

# 1. Buy America Requirements

## 1.1 FRA Buy America Requirements - Overview

This RFP is subject to FRA's "Buy America" statute at 49 U.S.C. § 24405 (a) (see Code Section at: [49 U.S.C. § 24405](#)) and applicable FRA guidance (see FRA Buy America Frequently Asked Questions at: <http://www.fra.dot.gov/Page/P0391>). 49 U.S.C. § 24405(a) allows the U.S. Secretary of Transportation to obligate funds for "a project only if the steel, iron, and manufactured goods used in the project are produced in the United States." FRA has stated that what constitutes FRA Buy America compliant locomotives are locomotives that have undergone final assembly in the U.S. from components that are manufactured in the U.S. FRA has compiled a comprehensive list of items that it considers components of locomotives (see form CER 2.6 "Buy America Diesel Electric Locomotive Component Worksheet"). The Buy America requirements of this RFP process are comprised of three parts:

**Part I – Statutorily Required Buy America Certification:** Offerors must use the Buy America Diesel Electric Locomotive Component Worksheet (CER 2.6) and the appropriate completed and signed certificates (see forms CER 2.1 Offeror's "Buy America Certificate of Compliance or Non-Compliance" and CER 2.7 "Buy America Component Supplier Certification Form") to indicate that their proposed locomotives will undergo final assembly in the U.S. and that the components listed on CER 2.6 "Buy America Diesel Electric Locomotive Component Worksheet" will be manufactured in the U.S. Any spare parts that are Buy America Components and that are subject to the master and ordering contracts must comply with the Buy America Certification requirements.

**Part II - Buy America Domestic Content Evaluation:** This RFP will utilize "Domestic Content" among its evaluation criteria, which is determined by giving points (see Buy America Diesel Electric Locomotive Component Worksheet (CER 2.6)) for domestically manufactured locomotive components. If an Offeror's design will not make use of a Buy America Component listed on CER 2.6, the value of that component in the calculation of the Offeror's Buy America score will be excluded from the Domestic Content points possible (denominator) in determining the Offeror's percentage compliance score.

The Offeror must commit to submitting a plan to increase the Domestic Content at a component and sub-component level over the life of the contract as a CDRL if selected as the successful Vendor (see Section 1.4 below).

**Part III – Buy America Audits:** The Buy America process for this procurement will include pre-award and post-award audits. IDOT or its representative(s) may also conduct ongoing oversight of selected Offeror's Buy America compliance at any time during the locomotive design and manufacturing.

While FRA uses some Federal Transit Administration (FTA) Buy America regulation and guidance as guidance for FRA grantees, the [FTA Buy America requirements do not apply to this RFP](#). FRA's Buy America statute does not contain an exception allowing for a waiver from the Buy America requirements, "when ... the cost of components and subcomponents produced in the U.S. is more than 60 percent of the cost of all components of the rolling stock; and ... final assembly of the rolling stock has occurred in the U.S."

For detailed Buy America definitions, see Section 1.2 of this appendix.

Buy America documentation (to be included in RFP Section A.21.5.4 Offer Packet3 – Tab 2), includes:

- Completed Buy America Diesel Electric Locomotive Component Worksheet (CER 2.6);
- Completed and Signed Buy America Certificate of Compliance or Non-Compliance (CER 2.1);
- Completed and signed Buy America Component Supplier Certification Forms (CER 2.7); (one for each supplier);

- Any Buy America Waiver Requests and Justifications (see Section 1.3.2 of this appendix for detailed requirements regarding application for waivers); and
- Any needed Supply Scouting Templates (CER 2.8)

## 1.2 FRA Buy America Definitions

The following definitions apply to all Buy America requirements in this RFP:

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

*Buy America Component* means all components listed on CER 2.6 “Buy America Diesel Electric Locomotive Component Worksheet.”

*A component is considered to be manufactured in the U.S. if it has been subject to Manufacturing Process / Manufacturing in the United States. All components relevant for this RFP are Buy America Components listed in the Buy America Diesel Electric Locomotive Component List (CER 2.6). These Buy America Components will be those subject to Buy America provisions irrespective of locomotive manufacturers’ individual manufacturing processes and interpretation.*

*End product* means a new Diesel Electric Locomotive, which directly incorporates constituent components at a U.S. assembly location, that is acquired for public use under a federally-funded third-party contract, and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s).

*Final assembly* is the creation of the end product (the new Diesel Electric Locomotive) from individual elements brought together for that purpose through application of manufacturing processes. If a system is being procured as the end product by the grantee, the installation of the system qualifies as final assembly; however, all items listed in the Buy America Diesel Electric Locomotive Component Worksheet (CER 2.6) must be manufactured in the U.S. whether they qualify as systems or are procured as systems by the Offeror.

*Manufacturing Process/ Manufacturing* 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 substantially 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.

*Rolling stock* means transit, passenger and freight rail vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, as well as vehicles used for support services.

*Subcomponent* means any article, material, or supply, whether manufactured or unmanufactured, that is one step removed from a component in the manufacturing process and that is incorporated directly into a component as a result of the application of a manufacturing process.

Activities constituting *Substantial Transformation of Subcomponents* to form a component include, but may not be limited to, forming, extruding, material removal, welding, soldering, etching, plating, material deposition, pressing, permanent adhesive joining, shot blasting, brushing, grinding, lapping, finishing, vacuum impregnating, and, in electrical and electronic pneumatic, or mechanical products, the collection, interconnection, and performance tuning and testing of various elements.

*System* means a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function. Factors to consider in determining whether a system constitutes an end product include: Whether performance warranties apply to an integrated system (regardless of whether components are separately warrantied); whether products perform on an integrated basis with other products in a system, or are operated inde-

pendently of associated products in the system; or whether transit agencies routinely procure a product separately (other than as replacement or spare parts).

### **1.3 Part I - Buy America Certification**

The FRA Buy America Certification requirement has two elements:

1. Final assembly of locomotives must occur in the United States (no waivers will be granted to this requirement); and
2. 100 percent of the Buy America Components (see list of Buy America Components in Buy America Diesel Electric Locomotive Component Worksheet CER 2.6) must be manufactured in the U.S. (waivers may be granted for this requirement).

However, an Offer or Revised Offer, (if requested by IDOT and submitted by the Offeror), will be deemed compliant with the Buy America Certification requirements in this RFP if:

1. Final assembly of the locomotives will occur in the U.S. and **EITHER**:
2. 100 percent of the locomotive Buy America Components will be manufactured in the U.S. and the Offeror submits a Certificate of Compliance (see CER 2.1) and CER 2.6 Buy America Diesel Electric Locomotive Component Worksheet, documenting the U.S. location of each Buy America Components' manufacture; **OR**
3. 100 percent of the locomotive Buy America Components cannot be manufactured in the U.S. and the Offeror submits a Certificate of Noncompliance (see CER 2.1) and CER 2.6 Buy America Diesel Electric Locomotive Component Worksheet, documenting the Buy America Components that will be manufactured in the U.S. and for Buy America Components that cannot be manufactured in the U.S. submits documentation sufficient to process and support a waiver from FRA's Buy America requirement (see 49 U.S.C. § 24405(a)(2)). See 1.3.2 for detailed requirements regarding application for waivers.

FRA may not have made a decision on a Buy America waiver request until after IDOT/Caltrans have made an award for the Diesel Electric Locomotive contract. In the event a waiver is not granted by FRA and the Selected Offeror is required to substitute a domestically available Buy America Component for an originally proposed foreign-made component, such event shall not constitute a failure to comply with the Buy America requirements in this RFP. To be clear, the Buy America requirements for this RFP are that the Offeror: 1) certifies it can meet Buy America or certifies that cannot meet Buy America AND at the same time submits a properly researched and documented waiver request, including the Scouting Template; and 2) submits ALL properly completed required Buy America certification forms included with this RFP.

All certifications are subject to audits.

#### **1.3.1 FRA Buy America Certification Requirements**

Each Offeror shall submit the appropriate Buy America Certifications (see forms CER 2.1 and CER 2.7) and completed Buy America Diesel Electric Locomotive Component Worksheet (form CER 2.6) with both the Offer and Revised Offer, if Revised Offers are requested. Offers and Revised Offers not accompanied by properly completed Buy America Certifications and a Buy America Diesel Electric Locomotive Component Worksheet will be rejected as nonresponsive.

The two signature blocks on the Buy America Certificate are mutually exclusive. Offerors shall sign **ONLY ONE** signature block on the certificate. Signing both signature blocks will render the Offer or Revised Offer,

(if submitted), nonresponsive. Making a knowing and willful false certification is a criminal act in violation of 18 U.S.C. §1001.

### **1.3.2 FRA Non-Compliance Certification and Waiver Process**

Final assembly of the locomotives must occur in the U.S. No waiver of this requirement will be granted and a Offer or Revised Offer, (if submitted), containing such a request for waiver will be rejected as nonresponsive.

A waiver from the FRA Buy America provision regarding the requirement that 100 percent of Buy America Components must be of U.S. origin may be granted if the FRA determines one of the following to be true:

- Applying the requirement would be inconsistent with the public interest;
- The required Buy America Component(s) are not produced in the U.S. in a sufficient and reasonably available amount or are not of a satisfactory quality;
- Including the required Buy America Component(s) would cause the rolling stock or power train equipment to not be bought and delivered in the U.S. within a reasonable time; and/or
- Including the domestic Buy America Component(s) will increase the cost of the overall project<sup>1</sup> by more than 25 percent.<sup>2</sup>

(See 49 U.S.C. § 24405(a)(2)). However, the FRA has stated that it is very unlikely that it will grant any waiver unless it is clearly convinced the needed Buy America Component is unavailable to the Offeror from a U.S. source.

In the instance where a waiver is granted, FRA has also stated that waivers will be time limited; apply only to the party and procurement referenced in the particular waiver; and be conditional upon the good faith efforts of the parties to secure domestic goods now and in future orders for locomotives.

The FRA may grant a waiver for a class of goods. In such a case, the FRA will inform IDOT of the waiver(s) granted, and IDOT will make this information available to Offerors in RFP addenda. Except where a waiver for a class of goods has been granted, the Offer should submit, as part of its Offer and Revised Offer, if Revised Offers are requested, any waiver request(s) together with its Certificate of Non-Compliance (see CER 2.1 and RFP Section A.21.5.4 Offer Packet 3 – Tab 2).

At minimum and where applicable, the Offeror's waiver request should include the following information:

- Identification and description of the locomotives proposed under this project;
- Description of the Buy America Component(s) not meeting the FRA Buy America requirement, including a completed Supply Scouting Template(s) (CER 2.8);
- Description of the efforts made to secure the Buy America Component(s);
- Description of the process used to find U.S. suppliers of Buy America Component(s) for which a waiver is being requested and such process shows a commitment to finding and/or developing U.S. suppliers in future procurements;

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<sup>1</sup> In this case, the "project" is for the procurement of engineering, design, production, assembly, inspection, testing, delivery, and warranty services for approximately 35 next generation intercity passenger rail locomotives (base order) by the states of California, Illinois, and Washington.

<sup>2</sup>The cost of foreign component content may not be aggregated to meet 25% threshold. In order to meet the 25% threshold for the application of a cost differential waiver, the cost of a single domestic component must increase the cost of the project for the entire locomotive procurement by more than 25%.

- Cost differential(s) to secure domestic Buy America Component(s) as compared with nondomestic Buy America Component(s);
- Issues with quality or quantity of compliant Buy America Component(s);
- Issues with timely delivery of compliant Buy America Component(s);
- Citation to the specific 49 U.S.C. § 24405(a)(2) waiver category(ies) under which the waiver is sought;
- Justification supporting the application of the waiver category(ies) cited to the extent not already answered by the above; and
- Contact information for the responsible party.

To the extent possible, the Offeror should submit only one waiver request addressing all the Buy America Components for which a waiver is being requested. However, since each Buy America Component will be analyzed separately, the Offeror must provide clear justification for each separate Buy America Component for which a waiver is being requested. After Offers are received but prior to award, IDOT will provide the FRA with waiver requests, if any, submitted by Offerors without identifying the Offeror that submitted the request.

The FRA will review the waiver documentation provided by IDOT from all Offerors. The FRA will identify any deficiencies with the waiver request(s), which will be forwarded to IDOT for reconciliation with the Offerors during Confidential Discussions, which may be held in the event waiver request deficiencies are identified. Waiver documentation review by the FRA does not guarantee the waiver request will be granted--only that sufficient information has been submitted in order to make a determination. Once IDOT has selected a Preferred Offeror, IDOT will submit the entire waiver request(s), including the identifying information of the Offeror, to FRA for the formal processing and a decision on that request.

Offerors should submit waiver requests with Offers or Revised Offers, if Revised Offers are requested and the Offeror chooses to submit one. Contract award can be made only to Offerors (now "Vendor") that have certified Buy America compliance (either certification that the Offeror can meet assembly and 100 percent Buy America Component requirements or certification that the Offeror can meet assembly requirements but not the 100 percent Buy America Component requirements and IDOT's receipt of a complete waiver request(s)), unless a waiver (if necessary) has previously been granted. Contract award may occur before the FRA has reached a final decision on a waiver. If the contract has already been awarded and FRA denies a waiver request because one or more domestic Buy America Component suppliers have been identified, the Vendor must change to a domestic supplier for those Buy America Components. An adjustment of the contract price will not be permitted.

The Offeror is bound by the certification(s) submitted with its Offer and is not permitted to change its certification(s) after submission of the Offer. In the event Revised Offers are requested, the Offeror shall be bound by the certification(s) submitted with its Revised Offer. Since the Revised Offer is a new proposal, the certification(s) submitted with the Revised Offer may be the same as or different from the certification(s) submitted with the Offer. Where the Offeror certifies in its Offer or in its Revised Offer, (if submitted), that it will comply with the applicable Buy America requirements and later determines that it cannot, the Offeror shall not be eligible for a waiver of those requirements, unless FRA determines that circumstances completely beyond the Offeror's control exist making compliance impossible (e.g., where the intended supplier for a particular Buy America Component goes out of business and no other supplier exists). No price adjustments will be allowed in these circumstances.

Offeror certifications, waiver request(s) and justifications, and requests to correct certifications are subject to FRA/IDOT audit, and the Offeror/Vendor and its suppliers must agree to provide all required information to support any such audit(s).

