



## Buy America: Transportation Manufacturing and Domestic Content Requirements

As the United States invests in building a 21<sup>st</sup> Century transportation system, expansion of public transit, “clean” freight movement, and high-speed rail will generate new demand for cleaner and more efficient transportation vehicles and systems. When these purchases are supported by federal dollars, they are subject to domestic content requirements, which stipulate that a minimum percentage of equipment costs or components supported be sourced domestically.

Many of the world’s largest economies utilize domestic content requirements as a way to support local industry. Domestic content requirements have a long history in the United States, and have played an important role in supporting U.S. manufacturers of certain products procured using public funds. This memo offers some brief background on U.S. domestic content requirements, as well as several examples of how they have been applied to the transportation sector internationally.

### History of U.S. Domestic Content Requirements

Domestic content requirements, known in the U.S. as Buy American and Buy America, are intended to support our manufacturing sector by ensuring that materials used in federally funded projects are sourced domestically. The Buy American Act, originally passed in 1933, applies to all large federal government agency purchases of goods, but does not apply to services.<sup>1</sup> Under the Act, at least 51% of content in goods for public use, including manufactured items and construction materials, must be produced in the U.S.

Buy America requirements are separate from Buy American and specifically apply to the transportation sector.<sup>2</sup> Buy America was added to the transportation bill in 1978, and applies to procurements which are funded by grants provided to state, municipal or other organizations, including transit authorities, through the Federal Transit Authority (FTA), Federal Highway Administration (FHWA), and Federal Rail Administration (FRA).

A report of the U.S. Government Accountability Office (GAO) released in December of 2008 noted that:

*“the types of potential benefits related to [the Buy America] program ...include protecting domestic employment through national infrastructure improvements that can stimulate economic activity and create jobs; protecting against unfair competition from foreign firms as a result of foreign government subsidies; and maintaining national security interests through the continued use and development of certain industries within the U.S. economy, like the iron and steel industries.”<sup>3</sup>*

Many states and municipalities also include preference for local products or businesses in their procurement policies, usually tied to sustainability goals.<sup>4</sup> Where investments within a particular

<sup>1</sup> Section 10a of Title 41 of the United States Code

<sup>2</sup> Section 5323(j) of Title 49 of the United States Code

<sup>3</sup> *Federal Aid Highways, Federal Requirements for Highways May Influence Funding Decisions and Create Challenges, but Benefits and Costs are Not Tracked* (Government Accountability Office, GAO-09-36; Dec. 2008).

<sup>5</sup> Sandler, L. “Rail Jobs Estimate Drops by Thousands,” *Milwaukee Journal Sentinel* (February 6, 2010).

state are fairly substantial, manufacturers have made the decision to site a facility in-state. This has already happened with high speed rail investments – in states where federal grants will support high speed rail projects, foreign rail car manufacturers familiar with Buy America are eager to build facilities nearby. For example, Spanish rail car manufacturer Talgo has plans to build a Wisconsin plant to assemble cars for a upgraded Milwaukee-to-Madison rail line.<sup>5</sup> And Siemens, a German-owned firm, has purchased 20 acres of land next to its existing light rail manufacturing plant in anticipation of future California high speed rail projects.<sup>6</sup>

Summary of Current Buy America Regulations:

Buy America requirements apply to all agencies within the Department of Transportation. For example, all projects funded by the FHWA must use 100% U.S. manufactured iron and steel products, with the exception of waivers (see below). One hundred percent of AMTRAK passenger rail purchases costing more than \$1 million must be U.S.-made. All projects funded by the FTA require that all steel and manufactured products use 100% U.S. content and to be 100% U.S. manufactured. And rolling stock (trains, buses, ferries, trolley cars, etc.) components must have final assembly occur in the United States and have 60% domestic content, meaning that the cost of components produced in the U.S. must be more than 60% of the cost of all components.

General waivers for domestic purchasing requirements are issued by the Secretary of Transportation for three reasons:

1. Preference for domestic product is “inconsistent with the public interest,” a broad category which can be interpreted to include a wide range of impacts on domestic markets or firms, or on project outcomes.<sup>7</sup>
2. The product is not available in the U.S. in sufficient and reasonably available quantities of a satisfactory quality.
3. Procuring the product or component domestically would increase project costs by more than 25%.

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<sup>5</sup> Sandler, L. “Rail Jobs Estimate Drops by Thousands,” *Milwaukee Journal Sentinel* (February 6, 2010).

<sup>6</sup> Associated Press. “Eyeing High-Speed Rail, Siemens Buys 20 Acres Next to its California Rail Plant,” *San Francisco Chronicle* (February 18, 2010).

<sup>7</sup> In one waiver request, for example, Firestone and Michelin claimed that excluding their Canadian-made tires from Buy America requirements would leave Goodyear as the only domestic supplier of bus tires, therefore limiting competition in the marketplace. (See Public Interest Waiver Number 52 FR 23735; June 24, 1987). Another waiver request, submitted by the Southern Nevada Regional Transportation Commission, claims that a contract had already been awarded to a foreign manufacturer to begin the project using local funds, and that it would not be in the public interest to rescind the contract after the project later received a federal grant (See Docket No. FTA-2008-0048 Federal Register: November 5, 2008 (Volume 73, Number 215) Page 65918-65920

<b>Federal Agency</b>	<b>Statute</b>	<b>Domestic Content Req.</b>	<b>Applicability</b>	<b>Waivers</b>
Buy American Act	41 U.S.C. § 10	51%	“Substantially or all” goods for public use (articles, materials, or supplies) must be produced in the U.S.; only 51 percent of the components of supplies and construction materials must be made domestically for the final product to qualify as U.S.-made	A waiver is permitted if the cost of the U.S.-manufactured good is six percent more than the imported good, or 12 percent more for small businesses.
Federal Highway Administration	23 U.S.C. § 101 (note)	100%	Prohibits granting of FHA funds unless steel, iron, and manufactured products are produced in the U.S.	(i) inconsistent with the public interest; (ii) not produced in a sufficient and reasonably available amount or are not of a satisfactory quality; (iii) will increase the cost of the overall project contract by more than 25 percent.
Federal Transit Administration	49 U.S.C. §§ 5307, 5323(j)	60% of the cost of all components; final assembly in the U.S	FTA funds may only be released where the steel, iron and manufactured goods used in the project are produced in the U.S.	(i) inconsistent with the public interest; (ii) not produced in a sufficient and reasonably available amount or are not of a satisfactory quality; (iii) will increase the cost of the overall project by more than 25 percent.
Federal Rail Administration (AMTRAK)	49 USC § 24305	100%	Amtrak shall buy only - (A) unmanufactured articles, material, and supplies mined or produced in the United States; or (B) manufactured articles, material, and supplies manufactured in the United States substantially from articles, material, and supplies mined, produced, or manufactured in the United States. Applies only when the cost of those articles, material, or supplies bought is at least \$1,000,000.	(i) inconsistent with the public interest; (ii) the cost of imposing requirements is unreasonable; (iii) not produced in a sufficient and reasonably available amount or are not of a satisfactory quality (iv) equipment cannot be bought and delivered in the United States within a reasonable time.
Department of Transportation - Intercity Passenger Rail Service Corridor Grant	49 U.S.C. § 24405	100%	Funds may only be allocated if the steel, iron, and manufactured goods used in the project are produced in the U.S.	(i) inconsistent with the public interest; (ii) not produced in a sufficient and reasonably available amount or are not of a satisfactory quality; (iii) equipment cannot be bought and delivered in the United States within a reasonable time; (iv) will increase the cost of the overall project by more than 25 percent.
American Recovery and Reinvestment Act	Section 1605 of P.L. 111-5	100%	Applies to ‘public works’ projects. All of the iron, steel, and manufactured goods used in the project must be produced in the U.S.	(i) inconsistent with the public interest; (ii) not produced in a sufficient and reasonably available amount or are not of a satisfactory quality; (iii) will increase the cost of the overall project contract by more than 25 percent.
Clean Water Act – Grants for Water Treatment Projects	33 U.S.C. § 1295	100%	All articles, materials, and supplies used in such works will be mined, produced, or manufactured in the U.S.	(i) inconsistent with the public interest (including multilateral government procurement agreements), (ii) the costs are unreasonable, (iii) not available in sufficient and reasonably available commercial quantities and of a satisfactory quality
Department of Energy,	42 U.S.C. § 13362	50% of the cost of	At least 50% of the cost of equipment shall be attributable to components	In determining whether the cost of United States components equals or exceeds 50 percent, the

Innovative Clean Coal Technology Transfer Program		equipment	made in the U.S.	cost of assembly of such United States components in the host country shall not be considered a part of the cost of such United States components.
Energy Policy Act of 1992	42 U.S.C. § 13316, 13387	50% of the cost of equipment	At least 50% of the cost of equipment shall be attributable to components made in the U.S.; requires “the maximum participation of U.S. firms.”	In determining whether the cost of the components equals or exceeds 50 percent, the cost of assembly is not counted
CAFÉ Standards	49 USC 32904 (b)	75%	A passenger automobile is deemed to be manufactured domestically if at least 75 percent of the cost to the manufacturer is attributable to value added in the U.S., Canada, or Mexico	There are a number of caveats, but primarily: (i) unless the assembly of the automobile is completed in Canada and the automobile is imported into the United States more than 30 days after the end of the model year (ii) the model or models involved previously have not been manufactured domestically

### Domestic Content Requirements in Other Countries

Many of the world’s strongest economies use domestic content requirements to support local and emerging industries. The following are a few examples of note:

- Under the WTO and NAFTA procurement agreements, Canada specifically excludes several categories of products from free trade rules, including:
  - All “construction contracts tendered on behalf of the Department of Transport”
  - Steel, motor vehicles and coal procurement for all provinces
  - Procurements of “urban rail and urban transportation equipment, systems, components and materials incorporated therein, as well as all project-related materials of iron or steel”.<sup>8</sup>
- The European Union excludes all transport-related contracts awarded by member nations from WTO procurement agreements, as well as contracts for U.S. firms with airport, water, and urban transportation authorities.<sup>9</sup> The European Union also adopted a revised Utilities Directive in 2004 covering purchases in the water, transportation, energy, and postal services sectors. The Directive requires open, objective bidding procedures, but discriminated against bids with less than 50 percent EU content that are not covered by international or reciprocal bilateral agreements. The EU content requirement applies to U.S suppliers of goods and services in urban transport (urban railway, automated systems, tramway, bus, trolley bus, and cable), among other sectors.<sup>10</sup>
- The Australian state of Victoria requires that all government procurement over A\$250 million should be subject to 40 percent local content requirements (local includes Australia and New Zealand). This requirement will particularly impact purchases of transit vehicles.<sup>11</sup>
- The province of Quebec, Canada recently imposed a 60 percent minimum domestic content requirement on all subway purchases funded in part by the provincial government.<sup>12</sup> In Toronto, 25 percent of the value of a transit contract must be met with Canadian parts and labor.<sup>13</sup>

<sup>8</sup> *Buy America Brouhaha: What Are the EU and Canada Hollering About? Their WTO Procurement Exceptions Are (Wisely) Much Broader Than U.S. Stimulus Proposal* (Public Citizen; February 5, 2009).

<sup>9</sup> *Ibid.*

<sup>10</sup> Public Citizen. “Canadian Businesses support ‘Buy Canada’,” *Eyes on Trade: Public Citizen’s blog on Globalization and Trade* (Feb 10, 2009)

<sup>11</sup> *Australia: Local Content Requirement* (Global Trade Alert; January 18, 2010).

<sup>12</sup> DiCaro, A. “The Importance of Buying Domestic,” *The Mark* (June 18, 2009)

<sup>13</sup> “Transit Contracts and Jobs at Home,” *The Star* (April 23, 2009).