

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs****Intent to Prepare an Environmental Impact Statement for the La Posta Recycling Center**

AGENCY: Bureau of Indian Affairs (BIA), Interior.

ACTION: Notice of intent and public scoping meetings.

SUMMARY: This notice advises the public that the BIA intends to gather information necessary for the preparation of an Environmental Impact Statement (EIS) for the La Posta Recycling Center proposed on the Las Posta Indian Reservation located in southeastern San Diego County, California. A description of the proposed project, location and environmental considerations to be addressed in the EIS is provided below (see supplemental information). In addition to this notice, two public meetings regarding the proposal and preparation of the EIS will be held (additional details provided below). This notice is being furnished as required by the National Environmental Policy Act (NEPA) Regulations (40 CFR 1501.7) to obtain suggestions and information from other agencies and the public on the scope of issues to be addressed in the EIS. Comments and participation in this scoping process are encouraged.

DATES: Comments should be received by March 8, 1991. Public scoping meetings will be held January 28, 1991, in the Mountain Empire Junior/Senior High School, 3291 Buckman Springs Road, Pine Valley, California 91962 from 6 p.m. to 9 p.m.; as well as January 29, 1991, in the Alpine Community Center, 1834 Alpine Boulevard, Alpine, California 91901 from 2 p.m. to 5 p.m.

ADDRESSES: Comments should be addressed to Ron Jaeger, Area Director, Bureau of Indian Affairs, Sacramento Area Office, 2800 Cottage Way, Sacramento, California 95825.

FOR FURTHER INFORMATION CONTACT: Gilbert Stuart, Land Operations Officer,

Bureau of Indian Affairs, Southern California Agency, 3500 Lime Street, suite 722, Riverside, California, 92501, telephone (714) 276-6629.

SUPPLEMENTARY INFORMATION: The proposed project, the La Posta Recycling Center (LPRC), involves the development and operation of an integrated hazardous and non-hazardous waste recycling and treatment facility. The project site is located on the south side of Interstate 8, approximated 60 miles east of downtown San Diego (just east to La Posta Road). The LPRC would include several types of waste treatment technologies to accommodate a variety of waste streams. The need for such facility, for recycling and treatment of hazardous and non-hazardous wastes, is specifically recognized in the current County and regional waste management plans, and is accentuated by legislation limiting landfill disposal and requiring recycling.

The selection and design of the treatment technologies for LPRC is oriented primarily towards recycling/reuse of up to approximately 80 percent of the treated waste materials. Wastes which cannot be recycled would undergo thermal destruction—incineration—or be treated/prepared for off-site disposal. No landfill or other subsurface disposal is proposed as part of the project. The waste treatment technologies currently proposed for the LPRC include:

(1) Soil Tech Process—A low-temperature treatment system capable of separating oils and hydrocarbon products from soils and plastics (e.g., treating soils contaminated from leaking underground fuel/oil tanks, and recycling plastics);

(2) Solvent Recovery—A distillation and filtration process by which solvents (i.e., industrial solvents, dry cleaning fluids, paint thinner, etc.) are purified;

(3) Aqueous Metals Separation—Wastes containing water and soluble metals are neutralized and filtered to generate water and metal-bearing solids which are stabilized and prepared for off-site disposal (see Stabilization description below);

(4) Household Hazardous and Recyclable Wastes—Household hazardous wastes such as paints, thinners, automotive oils and solvents will undergo the appropriate treatments on-site and household recyclables may be processed in terms of paper being pelletized for off-site cogeneration plants, plastics being broken down to fuel oil or reuse, glass being sorted, crushed and used for vitrification (see Stabilization below) and aluminum cans being sorted, crushed and shipped to can manufacturers;

(5) Incineration—Post-treatment residues, organic liquids and solids that cannot be recycled will be incinerated through a rotary-kiln system (no polychlorinated biphenyls (PCBs) will be incinerated); and

(6) Stabilization—Residues remaining from incineration and aqueous metals separation through the addition of binding materials-vitrification (encasement in glass).

Environmental issues to be addressed within the EIS are expected to include landform/topography, geology/soils/seismicity, hydrology/water quality, biological resources, cultural and scientific resources, land use, air quality, transportation/circulation, noise, health and safety/risk of upset, public services and utilities, and visual resources. In addition to the project proposal, the EIS will address a number of project alternatives including alternative technologies, facility sizing and several alternative locations.

This notice is published pursuant to § 1501.7 of the Council of Environmental Quality Regulations (40 CFR parts 1500 through 1508 implementing the procedural requirements of the NEPA of 1969, as amended (42 U.S.C. 4371 et seq.), Department of the Interior Manual (516 DM 1-6) and is in the exercise of authority delegated to the Assistant Secretary—Indian Affairs by 209 DM-8.

Dated: December 31, 1990.

William D. Bettenberg,

Acting Assistant Secretary—Indian Affairs.

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**Wednesday
January 9, 1991**

Part III

**Department of
Housing and Urban
Development**

Office of the Secretary

**24 CFR Parts 8, 35, 200, et al.
Inapplicability of Public Housing Rules to
Indian Housing; Final Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Parts 8, 35, 200, 215, 571, 750, 813, 880, 881, 882, 883, 884, 886, 887, 904, 905, 912, 913, 966, 968, 969, 970 and 990

[Docket No. R-90-1502; FR-2871-F-01]

RIN 2577-AA88

Inapplicability of Public Housing Rules to Indian Housing

AGENCY: Office of the Secretary, HUD.

ACTION: Final rule—technical amendment.

SUMMARY: A rule has been published that consolidates all the requirements from rules in chapter IX (the 900 series) of title 24 of the Code of Federal Regulations that apply to Indian Housing into a revised part 905 (55 FR 24722, June 18, 1990). This rule completes the separation of Indian Housing from Public Housing by amending the Department's rules throughout the title to clarify which provisions no longer pertain to Indian Housing and to add appropriate cross references.

EFFECTIVE DATE: February 8, 1991.

FOR FURTHER INFORMATION CONTACT: Dominic Nessi, Director, Office Of Indian Housing, room 4232, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410; telephone (202) 708-1015 (voice) or (202) 708-0850 (TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

Nondiscrimination in Housing. Two provisions of part 8 implements the statutory prohibition against discrimination based on handicap with respect to Indian Housing. (The Department of Justice has determined that the statute does apply to Indian Housing, regardless of whether the Indian Housing Authority (IHA) was created under State law or as an exercise of tribal self-government.) The provision concerning multifamily projects requires them to be made accessible. It is this provision (§ 8.25) that is amended in this rule to clarify that Indian Housing is not a category of Public Housing, but a distinct program. The provision applicable to the vast majority of Indian Housing (§ 8.29), requiring single family homes to be accessible only if the prospective buyer or expected occupant needs it, requires no modification. The appendix listing the housing programs covered by part 8 is amended to clarify that Indian

Housing is still covered, but not as a category of Public Housing.

Lead-Based Paint. Part 35 continues to apply to Indian Housing until final changes have been made to part 905, subpart H, that incorporate provisions of part 35 into part 905. Therefore, the amendments merely clarify the status of Indian Housing as a separate program from Public Housing.

Disclosure of Social Security Number. The two subparts of part 200 (T and U) that require disclosure and verification of an applicant or tenant's Social Security Number do apply to Indian Housing. Part 750, which deals solely with the method of disclosure and verification of social security numbers and employer identification numbers, also applies to Indian Housing. The definition of Public Housing Agency (PHA) in both of these parts is phrased in terms of including an IHA. This rule rephrases the definition of PHA to indicate that this inclusion of IHAs is the exceptional use of the term.

Federal Selection Preferences. Throughout the rules governing assisted housing programs (Parts 215, 880, 881, 882, 883, 884, 886, and 887), there is a reference to the rule used to determine the utility allowance (for purposes of determining rent burden for purposes of Federal selection preferences) in the case of an applicant residing in the jurisdiction of an IHA that does not establish a utility allowance under a Section 8 Housing Assistance Payments Program. All of these provisions, found in paragraph (i)(4) of the various sections, are revised to refer to the appropriate subpart (K) of the new part 905.

Tribal Resolution. Part 571 referred to compliance with an IHA's tribal resolution, giving as a citation an appendix in the CFR. Since the new part 905 no longer contains such an appendix, the reference has been made more general.

Turnkey III Homeownership. Part 904 governs the Turnkey III Program generally. However, since the publication of the separate Indian Housing rule, Turnkey III projects operated by an IHA are governed by subpart G of the new part 905. Part 904 is amended to reflect the applicability of this new regulation.

Indian Housing Correction. The Consolidated Indian Housing Rule published in June 1990 included provisions concerning ranking of applications in the Development subpart. Section 905.220 contained two references to dates from which the length of time to the previously funded application was to be measured. Inadvertently, a specific year was

stated, instead of the generic term "current calendar year". This rule amends that section to correct the term.

Definition of Income. Part 913 has governed the determination of income and rental (and homebuyer) payments for Indian Housing as well as Public Housing. Now that subpart D of part 905 covers this subject for Indian Housing, the title of this part is being revised, as well as its applicability section. The statement that a PHA includes an IHA is removed from the definition of PHA, and references to Indian Housing are removed throughout the part.

Maintenance and Operation of PHA-owned Projects. The Department has determined that the provisions of part 965 covering energy audits and conservation measures, individual metering, establishment of utility allowances, the Consolidated Supply Program, and lead-based paint poisoning prevention in the new part 905 are not adequate. Therefore, the references to Indian Housing Authorities will remain in this part now. When the final version of part 905 (the Consolidated Indian Housing rule) is issued, the provisions covering these subjects will be expanded and references to IHAs will be removed from pertinent sections of part 965.

Lease and Grievance Procedures. Part 966 already excluded Indian Housing from its coverage. However, it stated that the Mutual Help Homeownership Opportunities Program is also excluded. Since that program is considered to be one of the Indian Housing Programs, it does need to be listed separately and it has been removed from the exclusionary language in this part.

Public Housing Modernization. Part 968 has included IHAs in the definition of PHAs. This rule deletes those references and inserts a cross-reference to the new part 905 (subpart I).

Continued Operation as Low-Income Housing. Part 969's applicability section is revised to exclude Indian Housing projects, since subpart L of part 905 now covers that subject for IHAs.

Demolition or Disposition. A reference to title I of the United States Housing Act of 1937 is added to part 970, and an exclusion for Indian Housing is added to the applicability section, since that subject is now covered by subpart M of part 905.

Operating Subsidy. Since this subject is now covered for Indian Housing Programs by subpart J (or subpart E for Mutual Help or subpart G for Turnkey III—both on an exception basis), part 990 is revised to reflect its inapplicability to the Indian Housing Programs.

Findings and Certifications

Justification for Final Rule. In general, the Department publishes a rule for public comment before issuing a rule for effect, in accordance with its own rule on rulemaking, 24 CFR part 10. However, part 10 does provide for exceptions from that general rule where the agency finds good cause to omit advance notice and public participation. The good cause requirement is satisfied when prior public procedure is "impracticable, unnecessary, or contrary to the public interest." 24 CFR 10.1. In this case, the rule is technical in nature, clarifying which of two possibly overlapping regulations applies to Indian Housing Programs. Therefore, the Department finds that it is unnecessary to delay publication of the rule for effect so that public comment could be solicited.

Environmental Review. A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk at the above address.

Impact on the Economy. This rule does not constitute a "major rule" as that term is defined in section 1(d) of the Executive Order on Federal Regulations issued by the President on February 17, 1981. An analysis of the rule indicates that it does not (1) have an annual effect on the economy of \$100 million or more; (2) cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) have a significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Impact on Small Entities. In accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), the undersigned hereby certifies that this rule does not have a significant economic impact on a substantial number of small entities, since it is technical in nature, conforming the Department's rules to one published recently.

Regulatory Agenda. This rule was listed as Item No. 1287 in the Department's Semiannual Agenda of Regulations published on October 29, 1990 (55 FR 44530, 44568) pursuant to Executive Order 12291 and the Regulatory Flexibility Act.

Paperwork Requirements. There are no information collection requirements imposed in the amendments contained in this rule that would be required to be submitted to the Office of Management and Budget for review under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35).

Federalism Impact. The General Counsel, as the Designated Official under section 6(a) of Executive Order 12812, Federalism, has determined that this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government, since it is technical in nature. As a result, the rule is not subject to review under the Order.

Family Impact. The General Counsel, as the Designated Official under Executive Order 12606, The Family, has determined that this rule does not have potential for significant impact on family formation, maintenance, and general well-being, and, thus, is not subject to review under the Order.

Paperwork Reduction Act of 1980 (44 U.S.C. 3501-3520).

List of Subjects**24 CFR Part 8**

Administrative practice and procedure, Handicapped, Civil rights, Reporting and recordkeeping requirements, Equal employment opportunity, Loan programs—housing and community development, Grant programs—housing and community development.

24 CFR Part 35

Lead poisoning, Reporting and recordkeeping requirements, Grant programs—housing and community development, Mortgage insurance, Rent subsidies.

24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Home improvement, Housing standards, Lead poisoning, Loan programs—housing and community development, Mortgage insurance, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Social security.

24 CFR Part 215

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 571

Alaska, Community development block grants, Grant programs—housing and community development, Reporting and recordkeeping requirements.

24 CFR Part 750

Grant programs—housing and community development, Intergovernmental relations, Loan programs—housing and community development, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security.

24 CFR Part 813

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements, Utilities.

24 CFR Part 880

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 881

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 882

Grant programs—housing and community development, Lead poisoning, Manufactured homes, Homeless, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 883

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 884

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements, Rural areas.

24 CFR Part 887

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements.

24 CFR Part 904

Grant programs—housing and community development, Loan programs—housing and community development, Public housing.

24 CFR Part 905

Grant programs: Indians, Low and moderate income housing, Homeownership, Public housing.

24 CFR Part 912

Public housing, Reporting and recordkeeping requirements.

24 CFR Part 913

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 966

Grant programs—housing and community development, Public housing.

24 CFR Part 968

Grant programs—housing and community development, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 969

Grant programs—housing and community development, Low and moderate income housing, Public housing.

24 CFR Part 970

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 990

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

Accordingly, the Department amends 24 CFR parts 8, 35, 200, 215, 571, 750, 813, 880, 881, 882, 883, 884, 886, 887, 904, 905, 912, 913, 966, 968, 969, 970, and 990 as follows:

PART 8—NONDISCRIMINATION BASED ON HANDICAP IN FEDERALLY ASSISTED PROGRAMS AND ACTIVITIES OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

1. The authority citation for part 8 is revised to read as follows:

Authority: Sec. 504, Rehabilitation Act of 1973 (29 U.S.C. 794); sec. 109, Housing and Community Development Act of 1974 (42 U.S.C. 5309); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 8.22 [Amended]

2. In § 8.22, paragraph (a) is amended by adding the phrase "and Indian housing" after the phrase "public housing".

§ 8.25 [Amended]

3. In § 8.25, the section heading is amended by removing the opening

parenthesis, the word "including", and the closing parenthesis, and by adding the word "and" after the phrase "Public housing"; paragraphs (a) and (b) are amended by adding the phrase "and multifamily Indian housing" after each occurrence of the phrase "public housing"; paragraph (a)(3) is amended by adding the phrase "and IHAs" after the word "PHAs"; and paragraph (c) introductory text is amended by adding, after the first occurrence of the term "PHA" in the first sentence, the phrase "(for the purpose of this paragraph, this includes an Indian Housing Authority)".

Appendix A [Amended]

4. In appendix A to part 8, the fourth program listed under the heading of "Housing Programs" is amended by adding the word "and" in place of the comma after the word "subsidies", by adding a closed parenthesis after the word "modernization", and by removing the closed parenthesis after the phrase "Indian housing".

Appendix A [Amended]

5. In Appendix A to part 8, the eighteenth program listed under the heading of "Housing Programs" is amended by removing the parenthetical phrase and replacing it with the phrase, "(Turnkey III housing administered by PHAs and IHAs and Mutual Help housing administered by IHAs)".

PART 35—LEAD-BASED PAINT POISONING PREVENTION IN CERTAIN RESIDENTIAL STRUCTURES

6. The authority citation for part 35 continues to read as follows:

Authority: Lead-Based Paint Poisoning Prevention Act (42 U.S.C. 4821-4846); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 35.24 [Amended]

7. In § 35.24, paragraph (b)(4) is amended by removing the phrase "Public and Indian Housing)" and replacing it with the phrase "(Public Housing), part 905, subpart K (Indian Housing)".

PART 200—INTRODUCTION

8. The authority citation for part 200 continues to read as follows:

Authority: Titles I, II, National Housing Act (12 U.S.C. 1701-1715z-18); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)). Subparts T and U are also issued under sec. 165, Housing and Community Development Act of 1987 (42 U.S.C. 3543); subpart T is also issued under sec. 101, Housing and Urbana

Development Act of 1965 (12 U.S.C. 1701s), and sec. 203, Housing and Community Development Amendments of 1978 (12 U.S.C. 1715z-11).

9. In § 200.1005, the last sentence of the definition of "PHA" is revised to read as follows:

§ 200.1005 Definitions.

* * * * *

PHA. * * * For purposes of this subpart, the term PHA includes an Indian Housing Authority.

* * * * *

10. In § 200.1105, the last sentence of the definition of "PHA" is revised to read as follows:

§ 200.1105 Definitions.

PHA. * * * For purposes of this subpart, the term PHA includes an Indian Housing Authority.

* * * * *

PART 215—RENT SUPPLEMENT PAYMENTS

11. The authority citation for part 215 is revised to read as follows:

Authority: Sec. 101(g), Housing and Urban Development Act of 1965 (12 U.S.C. 1701s); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 215.22 [Amended]

12. In § 215.22, paragraph (i)(4) is amended by removing the phrase "part 965, subpart E" and replacing it with the phrase "part 905, subpart K".

PART 571—COMMUNITY DEVELOPMENT BLOCK GRANTS FOR INDIAN TRIBES AND ALASKAN NATIVE VILLAGES

13. The authority citation for part 571 is revised to read as follows:

Authority: Title I, Housing and Community Development Act of 1974 (42 U.S.C. 5301-5320); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

14. Section 571.606 is revised to read as follows:

§ 571.606 Housing assistance.

In those instances where a Tribe has established an Indian Housing Authority (IHA) and the IHA has obtained housing assistance from HUD, the Tribe's compliance with its commitments, set forth in the tribal resolution creating the IHA, will be a performance consideration for the Tribe under the Indian CDBG program.

PART 750—DISCLOSURE AND VERIFICATION OF SOCIAL SECURITY NUMBERS AND EMPLOYER IDENTIFICATION NUMBERS BY APPLICANTS AND PARTICIPANTS IN CERTAIN HOUSING ASSISTANCE PROGRAMS

15. The authority citation for part 750 is revised to read as follows:

Authority: Sec. 165, Housing and Community Development Act of 1987 (42 U.S.C. 3543); secs. 3, 6, 8, 17, 205, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437d, 1437f, 1437o, 1437ee); sec. 202, Housing Act of 1959 (12 U.S.C. 1701q); sec. 7(d), Department of Housing and Development Act (42 U.S.C. 3535(d)).

16. In § 750.1, paragraph (a)(1) is revised to read as follows:

§ 750.1 Summary and purpose.

(a) *Summary.* (1) This part implements section 165 of the Housing and Community Development Act of 1987 (42 U.S.C. 3543), as it pertains to the Section 8 Housing Assistance Payments programs administered by the Department under 24 CFR chapter VIII, and the Public Housing and the Indian Housing programs administered under 24 CFR chapter IX.

* * * * *

17. In § 750.5, the last sentence of the definition of "Public housing agency" is revised to read as follows:

§ 750.5 Definitions.

* * * * *

Public housing agency (PHA) * * * For purposes of this part, the term includes an Indian Housing Authority.

* * * * *

PART 813—DEFINITION OF INCOME, INCOME LIMITS, RENT AND REEXAMINATION OF FAMILY INCOME FOR THE SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAMS AND RELATED PROGRAMS

18. The authority citation for part 813 continues to read as follows:

Authority: Secs. 3, 5(b), 8, 16, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, 1437f, 1437n); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 813.101 [Amended]

19. In § 813.101, the last sentence is amended by removing the phrase "and Indian Housing Programs.)", and replacing it with the phrase "program and 24 CFR part 905, subpart D for the rule applicable to the Indian Housing program.)".

§ 880.613 [Amended]

20. In § 880.613, paragraph (i)(4) is amended by removing the phrase "part 964, subpart E." and replacing it with the phrase "part 905, subpart K.".

PART 881—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM FOR SUBSTANTIAL REHABILITATION

21. The authority citation for part 881 is revised to read as follows:

Authority: Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 881.613 [Amended]

22. In § 881.613, paragraph (i)(4) is amended by removing the phrase "part 965, subpart E." and replacing it with the phrase "part 905, subpart K.".

PART 882—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—EXISTING HOUSING

23. The authority citation for part 882 is revised to read as follows:

Authority: Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 882.219 [Amended]

24. In § 882.219, paragraph (i)(4) is amended by removing the phrase "part 965, subpart E." and replacing it with the phrase "part 905, subpart K.".

§ 882.517 [Amended]

25. In § 882.517, paragraph (i)(4) is amended by removing the phrase "part 965, subpart E." and replacing it with the phrase "part 905, subpart K.".

PART 883—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—STATE HOUSING AGENCIES

26. The authority citation for part 883 is revised to read as follows:

Authority: Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 883.714 [Amended]

27. In § 883.714, paragraph (i)(4) is amended by removing the phrase "part 965, subpart E." and replacing it with the phrase "part 905, subpart K.".

PART 884—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM, NEW CONSTRUCTION SET-ASIDE FOR SECTION 515 RURAL RENTAL HOUSING PROJECTS

28. The authority citation for part 884 is revised to read as follows:

Authority: Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 884.226 [Amended]

29. In § 884.226, paragraph (i)(4) is amended by removing the phrase "part 965, subpart E." and replacing it with the phrase "part 905, subpart K.".

PART 886—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—SPECIAL ALLOCATIONS

30. The authority citation for part 886 is revised to read as follows:

Authority: Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 886.132 [Amended]

31. In § 886.132, paragraph (i)(4) is amended by removing the phrase "part 965, subpart E." and replacing it with the phrase "part 905, subpart K.".

§ 886.337 [Amended]

32. In § 886.337, paragraph (i)(4) is amended by removing the phrase "part 965, subpart E." and replacing it with the phrase "part 905, subpart K.".

PART 887—HOUSING VOUCHERS

33. The authority citation for part 887 is revised to read as follows:

Authority: Secs. 3, 5, and 8, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437c, and 1437f); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 887.157 [Amended]

34. In § 887.157, paragraph (i)(4) is amended by removing the phrase "part 965, subpart E." and replacing it with the phrase "part 905, subpart K.".

PART 904—LOW RENT HOUSING HOMEOWNERSHIP OPPORTUNITIES

35. The authority citation for part 904 is revised to read as follows:

Authority: United States Housing Act of 1937 (42 U.S.C. 1437–1437ee); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

36. In § 904.101, the introductory language of paragraph (b) is revised to read as follows:

§ 904.101 Introduction.

* * * * *

(b) *Applicability.* This subpart is applicable to Turnkey III developments operated by LHA. For Turnkey III developments operated by an Indian Housing Authority, applicable provisions are found at 24 CFR part 905, subpart G.

* * * * *

PART 905—INDIAN HOUSING PROGRAMS

37. The authority citation for part 905 continues to read as follows:

Authority: Secs. 201, 202, 203, 205, United States Housing Act of 1937, as added by the Indian Housing Act of 1988 (Pub. L. 100-358) (42 U.S.C. 1437aa, 1437bb, 1437cc, 1437ee); sec. 7(b), Indian Self-Determination and Education Assistance Act (25 U.S.C. 450e(b)); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 905.220 [Amended]

38. In paragraphs (b)(3) (iii) and (iv) introductory text of § 905.220, the number "1990" is removed and the phrase "of the current calendar year" is inserted in its place.

PART 912—DEFINITION OF FAMILY AND OTHER RELATED TERMS; OCCUPANCY BY SINGLE PERSONS

39. The authority citation for part 912 is revised to read as follows:

Authority: Sec. 3, United States Housing Act of 1937 (42 U.S.C. 1437a); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 912.1 [Amended]

40. In § 912.1, paragraph (b)(1) is amended by adding a period in place of the comma after the word "programs", and removing the rest of the sentence that follows it.

41. The title of part 913 is revised to read as follows:

PART 913—DEFINITION OF INCOME, INCOME LIMITS, RENT AND REEXAMINATION OF FAMILY INCOME FOR THE PUBLIC HOUSING PROGRAM

42. The authority citation for part 913 continues to read as follows:

Authority: Secs. 3, 6, 16, United States Housing Act of 1937 (42 U.S.C. 1437a, 1437d, 1437n); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

43. Section 913.101 is revised to read as follows:

§ 913.101 Purpose and applicability.

This part establishes definitions, policies and procedures related to income limits and the determination of eligibility, income and rent for applicants and tenants in Public Housing, including the Turnkey III Homeownership Opportunities program; and for applicants and tenants assisted under sections 10(c) and 23 of the 1937 Act as in effect before amendment by the Housing and Community Development Act of 1974 (42 U.S.C. 1410 and 1421b (1970 ed.)). (See 24 CFR part 813 for the analogous rule applicable to the Section 8 Housing Assistance Payments and related programs, and 24 CFR part 905, subpart D for the analogous rule applicable to Indian Housing, including the Turnkey III Homeownership Opportunities program operated by Indian Housing Authorities.)

§ 913.102 [Amended]

44. In § 913.102, the first definition of "Public Housing Agency" is removed. The last sentence of the remaining definition of "Public Housing Agency (PHA)" is removed.

§ 913.104 [Amended]

45. In § 913.104, paragraph (b) is amended by removing the phrase "and Indian Housing" and by removing the letter "s" from the word "Programs".

§ 913.105 [Amended]

46. In § 913.105, paragraph (a) is amended by removing the phrase "or Indian Housing"; and paragraph (d) is amended by removing the phrase "and Indian Housing" and by removing the letter "s" from the word "Programs".

§ 913.109 [Amended]

47. In § 913.109, paragraph (b) is amended by removing the phrase "or Indian Housing" in the first sentence.

PART 966—LEASE AND GRIEVANCE PROCEDURES

48. The authority citation for part 966 is revised to read as follows:

Authority: Secs. 3 and 6, United States Housing Act of 1937 (42 U.S.C. 1437a and 1437d); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 966.1 [Amended]

49. In § 966.1, the last sentence is amended by removing the phrase "to the Mutual Help Homeownership Opportunities Program."

PART 968—PUBLIC HOUSING MODERNIZATION

50. The authority citation for part 968 is revised to read as follows:

Authority: Secs. 6 and 14, United States Housing Act of 1937 (42 U.S.C. 1437d and 1437i); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 968.101 [Amended]

51. In § 968.101, paragraph (b)(2) is amended by removing the phrase "including IHAs," from the first sentence; and paragraph (a) is amended by adding the following sentence at the end: "For requirements applicable to Indian Housing modernization, see part 905 of this chapter."

§ 968.105 [Amended]

52. In § 968.105, the definition of "IHA" is removed, and the definition of "PHA" is amended by removing the phrase "including IHA".

§ 968.110 [Amended]

53. In § 968.110, paragraph (a) is amended by removing the last sentence.

PART 969—PHA-OWNED PROJECTS—CONTINUED OPERATION AS LOW-INCOME HOUSING AFTER COMPLETION OF DEBT SERVICE

54. The authority citation for part 969 is revised to read as follows:

Authority: United States Housing Act of 1937 (42 U.S.C. 1437, *et seq.*); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

55. Section 969.102 revised to read as follows:

§ 969.102 Applicability.

This part applies to any lower-income public housing project that is owned by a Public Housing Agency (PHA), including any Turnkey III housing, and is subject to an ACC under section 5 of the United States Housing Act of 1937 (Act). This part does not apply to the Section 8 and Section 23 Housing Assistance Payments Programs, the Section 10(c) and Section 23 Leased Housing Programs, Lanham Act and Public Works projects that remain under administration contracts, or Indian Housing projects.

PART 970—PUBLIC HOUSING PROGRAM—DEMOLITION OR DISPOSITION OF PUBLIC HOUSING PROJECTS

56. The authority citation for part 970 continues to read as follows:

Authority: Sec. 18, United States Housing Act of 1937 (42 U.S.C. 1437p); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

§ 970.1 [Amended]

57. Section 970.1 is amended by adding the words "Title I of" after the word "under".

58. In § 970.2, the introductory language and paragraph (a) are revised to read as follows:

§ 970.2 Applicability.

This part applies to public housing projects that are owned by public housing agencies (PHAs) and that are subject to Annual Contributions Contracts (ACCs) under the Act. This part does not apply to the following:

(a) PHA-owned section 8 housing, housing leased under section 10(c) or section 23 of the Act, or Indian Housing;

* * *

PART 990—ANNUAL CONTRIBUTIONS FOR OPERATING SUBSIDY

59. The authority citation for part 990 is revised to read as follows:

Authority: Sec. 9, United States Housing Act of 1937 (42 U.S.C. 1437g); sec. 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

60. In § 990.103, paragraph (b) is revised to read as follows:

§ 990.103 Applicability of PFS.

* * *

(b) *Projects covered.* PFS is applicable to all PHA-owned rental units under Annual Contributions Contracts. PFS applies to PHAs that have not received operating subsidy payments previously, but are eligible for such payments under PFS. PFS, as described in this part, is not applicable to Indian Housing, the Section 23 Leased Housing Program, the

Section 23 Housing Assistance Payments Program, the Section 8 Housing Assistance Payments Program, or the Turnkey III or Turnkey IV Homeownership Opportunity Programs. PFS is not applicable to housing owned by the PHAs of the Virgin Islands, Puerto Rico, Guam and Alaska. Operating subsidy payments to these PHAs are made in accordance with subpart B of this part.

* * *

§ 990.105 [Amended]

61. In § 990.105, paragraph (g) is amended by removing the terms "/IHAs", "/IHA", "/MHACC", and "/IHA's".

Dated: December 31, 1990.

Jack Kemp,
Secretary.

[FR Doc. 91-235 Filed 1-8-91; 8:45 am]

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**Wednesday
January 9, 1991**

Part IV

Department of Transportation

**Urban Mass Transportation
Administration**

**49 CFR Part 661
Buy America Requirements; Final Rule**

DEPARTMENT OF TRANSPORTATION**Urban Mass Transportation Administration****49 CFR Part 661**

[Docket No. 88-G]

RIN 2132-AA15

Buy America Requirements**AGENCY:** Urban Mass Transportation Administration, DOT.**ACTION:** Final rule.

SUMMARY: This final rule implements section 337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (the STURAA) (Pub. L. No. 100-17), which amended the Urban Mass Transportation Administration's (UMTA) Buy America requirements. In this final rule, UMTA implements the statutory changes and makes other amendments based on UMTA's experience in enforcing and implementing the existing regulation. Certain changes are required by law, while others are being made to increase the usability of the regulation.

EFFECTIVE DATE: February 8, 1991.**FOR FURTHER INFORMATION CONTACT:**

Rita Daguiard, Attorney-Advisor, Office of the Chief Counsel, room 9316, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-1936.

SUPPLEMENTARY INFORMATION:**I. Statutory Background**

The Surface Transportation Assistance Act of 1978 (the 1978 STAA) (Pub. L. No. 95-599) included a Buy America provision applicable for the first time to the UMTA program. The provision was not an absolute prohibition against the procurement of foreign products, but established a preference for products mined, produced or manufactured in the United States. This initial provision only applied to contracts of UMTA grantees over \$500,000.

Section 165 of the Surface Transportation Assistance Act of 1982 (1982 STAA) (Pub. L. No. 97-424) made significant changes to the Buy America requirements by eliminating the \$500,000 applicability threshold. It also provided that no Federal funds could be obligated for mass transportation projects unless steel, cement, and manufactured products used in these projects are produced in the United States, with four exceptions. Section 10 of Public Law 96-229, enacted on March 9, 1984, amended section 165(a) of the STAA by striking "cement" from the materials and products covered under section 165.

The first exception allowed a waiver if the materials and products being procured are in the public interest. The second exception provided that the requirement would not apply if materials and products being procured are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality. The third exception provided that the requirement would not apply if the inclusion of domestic material will increase the cost of the overall project contract by more than 10 percent in the case of projects for the acquisition of buses and other rolling stock or 25 percent in the case of other projects.

The fourth exception, in essence, established an entire second program with its own requirements. This exception provided that the Buy America provisions would not apply to the procurement of buses and other rolling stock (including train control, communications, and traction power equipment) if the cost of components produced in the United States was more than 50 percent of the cost of all components of the vehicles or equipment, and if final assembly took place in the United States.

Section 337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (the STURAA) (Pub. L. No. 100-17) made further significant changes to UMTA's Buy America requirements for buses and other rolling stock. First, section 337 requires that more than 50 percent of the cost of a component's subcomponents be of U.S. origin for the component itself to be considered of U.S. origin. In addition, the domestic content requirement was increased from 50 to 55 percent on October 1, 1989, and to 60 percent on October 1, 1991. (However, any company that has met the existing Buy America requirement as of April 2, 1987, would be exempted from these increases for all contracts entered into before April 1, 1992.) Finally, the rolling stock price differential waiver was increased from 10 percent to 25 percent.

Today's final rule incorporates the most recent changes mandated by the STURAA into the Buy America requirements.

II. The Notice of Proposed Rulemaking

On August 29, 1988, UMTA issued a notice of proposed rulemaking (NPRM) seeking comments on the proposed amendments. The NPRM reflected both the statutory changes and UMTA's experience in enforcing and implementing the existing regulation (See 53 FR 32994).

In the preamble to the NPRM, UMTA discussed at length the statutory

changes and the proposed revisions to the existing regulation, and invited the public to submit comments and data on specific issues. The initial 60-day comment period ended on October 28, 1988, but was extended until November 14, 1988, in response to requests from the public.

Thirty-three (33) commenters submitted their views to the NPRM docket. The breakdown among commenter categories is as follows:

- 12 Manufacturers of rolling stock and related equipment.
- 6 UMTA recipients.
- 5 State Departments of Transportation.
- 4 Trade Associations.
- 2 Foreign Governments.
- 2 Engineering Firms.

III. Specific Comments and UMTA's Response

This section discusses the comments on the NPRM, and UMTA's specific response to them.

A. Procurement of Manufactured Products (§ 661.3(d).)

A number of commenters addressed the proposed requirements for the procurement of manufactured products. Some commenters supported UMTA's proposed revisions to the requirements concerning manufactured products, while others opposed the proposal.

The procurement of manufactured products is governed by section 165(a) of the 1982 STAA. The implementing UMTA regulation (§ 661.3(d)) defines a manufactured product as a "product produced as a result of [a] manufacturing process." Manufacturing is defined in § 661.3(e) of the regulation as the application of processes to alter the form or function of materials or of elements of the product adding value and transforming those materials or elements so that they represent a new product functionally different from that which would result from mere assembly of the materials or elements.

As indicated in the NPRM, compliance with the Buy America provisions requires that a manufactured product be produced in the United States from original items or material originating in the United States. In other words, an item is considered to be produced in the United States if all of the manufacturing processes for the item take place in the United States, and the components of that item are of U.S. origin. UMTA proposed amending the regulations to reflect this position.

Commenters opposed to the proposal argued that neither section 165(a) of the 1982 STAA nor UMTA's existing regulations at 49 CFR part 661 require a

manufactured product to contain a minimum domestic content. The commenters argue that the statutory requirement would be satisfied as long as an item is produced in the United States by a manufacturing process.

Section 401(a) of the 1978 STAA, UMTA's original Buy America requirement, provided that "Only * * * manufactured articles, materials, and supplies as have been manufactured in the United States *substantially all* from articles, materials, and supplies mined, produced, or manufactured * * * in the United States" could be used in UMTA-funded contracts. (Emphasis supplied.) Section 165(a) of the 1982 STAA requires that manufactured products used in an UMTA-funded project must be "produced in the United States," without further elaboration.

The legislative history of section 165 does not provide any guidance on why the term "substantially all" was dropped when the Buy America provision was revised. However, UMTA has taken the position since 1982 that the manufactured product requirements of section 165(a) are unambiguous—all manufacturing processes for the product must take place in the United States and all of the components of the product must be of U.S. origin.

Even if the language of the section was ambiguous, however, other provisions in the 1982 STAA, as well as other Buy America legislation, confirm UMTA's view of the terminology. For example, the Buy America Act of 1933 (41 U.S.C. 10b) contains a "substantially all" provision, which has been administered by the Federal Government as meaning over fifty percent domestic content. Moreover, section 165(b)(3) of the STAA (applicable to procurement of rolling stock and other associated equipment) explicitly provides for a fifty percent domestic content requirement in determining compliance with the statutory requirements. Since rolling stock and associated equipment are an expected category to the general domestic preference requirements, the agency believes that this supports its view that Congress intended manufactured products to be held to a higher standard of domestic content—100 percent.

Some commenters also questioned whether section 165(a) requires merely that all of the components of a manufactured product be of U.S. origin, or whether UMTA is required to examine the origin of all of the subcomponents that go into the manufacture of that component.

Again, UMTA looks to the statute for guidance. Section 165(b)(3) of the 1982

STAA, as amended by section 337(b) of the STURAA, imposes domestic preference requirements on the subcomponents of components of rolling stock and associated equipment. No similar statutory changes were made to section 165(a) for manufactured products. Therefore, the agency concluded that a component of a manufactured product is of U.S. origin if it is manufactured in the United States. (As indicated above, the manufactured product must be manufactured in the United States from items all of U.S. origin.) In other words, in determining the origin of a component of a manufactured product governed by section 165(a), UMTA will look only to where that component is manufactured, and will not look to the origin of the various materials included in that product during the manufacturing process.

B. Increase in Price Differential Waiver (§ 661.7(d).)

Two commenters suggested that UMTA not raise the price differential waiver for rolling stock from 10 percent to 25 percent until the agency has a change to analyze more fully the effect of the change on rolling stock procurements. UMTA has no discretion in this matter since the increase in the price differential was mandated by statute, and has thus revised § 661.7(d) of the regulation to reflect this increase.

C. Application of Price Differential Waiver (§ 661.7(d).)

In the NPRM, UMTA indicated that the price differential must be applied independently to each individual item even if there is a single contract for all of these items. The bid for each non-domestic item must be adjusted by the differential and then the adjusted bid price for the foreign item compared to the lowest responsive and responsible bid for a domestic item to determine if the grounds for a waiver exist. UMTA proposed to amend § 661.7(d) to reflect this and to clarify that the price differential is not to be applied to the overall contract between the grantee and its supplier, but to the comparative costs of each individual item being supplied.

UMTA received several comments on both sides of this proposal. Some of the commenters opposing the proposal thought that UMTA indicated that it should apply to the procurement of a vehicle containing several sub-systems. This is not the case. There have been many situations in which a grantee was purchasing multiple manufactured products and only one or two were of foreign origin. The calculation of the

price differential waiver is applied only to the comparative costs of the items for which both foreign and domestic bids were received. The application of the waiver to the over-all bid could skew the entire bid process, especially in the case where the foreign item is of low cost compared to all of the other items being procured.

This interpretation is consistent with the statutory terms, because the inclusion of domestic material in the overall project contract still is considered before a waiver is granted. The regulation amendment will only affect directly the determination of adjusted bid price in the case of a single contract for multiple items. A single contract for a single item will not be affected by the amendment. Accordingly, the amendment is adopted as proposed.

D. Requests for Waivers (§ 661.9.)

One commenter questioned why all waivers under § 661.9 are approved at UMTA Headquarters, rather than at the Regional level. UMTA is concerned with maintaining strict uniformity in the granting of waivers, and will continue its current practice of approving all waivers at the Headquarters level. All waiver requests are coordinated with the appropriate Regional Office.

E. General Waivers—(§ 661.7—Appendix A.)

One commenter suggested that UMTA revise the waiver in appendix A to § 661.7 concerning the incorporation of exceptions from the Federal Acquisition Regulation to incorporate the correct citation. In a separate rulemaking, UMTA already made this revision, and it is reflected in the revised Part 661.

F. Waivers for Prototype Vehicles (§ 661.9.)

One commenter suggested UMTA consider a general waiver for cases in which a grantee wishes to procure a prototype vehicle for testing and evaluation. Prototype vehicles are considered rolling stock, and are subject to the requirements of section 165(b)(3) of STURAA. While UMTA does not consider it appropriate to grant a general waiver for such procurements, UMTA has granted waivers for such procurements on a case-by-case basis.

G. General Waiver for Audio-Visual Equipment (§ 661.9.)

One State Department of Transportation sought a general non-availability waiver for audio-visual equipment. On May 23, 1988, UMTA published a request for comments on a

general waiver to the Buy America requirements to permit the procurement of certain audio-visual training equipment produced outside the United States (53 FR 18320). The agency received insufficient information on which to base a determination supporting a general waiver. However, UMTA has granted a number of individual non-availability waivers for audio-visual equipment and will continue to do so as appropriate. The agency will reconsider granting a general waiver if changed conditions warrant.

H. Determination of End Product in a Particular Procurement (§ 661.11(u).)

One commenter questioned how UMTA determines the end product in each procurement. An end product is "any item * * * that is to be acquired by a grantee, as specified in the overall project contract." (See § 661.11(u).) The key determinant is the grantee's specification. For example, if a grantee is procuring a new rail car, the car is the end product and the propulsion motor could be a component of the end product. If that same grantee is procuring a replacement propulsion motor for an existing rail car, that propulsion motor would be the end product. In the case of a contract for several items, each item may be a different end product.

I. Applicability of Buy America Requirements to Turn-Key Projects (§ 661.11(u).)

One commenter questioned how UMTA applies the Buy America requirements when a grantee procures an entire system (a turn-key project). In purchasing systems, it is industry practice to have a contract broken down by sub-systems. As just mentioned, UMTA has defined end product as "any item or items * * * to be acquired by a grantee, as specified in the overall project contract." (Emphasis supplied.) (See § 661.11(u).) Accordingly, each sub-system identified in the contract is an end product and subject to the Buy America requirement.

For example, UMTA has determined in the past that an entire people mover system has six sub-systems to be supplied by the contractor (under the terms of a particular contract) and that each sub-system is an individual end product. The six sub-systems are: the guideway surfaces and equipment; the vehicles; the traction power system; the command and control system; the communications system; and the maintenance facility and equipment. This means that six separate products

must meet the Buy America requirements.

J. Determination of Grandfathered Companies (§ 661.10)

A substantial number of commenters responded to the questions raised in the NPRM on the grandfathering provisions of section 337(a)(2)(B) of the STURAA. Specifically, that section provides that the revised requirements shall not apply to any contract entered into prior to April 1, 1992, with "any supplier or contractor or any successor in interest or assignee which qualified under the provision of section 165(b)(3) of the Surface Transportation Assistance Act of 1982 prior to (April 2, 1987)."

The first question concerned the scope of a grandfather determination—whether a company can be grandfathered on a nationwide basis, or whether the company is limited to previous contracts with a specific transit authority. If a company qualifies for the grandfathered treatment, this will be done on a nationwide basis. In other words, if a company entered into a single contract which qualified it for grandfathered status, it receives that status for all contracts entered into in the timeframes set forth in the statutory provisions.

Second, commenters asked whether a company which provided an item complying with section 401 of the 1978 STAA, but did not provide an item complying with section 165(b)(3) of the 1982 STAA, qualifies for grandfathered status. A company that provided an item complying with section 401 would qualify for grandfathering status, even through the company did not supply an item complying with section 165(b)(3). The agency's reasoning follows.

Section 401 did not mandate specific requirements concerning the procurement of rolling stock, but UMTA implementing regulations provided that rolling stock would be considered domestic if more than 50 percent of its components, by cost, were of U.S. origin and final assembly took place in the United States. Section 165(b)(3) of the 1982 STAA essentially made these regulatory requirements statutory. Therefore, a company that complied with the requirements of section 401 (for the procurement of rolling stock and associated equipment) meets the domestic content requirements in the STURAA's grandfather provisions, section 337(a)(2)(B). Accordingly, section 661.11 of the regulations now reflects this position.

Third, commenters asked how UMTA will determine company eligibility to be grandfathered, including: (1) What must

a company do to prove that it qualifies for the grandfather provision; and (2) what must a company show to demonstrate that it is a successor in interest to a grandfathered company.

With regard to qualifying for the grandfather provision, two commenters suggested that a company be allowed to certify that it qualifies to be grandfathered. UMTA agrees that this is an appropriate process and has added regulatory language to this effect. (See § 661.10.)

A company may receive grandfather treatment under the statute if the company is a successor in interest to a qualifying company. With regard to determining who is a successor in interest, several commenters suggested solutions. One commenter recommended that a company be considered a successor in interest if the company provides a like product or service, maintains the same assurances to the contracting party, and ensures compliance with the contract terms and conditions. Another commenter suggested that a successor in interest be "any entity which is duly contracted within the specified time and for which a duplicate or similar activity or service is required as that of the assignor."

A third commenter suggested that a successor in interest be a "U.S. corporation with ownership of more than 50 percent of the assets of the original U.S. entity that is being acquired or to which an interest is being assigned". This commenter also recommended that the supplier be required to show that it has been in compliance continuously with the requirements of section 165(b)(3) of the 1982 STAA and has served essentially the same market without a significant lapse of time in business. UMTA's reading of the legislative history of section 337(a)(2)(B) finds no support for this position.

UMTA believes that Congress intended to apply the increased domestic content requirements on an accelerated basis to firms entering the marketplace after April 2, 1987, and that it intended to grandfather existing firms that had complied with previous Buy America requirements regardless of the number of contracts or the product supplied (e.g. a bus versus a rail car).

A fourth commenter suggested that a successor in interest include a "wholly-owned U.S. subsidiary of overseas companies."

A fifth suggestion, UMTA believes, offers a reasonable approach. The commenter recommends that the determination focus on the transfer of substantial assets such as "contracts

and work in progress, designs and technology, manufacturing plants and staff." The commenter noted that the "mere acquisition of an established trade name by an existing unrelated business enterprise normally would not qualify the newly named enterprise as a successor in interest of the business which previously operated under that trade name." The commenter also suggested that maintaining continuity in ownership and assets should qualify an entity as a successor in interest, whether or not the name of the predecessor company was adopted. UMTA agrees with this comment and has made appropriate changes in the regulation (§ 661.10(b)).

Further, the regulation provides that a company claiming to be a successor in interest must supply UMTA with documentation to support its claim. UMTA will evaluate this material and publish a notice in the *Federal Register* concerning its determination.

One commenter indicated that the grandfather provision may give a competitive advantage to some companies. UMTA does not dispute this claim, but it appears that Congress intended to give an advantage to companies which had complied with previous Buy America requirements.

K. Requirements Applicable to the Manufacture of a Component (§ 661.11(g).)

UMTA received a number of comments on the manufacture of components requirements. Several commenters were concerned particularly with UMTA's position that mere assembly was not sufficient. As indicated below, one commenter suggested that UMTA look to the definition of a product of the United States as defined by the Customs Service in its Tariff regulations, while others suggested that the definition make reference to sufficient activities to advance or improve the conditions of the subcomponents, or adding value.

UMTA agrees that the requirement must be more explicit, and that the phrase "mere assembly of a component" may be a bit confusing. Accordingly, the regulations have been modified to clarify and expand on the steps that are needed for a component to be considered manufactured (see § 661.11(g)). The key element of this definition is the alteration of subcomponents to form a new product. The processes of alteration may include 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 testing of various elements.

L. Application of Requirements to Major Components (§ 661.11.)

In the NPRM, UMTA sought comment on whether the domestic content requirements should apply to all components of rolling stock and associated equipment, or just to the major components of these items. Comments on this issue were mixed. The Conference Report states that section 337 of STURAA is intended to cover only "major components" and "primary subcomponents." UMTA therefore considers that the requirements of section 337 of STURAA apply to all "major components" and "primary subcomponents" of rolling stock and related equipment.

M. Inclusion of List of Components of Buses and Rail Rolling Stock; Discussion of "Components" and "Subcomponents" (§ 661.11.)

The Conference Report to the STURAA lists major components of both buses and rail rolling stock. In the preamble to the NPRM, UMTA repeated the complete lists, but indicated that it had developed general language on the identification of components for the rule itself. UMTA requested comments on whether the complete listing from the Conference Report should be included in the regulation.

The commenters' views varied on this issue—some suggested the entire list be incorporated into the regulation, while some suggested inclusion in the regulation for illustrative purposes only. Still others opposed any inclusion, since such lists "appear to be an inconsistent and incomplete mixture of systems, components and subcomponents".

UMTA believes that the intent of Congress in implementing section 337 of STURAA was to increase the overall domestic content of rolling stock by requiring that all prime components have a domestic content of at least 50 percent.

As indicated above, section 165(b)(3) of STAA provided that rolling stock would meet the domestic content requirements only if "the cost of components which are produced in the United States is more than 50 percent of the cost of all components * * * and final assembly takes place in the United States." Section 337 of STURAA amended this provision by adding "and subcomponents."

The Conference Report to the STURAA states that "(b) including the term subcomponent, the conferees

intend that major components, systems, or assemblies of buses and rail rolling stock be counted towards meeting the Buy America domestic content standard if the components, systems, or assemblies themselves would meet the domestic content requirement." Therefore, under the regulation, a component is considered of domestic origin if the total cost of its subcomponents meet the domestic content requirements mandated by section 337 of STURAA, and the component is manufactured in the United States. In the example provided by the Conference Report for "grandfathered" companies, this means that a component will be considered domestic only if the domestic content value of its subcomponents is at least 50 percent. In the case of all other companies, as of October 1, 1989, a component meets the domestic content requirements if it has a domestic content value of at least 55 percent.

In the NPRM, UMTA sought comment on whether Congress intended that UMTA look to the origin of the parts of the subcomponents, or the "sub-subcomponents."

The Conference Report points out that section 337 of STURAA is intended to cover only "major components" and "primary subcomponents." UMTA concludes from this, and from the lack of any specific mention of the origin of sub-subcomponents, that the conferees intended that only components and subcomponents be counted toward the domestic content requirements. It is therefore UMTA's position that the origin of sub-components is immaterial and that to be considered domestic, a subcomponent need only be manufactured in the United States.

Clearly, then, to be considered domestic, components must meet a more stringent test than subcomponents, since in addition to manufacture in the United States, they must have a domestic content value of at least 50 percent.

It is therefore important to distinguish between the terms "component" and "subcomponent" for the purpose of establishing Buy America compliance. To assist grantees and manufacturers in making this distinction, and to prevent possible abuses resulting from an over-classification of vehicles parts as subcomponents, UMTA believes that it is useful to include the Conference Report list of major components in the regulations. Accordingly, UMTA includes the listings as appendices to the regulations concerning the procurement of rolling stock, specifying that they are not exhaustive.

N. Definition of Subcomponent (§ 661.11(h).)

One commenter noted that UMTA proposed a definition of component, but it did not propose a definition of a subcomponent. This commenter offered a definition, drawing on the language of the Conference Report referring to subcomponents as "one step removed" from components. UMTA agrees that such a definition should be included, and has adopted the commenter's definition.

O. Origin of Sub-Subcomponents

As indicated above, in the NPRM UMTA indicated that it believed that Congress did not intend that the origin of sub-subcomponents be examined when calculating the cost of subcomponents and components. All of the comments received on this issue supported UMTA's position. Accordingly, the regulation will *not* contain any requirements concerning the origin of sub-subcomponents.

P. Use of Tariff Exemption (§ 661.11(k).)

UMTA proposed using an existing tariff procedure to trace subcomponents of domestic origin which are exported from the United States, and then imported as part of a component. All of the commenters on this issue supported the proposal. One commenter suggested that it would be useful for UMTA to make clear that the standard for determining whether a subcomponent is domestic is the same standard imposed by the Customs Regulations for determining whether an item is a product of the United States (and therefore entitled to a tariff exemption under 19 CFR 10.10-10.24). The NPRM proposed that a subcomponent be considered to be of domestic origin if it is manufactured in the United States, but the NPRM did not provide requirements concerning manufacturing in the United States. One commenter recommended that UMTA adopt the Customs Service's requirements for defining the manufacture of a component or subcomponent (see discussion concerning manufacturing of components).

This commenter also indicated that UMTA should make clear that U.S.-origin subcomponents, installed overseas but retaining their domestic identity, will be valued for Buy America purposes in the same way they are valued for purposes of tariff exemption. UMTA proposed that the cost of a subcomponent is "the price that a bidder or offeror must pay to a subcontractor or supplier" for that subcomponent. The commenter

suggested that UMTA amend the rule to specify that the cost of a subcomponent retaining its domestic identity under the Tariff Exemptions will be determined as provided in the Customs Service regulation. UMTA agrees with this suggestion, and has included the appropriate definition in the regulation.

Q. Domestic Materials that Lose Physical Identity (§ 661.11(l).)

Two commenters disagreed with or questioned UMTA's position on domestic materials that are shipped abroad and lose their physical identity. The commenters believe that UMTA's position would discourage foreign manufacturers from using domestic suppliers. While UMTA agrees that foreign manufacturers may not utilize domestic sources for some materials, it is UMTA's position that it would be extremely difficult to trace such materials. The Customs approach that UMTA proposed is an established Federal procedure. In addition, since certain items will retain their domestic identity, UMTA believes that foreign manufacturers will use such items to meet the domestic content requirements. UMTA has not revised the regulations to permit domestically produced items or materials that are shipped abroad and lose their physical identity to be included when calculating domestic content. The final rule adopts the Customs Service procedure outlined in the NPRM.

R. Setting Cost for Foreign Components (§ 661.11(p).)

One commenter stated that the determination of Buy America compliance is affected by the currency exchange rates, and recommended that the regulations provide that compliance be determined on the basis of rates prevailing at a fixed point in time. UMTA agrees with the suggestion, and the regulations have been revised to reflect that the cost of a component of foreign origin will be set at the time the appropriate Buy America certificate is executed (See § 661.11(p)).

S. Final Assembly Requirements (§ 661.10(t).)

In the NPRM, UMTA proposed eliminating the regulatory provision that sufficient final assembly activity would be presumed to exist if the cost of final assembly is at least 10 percent of the overall project contract cost—indicating that its experience was that the 10 percent figure was arbitrary and that several manufacturers of rolling stock were performing adequate final assembly requirements, but the cost of

such final assembly did not reach the 10 percent level.

UMTA received four comments on this issue. Two supported the proposal, while two opposed the elimination of a set percentage to test final assembly.

The issue of determining what is adequate final assembly is one of the most difficult UMTA has faced. Since the Buy America requirements apply to such a vast number of products, it is extremely difficult for UMTA to develop a single definition to address all products.

UMTA had used the 10 percent test because it provided some yardstick against which manufacturers could measure their performance. Unfortunately, a number of suppliers spent considerable effort trying to determine what to include in the cost of final assembly in order to meet the artificially set standard of 10 percent of the total contract cost.

UMTA recognizes that, in the vast majority of cases that it has examined, there has been adequate and sufficient final assembly regardless of the cost of such activities. Additionally, UMTA has found that there has been little, if any, abuse of the regulations in this regard. UMTA believes that significant assembly operations are taking place without the imposition of an artificial threshold requirement. Accordingly, the final regulation contains no specific minimum cost requirement for final assembly.

Nonetheless, in order to clarify the required operations and to provide guidance for manufacturers and grantees, UMTA has defined "final assembly" in § 661.10(t) as "the creation of the end product from different elements brought together for that purpose through the application of manufacturing processes." These manufacturing processes may include joining, welding, installing, interconnecting (wire, fibers, or tube), filling, finishing, cutting, trimming, inspecting and testing. In the case of the manufacture of a new rail car, for instance, "final assembly" would include, as a minimum, the following operations: installation and interconnection of propulsion control equipment, propulsion cooling equipment, brake equipment, energy sources for auxiliaries and controls, heating and air conditioning, communications equipment, motors, wheels and axles, suspensions and frames; the inspection and verification of all installation and interconnection work; and, the testing in plant of the stationary product to verify all functions.

T. Train Control, Communications, and Traction Power Equipment (§ 661.11(u).)

The regulation contains non-inclusive listings of train control, communications, and traction power equipment governed by the requirements of section 165(b)(3) of the 1982 STAA. UMTA sought comments and suggestions on items that should be added to the lists and specifically sought comment on whether pantographs should be included as traction power equipment.

The comments on pantographs were mixed. Commenters opposing the inclusion did so since they believe that a pantograph is a component of rail rolling stock, and should not be listed. While UMTA agrees that a pantograph can be a component, it also can be an end product if it is supplied as a spare or replacement part. Therefore, UMTA agrees with those comments suggesting inclusion in the appropriate listing.

One commenter suggested that the contact rail be included as an item of traction power equipment. Those favoring inclusion did so since they felt that the contact rail is essential to the provision of power to rail rolling stock. While UMTA cannot disagree that the contact rail may be essential, UMTA agrees with the commenter that said the manufacturing of a contact rail does not differ from the manufacturing of a running rail, and that the purpose of the rail should not be dispositive of determining Buy America applicability. Accordingly, the regulations will continue to indicate that contact rail is not to be considered as traction power equipment. (See a Federal Register notice of February 11, 1986 (51 FR 5139), requesting comment on this issue.)

Another request to the agency outside the context of this rulemaking recommended that automatic door control systems for rail rolling stock be considered to be part of train control equipment since the vehicle cannot operate if the automatic door control system is not operating, or if the doors are not closed. While UMTA does not disagree with the purpose of the automatic door control system, the agency believes that the tie-in between the automatic door control system and the operation of a rail vehicle is for safety purposes, and the automatic door control system is *not* part of the actual train control system. Accordingly, this item will not be added to the listing of train control equipment.

U. Certifications by Component and Subcomponent Manufacturers (§ 661.11(z).)

Several commenters suggested that UMTA require component and

subcomponent manufacturers to submit certifications of compliance with the Buy America requirements. While UMTA is aware that the end product supplier must rely on component and subcomponent manufacturers in making its certification to UMTA grantees, UMTA does not believe that it is appropriate for UMTA to mandate that component and subcomponent manufacturers submit certifications. The ultimate supplier is responsible for determining how it will comply with the Buy America requirements, and is, in fact, free to use non-domestic sources as long as the minimum domestic content requirements are met. UMTA believes that it is more appropriate for the ultimate supplier of a product to ensure that its suppliers are providing domestic materials through contractual terms than to use federally mandated certification.

V. Update of Certifications and Contracts (§ 661.12)

One commenter suggested that UMTA's Buy America certifications set out in §§ 661.6 and 661.12 be updated to reflect current requirements. The certifications in § 661.6 were not affected by the 1987 statutory change, and do not need to be revised. The certification in § 661.12 are being revised to reflect the 1987 statutory change. In addition, UMTA will revise its standard contract terms and conditions to reflect the 1987 statutory changes.

W. Investigations (§ 661.15)

All commenters on investigations supported the proposed revision permitting UMTA to initiate an investigation and conduct site visits.

The proposed revision to the regulation specified that an investigated party could correspond directly with UMTA concerning an investigation as long as the affected grantee informed UMTA that this process would be used. The intent of this proposal is two-fold: (1) To facilitate the procurement process by expediting the investigation; and (2) to protect the confidentiality of information presented by the investigated party.

UMTA believes that its grantee should concur in having an investigated party correspond directly with UMTA since the grantee is bound contractually under its grant contract with UMTA to ensure that the Buy America requirements are met. The proposal did not require that all information go through the grantee, but intended the grantee be aware that the investigated party is corresponding directly with UMTA.

The final rule reflects the proposed rule's original intent.

IV. The Final Rule

This final rule implements section 337 of the STURAA, which amended UMTA's Buy America requirements. Section 337 of the STURAA made significant changes to UMTA's Buy America requirements for buses and other rolling stock. First, section 337 requires that more than 50 percent of the cost of a component's subcomponents be of U.S. origin for the component to be considered of U.S. origin. In addition, the domestic content requirement was increased from 50 to 55 percent on October 1, 1989, and to 60 percent on October 1, 1991. (However, any company that has met the domestic Buy America requirement as of April 2, 1987, would be exempted from these increases for all contracts entered into before April 1, 1992). Finally the rolling stock price differential was increased from 10 percent to 25 percent.

UMTA has also included, as appendices to the regulation, the listings of major components of buses and rail rolling stock set out in the Conference Report to the STURAA. UMTA has included these listings in order to assist grantees and manufacturers in distinguishing between the terms "components" and "subcomponents" for the purpose of establishing Buy America compliance, and to prevent possible abuse resulting from an over-classification of vehicle parts as subcomponents. These listings are not exhaustive.

The final rule also includes certain changes made to increase the usability of the regulation. Amendments have been made, for instance, in § 661.15, to clarify the investigation process.

Finally, it should be noted that the U.S.-Canada Free Trade Agreement does not exempt Canadian-made products from the UMTA Buy America requirements. Products manufactured in Canada are considered foreign goods, and are entitled to no special treatment under the UMTA Buy America provisions.

V. Impact analyses

A. Executive Order 12291

This action has been reviewed under Executive Order 12291, and UMTA has determined that it is not a major rule. The rule will not result in an annual effect on the economy of \$100 million or more, nor would it create a major increase in costs or prices for consumers, individual industries, or geographic regions, nor have significant

adverse effects on competition employment, investment, innovation or the ability of United States-based enterprises in domestic or export markets. The agency has prepared a Regulatory Evaluation for the rulemaking, which is on file in the public docket.

B. DOT Policies and Procedures on Improving Governmental Regulations.

This regulation is a "significant" rule, as defined by the Department's Regulatory Policies and Procedures on Improving Governmental Regulations, because it involves important departmental policy and it generates substantial public interest. UMTA has prepared a Regulatory Evaluation in support of this rulemaking, which is on file as part of the docket to this rulemaking. The regulatory evaluation responds to comments received in response to the agency's request for data on the potential economic impact of the rule.

C. Regulatory Flexibility Act.

Consistent with the Regulatory Flexibility Act (5 U.S.C. 605(b)), UMTA certifies that this rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Act.

D. Paperwork Reduction Act.

Collection of information under the Buy America regulations in part 661 has been approved by the Office of Management and Budget and given OMB control number 2132-0544. In addition, the regulation requires two new certification processes (i.e., for grandfathered companies and successor-in-interest companies), which certification requirements will be submitted to OMB for review.

E. Federalism.

This rule has been reviewed under Executive Order 12612 on Federalism, and UMTA has determined that it does not have implications for principles of Federalism that warrant the preparation of a Federalism assessment. The rule will not limit the policymaking and administrative discretion of the States, nor will it affect the States' abilities to discharge traditional State government functions or otherwise affect any aspects of State sovereignty.

List of Subjects in Part 661

Buy America, Domestic preference requirements, Grant programs—transportation, Mass transportation.

Accordingly, for the reasons set out in the preamble to this document, 49 CFR

chapter VI is amended by revising part 661 to read as follows:

PART 661—BUY AMERICA REQUIREMENTS—SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982, AS AMENDED

Sec.

661.1 Applicability.

661.3 Definitions.

661.5 General requirements for steel and manufactured products.

661.6 Certification requirement for procurement of steel or manufactured products.

661.7 Waivers.

661.9 Application for waivers.

661.10 Determination of qualification under section 337(a)(2)(B) of the STURAA.

661.11 Rolling stock procurement.

661.12 Certification requirement for procurement of buses, other rolling stock and associated equipment.

661.13 Grantee responsibility.

661.15 Investigation procedures.

661.17 Failure to comply with certification.

661.19 Sanctions.

661.20 Rights of third parties.

661.21 State Buy America provisions.

Authority: Sec. 165, Pub. L. 97-424, as amended by Sec. 337, Pub. L. 100-17 (49 U.S.C. 1602 note); 49 CFR 1.51.

§ 661.1 Applicability.

Unless otherwise noted, this part applies to all federally assisted procurements using funds authorized by the Urban Mass Transportation Act of 1964, as amended; 23 U.S.C. 103(e)(4); and section 14 of the National Capital Transportation Act of 1969, as amended.

§ 661.3 Definitions.

As used in this part:

Act means the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424), as amended by section 337 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17).

Administrator means the Administrator of UMTA, or designee.

Grantee means any entity that is a recipient of UMTA funds.

Manufactured product means an item produced as a result of manufacturing process.

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.

Rolling stock means transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and

ferry boats, as well as vehicles used for support services.

STURAA means the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. No. 100-17).

UMTA means the Urban Mass Transportation Administration.

United States means the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

§ 661.5 General requirements for steel and manufactured products.

(a) Except as provided in §§ 661.7 and 661.11 of this part, no funds may be obligated by UMTA for a grantee project unless all steel and manufactured products used in the project are produced in the United States.

(b) All steel manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.

(c) The steel requirements apply to all steel items including, but not limited to, structural steel, running rail and contact rail.

(d) For a manufactured product to be considered produced in the United States:

(1) All of the manufacturing processes for the product must take place in the United States; and

(2) All items or material used in the product must be of United States origin.

§ 661.6 Certification requirement for procurement of steel or manufactured products.

If steel 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 in accordance with the requirement contained in § 661.13(b) of this part.

Certificate of Compliance With Section 165(a)

The bidder hereby certifies that it will comply with the requirements of section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, and the applicable regulations in 49 CFR part 661.

Date _____
Signature _____
Company Name _____
Title _____

Certificate for Non-Compliance With Section 165(a)

The bidder hereby certifies that it cannot comply with the requirements of section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, but it may qualify for an exception to the requirement pursuant to section 165 (b)(2) or

(b)(4) of the Surface Transportation Assistance Act of 1992 and regulations in 49 CFR 661.7.

Date _____
Signature _____
Company Name _____
Title _____

§ 661.7 Waivers.

(a) Section 165(b) of the Act provides that the general requirements of section 165(a) shall not apply in four specific instances. This section sets out the conditions for the three statutory waivers based on public interest, non-availability, and price-differential. Section 661.11 of this part sets out the conditions for the fourth statutory waiver governing the procurement of rolling stock and associated equipment.

(b) Under the provision of section 165(b)(1) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that their application would be inconsistent with the public interest. In determining whether the conditions exist to grant this public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis, unless a general exception is specifically set out in this part.

(c) Under the provision of section 165(b)(2) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that the materials for which a waiver is requested are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

(1) It will be presumed that the conditions exist to grant this non-availability waiver if no responsive and responsible bid is received offering an item produced in the United States.

(2) In the case of a sole source procurement, the Administrator will grant this non-availability waiver only if the grantee provides sufficient information which indicates that the item to be procured is only available from a single source or that the item to be procured is not produced in sufficient and reasonably available quantities of a satisfactory quality in the United States.

(d) Under the provision of section 165(b)(4) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that the inclusion of a domestic item or domestic material will increase the cost of the contract between the grantee and its supplier of that item or material by more than 25 percent. The Administrator will grant this price-differential waiver if the amount of the lowest responsive and responsible bid offering the item or material that is not produced in the United States multiplied by 1.25 is less

than the amount of the lowest responsive and responsible bid offering the item or material produced in the United States.

(e) The four statutory waivers of section 165(b) of the Act as set out in this part shall be treated as being separate and distinct from each other.

(f) The waivers described in paragraphs (b) and (c) of this section may be granted for a component or subcomponent in the case of the procurement of the items governed by section 165(b)(3) of the Act (requirements for rolling stock). If a waiver is granted for a component or a subcomponent, that component or subcomponent will be considered to be of domestic origin for the purposes of § 661.11 of this part.

(g) The waivers described in paragraphs (b) and (c) of this section may be granted for a specific item or material that is used in the production of a manufactured product that is governed by the requirements of § 661.5(d) of this part. If such a waiver is granted to such a specific item or material, that item or material will be treated as being of domestic origin.

Appendix A to § 661.7—General Waivers

(a) All waivers published in 48 CFR 25.108 which establish excepted articles, materials, and supplies for the Buy American Act of 1933 (41 U.S.C. 10a–d), as the waivers may be amended from time to time, apply to this part under the provisions of § 661.7 (b) and (c).

(b) Under the provisions of § 661.7(b) of this part, 15 passenger vans produced by Chrysler Corporation are exempt from the requirement that final assembly of the vans take place in the United States (49 FR 13944, April 9, 1984).

(c) Under the provisions of § 661.7(b) of this part, 15 Passenger Wagons produced by Chrysler Corporation are exempt from the requirement that final assembly of the wagons take place in the United States (letter to Chrysler Corporation dated May 13, 1987.)

(d) Under the provisions of § 661.7 (b) and (c) of this part, microcomputer equipment, including software, of foreign origin can be procured by grantees (50 FR 18760, May 2, 1985 and 51 FR 36128, October 8, 1986).

§ 661.9 Application for waivers.

(a) This section sets out the application procedures for obtaining all waivers, except those general exceptions set forth in this part for which individual applications are unnecessary and those covered by section 165(b)(3) of the Act. The procedures for obtaining an exception covered by section 165(b)(3) are set forth in § 661.11 of this part.

(b) A bidder who seeks to establish grounds for an exception must seek the exception, in a timely manner, through the grantee.

(c) Except as provided in paragraph (d) of this section, only a grantee may request a waiver. The request must be in writing, include facts and justification to support the waiver, and be submitted to the Administrator through the appropriate Regional Office.

(d) UMTA will consider a request for a waiver from a potential bidder or supplier only if the waiver is being sought under § 661.7 (f) or (g) of this part.

(e) The Administrator will issue a written determination setting forth the reasons for granting or denying the exception request. Each request for an exception, and UMTA's action on the request, are available for public inspection under the provisions of 49 CFR part 601, subpart C.

§ 661.10 Determination of qualification under section 337(a)(2)(B) of the STURAA.

(a) A supplier or contractor that qualifies under the provisions of section 337(a)(2)(B) because it had supplied an item that complied with the provisions of section 165(b)(3) of the Surface Transportation Assistance Act of 1982 or under section 401 of the Surface Transportation Assistance Act of 1978 must certify to this qualification when its bid or offer is submitted. Such certification must accompany the certification set forth in § 661.12 of this part.

(b) A supplier or contractor that qualifies as a successor in interest or assignee under the provisions of section 337(a)(2)(b) of the STURAA is one to which has been transferred the substantial assets, such as contracts and work in progress, designs and technology, and manufacturing plants and staff, of a previously existing company. The mere acquisition of an established trade name by an existing business enterprise does not qualify as a successor in interest. A supplier or contractor adoption of a new corporate name while maintaining continuity in ownership and assets qualifies the supplier or contractor as a successor in interest.

(c) Any supplier or contractor wishing to claim that it is a successor in interest or assignee under the provisions of paragraph (b) of this section must provide UMTA with sufficient documentation to support its claim. If UMTA determines that a supplier or contractor does qualify as a successor in interest or assignee, UMTA will publish notice of this determination in the Federal Register.

§ 661.11 Rolling stock procurement.

(a) The provisions of § 661.5 of this part do not apply to the procurement of buses and other rolling stock (including train control, communication, and traction power equipment), if the cost of components which are produced in the United States is more than 50 percent of the cost of all of the components and final assembly takes place in the United States.

(b) Except as provided in paragraph (c) of this section, the domestic content requirement is 55% for contracts entered into after October 1, 1989, and is 60% for contracts entered into after October 1, 1991.

(c) The domestic content requirement will be 60% for contracts entered into after April 1, 1992, with any supplier or contractor or any successor in interest or assignee, as determined under the provisions of § 661.10 of this part, which complied with the requirements of section 165(b)(3) of the Surface Transportation Assistance Act of 1982 or section 401 of the Surface Transportation Assistance Act of 1978 before April 2, 1987.

(d) The increased domestic content requirements in paragraphs (b) and (c) of this section also apply to the domestic content requirements for the components set forth in paragraphs (i), (k), and (n) of this section.

(e) A component is any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an end product at the final assembly location.

(f) A component may be manufactured at the final assembly location if the manufacturing process to produce the component is a separate and distinct activity from the final assembly of the end product.

(g) 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.

(h) Except as provided in paragraph (m) of this section, a subcomponent is any article, material, or supply, whether manufactured or unmanufactured, that is one step removed from a component (as defined in paragraph (e) of this section) in the manufacturing process and that is incorporated directly into a component.

(i) For a component to be of domestic origin, more than 50 percent of the subcomponents of that component, by cost, must be of domestic origin and the manufacture of the component must

take place in the United States. If, under the terms of this part, a component is determined to be of domestic origin, its entire cost may be utilized in calculating the cost of domestic content of an end product.

(j) A subcomponent is of domestic origin if it is manufactured in the United States.

(k) If a subcomponent manufactured in the United States is exported for inclusion in a component that is manufactured outside of the United States and it receives tariff exemptions under the procedures set forth in 19 CFR 10.11-10.24, the subcomponent retains its domestic identity and can be included in the calculation of the domestic content of an end product even if a such a subcomponent represents less than 50% of the cost of a particular component.

(l) If a subcomponent manufactured in the United States is exported for inclusion in a component manufactured outside of the United States and it does not receive tariff exemption under the procedures set forth in 19 CFR 10.11-10.24, the subcomponent loses its domestic identity and cannot be included in the calculation of the domestic content of an end product.

(m) Raw materials produced in the United States and then exported for incorporation into a component are not considered to be a subcomponent for the purposes of calculating domestic content. The value of such raw materials is to be included in the cost of the foreign component.

(n) If a component is manufactured in the United States but contains less than 50% domestic subcomponents, by cost, the cost of the domestic subcomponents and the cost of manufacturing the component may be included in the calculation of the domestic content of the end product.

(o) For purposes of this section, except as provided in paragraph (q) of this section:

(1) The cost of a component or a subcomponent is the price that a bidder or offeror must pay to a subcontractor or supplier for that component or subcomponent. Transportation costs to the final assembly location must be included in calculating the cost of a component. Applicable duties must be included in determining the cost of foreign components and subcomponents.

(2) If a component or subcomponent is manufactured by the bidder or offeror, the cost of the component is the cost of labor and materials incorporated into the component or subcomponent, an allowance for profit, and the administrative and overhead costs attributable to that component or

subcomponent under normal accounting principles.

(p) The cost of a component of foreign origin is set at the time the bidder or offeror executes the appropriate Buy America certificate.

(q) The cost of a subcomponent which retains its domestic identity consistent with paragraph (l) of this section shall be the cost of the subcomponent when last purchased, f.o.b. United States port of exportation or point of border crossing as set out in the invoice and entry papers, or, if no purchase was made, the value of the subcomponent at the time of its shipment for exportation, f.o.b. United States port of exportation or point of border crossing, as set out in the invoice and entry papers.

(r) In accordance with section 165(c) of the Act, labor costs involved in final assembly shall not be included in calculating component costs.

(s) The actual cost, not the bid price, of a component is to be considered in calculating domestic content.

(t) Final assembly is the creation of the end product 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.

(u) An end product means any item subject to section 165(b)(3) of the Act, that is to be acquired by a grantee, as specified in the overall project contract.

(v) Train control equipment includes, but is not limited to, the following equipment:

- (1) Mimic board in central control.
- (2) Dispatchers console.
- (3) Local control panels.
- (4) Station (way side) block control relay cabinets.
- (5) Terminal dispatcher machines.
- (6) Cable/cable trays.
- (7) Switch machines.
- (8) Way side signals.
- (9) Impedance bonds.
- (10) Relay rack bungalows.
- (11) Central computer control.
- (12) Brake equipment.
- (13) Brake systems.

(w) Communication equipment includes, but is not limited to, the following equipment:

- (1) Radios.
- (2) Space station transmitter and receivers.
- (3) Vehicular and hand-held radios.
- (4) PABX telephone switching equipment.
- (5) PABX telephone instruments.
- (6) Public address amplifiers.
- (7) Public address speakers.
- (8) Cable transmission system cable.

- (9) Cable transmission system multiplex equipment.
- (10) Communication console at central control.
- (11) Uninterruptible power supply inverters/rectifiers.
- (12) Uninterruptible power supply batteries.
- (13) Data transmission system central processors.
- (14) Data transmission system remote terminals.
- (15) Line printers for data transmission system.
- (16) Communication system monitor test panel.
- (17) Security console at central control.
- (x) Traction power equipment includes, but is not limited to, the following:
 - (1) Primary AC switch gear.
 - (2) Primary AC transformers (rectifier).
 - (3) DC switch gear.
 - (4) Traction power console and CRT display system at central control.
 - (5) Bus ducts with buses (AC and DC).
 - (6) Batteries.
 - (7) Traction power rectifier assemblies.
 - (8) Distribution panels (AC and DC).
 - (9) Facility step-down transformers.
 - (10) Motor control centers (facility use only).
 - (11) Battery chargers.
 - (12) Supervisory control panel.
 - (13) Annunciator panels.
 - (14) Low voltage facility distribution switch board.
 - (15) DC connect switches.
 - (16) Negative bus boxes.
 - (17) Power rail insulators.
 - (18) Power cables (AC and DC).
 - (19) Cable trays.
 - (20) Instrumentation for traction power equipment.
 - (21) Connectors, tensioners, and insulators for overhead power wire systems.
 - (22) Negative drainage boards.
 - (23) Inverters.
 - (24) Traction motors.
 - (25) Propulsion gear boxes.
 - (26) Third rail pick-up equipment.
 - (27) Pantographs.
- (y) The power or third rail is not considered traction power equipment and is thus subject to the requirements of section 165(a) of the Act and the requirements of § 661.5 of this part.
- (z) A bidder on a contract for an item covered by section 165(b)(3) of the Act who will comply with section 165(b)(3) and regulations in this section is not required to follow the application for waiver procedures set out in § 661.9 of this part. In lieu of these procedures, the bidder must submit the appropriate

certificate required by § 661.12 of this part.

Appendix A to § 661.11—General Waivers

(a) The provisions of § 661.11 of this part do not apply when foreign sourced spare parts for buses and other rolling stock (including train control, communication, and traction power equipment) whose total cost is 10 percent or less of the overall project contract cost are being procured as part of the same contract for the major capital item.

Appendix B to § 661.11—Typical Components of Buses

The following is a list of items that typically would be considered components of a bus. This list is not all-inclusive.

Engines, transmissions, front axle assemblies, rear axle assemblies, drive shaft assemblies, front suspension assemblies, rear suspension assemblies, air compressor and pneumatic systems, generator/alternator and electrical systems, steering system assemblies, front and rear air brake assemblies, air conditioning compressor assemblies, air conditioning evaporator/condenser assemblies, heating systems, passenger seats, driver's seat assemblies, window assemblies, entrance and exit door assemblies, door control systems, destination sign assemblies, interior lighting assemblies, front and rear end cap assemblies, front and rear bumper assemblies, specialty steel (structural steel tubing, etc.), aluminum extrusions, aluminum, steel or fiberglass exterior panels, and interior trim, flooring, and floor coverings.

Appendix C to § 661.11—Typical Components of Rail Rolling Stock

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, 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, couplers and draft gear, trucks, journal bearings, axles, diagnostic equipment, and third rail pick-up equipment.

§ 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.

Certificate of Compliance With Section 165(b)(3)

The bidder hereby certifies that it will comply with the requirements of section 165(b)(3), of the Surface Transportation

Assistance Act of 1982, as amended, and the regulations of 49 CFR 661.11.

Date _____
Signature _____
Company Name _____
Title _____

Certificate for Non-Compliance with Section 165(b)(3)

The bidder hereby certifies that it cannot comply with the requirements of section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, but may qualify for an exception to the requirement consistent with section 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act, as amended, and regulations in 49 CFR 661.7.

Date _____
Signature _____
Company Name _____
Title _____

§ 661.13 Grantee responsibility.

(a) The grantee shall adhere to the Buy America clause set forth in its grant contract with UMTA.

(b) The grantee shall include in its bid specification for procurement within the scope of these regulations 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 a completed Buy America certificate in accordance with § 661.6 or § 661.12 of this part, as appropriate.

(c) Whether or not a bidder or offeror certifies that it will comply with the applicable requirement, such bidder or offeror is bound by its original certification and is not permitted to change its certification after bid opening. A bidder or offeror that certifies that it will comply with the applicable Buy America requirements is not eligible for a waiver of those requirements.

§ 661.15 Investigation procedures.

(a) It is presumed that a bidder who has submitted the required Buy America certificate is complying with the Buy America provision. A false certification is a criminal act in violation of 18 U.S.C. 1001.

(b) Any party may petition UMTA to investigate the compliance of a successful bidder with the bidder's certification. That party ("the petitioner") must include in the petition a statement of the grounds of the petition and any supporting documentation. If UMTA determines that the information presented in the petition indicates that the presumption in paragraph (a) of this section has been overcome, UMTA will initiate an investigation.

(c) In appropriate circumstances, UMTA may determine on its own to

initiate an investigation without receiving a petition from a third party.

(d) When UMTA determines under paragraph (b) or (c) of this section to conduct an investigation, it requests that the grantee require the successful bidder to document its compliance with its Buy America certificate. The successful bidder has the burden of proof to establish that it is in compliance. Documentation of compliance is based on the specific circumstances of each investigation, and UMTA will specify the documentation required in each case.

(e) The grantee shall reply to the request under paragraph (d) of this section within 15 working days of the request. The investigated party may correspond directly with UMTA during the course of investigation, if it informs the grantee that it intends to do so, and if the grantee agrees to such action in writing. The grantee must inform UMTA, in writing, that the investigated party will respond directly to UMTA. An investigated party may provide confidential or proprietary information (see paragraph (l) of this section) directly to UMTA while providing other information required to be submitted as part of the investigation through the grantee.

(f) Any additional information requested or required by UMTA must be submitted within 5 working days after the receipt of such request unless specifically exempted by UMTA.

(g) The grantee's reply (or that of the bidder) will be transmitted to the petitioner. The petitioner may submit comments on the reply to UMTA within 10 working days after receipt of the reply. The grantee and the low bidder will be furnished with a copy of the petitioner's comments, and their comments must be received by UMTA within 5 working days after receipt of the petitioner's comments.

(h) The failure of a party to comply with the time limits stated in this section may result in resolution of the investigation without consideration of untimely filed comments.

(i) During the course of an investigation, with appropriate notification to affected parties, UMTA may conduct site visits of manufacturing facilities and final assembly locations as it considers appropriate.

(j) UMTA will, upon request, make available to any interested party

information bearing on the substance of the investigation which has been submitted by the petitioner, interested parties or grantees, except to the extent that withholding of information is permitted or required by law or regulation.

(k) If a party submitting information considers that the information submitted contains proprietary material which should be withheld, a statement advising UMTA of this fact may be included, and the alleged proprietary information must be identified wherever it appears. Any comments on the information provided shall be submitted within a maximum of ten days.

(l) For purposes of paragraph (j) of this section, confidential or proprietary material is any material or data whose disclosure could reasonably be expected to cause substantial competitive harm to the party claiming that the material is confidential or proprietary.

(m) When a petition for investigation has been filed before award, the grantee will not make an award before the resolution of the investigation, unless the grantee determines that:

(1) The items to be procured are urgently required;

(2) Delivery of performance will be unduly delayed by failure to make the award promptly; or

(3) Failure to make prompt award will otherwise cause undue harm to the grantee or the Federal Government.

(n) In the event that the grantee determines that the award is to be made during the pendency of an investigation, the grantee will notify UMTA before making such award. UMTA reserves the right not to participate in the funding of any contract awarded during the pendency of an investigation.

(o) Initial decisions by UMTA will be in written form. Reconsideration of an initial decision of UMTA may be requested by any party involved in an investigation. UMTA will only reconsider a decision only if the party requesting reconsideration submits new matters of fact or points of law that were not known or available to the party during the investigation. A request for reconsideration of a decision of UMTA shall be filed not later than ten (10) working days after the initial written decision. A request for reconsideration will be subject to the procedures in this section consistent

with the need for prompt resolution of the matter.

§ 661.17 Failure to comply with certification.

If a successful bidder fails to demonstrate that it is in compliance with its certification, it will be required to take the necessary steps in order to achieve compliance. If a bidder takes these necessary steps, it will not be allowed to change its original bid price. If a bidder does not take the necessary steps, it will not be awarded the contract if the contract has not yet been awarded, and it is in breach of contract if a contract has been awarded.

§ 661.19 Sanctions.

A willful refusal to comply with a certification by a successful bidder may lead to the initiation of debarment or suspension proceedings under part 29 of this title.

§ 661.20 Rights of third parties.

The sole right of any third party under the Buy America provision is to petition UMTA under the provisions of § 661.15 of this part. No third party has any additional right, at law or equity, for any remedy including, but not limited to, injunctions, damages, or cancellation of the Federal grant or contracts of the grantee.

§ 661.21 State Buy America provisions.

(a) Except as provided in paragraph (b) of this section, any State may impose more stringent Buy America or buy national requirements than contained in section 165 of the Act and the regulations in this part.

(b) UMTA will not participate in contracts governed by the following:

(1) State Buy America or Buy National preference provisions which are not as strict as the Federal requirements.

(2) State and local Buy National or Buy America preference provisions which are not explicitly set out under State law. For example, administrative interpretations of non-specific State legislation will not control.

(3) State and local Buy Local preference provisions.

Issued: January 3, 1991.

Brian W. Clymer,

Administrator.

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