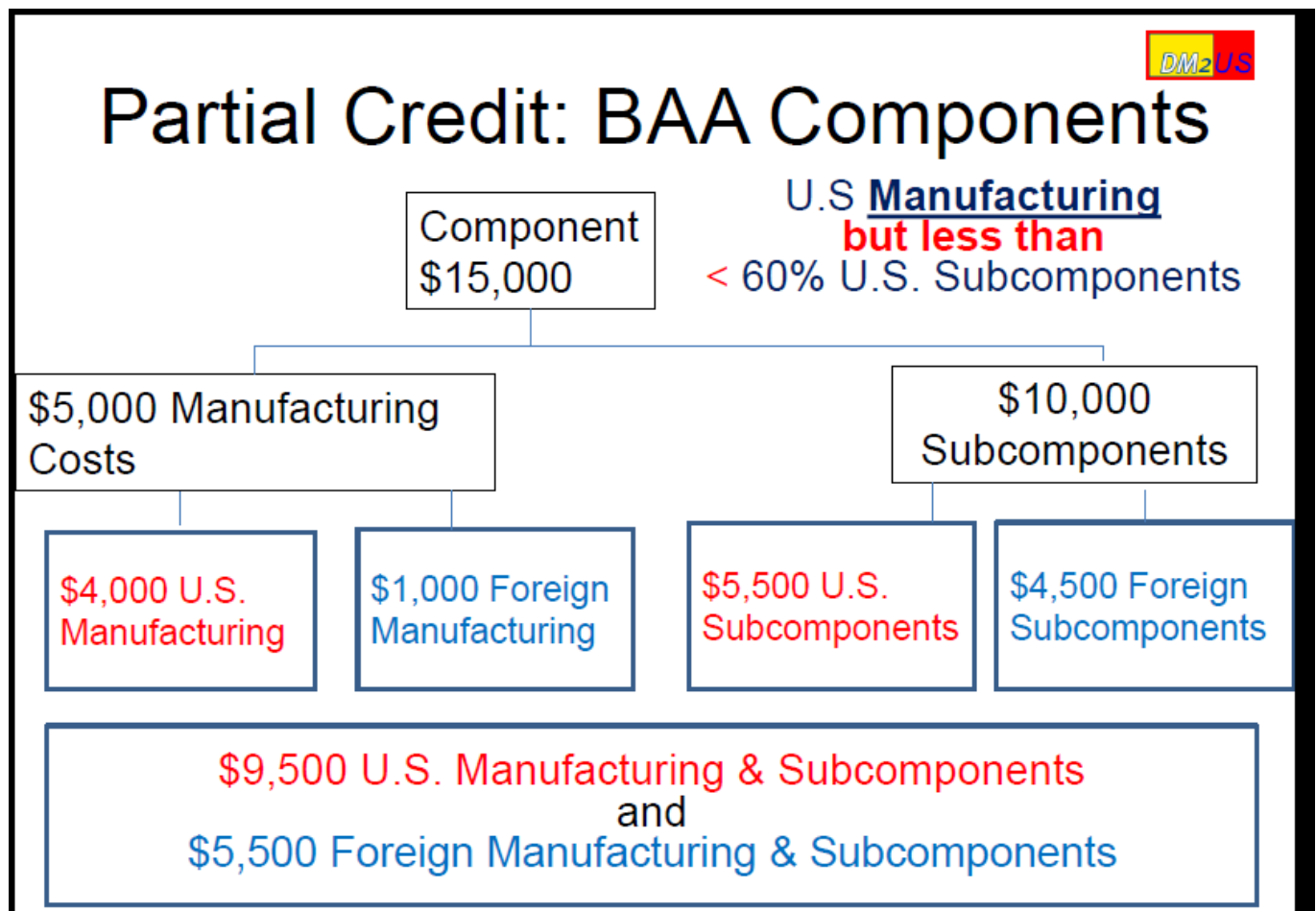
Within the **top section**, change the term "*Contractor*" to "*End Product Vehicle Manufacturer.*"

| SAMPLE BUY AMERICA SUPPLIER CERTIFICATION | | | |
|--|--|---|---|
| Supplier: _____ | | | |
| Address: _____ | | | |
| Phone: _____ | | Fax: _____ | |
| Email: _____ | | | |
| Contractor: _____ | | | |
| Contract/Purchase Order: _____ | | | |
| This certifies the Supplier's status of compliance with FTA Buy America Regulations set forth in 49 C.F.R § 661.11. | | | |
| For each component supplied for the Contract, the Supplier attests that (CHECK ONE BOX): | | | |
| <input type="checkbox"/> | More than 60% of the subcomponents, by cost, are of U.S. origin/manufacture, and is manufactured in the U.S. The Supplier attests that the U.S. content of subcomponents, by cost, is as indicated below. | | |
| <input type="checkbox"/> | Less than 60% of the subcomponents, by cost, are of U.S. origin/manufacture, and is manufactured in the U.S. (in such case, the cost of U.S. subcomponents and cost of U.S. manufacturing labor are eligible for inclusion towards domestic content calculations). The Supplier attests that the U.S. content of subcomponents, by cost, is as indicated below. | | |
| <input type="checkbox"/> | The component contains subcomponents of domestic origin, however, the component is NOT manufactured in the U.S. (in such case, the cost of U.S. subcomponents and cost of U.S. manufacturing labor are eligible for inclusion towards domestic content calculations). The Supplier attests that the U.S. content of subcomponents, by cost, is as indicated below. | | |
| | MANUFACTURING LOCATION | % DOMESTIC CONTENT | % FOREIGN CONTENT |
| [COMPONENT NAME] | [Location of individual component] | [Total domestic content % of all subcomponents] | [Total content % of all subcomponents] |
| [SUBCOMPONENT NAME] (use rows for each subcomponent) | [Location of individual subcomponent] | [Total domestic content % of individual subcomponent] | [Total U.S. content % of all subcomponents] |

Appendix C, Certifications and Forms, C.5. (not labeled) Sample Buy America certification – page 114

Within the **2nd yellow check box**, the term “*labor*” should be deleted to remain in compliance with 49 CFR Part 661.11(l) and because there are additional manufacturing costs besides labor (e.g., engineering, QC, program management, etc.).

- The term “*of the end product (e.g., vehicle)*” should be added at the end of the sentence within the parentheses to remain in compliance with 49 CFR Part 661.11(l) and avoid misinterpretation.
- Furthermore, the “% *Domestic Content*” column in the following section provides no accurate method to list Component domestic manufacturing costs referenced in this 2nd box.
- Please see listed below an example where the domestic content (i.e., Subcomponent materials and Component manufacturing costs) exceeds 60% of a Component’s selling price but does not exceed 60% domestic subcomponents and therefore does not meet both requirements of Buy America Rule 49 CFR Part 661.11(g)



- In this example, the auditor must count only \$9,500 in domestic content toward the vehicle. The \$9,500 total domestic content equals more than 60% of the \$15,000 Component selling price (i.e., **63%**). However the \$5,500 domestic subcomponents referenced in the “% *Domestic Content*” column of the following section equals **55%** of total material cost and **37%** of the Component’s total value. If this proposed form isn’t corrected and simplified, misinterpretation and confusion will be significant among Component suppliers, vehicle manufacturers, and transit agency auditors

Appendix C, Certifications and Forms, C.5. (not labeled) Sample Buy America certification – page 114

Within the **3rd yellow check box**, the term “...and the cost of U.S. manufacturing labor” should be deleted because the beginning part of that sentence states “*the component is NOT manufactured in the U.S.*”

- Furthermore, reference to 49 CFR Part 661.11(i) and (j) tariff exemption requirements should be added because a significant portion of Component suppliers (and some vehicle manufacturers) are not aware of them. Supplier should be required to attach documentation to substantiate tariff exempt status.

Within the “% Foreign Content” column of the “Component Name” row, the term “Total content % of all subcomponents” should be changed to “Total **foreign** content % of all subcomponents.”

- Within the “% Foreign Content” column of the “Subcomponent Name” row, the term “Total U.S. content % of all subcomponents” should be changed to “Total **foreign** content % of **individual subcomponent**.”

FTA’s use of the compliance term “*is*” should be changed to “shall be” for only Pre-Award audits because no subcontract will have been awarded at that time.

DM2US suggested Buy America Supplier Certification form

Please see listed below a sample DM2US Buy America Supplier Certification form that I've successfully used on every Buy America audit over the past 11 years. All Grantee auditors have accepted this certificate because it's clear, simple and succinct (based upon feedback received).

Component Manufacturer's Buy America Confirmation Statement

1. The cost of Component manufacturer's **subcomponents manufactured in the United States** and sold to ABCD transit vehicle assembler on XYZ Transit Authority RFP # TUVW-123 Hybrid Transit Coaches equals **more than 60%** of the Component manufacturer's **total Subcomponent** costs on XYZ Transit Authority RFP # TUVW-123 Hybrid Transit Coaches.
Yes _____ No _____
2. The Component sold by the Component manufacturer to ABCD transit vehicle assembler on XYZ Transit Authority RFP # TUVW-123 Hybrid Transit Coaches **is manufactured* in the United States**.
Yes _____ No _____
3. **If** Component manufacturer answered **"No" to either or both** of the **questions** listed above, the **sum total** of Component manufacturer's U.S. subcomponents **and** U.S. **manufacturing** costs of the Component manufacturer's product sold to ABCD transit vehicle assembler on XYZ Transit Authority RFP # TUVW-123 Hybrid Transit Coaches equals
\$ USD _____.

Component manufacturer's workscope description _____

Component manufacturer's **manufacturing** location (city, state) _____

Component manufacturer's Company Name _____

Component manufacturer's Contact Person's Name (please print or type) _____

Component manufacturer's Contact Person's Title _____

Component manufacturer's Contact Person's Phone # and Fax # _____

Component manufacturer's Contact Person's E-mail address _____

Date _____

Component manufacturer's Contact Person's signature

* Please see listed below USDOT's definition of **"Manufacturing"** from Buy America Rule 49 CFR Part 661:

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

§ 661.11 Rolling stock procurements. (e) A component is considered to be manufactured if there are sufficient activities taking place to advance the value or improve the condition of the subcomponents of that component; that is, if the subcomponents have been substantially transformed or merged into a new and functionally different article.

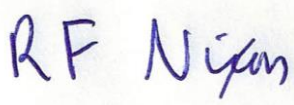


Conclusion

DM2US thanks FTA for their due diligence in creating the proposed Buy America Handbook and looks forward to its further development. DM2US respectfully requests to actively participate as a stakeholder in any and all future meetings.

Please contact DM2US whenever we may be of assistance and we welcome the opportunity to participate in future stakeholder meetings.

Respectfully yours,

A handwritten signature in blue ink that reads "RF Nixon". The letters are cursive and slightly slanted to the right.

Bob Nixon, President
Diversity Matters 2 US, LLC