BUY AMERICA

(110–32)

HEARING

BEFORE THE

SUBCOMMITTEE ON
HIGHWAYS AND TRANSIT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

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April 19, 2007

SUMMARY OF SUBJECT MATTER

TO: Members of the Subcommittee on Highways and Transit

FROM: Subcommittee on Highways and Transit Staff

SUBJECT: Hearing on "Buy America"

PURPOSE OF HEARING

The Subcommittee on Highways and Transit is scheduled to meet on Tuesday, April 24, 2007, at 2:00 p.m., to receive testimony on the implementation of statutory requirements relating to the use of domestically produced materials, products, and components in federally-assisted highway and transit projects (commonly known as Buy America). The Subcommittee will hear from the Administrators of the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA), officials of a state department of transportation and a transit agency, and representatives of a steel bridge manufacturer and a transit fare collection systems manufacturer.

BACKGROUND

In 1933, as part of the government's response to the Great Depression, Congress enacted the Buy American Act (the 1933 Act). The 1933 Act provides that: (1) only articles, materials, and supplies mined, produced or manufactured in the United States can be used for public projects; and (2) all contractors for public construction projects in the United States must use only domestic materials. The 1933 Act applies only to direct purchases of goods by federal agencies, not to grants made by federal agencies or to purchases by state and local governments with federal funds. The purpose of the 1933 Act was to require the federal government to spend taxpayers' dollars only on goods produced in the United States, thereby fostering and protecting American industry and workers.

Federal-Aid Highway Program

Buy America requirements were first included in highway law in the Surface Transportation Assistance Act of 1982. The provision has been revised several times. Currently, the Secretary of

Transportation (Secretary) is prohibited from providing federal assistance for a highway project unless the steel, iron, and manufactured products used in the project are produced in the United States.

However, the Secretary is authorized to waive the Buy America requirements if (1) applying those requirements would not be in the public interest, (2) the materials and products are not produced in the United States in reasonably available quantities or a satisfactory quality, or (3) using such domestic materials would increase the cost of the overall project contract by more than 25 percent.

Current controversies concerning Buy America requirements in the federal highway program center mainly on bridge projects, specifically the test used to determine if the contract cost of using domestic steel to build a bridge exceeds the contract cost of using foreign steel by more than 25 percent.

Domestic steel bridge fabricators contend that the language in the law refers to "projects", and as such, the test should be conducted on the basis of an entire project. By allowing project sponsors to divide a bridge project into several smaller segments and then evaluate the costs of domestic versus foreign steel separately on each of the contracts for each individual segment, some people contend that FHWA is not implementing the statutory provision according to congressional intent.

However, the language in the law specifically refers to "overall project contract" costs. For a variety of reasons, most large highway projects are broken into segments and different contracts are executed for each individual segment. FHWA applies the 25-percent threshold for the waiver to each individual contract.

FHWA also points to the specific reference in the law to the word "obligate" when justifying why the 25-percent threshold is applied to each individual contract. Federal highway law prohibits the Secretary from "obligating" federal funds for a project unless the Buy America requirements are satisfied. In obligating federal funds under the federal highway program, FHWA defines projects on the basis of contracts. In other words, the scope of work (project) and the cost of such work are defined in a contract. Federal funds are obligated to a project through the execution of a project agreement. There is a project agreement for each contract. In a complex project such as building a bridge, the overall project is usually broken into separate segments such as the foundation, superstructure, deck, and approaches. A construction contract is awarded for each of the segments to the lowest responsible bidder. From the federal fund obligation standpoint, each contract represents a project. Thus, the overall bridge project that encompasses a number of contracts is not considered one project but a series of projects each defined by its contract.

The effect of FHWA's approach to defining "projects" is that some segments of an overall bridge project may meet the 25-percent additional-cost threshold and qualify for waivers under the Buy America requirements if the test is conducted separately for each segment of the overall project.

A current example of that is the San Francisco Oakland Bay Bridge. The East Span Seismic Safety Project is comprised of as many as 16 contracts. The single most expensive segment, the Self-Anchoring Suspension Superstructure with an estimated contract cost of $1.4 billion, will receive a waiver from the Buy America requirements because the contract cost of using domestic steel in one design was determined to exceed the contract cost of using foreign steel in another design by more than 25 percent. The contract cost of using domestic steel was $1.8 billion. By using foreign steel, the California Department of Transportation was able to save $400 million. Had the test not been conducted on only that contract, but on the bridge as a whole, the higher cost of using domestic steel for the superstructure would have been spread over a larger cost base of more than $5 billion, and would have fallen short of the 25-percent threshold for the waiver.

It is also important to note that an American company had the low bid for this contract. The Pennsylvania-based American Bridge Company won this contract, and will be using steel fabricated in China, Korea, England, and the U.S. to construct the superstructure.

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005 (SAFETEA-LU) included a Sense of Congress to clarify congressional intent that the cost test required for a waiver from the Buy America requirements be applied to an entire bridge project and not separately to segments of the project. However, FHWA did not revise its guidance or regulations on this issue, and continues to apply the 25-percent threshold for the waiver based on the "project contract" cost.

In response, the House adopted two provisions in the SAFETEA-LU technical corrections bill (H.R. 1195) earlier this year. These provisions would (1) make clear that the current application by FHWA of the Buy America test to segments of a bridge project is inconsistent with the Sense of Congress adopted by Congress in SAFETEA-LU, (2) require the Secretary, in the interest of transparency, to provide a detailed justification for a waiver and a reasonable opportunity for notice and public comment, and (3) require the Secretary to submit an annual report to the authorizing committees detailing the waivers granted.

Federal Public Transportation Program

Legislative History of Transit Buy America Requirements

Buy America requirements were first included in the Surface Transportation Assistance Act of 1978 (STAA) and were applicable to the expenditure of Federal funds received under Federal Transit Administration (then Urban Mass Transportation Administration) grant programs in section 401 of STAA. This legislation established a domestic preference for "articles, materials, supplies mined, produced, or manufactured" in the United States. The House report accompanying STAA stated that the provision was added:

> *to protect American manufacturers and suppliers who have suffered substantial losses as a result of competition from foreign imports, which, in many cases, are underpriced because of governmental financial support and cheap labor costs. The loss of business by domestic companies adds to the trade deficit, fuels inflation and leads to unemployment and reduced productivity.*

Congress strengthened transit-related Buy America provisions in the Surface Transportation Assistance Act of 1982, the Surface Transportation and Uniform Relocation Act of 1987 and in the Transportation Equity Act for the 21st Century (1998). The transit Buy America provisions are codified at 49 U.S.C. 5323(j), and 49 CFR 661 contains Federal Transit Administration (FTA) regulations to implement and administer the requirements.

The transit Buy America requirements divide Federally-funded procurements into three categories: steel and iron, manufactured goods, and rolling stock. Steel and iron and manufactured goods must be of 100 percent domestic origin and the manufacturing process must take place in the United States. Rolling stock procurements must be of at least 60 percent domestic origin and final assembly of the bus or rail car must take place in the United States. Domestic origin is determined by the cost of a component's subcomponents that are considered to be domestic material. Any procurement of a component or of an end product made up of components is subject to Buy America requirements. However, a procurement of subcomponents alone is not subject to the requirements.

During the period of time leading up to reauthorization, transit stakeholders, including public agencies and business members, expressed concern and frustration to the Committee on Transportation and Infrastructure regarding the "shifting" nature of an end product as defined under 49 CFR 661, which is dependent upon how the item is specified in a procurement contract. Using this definition, the same item can be an end product under one procurement contract but merely a component, or even a subcomponent, under the terms of another contract. The majority of transit industry representatives who contacted the Committee were seeking greater predictability. In addition, the Committee wanted to establish a more transparent process regarding the issuance of waivers, to ensure that such waivers were issued on a purely objective basis and that the public had an opportunity to comment on proposed waivers. Other issues brought to the Committee by the transit community included concerns regarding microprocessors, and a desire for procedures to be established for negotiated procurements.

SAFETEA–LU Changes to Transit Buy America Requirements

SAFETEA–LU strengthens the Buy America requirements by repealing a general waiver for 15 passenger vans and wagons produced by Chrysler Corporation, and by requiring that FTA publish a detailed written justification in the Federal Register – with a comment period – when issuing a public interest waiver. SAFETEA-LU also provides greater predictability to transit agencies and manufacturers by requiring that the Secretary issue a rule that: clarifies the microprocessor waiver; defines end product, negotiated procurement, and contractor; allows for a post-award waiver; and includes a certification under a negotiated procurement process. This rulemaking is currently in progress.

On November 28, 2005, the FTA published a Notice of Proposed Rulemaking (NPRM) in the Federal Register (70 FR 71246) that discussed several SAFETEA–LU mandates and proposed to provide further clarification of existing FTA decisions on Buy America. Due to the complexity of many of the Buy America issues addressed in the NPRM and the divergence of opinion in important areas, FTA issued a final rule that addressed fewer subjects than addressed in the NPRM (71 FR 14112, Mar. 21, 2006). The topics covered in this final rule included: (1) Administrative review; (2) the definition of "negotiated procurement"; (3) the definition of "contractor"; (4) repeal of the general waiver for Chrysler vans; (5) certification under negotiated procurements; (6) pre-award and post-award review of rolling stock purchases; and (7) miscellaneous corrections and clarifications to the Buy America regulations.

On November 30, 2006, FTA issued a Second Notice of Proposed Rulemaking (SNPRM) to address six issues identified in the NPRM but not covered in the final rule, and one new issue: (1) a publication process for public interest waivers to provide an opportunity for public comment; (2) clarification of Buy America requirements with respect to microprocessor waivers; (3) new provisions to permit post-award waivers; (4) clarifications in the definition of "end products" with regard to (a) components and subcomponents, (b) major systems, and (c) a representative list of end products; (5) a clarification of the requirements for final assembly of rolling stock and a list of representative examples of rolling stock items; (6) expanding FTA's list of eligible communications, train control, and traction power equipment; and (7) an update of the debarment and suspension provisions to bring them into conformity with statutory amendments made by SAFETEA-LU. Formal comments on these issues have been submitted to FTA, and a final rule is expected by the end of the year.

WITNESSES

PANEL I

The Honorable J. Richard Capka
Administrator
Federal Highway Administration
Washington, DC

The Honorable James S. Simpson
Administrator
Federal Transit Administration
Washington, DC

PANEL II

The Honorable Will Kempton
Director
California Department of Transportation
Sacramento, CA

Mr. John B Catoe, Jr.
General Manager
Washington Metropolitan Area Transit Authority
Washington, DC

Mr. Richard Trenery
Vice President, Northeast Region
Cubic Transportation Systems
New York, NY

Mr. Robert H. Luffy
President and CEO
American Bridge Company
Coraopolis, PA

HEARING ON BUY AMERICA

Tuesday, April 24, 2007,

House of Representatives,
Committee on Transportation and Infrastructure,
Subcommittee on Highways and Transit
Washington, DC.

The Subcommittee met, pursuant to call, at 2:00 p.m., in Room 2167, Rayburn House Office Building, the Honorable Peter DeFazio [Chairman of the Subcommittee] presiding.

Mr. DeFazio. The Subcommittee will come to order.

I want to welcome the two Administrators here today and I have a very brief opening statement.

There are ongoing issues regarding Buy America provisions. This is a long and hallowed tradition in the United States, dating back to 1933. It has always been an issue for the creation of jobs, with the expenditure of public funds. This has been revisited most recently in SAFETEA-LU, but only with report language. And there are ongoing questions about the interpretations of the existing law, its limitations and how it might be improved to better accomplish the objectives which we have had over time.

I could go on with a much longer summation of the history, but I don't think that is necessary. We will certainly be enlightened by the two Administrators. With that, I will yield to the Ranking Member.

Mr. Duncan. Thank you very much, Mr. Chairman. I am very pleased that you have called a hearing on this Buy America subject. The Federal Highway Administration and the Federal Transit Administration have similar but different Buy America requirements that are applied to project construction and other procurements using Federal funds. These requirements were passed by the Congress in surface transportation laws in the 1970s and 1980s, to foster and protect American industry and workers, something that we all want to do.

Both Federal highway and transit law includes certain waivers for Buy America requirements, based on public interest, non-availability, and cost differential. These waivers are very seldom necessary. In fact, in an average year, FHWA funds 13,000 projects and receives requests for Buy America waivers for only 7 projects.

However, some people have criticized FHWA's application of the cost differential waiver. I believe that the agency is striking a good balance between supporting American businesses and making the best use of taxpayer dollars, something else that we all want to do. Breaking up large highway projects into segments or phases encourages more companies to bid on these highway projects, especially smaller businesses. More competition translates directly into cost savings and efficiencies.

If projects could not be broken up into separate contracts, and if the Buy America cost differential test was not applied on a contract basis, only very big companies would be able to compete for these contracts, and the total project cost could be substantially higher.

On the transit side of Buy America enforcement, my understanding is that the transit agencies and transit manufacturers are all generally pleased with the changes made in SAFETEA-LU and with the FTA's implementation of these changes. I look forward to exploring these issues further with the two agency administrators who are here with us today and also with the users and manufacturers who are represented on the second panel.

Thank you, Mr. Chairman.

Mr. DEFAZIO. I thank the gentleman. Mr. Baird, do you have an opening statement?

Mr. BAIRD. I thank the Chair for holding this important hearing.

As the Chairman has mentioned, the original Buy America Act was put in place to protect our domestic industry and to ensure we can always produce our own steel. This is especially important for America's economic competitiveness, as well as for our national security. The domestic steel industry is a huge contributor to our economy. In 2005, it was valued at $50 billion and employed 95,000 people. Buy America is a big part of the success of this economic sector.

A vibrant steel industry domestically is important for our security as well. Over-reliance on imports could leave us in peril should we face major natural disasters or security incidents. We may well need steel in a hurry to rebuild infrastructure or even quickly enhance our armed forces. That is not a situation in which we want to be held over a barrel by a foreign government, but I fear our Country is heading in precisely that direction.

Unfortunately, the Administration's policies are undermining our domestic steel industry. I have learned about this first-hand from a Federal Highways Administration memorandum and conversations with then-Secretary Mineta. Despite clear sense of Congress language in SAFETEA-LU, the Administration has decided to encourage States to break projects into smaller components to circumvent Buy America. The most recent example of this we know about is the San Francisco Oakland Bay Bridge project.

Regardless of the particulars, CalTrans' decisions and the Administration's approval have already had dramatic consequences. Universal Structural, Inc. (USI), a steel fabricator from my district, has linked massive layoffs and its closure in part to the loss of the California bridge potential. While one bridge alone did not shut down USI, this is symptomatic of the effect the Administration's views have on the industry at large.

I have introduced legislation, along with my good friend and colleague from Pennsylvania, Mr. Altmire, to close loopholes in Buy America and ensure that the Transportation Department, as well as State transportation agencies, are complying with the law. First, the legislation would make clear that Federal funding would not go toward any project not in compliance with the Buy America statute, even if the violation took place before Federal funding was received.

Second, the legislation would make clear that bridge projects cannot be broken into components for the purpose of Buy America. With these two loopholes closed, we can ensure that Federal transportation dollars are being spent on projects using American steel as intended by Buy America.

I am happy to have the support of the Subcommittee Chairman, Mr. DeFazio, the chair of the Steel Caucus, Mr. Visclosky, the Steel Bridge Alliance and others. I hope the Subcommittee, after hearing the testimony today, will tackle this issue and mark up this important legislation.

Again, I thank the Chairman very, very much for holding this hearing, and I look forward to the testimony. I yield back.

Mr. DEFAZIO. I thank the gentleman for his leadership on this issue.

No further requests for opening statements, so at this point, we would turn to the Honorable J. Richard Capka, Administrator of the Federal Highway Administration. Mr. Capka.

TESTIMONY OF THE HONORABLE J. RICHARD CAPKA, ADMINISTRATOR, FEDERAL HIGHWAY ADMINISTRATION; THE HONORABLE JAMES S. SIMPSON, ADMINISTRATOR, FEDERAL TRANSIT ADMINISTRATION

Mr. CAPKA. Thank you, Mr. Chairman and Ranking Member Duncan, for the opportunity to testify today.

Before I begin my statement, I would like to express our most sincere condolences on behalf of the Federal Highway Administration and the Department of Transportation to the family of Congresswoman Millender-McDonald, and to the Members of the Committee for the loss of their colleague. Representative Millender-McDonald was a tireless advocate for transportation improvements for her constituents. We in the U.S. Department of Transportation were privileged to have worked with her and will miss her.

Mr. DEFAZIO. I want to thank the gentleman. I was remiss in not mentioning Ms. Millender-McDonald's passing. She was an esteemed Member of the Committee, and I thank the gentleman for making the remarks, which I should have led off with. Thank you.

Mr. CAPKA. Yes, sir.

Again, Mr. Chairman and Ranking Member and Members of the Committee, Federal Highways supports the goal of the Buy America Act and understands the issues that have been raised about its implementation. We in the Federal Highway Administration take seriously our responsibilities to enforce the requirements of the law, and have consistently ensured that States comply with the provisions of Buy America whenever Federal aid funds are obligated on a project.

As provided in Section 313 of Title 23, it is a State's obligation of Federal Highway funds that triggers the provisions of Buy America. Federal funds are obligated to a project through the execution of a specific project agreement that describes the work and scope of the project being constructed.

Each of these individual contracts, for the purpose of the Federal-Aid highway program, is considered to be an individual project and is considered independently for Buy America purposes. As you have observed, there may be a number of separate contracts that constitute a large project, like the San Francisco Oakland Bay Bridge.

Since its enactment, Federal Highways has interpreted Buy America to apply on a contract by contract basis and only applies when States use Federal funds in a construction contract. Federal Highways' interpretation is in keeping with Section 145 of Title 23, which provides for the State's right to decide on which projects to use Federal-Aid highway funding.

The State DOTs have the discretion to develop transportation projects and programs, including decisions regarding contract scope and contract size. Also, the State DOTs have always had the discretion of using or not using Federal-aid on any given construction contract.

Section 313 of Title 23 does provide for waivers of the Buy America requirements under certain circumstances. First, a waiver may be granted if Buy America would be inconsistent with the public interest. Second, a waiver may be granted if the required steel and iron materials or products are not produced in the United States or are not in sufficient or reasonably available quantities. Finally, a waiver may be granted if inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent.

Federal Highways' review of waiver requests, based on availability, involve coordination with the appropriate industry associations to verify the industry's inability to respond. When this informal coordination process results in the identification of a domestic supplier, the State generally no longer pursues a Buy America waiver.

The cost differential between domestic and foreign products can be grounds for a waiver. The use of foreign steel or iron may be justified as a result of a special bidding procedure where the project's bid identifies two alternatives, one based on foreign-sourced products and one based on domestic products. If the total contract cost for the domestic product alternative is 25 percent higher than the cost of the foreign product alternative, a waiver may be granted to use the foreign product.

We understand the concerns that have arisen about how the law has been defined and what projects are applicable under Buy America. We have had very productive discussions with industry representatives. Let me assure you that Federal Highways remains very respectful of Congressional direction and the sense of Congress that was provided in SAFETEA-LU. Consequently, the Federal Highway Administration sought diligent and careful legal interpretation of all applicable statutes. Notwithstanding the sense of Congress, our legal review determined that since Buy America was first enacted in the early 1980s, the Federal Highway Administration has consistently and correctly ensured that States adhere to the requirements of the law and that we do not have the legal authority to modify that application of law.

We strongly support the aim of Buy America requirements to strengthen the national economy, and understand very clearly what it means to our Nation to remain competitive in a global marketplace.

We appreciate our role in the Buy America process. Mr. Chairman, Members, thank you for this opportunity to testify, and I look forward to answering your questions.

Mr. DEFAZIO. Thank you. The Honorable James Simpson, Administrator, Federal Transit Administration.

Mr. SIMPSON. Thank you.

Good afternoon, Chairman DeFazio, Ranking Member Duncan, Congressman Oberstar and Members of the Subcommittee. Thank you for the opportunity to testify today regarding the Federal Transit Administration's implementation of the Buy America amendments initiated by SAFETEA-LU. This is my first appearance before this Subcommittee since taking office in August, and it is a great honor for me to be here today.

FTA split its rulemaking into two parts: one part to address routine matters and the second part to address the more complex issues that deserve further consideration and public comment. To address routine matters, FTA issued a final rule on March 21st, 2006, implementing several SAFETEA-LU mandates which removed the general waiver for Chrysler vehicles, provided a definition for negotiated procurement and contractor, required certification under a negotiated procurement process, allowed administrative and judicial review of decisions and streamlined pre-award and post-award review of rolling stock purchases.

To address the more complex issues, such as the definition of end product, the definition of system and whether a system can be an end product, FTA issued a second NPRM on November 30th, 2006. The comment period for the second NPRM closed on February 28th, 2007, and we are currently working on responding to comments and developing a final rule.

Mr. Chairman, I would like to make two important points about our final rule and the second NPRM. First, neither our final rule nor our second NPRM changes the requirements for steel and iron manufactured products. Specifically, Federal funds may not be obligated unless steel, iron and manufactured products other than rolling stock used in FTA-funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. The Buy America steel and iron requirements apply to all construction materials made primarily of steel or iron and used in infrastructure projects, such as transit or maintenance facilities, rail lines, including third rail and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams, running rail and contract rail.

Second, our final rule and second NPRM also do not change the procurement requirements for rolling stock. That is rail cars, buses, train control equipment, communication equipment and traction power equipment as end products. Sixty percent of all components in rolling stock must still be of U.S. origin and final assembly of all vehicles must take place in the United States.

We are still considering two open items: the treatment of end products and system. With respect to end products, we agree with the comments we received from the first NPRM that expressed concern with the current shift approach for end products. In our second NPRM, we proposed adopting a non-shift methodology. Under our non-shift proposal, using the procurement as a bus, for example, procurement replacement items such as an engine, which would be a component, or a piston, which would be a sub-component, would no longer shift to being an end product, but would instead remain a component or a sub-component for the life of the item. We believe this non-shift approach will provide the necessary consistence, stability and favorable price structures for the transit industry and streamline procurement practices.

With respect to our proposed treatment of a system, FTA agreed with comments submitted on the first NPRM that it should continue its longstanding practice of including system as a definable end product. To ensure that major system procurements are not used to circumvent Buy America requirements, FTA's second NPRM proposed to define a system as the minimum set of components and inter-connections needed to perform all the functions specified by the granting in its procurement. We believe this proposed definition will avoid the creation of supersystems and thwart potential abuses.

Mr. Chairman, we believe our proposals address the concerns raised by Chairman Oberstar and Representatives Young and LaTourette in their February 7th, 2006 letter, which emphasized the need to develop a clearer and more consistent definition of end product, and to ensure that major system procurements are not used to circumvent the Buy America requirements.

In conclusion, Chairman DeFazio, Ranking Member Duncan and Members of the Subcommittee, FTA's program takes a holistic approach to funding transit projects. In other words, we look at projects in their entirety and apply the Buy America requirements to the project as a whole. We also look at our rulemaking proposal as an opportunity to fine tune our regulation to ensure consistency, predictability, transparency and to stimulate competition.

I look forward to working with Congress on this and other issues facing our Nation's transit systems, and I would be pleased to respond to your questions. Thank you.

Mr. DEFAZIO. Thank you.

We have 6 minutes 15 seconds until the vote. Unless the Chairman would like to make some really brief remarks now, we would just adjourn until after those. Unfortunately there are five votes, so this will take a bit of time. Can both of you gentlemen remain?

Mr. CAPKA. Yes.

Mr. SIMPSON. Yes.

Mr. DEFAZIO. That would be great. Thank you. Sorry for the inconvenience.

Mr. OBERSTAR. [Presiding.] Mr. Chairman, may I just make a brief—and I will keep it to a minute.

Twenty years ago, almost to the month, the Subcommittee on Investigations and Oversight of this Committee held an extensive hearing, a three-part hearing on Buy America, to inquire into the operation and effectiveness of the Buy America law that I originated in the 1982 Surface Transportation Assistance Act. We didn't have fancy names for them in those days, just called it the Surface Transportation Assistance Act.

I would like to ask, Mr. Chairman, unanimous consent to include in the record for the first few pages, the first 11 pages of that hearing, because I think it is instructive, it reflects from back then to where we are today. The Federal Highway Administration in those hearings was doing a superb job of implementing the Buy America Act, and not segmenting projects, as we found them trying to do at the time, do just the center arch span and say, oh, that is a project, and do another thing and say, that is a project, instead of the whole bridge being a project, instead of the whole 20 mile highway length a project.

The Federal Transit Administration was not doing so well. One, because in the neglect of transit over 30 years, much of the industry that had been American had moved offshore. It was gone. And there wasn't much left with which to contract.

Third was the Corps of Engineers, and we found them putting pilings, steel sheathings, around the caissons where they were building bridge structures, buying foreign steel and putting it in place, and then leaving it after the project was constructed and saying, oh, this is wonderful, it is protecting the bridge structure. Oh, but it becomes a permanent part. So you are escaping the Buy America. We caught the Corps of Engineers doing that and we tightened that up.

So today's hearing is both a retrospective and a prospective. Our purpose here is to get a better understanding of how the law is being implemented. I think it is instructive to quote from my then-Committee colleague, Ranking Member Bill Clinger of Pennsylvania, who said that "The erosion of our industrial base in this Country cannot be allowed to continue without running the risk of making the United States much less than a world power. You cannot be a world power or a significantly player in the world scene if you don't have a healthy, viable steel industry." Bill Clinger, no longer a Member of Congress, still living. I think he would subscribe to that statement today.

Mr. Baird has raised the bar on this issue in the last session of Congress, as we crafted SAFETEA-LU, and raised some of these very issues. So we will return after this series of votes to pursue the inquiry, and appreciate your remaining with us.

The Committee will stand in recess until after this series of votes.

[Recess.]

Mr. DEFAZIO. [Presiding] The Subcommittee will come back to order.

I appreciate the indulgence of the witnesses. There should not be any votes for about an hour and a half, so hopefully we can move both through this panel and the remaining panels.

As we concluded, both witnesses had presented their testimony and we are now going to move to questions.

First, to Mr. Capka. You stated how, I think you said respectful of the direction that Congress has indicated, but sort of that respect falls short of doing what Congress indicated it wanted to do, because of the feeling that you are constrained by the conflict between the statute and the direction which was only provided as non-binding in the SAFETEA-LU, is that correct?

Mr. CAPKA. That is correct, yes, sir.

Mr. DEFAZIO. So if we wanted, what direction do you think we were attempting to provide in terms of our report language?

Mr. CAPKA. Mr. Chairman, when we took a look at the report language, the sense of Congress indicated that preference not to break up large, specifically bridge projects, specifically the San Francisco Oakland Bay Bridge. And that a Federal investment on any one part of the bridge would attach Buy America to the entire Project, big P, Project.

So that was the intent that I think that was being expressed by Congress in the sense of Congress.

Mr. DEFAZIO. How would you recommend we accomplish that goal? I agree with you on the stated intent.

Mr. CAPKA. Yes, sir. Of course, that put us in conflict with the letter of the statute that attaches Buy America when there is an obligation of Federal dollars. And that obligation of Federal dollars occurs legally in a contract.

So the sense of Congress was not significant enough to have us re-look or re-assess our interpretation of our legal opinion of what the statute requires. In order of precedent, our interpretation of statute supersedes the sense of Congress in this particular case.

Mr. DEFAZIO. But you see what Congress was attempting to get at in the sense of Congress and what I think we will attempt to get at again, perhaps in a statutory manner, is the idea that, I mean, what is the logical or illogical extent to which someone could go in segmenting? I could do a contract on my bridge for the bolts. I could do a contract for the cable. I could do a different contract for each diameter of cable. I am going to do a contract for the footings, I can do a contract for the cement that goes in the footings.

At some point, it seems to me you are creating something that attempts to try and circumvent Buy America for segments of a project while taking Federal funds, it becomes sort of wasteful administratively and illogical. It is really, you are not limiting their discretion. Right now you say the law doesn't limit their discretion in segmenting a project, does it?

Mr. CAPKA. Sir, when we look at how a contract is broken up, we would make a judgment call and determine whether or not the breaking up of the contract was being done to evade the Buy America or any other Federal requirement, as opposed to doing something from a very practicable engineering construction management.

Mr. DEFAZIO. So then, we are not here to pick on them, but you are saying in the case, because I believe they follow your direction and what your interpretation of the law is, but so you are saying that it wasn't done for the project in the Bay area to evade Buy America, it was done, that was the most logical engineering way to do it?

Mr. CAPKA. It was a very logical way to break up a very large project. Then it is up to the State to determine where they want to invest their Federal dollars, for whatever reason. For an example, on the Woodrow Wilson bridge, we went through a stage where we were looking at a very large contract. The construction industry, the bonding community could not handle a job quite that large, and the initial bid came in very, very high.

So we broke that contract up into three pieces and were very successful with it. It had nothing to do with any of the Federal statutes that attach to Federal funding. It was a matter of doing something that was practicable from an engineering and construction management perspective.

Mr. DEFAZIO. But given what you understand as the stated intent or at least the non-statutory intent of Congress, wouldn't it be the State's right just not to accept Federal dollars and then contract as they wish?

Mr. CAPKA. Mr. Chairman, that is absolutely correct. They would not have to accept or apply Federal dollars to any project they would wish not to apply it to.

Mr. DEFAZIO. Right. But when you are putting Federal dollars into a project, I think the average American would think of a project is a bridge which gets me from this shore to this shore. That is a project. Not, well, the decking is a project, the supports are a project, superstructure is a project. So if one was going to take money for that project from the Federal Government, I mean, the case that I would make is if you want to the Federal money for that project as defined by the bridge that goes across the water, then certain obligations come with that, and one of them being that we want to, as best as we can, protect our critical infrastructure in this Country, our manufacturing infrastructure, our steel infrastructure, our jobs.

Do you think that would be unreasonable in an engineering or other sense?

Mr. CAPKA. Certainly not from an engineering sense. If the project was assembled in a way that made good practical sense, I would agree with you that if we wanted to achieve that kind of an arrangement, right now the statute does not provide us the latitude to make that kind of a judgment.

Mr. DEFAZIO. Okay. You made that clear.

Mr. Simpson, you are going to get off easy, because nobody can understand what it is you are doing.

[Laughter.]

Mr. DEFAZIO. I don't know if you have been privy to the testimony. There is one subsequent witness who will raise concerns. They think you are not quite there as a second NPRM. Are you aware of those concerns?

Mr. SIMPSON. There are a multitude of concerns on both sides. You can be specific, Mr. Chairman.

Mr. DEFAZIO. Well, it is on the technology. When we get into sub-components, components, things like that.

Mr. SIMPSON. Right.

Mr. DEFAZIO. This has to do particularly with the manufacture of fare equipment and what constitutes a component or sub-component.

Mr. SIMPSON. I am very well familiar with it.

Mr. DEFAZIO. Do you think you can thread the needle yet? Of course, you are in the midst of rulemaking, so I guess it's not fair to belabor the point.

Mr. SIMPSON. I could delineate the issue, if you would like that.

Mr. DEFAZIO. Sure, why don't you do that simply, so everybody in the audience understands.

Mr. SIMPSON. Sure. A lot of it has to do with technology. Let's say we went back 30 years, when you had fare systems that didn't talk to each other, where you had a standalone turnstile. Basically that was an end product.

Today, you have inter-dependent products where you have a synergistic relationship where the whole is greater than the individual parts. A perfect example of that is an automated fare collection system, where you are buying a whole bunch of integrated parts that in and of themselves in most cases won't work alone but they work as an integrated unit to achieve and end. We know what our automated fare structure systems are, our automated fare card systems. You are not buying a turnstile. You are not buying a com device. You are buying an integrated system.

And we have history on this with the Massachusetts case, where it was clear at the time at the FTA that this was indeed a system. So the system could be procured. So the system becomes the end product.

And I am not going to make it complicated, you have three things. You have the end product and you have your components. So if your automated fare collection system is the end product, then your component would be any one of those things that you see in Metro, the ticket vending machine——

Mr. DEFAZIO. The turnstile——

Mr. SIMPSON. You have got it, any of those boxes. Now, it is the stuff inside the boxes that are the sub-components.

Mr. DEFAZIO. Right, okay.

Mr. SIMPSON. However, sub-components, as we know, sub-components can be forced on a foreign basis. You can have foreign sourcing. When you have the automated fare collection system, you are moving what was maybe previously, if it was a standalone product, a component that had been sourced in the United States. Now because you are procuring a fare collection system, rather than one of those boxes, you are moving the guts, some of the guts in that box down one rung on the food chain and it can be source on a foreign basis.

Mr. DEFAZIO. So if we said that the turnstile was a——

Mr. SIMPSON. End product.

Mr. DEFAZIO. If that was a component, not a sub-component, then the things of which it was made would have to be domestically sourced.

Mr. SIMPSON. No. If we said that the turnstile——

Mr. DEFAZIO. I had this yesterday, I lost it.

Mr. SIMPSON. Guess what? We had it yesterday, too.

[Laughter.]

Mr. SIMPSON. The turnstile would be end product. Then the component has to be sourced in the U.S.

Mr. DEFAZIO. Okay.

Mr. SIMPSON. The end component, which would be like the ticket handling——

Mr. DEFAZIO. So you would say that the turnstile then has to be classified as a system?

Mr. SIMPSON. Yes, really end product. What we are saying is the whole system is the end product for procurement. Then we are——

Mr. DEFAZIO. The Ranking Member understands fully, so I am going to defer to him at this point in time. Thank you, Mr. Simpson.

Mr. DUNCAN. Thank you, Mr. Chairman. Will both of you gentlemen give me some idea about how many waivers get requested each year?

Mr. SIMPSON. Prior to SAFETEA-LU, we had no ability to grant post-award waivers, which yo have now given us the ability to. In those cases, it is for non-availability. We have issued none yet. In our history, we have had no price differential waivers, we have had none. And public interest waivers, every now and then we would have a public interest waiver.

Mr. DUNCAN. So it is very rare?

Mr. SIMPSON. Very rare, yes, sir.

Mr. DUNCAN. What about you, Administrator Capka?

Mr. CAPKA. Sir, on the order of about seven a year. That is out of about 12,000 to 14,000 contracts that are being worked at any given point in time. So it averages about seven a year, requests that come in for waivers to Buy America.

Mr. DUNCAN. Is it accurate to say that if you break up these projects or these contracts into segments or phases, that that does open up the process more to small or medium size companies?

Mr. CAPKA. Sir, from our perspective, there are advantages like that to breaking up a larger project. Certainly, those kinds of decisions are made at the State level. We support the States' freedom to exercise their engineering judgment as they most efficiently do.

Mr. DUNCAN. The estimate on this Oakland San Francisco Bay Bridge waiver, you say that it produced a savings of over $400 million, is that correct?

Mr. CAPKA. Sir, there was an alternative form of bidding on that main span at one point in time. And I would defer to the gentleman who will be testifying in a moment from CalTrans to provide the specifics for it. But there was one bid that was based upon foreign steel, and then there was one bid based upon domestic steel. The foreign steel was about $1.4 billion, the domestic steel bid was about $1.8 billion. That was on the entire contract, not just the steel, but the entire contract.

So the difference between the two bids was about $400 million.

Mr. DUNCAN. Is there any other waiver that has ever produced that much in savings or close to it? Do you have any other examples like that?

Mr. CAPKA. Sir, we never waived Buy America in that situation, because even the low bid exceeded what the State was willing to sign up for. So there was a redesign that followed that particular bid.

Mr. DUNCAN. Okay. The waivers that you have granted, these seven or so waivers that you are granting in a year, have those saved substantial amounts of money?

Mr. CAPKA. Most of those waivers were the result of materials not being available.

Mr. DUNCAN. Not being available.

Mr. CAPKA. Not being available, as opposed to the cost differential.

Mr. DUNCAN. So there wasn't a choice?

Mr. CAPKA. That is correct, sir.

Mr. DUNCAN. All right. Mr. Simpson, your November 30th, 2006 proposed rule stated that the FTA already employs a model to determine if a system is too large to be a single end product. Can you describe for us the model that the FTA currently uses to determine whether a system is so large that it would potentially circumvent this Buy America requirement?

Mr. SIMPSON. Yes, we are defining it as the minimum amount of parts necessary in order to have a benefit. And also, items that are normally procured as part of a system. Going forward, what the proposal is, part of the proposal is to look at it, and since technology is changing so rapidly, what is not a system today may be a system tomorrow, to look at it on a case by case basis to make sure we don't get any of these "supersystems," like for somebody to go out and procure and entire transit system. Because if you look closely at the definition on system, one could easily construe that a transit system would qualify.

So we are very cognizant of that, and we are aware that through a lot of the outreach that we have had, we are getting there. We still have more comment, but we believe that we have gotten our hands around the adequate definition of system.

Mr. DUNCAN. All right. Thank you, Mr. Chairman.

Mr. DEFAZIO. Mr. Baird was next in order of arrival.

Mr. BAIRD. I thank the Chair, and would ask unanimous consent, if I may, to submit the statement of Conn Abnee, who is Executive Director of the National Steel Bridge Alliance, as part of the testimony for the record.

Mr. DEFAZIO. Without objection, so ordered.

Mr. BAIRD. Thank you.

Mr. Capka, have you ever been to a steel mill?

Mr. CAPKA. Yes, sir, I have.

Mr. BAIRD. How about a steel fabricator?

Mr. CAPKA. Yes, sir, I have.

Mr. BAIRD. Are you aware of the immense cost in terms of capital and investment and land that goes into these places?

Mr. CAPKA. I am.

Mr. BAIRD. And the trained work force that it takes to put together these really extraordinarily complex and expensive structures?

Mr. CAPKA. Yes, sir.

Mr. BAIRD. Do you believe it is in the national interests of the United States of America to have a vibrant domestic steel industry, including production and fabrication?

Mr. CAPKA. Yes, sir, I believe that capability is important to a nation.

Mr. BAIRD. Do you believe the Buy America Act is incentive to support that industry?

Mr. CAPKA. I believe the Buy America Act was intended to support the industry, and is.

Mr. BAIRD. Do you believe that facilitating or encouraging people who are involved or entities who are involved in construction to circumvent the Buy America will strengthen or weaken the U.S. domestic steel industry?

Mr. CAPKA. Sir, I know of no one who is encouraging the States to bypass Buy America. Certainly, we are not, at the Federal Highway Administration.

Mr. BAIRD. Well, the United States Congress, in a sense of Congress resolution in SAFETEA-LU, set out some standards, which we are actually working with here, legislation introduced by Mr. Altmire and myself. Internal memos from your folks seem to suggest to the States that they didn't necessarily have to apply to the sense of Congress resolution, they didn't have to comply with the sense of Congress resolution, that there were ways they could work around that. That seems to me to be not consistent with the intent of the Congress.

Mr. CAPKA. Sir, the memo that you are referring to was a product of our legal investigation or legal opinion into——

Mr. BAIRD. Was Attorney General Gonzales part of that?

Mr. CAPKA. Sir, that was Federal Highways.

Mr. BAIRD. You could have said, I don't recall, that would have been sufficient.

Mr. CAPKA. But we were well aware of your interest, of other Members' interest in Buy America. So we did diligent and careful legal work to determine exactly where we in the Federal Highway Administration would have to be in executing our primary mission, and that was to enforce the statute, the law that was in place.

Mr. BAIRD. Well, it seems to me this Administration, through signing statements and a host of other ways, has found all kinds of ways to fudge around the intent of the Congress. The purpose here is this: we believe, we the Congress, on behalf of the American people believe a domestic steel industry is essential to our economy and our national security. Point one. We believe that if U.S. taxpayer dollars are spent on domestic highway projects, they ought to go toward U.S. made goods, because that employs U.S. workers and maintains a vibrant infrastructure, which we just might need one day.

We believe that if you start parceling these things out in contracts, that you circumvent the intent of the Buy America Act, the intent of the Buy America Act, and you weaken the domestic steel industry. That is going to have both immediate and long-term consequences. So I have to tell you, and it will come as no surprise, many of us believe that you are undermining the national security and the economy of this Country, in the long haul, through your interpretation.

Mr. CAPKA. Sir, we disagree on that point, but I do agree with you that the approach that you are taking is the right one to change the statute that governs what we enforce at the Federal Highway Administration. I think that is what it will take to change the situation with the implementation of the Buy America Act.

Mr. BAIRD. When you drive across a bridge, do you like to have a start, a middle and an end to a bridge, or do you like to jump like they do in the movies and just sort of jump that middle section?

Mr. CAPKA. Sir, we drive when the bridge is complete and the shore to shore is intact.

Mr. BAIRD. The purpose is that there are some semantics here. As Mr. DeFazio said, the Chairman said, when we think of a project, we think of the bridge as the project. And yes, of course there are smaller contracts that go into that. But if you purposefully break that up into smaller projects, as a way to circumvent the cost ceilings on Buy America, you are encouraging portions of that bridge to be outsourced, I believe. Do you share that?

Mr. CAPKA. Sir, we are not encouraging anything to be outsourced with respect to allowing a State to break up a very large project into manageable pieces, which I think we have learned from experience, it is the practicable way to deliver these very large projects.

Mr. BAIRD. Let me, if I may, I want to respond to——

Mr. DEFAZIO. We are about to run the clock on you. You have one more.

Mr. BAIRD. I won't take the remaining five, in deference to my comments. But I do want to address Mr. Duncan's statement. Mr. Duncan raised the question about whether breaking these projects into smaller components was advantageous to smaller companies. I would submit that it is not, in the manner in which you have done it. I have living, or actually dying proof of that in my district.

The problem is, when uncertainty is created in the contracting process, when gimmicks are used about breaking things into contracts instead of bigger projects, when delays in use of Federal funds create uncertainty about whether Buy America provisions will be adhered to or not, small companies cannot have the scratch, the up-front capital, to bid on these big projects. They go belly-up. That happened to a company in my district. They tried to put forward, it was a bet the company strategy. The uncertainty created on the Bay Bridge project cost us several hundred jobs and a very vibrant industry.

I think there is a real problem, and I respect you immensely, as you know. But I really would encourage you to look into this. Because an enormous company and multi-nationals may have the facilities and the capital to take advantage of this uncertainty. Smaller companies perish because of the uncertainty you folks have created. I think that is why the Steel Bridge Alliance and many others have endorsed this legislation by Mr. Altmire and myself.

I think what you are doing is contributing, whether intentionally or not, it is hard for me to imagine you are doing it intentionally, there will be, one day, a major, massively destructive earthquake on the West Coast. On that day, if we have to call China and Korea and Japan up and say, can you come rebuild our infrastructure, because we have nobody here who can do it any more, we are going to be in big trouble. And I think it is going to be on your watch, and we are going to try to stop that, as a Congress.

I yield back the balance of my time.

Mr. DEFAZIO. I thank the gentleman.

Mr. Boozman.

Mr. BOOZMAN. Thank you, Mr. Chairman. I don't have any questions.

Mr. DEFAZIO. Mrs. Schmidt.

Mrs. SCHMIDT. Yes, thank you. I arrived late, so this might be redundant.

I understand sometimes that contracts have to be broken up into smaller contracts simply to be able to get a manageable contract regardless of Buy America provisions or not. In my limited role in my past life as a local government official, sometimes we couldn't get people to actually answer the contract until we broke it up into smaller feats.

But I really want to go back. I briefly read a little bit about the Oakland San Francisco Bay Bridge waiver. I understand that the savings was over $400 million.

I do support American-made products and American businesses. But I also understand the use of prudent tax dollars. Could you walk me a little bit through that waiver process and how that worked in that case?

Mr. CAPKA. Yes, ma'am, and I would like to characterize it first by saying that the situation never evolved to the point where we had to grant a waiver. Even the low price associated with the foreign steel was too much for CalTrans, the California State Highway Department there to accept. So they did not accept the bid and they did something different.

But when they got to the point, they elected to use an alternative form of bidding, which is authorized under the Buy America procedures, where a contractor would submit a bid based upon the use of foreign steel, and then a second bid based on the use of domestic. And at the end, take a look at the bottom line price of both bids, which is more than just steel, but the entire contract. In this particular case, there was a difference of about $400 million. The low bid, which was based on foreign steel product, was about $1.4 billion; the domestic alternative was about $1.8 billion. So the difference was $400 million.

But even the $1.4 billion was too high for the contract to be awarded. So we were never posed with an official Buy America waiver on that.

Mr. BAIRD. Would the gentlelady yield for just five seconds? I would just suggest that you really look with great scrutiny about that figure. I am well aware of data suggesting that the $400 million was not the Buy America difference. That is a gross exaggeration of the actual cost differential between U.S. steel and foreign steel. I would be happy to share with you that for the record. I don't want to leave that statement unchallenged, because it is not a fact.

Mrs. SCHMIDT. My second question is, if we make it so impossible to ever get a waiver granted, knowing that the tax dollars for infrastructure in States is not keeping up, the way tax dollars are collected for infrastructure in States, especially in my State of Ohio, it is not keeping up with the demand to just maintain the roads and the bridges as well as expand new roads and bridges. Where will the potential cost of narrowing the field to a limited supply source come from, and would this be something that the Federal Government would pay for the additional cost, the State government? How would that be managed? Would the States think this was an unfunded mandate?

Mr. CAPKA. Ma'am, if I understand your question correctly, if we narrow down the requirements to limit the source——

Mrs. SCHMIDT. The bidding process itself, which you can't break it down, if we limit it to the point where it is 100 percent Buy American, and that might limit the resources to be able to produce bridges, highway bill construction, because there is a supply and demand issue. That cost is then going to go back to the States, like ODOT, Ohio Department of Transportation. Where are they going to get the additional dollars, when they are seeing their revenue sources not keep pace with the inflationary cost of building the roads and the bridges, as well as the need to continue to build more roads and more bridges?

Mr. CAPKA. I am not aware that there would be additional funding. It is hard to speculate there. I am not aware that there would be additional funding. I think normally what the States would do when presented with something like that would be to look internally, re-prioritize, delay projects and make the adjustments in order to pay for the project at the bid opening time.

Mrs. SCHMIDT. My final thing, and it will be quick, is that Ohio continues to be a donor State when it comes to Federal dollars. We are the fifth highest use for traffic. So whatever we do to improve the Buy America bill, I would hope that it compensates for the dilemma that Ohio faces. Thank you.

Mr. DEFAZIO. I thank the gentlelady for her questions and comments.

Mr. Altmire?

Mr. ALTMIRE. Thank you, Mr. Chairman.

For Mr. Capka, how much does the Federal Highway Administration expect to save over the next five years by purchasing foreign steel over domestic steel in the construction of bridge projects and through the application of the 25 percent test on the piece by piece basis?

Mr. CAPKA. Sir, we have no figures and there is no expectation or anticipation that there will be any savings. It is entirely up to the States to manage their contracts within the limits of the law.

Mr. ALTMIRE. So I guess your opinion on this question, if there is no estimated cost savings to the taxpayer, the estimate has not been provided, then what is the point of dividing up the project and circumventing the Buy America Act?

Mr. CAPKA. Sir, the projects that we look at are not broken up to circumvent the Buy America Act. The decisions made at the State level are made with a number of different variables that help decision makers determine a course of action to take. Provided that course of action is within the law, the law that we are required to enforce, we have no problem with the States taking their discretion and making those decisions.

Mr. ALTMIRE. Can you talk, perhaps Mr. Simpson can weigh in on this as well, just about philosophically, what the balance is? You hear the different discussion points and we know what is at work here. What is the balance between the appropriateness of cost savings by sending American tax dollars overseas, and at what point are we hurting our domestic production and our domestic industries, as Mr. Baird talked about, versus the importance of lowering the cost? In your opinion, at what point is it not worth the effort to move in the direction that you have chosen to move?

Mr. CAPKA. Sir, I am not an expert in that area by any means. I do know that it is important for decisions to be made at the level at which the consequences can be best understood. And certainly at the State level, where they are faced with the challenges that all State departments of transportation are faced with, as long as those decisions and the discretion being used fits the statute, we will support that at the Federal level.

Mr. ALTMIRE. Do you want to call it, Mr. Simpson?

Mr. SIMPSON. The only thing that I will comment on at a philosophical level, I guess you have to look at the cost and benefits to society and somehow enumerate them in dollars, the taxpayers saving a billion dollars on one side and on the other side maybe some jobs have been lost, and maybe that is at a $100 million level. I think that is part of our rulemaking process, to try and vett out what is happening in the economy, to try to determine, to try to come up with informed decisions.

Mr. ALTMIRE. Thank you. Mr. Capka, do you have confidence, when the States are making these decisions, when you are allowing them to make the determination, that they are thinking in the long-term interest of the domestic steel industry as well as just a potential short-term gain with a specific project?

Mr. CAPKA. We haven't looked philosophically at what each State does and the basis for the decisions that are made. Certainly the Buy America Act is there to encourage the investment domestically. Again, the way the statute is constructed right now, it attaches to the obligation instrument, which is the single contract, as opposed to a collection of contracts.

Mr. ALTMIRE. Do you want to comment, Mr. Simpson?

Mr. SIMPSON. No, thank you, sir.

Mr. ALTMIRE. Thank you both, and thank you, Mr. Chairman.

Mr. DEFAZIO. I thank the gentleman.

Mr. Arcuri.

Mr. ARCURI. Just one question, actually two. Wouldn't you agree that it is the role of the Federal Government to determine what is best for the Country, for the United States as a whole?

Mr. CAPKA. I believe the Federal Government has a perspective that is broader than those that you would find in the States, for the obvious reasons.

Mr. ARCURI. Isn't buying domestic steel good for the Country as a whole?

Mr. CAPKA. I would say that strengthening any one of our industries would certainly be beneficial for the Nation.

Mr. ARCURI. Taking it to the next logical step, then, wouldn't it be the kind of thing that the Federal Government should do to promote purchasing of domestically produced steel?

Mr. CAPKA. And I think within the law, that is correct. As the Federal Highway Administrator, I am required to enforce the law as it has been written. In this particular case, the Buy America Act has been written in a manner that we feel as though we have been enforcing accurately and correctly.

Mr. ARCURI. Based upon how your agency interprets it.

Mr. CAPKA. How it has been interpreted since about 1982 through a number of Administrations. We haven't changed from Administration to Administration during the enforcement of Buy America. So it has been rather consistent since 1982.

Mr. ARCURI. Thank you, sir.

Mr. DEFAZIO. I thank the gentleman for his questions.

We are going to do a second round—oh, Mr. Hayes. You sneaked in, you are so quiet. Your turn, sir.

Mr. HAYES. Thank you, Mr. Chairman. Thank you for holding the hearing.

Mr. Capka, thank you for being here, and Mr. Simpson as well. This is a subject that is very near and dear to my heart. Mr. DeFazio mentioned that a strong industrial base is crucial for our future. If you wouldn't mind speculating a bit, as we compete in various areas, steel is certainly critical. As you compete with the Chinese, who get a 40 percent cut for currency manipulation, right off the bat, if nothing else, do you have any suggestions from your perspective, having to make this work, how we can maintain an attitude, and be careful to use the words, this is not about protectionism. Our steel is better, our workers are better.

How do we work within those parameters to maintain this vital part of our industrial base and still acknowledge and recognize the importance of squeezing every ounce we can out of the taxpayer dollars? You have had to work this thing for some time. Can you suggest to the Committee something that we can do to help move this process forward? Again, it is not about protectionism. It is about good, common sense business practices that keeps our industries and the people that make them run viable.

Mr. CAPKA. Sir, that is a challenge that I think all of us are very concerned about. The fact that the global marketplace is changing every day, that we are competing globally, and whether the playing field is level or not, the impacts are certainly being felt. With respect to Buy America, I think the intention of the Act was to provide some leveling of that playing field. But the way the statute is written, from my perspective, has directed the Federal Highway Administration to make those calls the way we have been making them with respect to Buy America. Whether there needs to be a strengthening of the Buy America Act or the provisions, I think that is something for the public debate as we go forward.

But I would not argue with you at all that having a strong industrial base is to the advantage of the Nation's economic strength.

Mr. HAYES. Well, if I might suggest, Mr. Chairman, and a partial answer on the question, if the USTR and other Administration folks would be a lot more serious and committed to enforcing trade agreements, putting safeguards in place and countervailing tariffs, as you have seen some limited emphasis on doing, then again, I think that helps to make us appropriately competitive in a global marketplace.

Mr. Simpson, would you like to add anything to that?

Mr. SIMPSON. Yes, the only thing I would like to add that maybe will allay some of your fears with respect to how DOT is implementing Buy America, currently, there are about $25 billion worth of new starts of transit projects in the Country, and there is no foreign steel there. It is all with American steel. Additionally, the FTA spends about, I think it is in the area of $4 billion or $5 billion between our urbanized money and our rail mod money. Once again, we meet the Buy America requirements.

Mr. HAYES. I thank you for your answers, and Mr. Chairman, I yield back. Thank you.

Mr. DEFAZIO. I thank the gentleman for his excellent line of questions.

If I could just follow up, Mr. Simpson, again on this system component, sub-component issue. This is from a letter that was directed to you, not to you, sorry, to before you were there, to the chief counsel at the FTA, February 7th, 2006. I just want to make certain that you believe the SNPRM has addressed this issue, if I can just read from the letter. It was sent by then-Chairman Young, Mr. Oberstar and Mr. LaTourette. “We are concerned that an end product system could be so large and incorporate so many different levels and types of equipment, that eh sub-components, which are not subject to Buy America compliance analysis, would be relatively major items.”

Was it the intent of your second NPRM to address that issue?

Mr. SIMPSON. Yes, it was, and we have had outreach with Chairman Oberstar’s office, Congressman LaTourette and, I forgot the third Congressman. Congressman Young. And it is my understanding that the staff is comfortable with what our proposals, we haven’t made any decisions yet. We are comfortable that in the direction we are moving, we have the system well balanced.

Mr. DEFAZIO. Is this going to require some extraordinary encyclopedia of what constitutes components, sub-components, end products?

Mr. SIMPSON. No, it is not, because SAFETEA-LU directed us to have a representative list and also to look, as new issues come up, to take a look at it in a regular basis and to have transparency and have an open door policy.

Mr. DEFAZIO. Okay. What is a fare card?

Mr. SIMPSON. A fare card would be probably—the card itself?

Mr. DEFAZIO. Yes.

Mr. SIMPSON. A sub-component.

Mr. DEFAZIO. All right. That is good. That is what I thought, but I just wanted to make sure I had grasped this. I hope we aren’t going to print our fare cards overseas.

Thank you for that.

Mr. Baird?

Mr. BAIRD. I want to go back to this memorandum. Mr. Capka, you continually refer to this memorandum, and with respect, it is baloney. I will tell you why I think is baloney. It is because you are basically saying that project is synonymous, not basically, that is what you are saying in this memorandum, or your attorney, supposedly is saying, project is synonymous with contract. As you look at SAFETEA-LU and the couple hundred billion bucks that were allocated to various projects and what-not, did we, for example, say we want $100 million to go to project X or did we say, let’s say it is a bridge. Let’s say $100 million for the bridge, or did we say, we want $20 million to go to the paving of the bridge and $40 million to go to the concrete of the bridge? Did we break the projects out that way, or did we build the project as a bridge?

Mr. CAPKA. Sir, those project designations in SAFETEA-LU were scope and description driven, as opposed to component driven.

Mr. BAIRD. So when the Congress allocates money to a project, we are not saying that the project is an amalgam of sub-contracts, we are saying the project is the project, finish the bridge, are we not?

Mr. CAPKA. The——

Mr. BAIRD. We certainly are not. Have you seen it as standard, let me ask it this way, is it standard in language in SAFETEA-LU or in transportation appropriations to break projects into sub-contracts, or do we refer to the project as the project?

Mr. CAPKA. In SAFETEA-LU, the designation is the project.

Mr. BAIRD. Then how can you justify the logic of this memorandum saying that the sub-contracts are in fact the project, when the Congress doesn't itself allocate the money that way?

Mr. CAPKA. Section 313 of Title 23 defines the attachment of the Federal requirements to the obligation document. That is attached to the contract itself. So the application of the Buy America Act that we are enforcing has nothing to do with how the project designations occur in the legislation. But the attachment of the obligation occurs at the contract level. And that is where the Buy America——

Mr. BAIRD. I just really disagree with that. The Federal Government, when we make decisions here, we say, we basically say this: we have deemed as this Committee, as the elected representatives of the people, that completing X bridge or repairing X highway is in the best interest of this public, and that is why we commit the dollars to it. We do it, writ large. Nobody comes before this Committee and says, I want to parcel out this project into component parts, so that the contracts can be written in a sub-way.

Then you are allowing the States to take Federal dollars which went to a big project which this Committee and the full Congress has said matters as a full project, and you are allowing the States to then parse that out as if we considered the projects in form of sub-contracts. I just think that is faulty reasoning. I think it is logically inconsistent.

Mr. CAPKA. Sir, it is the way the law was written.

Mr. BAIRD. No, it is the way you are interpreting the law, is what I am telling you. I believe it is clearly the way you are interpreting the law, and I would assert that a far better, more consistent matter with how this Congress functions and the intent of this Congress functions is to say, the project is what we are after. This Congress does not say, we are going to authorize tiny subsections. We authorize big projects. And to then say that the contract is synonymous with the project I think is inconsistent with how the Congress functions and the intent of Congress.

What I find troubling is, it seems to me that you went out of your way with legal legerdemain to say, we are going to try to find a way to redefine this. It is really pretty astonishing in this memo. You go through this whole thing, once the project agreement is executed, the State will then proceed to award a construction contract, a construction contract for the project, work covered by the project agreement through competitive bidding. But you have again conflated project with contract. I don't think that is how it works. I think you just found a way to do it because you really want to undermine Buy America.

I sure don't see that you honored, and clearly the sense of Congress, the reason we do a sense of Congress is to say, no, that ain't right, people. That is not the interpretation this Congress wants. And you went ahead and did it. And so to hide behind this memo, which is flawed on the face of it, I think is it disingenuous for you to say, oh, we were sincerely, as I think you said in your testimony, implied you sincerely wanted to honor the spirit of Buy America. I don't think you do. I think you went out of your way to violate the spirit of it. I think that is undermining our industry.

Mr. CAPKA. Sir, we have been consistent, since the early 1980s, in our approach to Buy America. So there has been nothing inconsistent during that time frame. It is not just this Administration, but every one——

Mr. BAIRD. Well, I would assert that Mr. Oberstar, perhaps he will have time to join us, would see it a good bit differently.

Mr. DEFAZIO. Could I ask the Administrator, has there been, has this issue been litigated, or are we just relying upon, you are relying upon advice of counsel?

Mr. CAPKA. I am not aware of any litigation that has occurred. But I do rely upon the advice of legal opinion and my counsel.

Mr. DEFAZIO. Are you bound by that?

Mr. CAPKA. When it comes to the statute, sir, I listen very carefully to my legal opinion with respect to what our requirements are.

Mr. DEFAZIO. Right. So even though you understand what Congress intended in the sense of Congress, or the report language, you feel that, and you certainly made that clear at the outset, that your higher duty is to follow the advice of your counsel, whose ultimate conclusion disagrees with what Congress would prefer to have done. As I think you stated earlier, the only way we can give you a higher direction is with statutory language.

Mr. CAPKA. That is correct, sir. I am aware of other situations where the language of the statute has caused problems and had to be corrected that way as well.

Mr. DEFAZIO. It was probably written by the Senate, that is probably the problem. It is not as clear as it should be.

[Laughter.]

Mr. DEFAZIO. Chairman Oberstar had expressed a strong desire to have one very gentle round with the two of you before you left, I am certain, since he has only been working on this issue for at least 20 years. So if we could just sit here quietly, unless Mr. Hayes wants another round.

Mr. HAYES. Thank you, Mr. Chairman. I am smiling, Mr. Baird, I agree with your conclusion but I don't agree with what gave you that gleam. We need to be more clear if we agree, and we do. If we want to use American steel, then we need to say that. A bridge is no different than an interstate highway going from Lexington to Charlotte, because Lexington to Salisbury, that is one segment, Salisbury to Concorde is another segment.

But again, this issue comes up over and over again, how do we keep America strong. I really don't fault your interpretation in what you are seeing, but I would like to see us get together and make i ta little bit more clear, at the same time, make sure that our industries are competitive as they need to be, in order to protect the taxpayer, who is footing the bill for everything. Your assistance in helping us do that would be much appreciated.

Mr. BAIRD. Would the gentleman yield for a second?

Mr. HAYES. I will try to.

Mr. BAIRD. I appreciate it. The thing is this, Mr. Hayes, had the Administration sincerely wanted to do this, an equal form of reasoning could have been, whereas the Congress of the United States appropriates money and authorizes funding for projects writ large as whole, therefore it is intended that the total amount of funding for that project is intended for the whole project. Therefore, breaking those projects into sub-contracts for the purpose of finding ways that might exceed the 125 percent cutoff for Buy America is inconsistent.

In other words, that is what is going on here. They are breaking, entities are breaking up their projects, for which they get a lot of Federal money, into smaller contracts and saying, well, this portion of the project, this contract doesn't have to adhere to Buy America because this portion would exceed the 125 percent. We are saying, if you look at it as a project as a whole, then you no longer exceed the 125 percent cap and the entire thing must be governed by Buy America. My point being, Mr. Hayes, that instead of going out of their way to do exactly as you say, and I know you are sincere in this, instead of going out of their way, or not even out of their way, instead of offering, I think, a more logically consistent and well-reasoned argument that would support the Buy America Act, they are in fact going out of their way to allow contractual structures that circumvent Buy America. That is the problem I have.

Where I am trying to say, they should be helping us here, they are going out of their way to undermine it, I think.

Mr. HAYES. Again, I appreciate the gentleman's conclusion. As the number one proponent of the very amendment, this is the same thing in a different arena, we need to get our heads together and give some assistance and clear direction to these gentlemen in Highways and at Department of Defense. I would welcome the opportunity, as always, to do that with you.

Mr. Oberstar is here. I yield back.

Mr. DEFAZIO. I thank the gentleman.

We would now hear from the esteemed Chairman of the Full Committee, with a lengthy history and knowledge, he can probably even explain systems components and sub-components in great detail and how that law would apply. But we won't ask him to do that.

Mr. OBERSTAR. Thank you. I will refrain, Mr. Chairman, thank you very much.

I appreciate the panel being here. Administrator Capka and Administrator Simpson, I didn't realize this was your first visitation before the Committee. We will have you back frequently.

Mr. SIMPSON. I am looking forward to it.

[Laughter.]

Mr. OBERSTAR. Look, common sense tells you, when you are building a bridge, you don't just build a center arch span. It is a whole project. The bridge is a project. I don't want to hear parsing of construction projects about, you can get a thousand angels dancing on the point of a pin to discuss some fine point of tautological inquiry. We don't need to do that. Highway construction, bridge construction is common sense stuff. You build a whole bridge.

You know what happened between Duluth and Superior, 26 year ago? The State of Wisconsin wanted to avoid buying American steel. So they let the bid first on the center arch span, 10,000 tons of steel come into the harbor in Duluth. And under this bridge that they want to build with Japanese steel that came on a journey of 10,000 miles, will go iron ore from my district to lower lake steel mills to make American steel, pass under a Japanese steel bridge. Outrageous.

And they are going to sell it for $100 a ton less than it could be produced 500 miles away at South Works of U.S. Steel in Chicago? Common sense tells you that steel is subsidized.

I had the economic staff of the Japanese embassy in my office, and I looked them right square in the eye and I said, I know what you are doing, I know how you are subsidizing this, I know how you are skirting the law, and here is how you did it, and I won't go through all that now, these big subsidies that they did through the Bank of Japan. But if this contract isn't withdrawn, I will tell you, we have a $2 billion steel bridge program in the current Surface Transportation bill that I will make sure there won't be another pound of Japanese steel in the U.S. marketplace. Oh, consultation with Tokyo. But the Japanese came back and said, if the contract is rebid, we won't submit Japanese steel. But the Governor of Wisconsin said, oh, we will save money on building this bridge. It was a shared bridge, Minnesota and Wisconsin. But Wisconsin, in the trade-off that we do between our two States, had the authority to do this bridge. So the center arch span went up with Japanese steel. The other 70,000 tons of steel were American steel, because I put a provision in the 1982 Surface Transportation Assistance Act that said it was going to be all American steel.

But that was the first instance of segmenting projects. Then in 1988, as I said earlier, I think Mr. Hayes, you weren't in the room at the time, but I quoted from my statement in 1988, when I was chairing Investigations and Oversight hearings, and that of my Republican partner on the Committee, Congressman Bill Clinger from Pennsylvania, who was very, very clear that we need to have a domestic steel industry. His statement was very, very clear, I won't go back and repeat it. It is in the record.

So now we are coming back again and seeing this segmenting again of contracts. That defies common sense. I heard your defense of it, Mr. Capka, but I don't accept that. You have lawyers dancing on the head of a pin to try to achieve a result. Do you have any idea how much steel China produces today?

Mr. CAPKA. Sir, I know they produce a lot.

Mr. OBERSTAR. Yes, a lot. The highest raw steel production in the history of the industrial revolution was in 1979, the U.S. domestic steel industry poured 129 million tons of raw steel. Last year, Chinese steel industries poured 450 million tons of raw steel, 95 percent of it for domestic consumption. They are building ports and railways and highways and airports. They are investing a trillion dollars in their infrastructure. They have completed a rail line from Beijing to Lhasa, Tibet, 2,500 miles. You can travel it in 48 hours, 14,000 feet altitude, pressurized rail cars. We can hardly go across the United States in Amtrak limping along.

But they are investing in their future and they are doing it with their steel industry. What do you think they are going to do in time? Dump that steel into the U.S. marketplace at some point.

Steel is the basic building block of an industrial society. We have an obligation to support our steel, just as they are supporting theirs. We put that 26 percent in the law because that was the margin by which the International Trade Commission found foreign governments were subsidizing steel to be dumped in the U.S. marketplace, International Trade Commission finding under the Reagan Administration. Subsidizing their exports to the United States at 26 percent below domestic market prices, what I said in my opening statement 19 years ago. So I picked that out and said, that is the benchmark.

Now, to shift over to the transit program, the problem there was that we had neglected transit so badly in America, and made such a cultural shift to the highway, that the domestic component production industry withered. And at the time, there wasn't, in the 1980s, there were only a handful of industries capable of supplying the needs, because there wasn't demand. The demand is there now, and it is going to be up in the future. We are going to increase and build on the 18 percent out of the Highway Trust Fund for transit in the next authorization, we are going to expand upon that. We will have a more robust transit sector and a more robust production industry and build light rail and trolleys and commuter rail and streetcars and whatever it takes to move America more efficiently. And we are going to do it with American goods. These are American taxpayer dollars. When I hear from people who say, oh, it is cheaper to buy it from overseas, that steel isn't paying Social Security, it isn't paying unemployment compensation, it isn't paying into workers comp. It isn't paying the resources for trade adjustment assistance. Take into context the total economic consequence of out-sourcing our steel.

I don't think you ought to have your job out-sourced to India, to a call center. We don't want our steelworker jobs out-soured to China or Japan or Korea or Taiwan, or the European Community, which is subsidizing until just recently. That is the fundamental that I bring to this issue. If you don't administer the law in a common sense way, then we will write it even tighter. But we shouldn't have to do that.

I will leave a moment for your response, if you wish.

Mr. CAPKA. Sir, I don't take exception to anything that you have said. I think there have been some excellent observations made. I do think that in order to tighten up Buy America the way that the Members have suggested this afternoon, we do need to look at the statute and see how we can tighten it up.

It has not just been this Administration's interpretation that has attached the Buy America to the contract document, it has been, as far as I know, back into the 1980s when the bill first was passed and you were involved in the initial stages of the bill. So we in the Administration, in the Department, have been consistent with what the interpretations have been in the past. Being consistent in that interpretation is important for the whole dynamic of working with the States, of delivering the highway requirements. It is important that we have a consistent interpretation of the law.

So if a law needs to be changed, a law would need to be changed, sir.

Mr. OBERSTAR. I know there is history, I know there is. But those are aberrations, past practices are aberrations from common sense, and we need to get back on a common sense track. Until we get to the next law, let's try to impose common sense.

Administrator Simpson, I just wanted to thank your staff for their splendid work on the Northstar Corridor project.

Mr. SIMPSON. Thank you.

Mr. OBERSTAR. The bid came in under expectations and we will be able to move ahead with it.

Mr. SIMPSON. My staff has been out there this week, I just signed yesterday a letter of no prejudice for the purchase of the locomotives, the diesel locomotives.

Mr. OBERSTAR. I would yield to the gentleman from North Carolina.

Mr. HAYES. Thank you, Mr. Oberstar. You presented the case very accurately as always. The only little thing I want to make sure you include in there is that 40 percent discount on that however many millions of tons of Chinese steel for currency manipulation.

Mr. OBERSTAR. Yes, that is a Treasury issue. Darned right. I am with you on that.

Mr. HAYES. It is a Treasury issue, but it translates into a huge subsidy, as you mentioned.

Mr. OBERSTAR. That is right.

Mr. HAYES. Thank you for bringing that up.

Mr. OBERSTAR. Thank you.

Mr. DEFAZIO. I thank the Chairman. In fact, in clarifying definitively the statute, we might have to deal with that issue in terms of the percentage allowance that is given for foreign bids, since now they have a built-in advantage that is so large, because of currency manipulation. We might want to, that 25 percent figure which was valid 20 year ago, may not be valid today for a competing bid.

I thank the two Administrators for their testimony and look forward to continuing a productive relationship as we try and rebuild and better build America's infrastructure. Thank you.

I would call the next panel. Mr. Randall Iwasaki, Mr. John Catoe, Mr. Richard Trenery, and Mr. Robert Luffy.

Again, I thank you for your patience. We will move right ahead with your testimony. Mr. Iwasaki, you would be first.

TESTIMONY OF RANDALL IWASAKI, CHIEF DEPUTY DIRECTOR, CALIFORNIA DEPARTMENT OF TRANSPORTATION; JOHN B. CATOE, JR., GENERAL MANAGER, WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY; RICHARD TRENERY, VICE PRESIDENT, NORTHEAST REGION, CUBIC TRANSPORTATION SYSTEMS; ROBERT H. LUFFY, PRESIDENT AND CEO, AMERICAN BRIDGE COMPANY

Mr. IWASAKI. Thank you, Mr. Chairman, Members of the Subcommittee. This is actually my first time that I have testified here as well. It is an honor to be here. Thank you for inviting the Department to testify. Director Kempton sends his regrets; however, Governor Schwarzenegger asked him to stay in Sacramento and testify in front of the State legislature, so he couldn't be here.

I am going to give you a quick snapshot of CalTrans, the California Department of Transportation. Current year budget is around $12.8 billion. We have more than 22,000 employees. Currently we just hit a milestone in the history of California and we have $10 billion worth of contracts under construction in the State, on the highway system that we oversee.

The State's transportation system is comprised of over 50,000 lane miles of highway, 12,000 State-owned bridges, 2 of the top five largest transit operators and 2 of the busiest ports in the Nation. Even with all that, the State is still growing. It is projected by 2020 to grow by 29 percent from 34 million people to about 44 million people.

The vehicle miles traveled on an annual basis is projected to grow 38 percent. We are in love with the car out west. So we are growing from 344 billion miles to 475 billion miles. And the trade volume will double on top of all that.

So in response to that, we not only have our Federal dollars, we also have our Federal dollars, but we have State dollars as well. We recently passed the Governor's strategic growth plan. The voters of the great State of California passed a proposition, in my case, or CalTrans' case, Proposition 1A, which safeguarded Prop 42, which is the sales tax on gasoline. It used to go to the general fund, now it goes to the State highway account. Proposition 1D was a $19.925 billion general obligational bond initiative for transportation.

Even though we passed that bond initiative, we still need more money. The first segment of money was the corridor mobility improvement account. It was $4.5 billion. The key thing on the Governor's strategic growth plan is that projects have to be under construction by 2012. For that $4.5 billion, we had $11.5 billion worth of ready projects to use those dollars.

So what I am trying to say is that the needs outstrip the available funding in California, and I am sure the rest of the Nation. So we have another program we call the ICE program, or Industry Capacity Expansion. So we are concerned that we need the labor to put all this money to work, we need the materials, we need contractors and we need suppliers. So we are taking a look at the whole gamut to ensure that when al this money hits the street, that we can adequately use it in the most efficient and effective manner.

We also partner with the Federal Highway Administration, as Administrator Capka said. We are very close partners with the Federal Highway Administration. They are with us every step of the way.

We also adhere to the Buy America requirements. Current year, the STIP, the State Transportation Improvement Program and the State Highway Operation and Protection Program, is about $2.89 billion, which includes $1.6 billion of Federal money. having said that, the Federal share of funding in California is declining, because we have self-help counties where the sales tax on goods are used for transportation. In San Diego County, TransNet was extended for 40 years, it generates about $15 billion. Then we have our Governor's strategic growth plan, which is more bonds. We plan to put $107 billion to work over the next 10 years.

Once again, when we use Federal funding, we are in compliance with the Buy America provisions under the current Federal law. We have asked for six waivers in the last five years and were granted six waivers in the last five years for specialty items. One wa sa local bridge, three for double slide, which is a tunnel slide, then two for the San Francisco Oakland Bay Bridge. There has been a total of five waivers granted since 2001 for the San Francisco Oakland Bay Bridge, so the last five years only goes to 2002.

Buy America continues to apply for a majority of the work in which the waivers were granted. It only applies when you have Federal funding. So if you have State funding, there are no Buy America provisions. If it is a State-only funded project, it is not a requirement. However, much or all of the materials are purchased out of American vendors.

The number of State-only contracts is increasing due to the fact hat many counties are helping themselves and in our bond initiative. But once again, American products still will be the most likely source with regards to the funding source. And domestic reinforcing steel, we build a lot of concrete bridges, is very competitive.

There were a lot of questions about the toll bridge seismic retrofit program. Basic ally, we had an earthquake in 1989 in Loma Prieta, which damaged the east span, which is a cantilevered truss section going from Yerba Buena Island to Oakland. So the retrofit, the earthquake then generated a seismic retrofit program. We retrofitted all the bridges that we deemed vulnerable. The last bridges are the toll bridges, which are the most complex. They are large span, they span water and you need to have a long span between the frames. So we used steel in many cases, because it is lighter and you can span greater distances with steel structures.

The program is about $8.7 billion, of which $500 million of it is Federal. The Buy America is included in all contracts that have Federal funding.

The Bay Bridge is important to us, because if you look at a shake map, an AASHTO seismic map, the State of Texas is rated at a 2, this location is 60. So it is a very seismic reactive area.

I think in closing, the contract that we are talking about, the south anchor suspension contract, so what we do is we split these contracts up. After 9/11, the contractors are having problems getting bonding and getting insurance. It has raised the cost of all these things to do business. And so we have gone out with a number of peer reviews to say, okay, how do we deliver this program in the most safe and efficient and effective manner. So we have determined that splitting these contracts up is one of the ways.

You do not want to split these contracts up for the sake of splitting them up, because you will have contractors walking on contractors. So it is really critical that you stage the work, it makes a lot of sense. But the goal is to make these contracts more biddable.

We advertised the SAS, the south anchor suspension contract in 2003, with Buy America requirements. We asked for two estimates that Administrator Capka talked about, one domestic and one international. One bid was $1.8 billion domestic and $1.4 billion international. And when you take a look at it, it was greater than 25 percent. So if we had the money to award, we would more than likely award it, International Steel bid. But we didn't, because we didn't have the money. So we went back and worked with our partners, the Metropolitan Transportation Commission and the legislation and the administration, and we crafted new legislation. It was determined that are going to State fund the SAS. So Buy America provisions do not apply to a non-Federal project.

Some of the construction community input is that when you have a complex contract like this, and we don't split every contract up in the State of California. It is these big bridge projects that we are taking a look at, specifically this east span. And so it was determined that it would probably get us more bidders. We added stipends, we added stipends of $5 billion for each responsible bidder that would bid the south anchor suspension bridge. We also required a $350 million performance bond on a $1.4 billion project and a $350 million bond for materials.

Mr. DEFAZIO. If you could summarize very quickly, you are considerably over at this point.

Mr. IWASAKI. I am sorry about that.

So State-funded projects, market forces will prevail. You still have high level domestic products. Special requirements may result in a distinct advantage for foreign products, especially in cost differentials. So you have to look at your specialty requirements of your structures. Then you need to do what is financially prudent. We will continue to follow the Federal process for federalization of projects.

I want to thank you for your time.

Mr. DEFAZIO. I thank the gentleman.

Mr. Catoe.

Mr. CATOE. Thank you, Mr. Chairman and Members of the Committee, for inviting me here and giving me this opportunity to testify.

I look forward to the future, as Chairman Oberstar mentioned, when the funding for transit in future years will be far greater than what it is today, because that is a necessity for the communities in this Country.

First, a little bit of background about WMATA, the Washington Metropolitan Transit Authority. We are the largest public provider of transportation in the region. We carry 1.2 million people on a daily basis. We are the second largest subway system in the Nation and the fifth largest bus system. Sometimes we have been called "America's transit system."

I want to commit to you, Mr. Chairman and Members of this Committee, that we will become America's best bus system. There have been many issues that have confronted us in the last few months. We are going to overcome those and we will come back and be America's best.

As an FTA grantee, WMATA includes Buy America requirements in all procurements over $100,000 that utilize Federal funds. Buy America regulations distinguish between procurement of steel, iron or manufactured goods, and of rolling stock. For example, when WMATA procures steel for the construction and maintenance of its facilities, or for track work, the contract must certify that that product is of 100 percent domestic origin.

On the other hand, when we produce or procure buses or rail cars, the contractor must certify that more than 60 percent of the components by cost are produced in the United States, and that final assembly takes place in the United States. The marketplace has changed significantly since WMATA acquired the four regional bus systems in 1973 and since it procured its first 300 rail cars in 1976. There are fewer manufacturers of bus and rail rolling stock today and, in fact, only one domestic manufacturer of buses that is owned by an American company. WMATA has been able, though, to purchase equipment and materials and to comply with the Buy America requirements.

WMATA thanks the Committee for its direction in the SAFETEA-LU Act to update the Buy America regulations. We believe this will result in increased clarity for manufacturers and transit providers. With regard to the current FTA rulemaking, WMATA supports the FTA's approach and the changes that they propose to the existing regulations.

As concerns the end product definition, WMATA believes that it is most important that the final rule provide clarity, consistency and predictability for the transit industry. We believe by removing the so-called shifting methodology, as the FTA now proposes, there will be more predictability and competition in the marketplace, benefiting both the transit industry and American manufacturers.

We also believe that the representative list of end products should balance the purpose of Buy America—to promote the domestic industry—with the needs of transit industries—to obtain high quality products at a reasonable price. We believe that balance can be achieved.

WMATA's goal is a representative list that would add clarity and consistency as to whether a particular item is an end product for the application of the Buy America rules. Therefore, we encourage the FTA to provide an additional comment period on the proposed list and suggest that the FTA revise this list periodically.

Again, we commend the FTA for its efforts. We thank this Committee for your efforts and we thank you for the opportunity to appear before you today.

Mr. DEFAZIO. Thank you, Mr. Catoe.

Mr. Trenery.

Mr. TRENERY. Mr. Chairman and Members of the Committee, my name is Richard Trenery, and I am Vice President and Regional General Manager for Cubic Transportation Systems. Cubic is based in San Diego, and we are the world's largest turnkey solution provider of automated fare collection systems for public transport.

I also serve in the capacity as President of the U.S. Transit Suppliers Coalition, a trade association consisting of more than two dozen manufacturers, composed of both large and small firms that supply products for the mass transit programs. The Coalition strongly supports the Buy America statutory requirements for the purchase of products manufactured in the U.S. in federally-funded transit contracts.

Since its inception, Buy America has served as the basis for hundreds of millions of dollars in American manufacturing facilities in the creation of a highly trained work force composed of thousands of manufacturing jobs. Several years ago, the U.S. Transit Suppliers Coalition was formed out of necessity. Despite Buy America's obvious value, it becomes increasingly clear to many observers that Buy America, as administered, has become increasingly mis-interpreted, exploited and manipulated to the detriment of U.S. workers and the economy.

The Coalition responded with a positive approach designed to clarify Buy America and make it more open and accountable. Our Coalition advocated a common sense solution centered around three key improvements to the law. First, keep Buy America up with the times. Amend the law to eliminate any confusion and reflect the current marketplace. Close existing loopholes. Eliminate the temporary and overly broad microprocessor exception and minimize the use of any ambiguous and broadly defined complex system as an end product. These loopholes often allow companies that do not manufacture public transit equipment in the U.S. to profit from taxpayer dollars.

Lastly, put teeth into the law. Require open and accountable enforcement procedures. In passing SAFETEA-LU, Congress made it clear that it too wanted the FTA to specifically promulgate regulations that would assure that the Buy America requirements and goals would not be circumvented by an expansive use of the microprocessor waiver and the bundling of complex systems in the so-called end products as a means to circumvent Buy America compliance.

I want to congratulate this Committee, and particularly Mr. Oberstar and Mr. LaTourette for their steadfast leadership efforts to continue in its careful and thoughtful consideration of our views, and the issuance of specific reform language, both legislation and by letter, to direct the FTA to follow Congressional guidance in its rulemaking process.

Mr. Chairman, we strongly believe that the FTA's second notice of proposed rulemaking is a step in the right direction toward compliance with the letter and spirit of the Congressional direction as it applies to Buy America. However, we continue to have some concerns with two specific elements of the second proposed rulemaking.

First, FTA's proposed rulemaking offers factors that can be used to distinguish between a system that would be truly as an end product and what is designated as an end product as a way to avoid Buy America requirements. Indeed, this is an acknowledgement of the past problem and a step in the right direction toward a workable definition.

However, in its proposed rulemaking, FTA continues to propose a definition of end product that includes undefined systems classification. This will clearly undermine the spirit intended by Buy America. The inherent problem with the proposal is that it does not definitively state how these factors will be used to determine whether a system is being properly designated as an end product.

As an aid, we have recommended to the FTA the following simple test to identify an end product. The solicitation should provide separate line item pricing for individual products, or if a procurement provides for individual performance warranties for individual or separate performance, products, other than warranties related to degraded modes. Therefore it can demonstrate a clear independence.

Or if items that are identified in the solicitation that constitute a system originally sold separately and can function independently of a system. Put simply, Congress perceived the old interpretation of major system end products as a circumvention of Buy America directed at FTA to redefine the end product way that a major system cannot be used to reduce other items that must be manufactured in the U.S.

Again, we suggest a mandatory bright line test is required to put an end to the confusion.

Secondly, we propose that FTA clarify the description of the microprocessor waiver. But we would like to see the input/output facility of that to be readjusted. These devices do more than just process data.

Mr. Chairman, our industry and thousands of tax-paying U.S. workers applaud and appreciate the strong work this Committee has done for its inspired leadership role in reforming Buy America. We trust that you will continue to monitor the FTA as it finalizes its Buy America regulations.

Cubic and our 29 member firms in the U.S. transit supply area look forward to continuing to manufacture products that will help keep our Country on the move. Thank you, sir.

Mr. DEFAZIO. I thank the gentleman.

Mr. Luffy.

Mr. LUFFY. Thank you, Chairman DeFazio and Members of the Subcommittee. Thank you for inviting me here today.

I first want to apologize for not having written comments. I got word of this while I was overseas in China visiting some of the facilities that Chairman Oberstar talked about and just got back into town Monday. So I have been out and have not had an opportunity to give written documentation. But I will provide it afterward, naturally.

I would like to tell you that I am President and CEO of American Bridge Company. We have been building steel bridges around the world, particularly in the United States, for over 140 years. We are a heavy civil contractor and there is probably not a major bridge to be built anywhere in the world today, with the exception of the Far East, that we would not be in pursuit of the project. We currently are the lead in two contracts on the Woodrow Wilson Bridge, two main crossings, we are the contractor there. And we are the lead of the joint venture that has the SAS project that was the subject of questions here with the last group.

So I have, I think, the facts on many of your questions, and I am going to cut my comments short, so that you have the opportunity to ask me whatever. I do want to say that we as a company are pretty unique. We not only are a large civil contractor bridge builder, but we are a steel fabricator. We have facilities in Western Pennsylvania, in Pittsburgh, also in Reedsport, Oregon. So we support, in a large way, Buy America, and applaud the efforts of Congressman Baird and Congressman Altmire.

But I can tell you, and I can go into detail, that is not enough. This has been in effect for over 20 years now. I have been in this business 35 or 40 years, and I can tell you that the steel fabrication capability in the United States has deteriorated over the last 20 years. It has not gotten stronger. It probably would not exist were it not for Buy America.

But still today, bridges without Federal money or, I don't even understand how this works, bridges by the Corps or the Coast Guard are open to Buy America, or are not subject to Buy America. In fact, we just completed a Florida Avenue bridge down in the Port of New Orleans for the Coast Guard, and that steel went to a foreign provider.

Huey P. Long Bridge, it will be a $60 million to $100 million steel contract. It is bidding in June in New Orleans. It will definitely go to a foreign steel fabricator.

This is not an issue often of dollars. Ultimately it is, but until the issues of capacity and capability in guarantees are addressed, you won't be changing much. This is where the problem lies. The SAS project that everybody got into, and you were tied up over this $400 million difference, I put those numbers together personally, so I can tell you exactly how they were arrived at, was not an issue of the steel being more expensive. It was the issue of nobody in the United States could do the job. The capacity is not here. It could simply not be done. There is a requirement by the law that you cannot bid the foreign price unless you bid the domestic price when you bid the contract like that both ways.

So we had to ourselves bid the domestic end of that job. We would not normally have gone after that job. And that difference in price reflects the investment in the infrastructure we would have to have made in order to drastically expand our facilities, to hire and train people and the liquidated damages that would have been necessary, because we would have been late. There is no way we could have done the job on time. And nobody else in the United States was interested in the job because of the constraints of the project itself.

Any major project that requires a fast delivery, you are going to have this problem, whether you have Federal money in it or not. There is not capacity. The largest steel fabricating facility in the United States for bridges, I don't know if Conn Abnee is still in the room, but I am guessing, because I know the industry so well, is probably 300 or 400 people on the floor working. I was in a facility that is going to fabricate the steel for the Oakland Bay Bridge all last week. They have 32,000 people in that facility. It is not even a contest. It is not even a contest.

Anyway, we are in support of Buy America. We would like to see it a lot more strongly enforced. There is some ambiguity, obviously, and that needs to be straightened out. It should apply to the whole project.

The details of a job will require that the job be broken into various segments, just so they can be bid and make more competition and therefore a better price to the State or the letting agency. But you have to look at the Buy America provision across the whole project, and that can still be done.

So I will cut my comments off there. I really appreciate being here. I have a lot of first-hand knowledge to this particular issue and I will answer any questions you have. Thank you.

Mr. DEFAZIO. I thank the gentleman. That was excellent testimony, very informative for the Committee.

We have a vote in five minutes, so I am going to ask one quick question, and then each of you, I don't know what your schedules are for planes or whatever, if you can remain, we will come back for a few questions. And anybody that has to leave, we understand.

Mr. Luffy, if the language was in place, a more stringent Buy America, and we certainly know if our infrastructure deficit, one could project forward with it, would there then be more fabricators willing to make the investments here, knowing that there was a potential for business out into the future?

Mr. LUFFY. Well, it is a good question. That is something else I was going to address. Because we personally, our company has invested $20 million, these two facilities are new, they are not old facilities that we have as a company. And we invested in the late 1990s up through 2003 in both these facilities.

We believe that Buy America, didn't think we were going to see a lot of change. But now, I think if we had the decision to make today, we would not invest. There needs to be a clear signal that the steel bridge structures will go to U.S. fabricators.

Mr. DEFAZIO. Right. But if we tighten the law so that we are sending a signal that it will be fabricated——

Mr. LUFFY. Absolutely. Absolutely.

Mr. DEFAZIO. I had heard that actually the Chinese didn't have the capacity for this particular structure, either, and they had to either modify or build a plant to do it?

Mr. LUFFY. Believe me, they have capacity. It is beyond your comprehension if you haven't been there.

What they did is, we insisted that they segregate this bridge, because the requirements are so stringent with regard to quality that they segregate this completely from everything else they do.

Mr. DEFAZIO. Okay.

Mr. LUFFY. To give you an idea how fast they work, they were given a contract in June. They are building a completely new facility that I just visited last week. It will be open for business and producing steel the beginning of this June. In 11 months time from inception to completion to producing steel, in 11 months time.

Mr. DEFAZIO. Okay, thank you.

With that, we are going to have to recess until—we should be back hopefully in about 20 minutes. Thank you.

[Recess.]

Mr. DEFAZIO. All right, the Committee will come back to order. Other Members will be along shortly. Again, I appreciate your indulgence in terms of the schedule and length of this hearing.

Mr. Luffy, if I could just pursue the line of questioning just before recessed for the votes on the Floor, as I understand it, at the time the project was proposed, there was no one domestically who could produce the components.

Mr. LUFFY. Within the time constraints that they required, that is correct. There are two issues there, not to interrupt you. One is the capacity to get it there with regard to schedule and people. The other is the guarantee that you have to give in order to get the contract. There are not fabricators today in the United States that have the capital, the balance sheet that can get the guarantees needed, the bonding needed to guarantee the project on these mega-projects.

So if there is a steel sub-contractor you are going to give to a steel supplier, if it is more than $100 million, other than ourselves, I don't think there is another fabricator in the United States that would be able to provide a bond, which is the surety bond that is required as part of the construction process.

Mr. DEFAZIO. Okay. But in response to, I mean, we will get this, I find it odd that you bid both the domestic bid and the foreign bid.

Mr. LUFFY. That was a requirement. That was required by the contracts.

Mr. DEFAZIO. So basically, you said okay, for bidding it domestically, we know we are going to have to acquire the steel from overseas?

Mr. LUFFY. Yes, you actually go through a separate pricing process, one doing it with domestic steel and one doing it with foreign steel. Because there are implications on delivery and timing and size of components and on and on. It affects the whole job.

Mr. DEFAZIO. But at the $1.8 billion, you would have been building some additional capacity here in the U.S.?

Mr. LUFFY. A lot of additional capacity.

Mr. DEFAZIO. Right. So in a sense, because of the way Buy America is set up, we are investing in capacity in China.

Mr. LUFFY. No doubt about it.

Mr. DEFAZIO. And the way we can turn that around for the future would be statutory change that makes it much more definitive that we are not going to allow this segmentation and these major projects will be required to be sourced here in the United States. And at that point, either your company or perhaps some other new entrants might be willing to take a risk on the investment necessary to meet that, what would be a fairly substantial projected demand into the future, very substantial demand?

Mr. LUFFY. Yes, it would be a pretty safe prediction that that would happen. You would have significant investment.

Mr. DEFAZIO. So we have a great chance to bring some capacity and jobs home here, potentially, if we revise this law?

Mr. LUFFY. Absolutely.

Mr. DEFAZIO. Okay, thank you.

Mr. Trenery, I heard your concerns at the end. I couldn't get very specific, unfortunately, with Mr. Simpson, because he is in the middle of a rulemaking, so he is in the quasi-judicial mode, et cetera. So he can't really comment on exactly what he is doing.

Did you propose, I assume you submitted comments, and in those comments, did you propose specifically how they might address your continuing concerns? You don't think he has quite gotten to the point of resolving the issues I raised in the letter I read to him?

Mr. TRENERY. That is correct, sir.

Mr. DEFAZIO. Could you explain those in layman's terms?

Mr. TRENERY. We prefer the common sense approach to it. We try and look very pragmatically at what is the end result, does it create jobs or does it not create jobs. In the particular instance of the second notice of proposed rulemaking, we gave a set of formal approach, very simple, and said that we in the industry would this as a way you could determine whether something is an end product or isn't.

Mr. DEFAZIO. Would you do it with all these specific lists, or would you do it more with a generic kind of test?

Mr. TRENERY. I think there are two answers to that. We definitely applaud the representative list. That puts clarity with everybody you know right from the get-go, what is an end product. And if it isn't in there, because times will change, there should be a set of tests that you can go through with clarity, so you as a manufacturer and you as a buyer would know exactly what was on there.

So we laid out in our comments, in both the original rulemaking and we echoed again in the second rulemaking a set of specific approaches to be able to offer. And that was done from a coalition standpoint of 29 member firms.

Mr. DEFAZIO. Okay. Mr. Catoe, I appreciate your determination to improve the service here locally. That is grand. But on the specific topic here before us, has Buy America presented any particular challenges to your organization?

Mr. CATOE. I would say there have been challenges to this organization and other organizations, because we have had the same experience across the Country. We have been able to not only meet the guidelines but in a lot of cases, particularly with buses, to exceed the guidelines.

Part of the problem we have been confronted with, though, because of the peaks and valleys, valleys of Federal Transit appropriations, is that the bus industry has left the United States. As I mentioned earlier, there is only one truly domestic manufacturer of buses, and that has provided a challenge from a competitiveness standpoint. There are fewer manufacturers. It is really not tied into the United States, it is just the way the funding has occurred.

Buy America has limited some of the manufacturers, since they don't exist in the United States, from being able to bid here. So we have less competition, and when you have less competition, you have costlier products, or you don't find the technology that you want in the few providers that exist.

Mr. DEFAZIO. But in the aggregate, the amount of Federal funding that is going in at this point isn't enough to create or induce someone to produce domestically?

Mr. CATOE. The problem is the long-term certainty of it. It takes an enormous capital investment to build the capacity to build a transit vehicle. It is an assembly line type of operation. What the industry has seen over the last decade or two has been the peaks and valleys. When it is good, it is great. But when it is slow, it is real slow, to the point that we have all three domestic bus manufacturers, one from Michigan, one from New Mexico and one from California, that have gone out of business, that went bankrupt as a result of the valleys. It looks good today. If, as Congressman Oberstar mentioned, there will be increased funding in the future, and it is a long-term funding source, I think you would see more domestic providers coming into the market or start-ups. But today, again, there is some uncertainty on the amount of monies that would be appropriated for rolling stock.

Mr. DEFAZIO. So the more certainty we could provide in the next iteration of the surface transportation reauthorization over the longest period of time, in addition to strictures on out-sourcing, could bring manufacturing?

Mr. CATOE. Yes.

Mr. DEFAZIO. I would just reflect that in the last reauthorization bill, I did get in a provision regarding domestic manufacture of street cars, since we are about to have the rebirth of the street car industry in America, and the domestic manufacturer has stepped up and is working now on the first prototype. They did license some Czechoslovakian technology, but they have actually improved on it. This is a company that produces a lot of exotic things for DOD. It happens to be in Oregon, too. I am quite confident that we are going to have state of the art streetcars available. I would hope that we can get back to buses, too.

Just back to Mr. Luffy for a second, we have had a series of hearings, and I will continue to hold hearings on private-public partnerships. I am not sure how much you followed the debate. I draw distinctions between greenfield projects, new capacity, enhanced capacity and then the third iteration, which is essentially just monetizing an asset and having someone run the existing capacity.

Mr. LUFFY. Right.

Mr. DEFAZIO. The last area I am very skeptical of.

But you raise kind of a new concern with me here. As much as PPPs don't require Buy America, clearly, unless an individual State negotiated those terms in the contract with the—is that correct?

Mr. LUFFY. Yes, this is a major concern, and I voiced it in the break. We see the trend, we are involved in a couple PPPs right now outside of the Country. We see the trend in the United States will be on the increase. By their very nature, they are free to go and buy where they like. Major structures are done this way and there is a shortfall in the revenue from the DOTs. This is how the problem is going to be solved, in our opinion. Then those bridges will go to foreign steel.

If the dividing line is about 5,000 tons or so, if a project has more than that, there is a very good chance it would be in its open competition and it would go to a foreign supplier. And when we say foreign today, forget, the Japanese are no longer competitive, really. The Koreans are no longer competitive. What you are talking about is mainland China and Canada. Canada has three major fabricators up there that take work from us every day. So when you talk foreign, I think you can be specific. You are really talking about mainland China on major structures and Canada.

Mr. DEFAZIO. I assure the gentleman that we are shining a spotlight on PPPs. Even the most enthusiastic proponents of PPPs realize that it is going to be a small percentage of our future investment. We will continue to do that.

I have a question the staff gave me. What volume of work on an annual basis would be needed to sustain a viable domestic steel fabricator industry in the United States? How many fabricators would be in such an industry?

Mr. LUFFY. I don't know that I am confident, that I could answer that off the top of my head. I can tell you that it would be tough to have a facility that had the wherewithal, the technical skills to develop a facility where you have people that can do major bridges.

Then you would have to have a facility that is drawing roughly $50 million in revenues a year, and if you could use a number of about $3,000 a ton to $4,000 a ton, that would tell you the capacity, if somebody can do that arithmetic.

That is about what you would need to maintain an ongoing entity. Again, the Steel Bridge Alliance probably has more accurate figures than my guess. But there are two or three, depending on which part of the Country you are in, because transportation has something to do with this, if you don't have a facility, there are two or three competitors in existence in most areas today. The problem is that if the job is significantly large, and the schedule is challenging enough, they just can't be competitive.

Mr. DEFAZIO. So the scheduling, the bonding, the predictability of demand, the total dollar value of demand, all those would be the major factors. It would be helpful if we got some analysis of our answer to that question subsequent to the hearing from either you or the Alliance, just because if we are making a real objective in the next reauthorization bill to really bring this industry home, we just need to know what we have to be protecting in terms of investment in order to perhaps accomplish that goal.

Mr. LUFFY. We will get you accurate numbers. In fact, we are one of the few that probably have them, because we have investment in two new facilities here.

Mr. DEFAZIO. I thank you.

With that, I have some people waiting patiently in my office, but this was a compelling panel and I had to come back. I am going to ask Mrs. Napolitano to assume the Chair for the remainder of the questions, and I am not certain whether Chairman Oberstar is coming back or not. She will assume the Chair and we won't keep you here much longer, I promise.

Mrs. NAPOLITANO. Thank you very much.

We would like to continue. I thank the Chair for allowing me to come up here, because I do have questions, and I told him, don't make promises I can't keep.

Part of what I wanted to ask was, for many years, because I have been through the different levels of government, city council, and we wanted to put in a Buy America, because back in the 1980s, we started losing manufacturing, losing the ability to create, to make the rail cars, to do many things that we knew the industries were going abroad. We weren't training personnel. We were not investing in being able to keep up the infrastructure to maintain. And everybody was not of the opinion that we should invest or that we would be able to remain competitive and be able to get things done cheaper.

What it really boiled down to was, bottom line was the money and how much it was going to cost, and where can you cut corners, or how can that be made at a cheaper price for the taxpayer. In the end, the taxpayer did lose, and we know that.

Following the Chairman's line of questioning, how do we begin to rebuild that which we have allowed to erode, knowing full well that yes, we don't have a lot of the ability to do the major projects, because we don't have the infrastructure we once had. How do we together, the industries, the labor, everybody, work together, work towards that aim. I would like to pose that to all three of you.

Mr. CATOE. Thank you very much. I will attempt to respond from a transit operator's perspective.

As I discussed earlier, one of the issues that has happened to the rolling stock industry. For example, there is no American or domestic manufacturer of a rail car. From a bus standpoint, there is only one remaining domestic manufacturer of a heavy duty bus that we use in the transit industry, the 40 and the 60 foot vehicle.

Again, some of the issues have been the inconsistencies in the demand and the funding for vehicles, and that the businesses did not survive in the United States. Instead, you have businesses that are owned by firms in Europe, because there is a consistency in the demand that came into the market.

So if there is a way that, from an industry perspective, and we as operators have to be a part of this, to plan out the needs over the next ten years, to schedule those needs out and then look, from a funding perspective, a Federal funding and local funding perspective, to ensure that the dollars are there, there is the opportunity for someone to come in to invest and to make a profit. Because no business is going to come here and manufacture a product just for patriotic duty. There is a profit involved in this also. That is one way.

As an industry, as we look at the aspect of the Federal regulations, the FTA, and we are here today to support those, if we continue that support, because you are right, there is a direct relationship. With regard to the transit industry and ridership, between those individuals who have jobs and the ridership in the transit organization, my job is to pick up people and carry people. I want as many people as possible out there to use the system.

So I want jobs in this Country because jobs in this Country support everything that we do. So from a personal perspective, I support Buy America. But from an industry perspective, again, we need to define and clarify our demands, through the American Public Transportation Association. The work of Congress is to ensure that funding is there to fund those needs for a sustained period of time.

Mrs. NAPOLITANO. Thank you.

Mr. TRENERY. From the transit suppliers' perspective, let me just echo and agree with Mr. Catoe's remarks. I think funding is key and important. But also, there is a lot of funding out there. Congress allocates a lot of funding each year to this. So there is funding there.

What is also needed is consistent regulations. So the field is level and plain. From a supplier standpoint, we need to know what the interpretation is going to be, and not that it changes. Because we make investments, and those investments have to be equitable for all parties. We don't want to make a $100 million investment in plant and supplies and then find out the next year we didn't need to do that, all we needed to do was interpret the regulations in such a way we could offshore it. That doesn't help our manufacturing capacity and capabilities.

So it is not only funding, it is also consistency of the regulations and clarity that is necessary.

Mr. LUFFY. From the steel fabricators' perspective, it is a similar answer. At the heart of this is that you have to create a level playing field. As I said, I was just in China looking at steel fabricators. They are paying their people a buck, a buck and a half a day. Our cost of labor is $30 an hour. So it is not competition when you are going head to head. It just doesn't exist.

Something has to be done about that. If you are going to allow them to compete here without any requirements that they do anything to level things out, then they are going to have the work and we won't have the fabricating capability in the United States. That is the long and short of it. This is not a very complicated issue. We can help with the Buy America clauses, of course, in that in some portions of the steel fabrication industry, we can maintain a steady revenue stream, projects. If that is the case, and we can see it out there in the future, people will invest in facilities. So you maintain some fabricating capability.

But there is an awful lot of steel produced in the United States that is not subject to this, and of course, that will go foreign and will further diminish the steel fabrication capacity in the U.S.

Mrs. NAPOLITANO. Can you elaborate a little more on the level playing field aspect of it?

Mr. LUFFY. Well, I think the labor, cost of labor is a big issue. We are paying 20 times what they pay for labor. So their cost to produce the steel is a heck of a lot cheaper than ours.

Mrs. NAPOLITANO. What about quality? Is the quality comparable? Is it better?

Mr. LUFFY. They solve quality with labor. They just keep, they will do it over five times until they get the quality right and it is still way cheaper than us.

Mrs. NAPOLITANO. Well, but that brings to point the safety issue. Because we hold our standards much higher than China.

Mr. LUFFY. No, no. This is not the case. Because, and CalTrans is a good example, the requirements are very specific. The quality standard has to be met. They will meet the quality standard. So this is not an issue where we are buying an inferior product.

Somebody made the statement earlier that their steel is not as good as ours. Steel is a chemical composition. Anybody can do a spectrographic analysis and look at it and determine whether the steel is steel or not, and if it meets the standards of the specification. Their steel is exactly the same as ours, it is exactly the same.

The fact is that the government subsidizes their steel production. So if you are a steel fabricator from China, you buy your raw materials cheaper and your labor is cheaper. How can we compete?

Mrs. NAPOLITANO. Well, that also brings to mind the difference between the dollar which plays a major part in that.

Mr. LUFFY. Right. Absolutely. And you put them all together and again, it is not a level playing field. If there is open competition, they will always win.

Mrs. NAPOLITANO. One of the areas that has really played a big part in the resurgence of American economy, if you will, back in the 1930s, when there was recession and you had dams being built, bridges, highway construction, why is it we can't begin to look at transportation as being one of the cogs of rebuilding America's economy? Anybody?

Mr. CATOE. Thank you. You are preaching to the choir here. Absolutely.

Mrs. NAPOLITANO. But I want it for the record, sir.

[Laughter.]

Mr. CATOE. I support that. That is something that we can look at, and as we look to the future, with the growth here in the Metropolitan Washington area.

An example, today we are very quickly approaching capacity on our rail system. We will be able to add additional cars. That would give us some additional capacity. But as you look five, ten years out, the increase in the population growth and jobs will again exceed that capacity.

While we have said this is a system that is completed, because it is 106 miles, plus some additional miles in a plan for Dulles, there are many more corridors where we could enhance the transportation and the transit system in this area and around the Country. So if there is any proposal to have a public works program for transportation, I volunteer our agency and I volunteer this area, because the need will be there. There is a way of creating jobs and a way of creating an industry that will continue after the project is completed, if we revitalize the rail car industry, as well as the tracks and all the other components that we use on an ongoing basis.

Mrs. NAPOLITANO. Anyone else?

Mr. Luffy, you did make a statement that we cannot compete because of inequity, the cost or the price. Then what should we, or what can we do to sustain or improve our steel industry?

Mr. LUFFY. It is not going to happen without a steady revenue stream. Nobody is going to invest in a production facility unless you have a buyer for the product. And it is just not going to happen here, because our product will cost more.

The result is that you are not only losing industry and basic jobs, you are losing a lot of engineering talent. I happen to sit on the board of an engineering school. This is a major problem we talk about constantly, is that the engineering jobs are leaving with the manufacturing jobs. So you are losing, you have everybody wanting to be a consultant, and at the end of the day here, we are all going to consult with each other, we are not going to produce anything. Something has to be done to stem the tide. This is a good place to start, because it affects us.

Mrs. NAPOLITANO. Thank you.

Is it also a factor that we are not providing enough training for our young people to become the engineers?

Mr. LUFFY. This is a whole other issue. I can speak to it with some knowledge, having been involved in these programs. The issue is the attractiveness of an engineering education. We are as a Nation, if you turn on your television tonight, you will see seven shows about attorneys and not one about an engineer. The fact is that kids go to school and want to do everything but be an engineer.

Yet today the highest starting salaries out of any university are for engineering. This story isn't getting to kids. Unfortunately because of the high math requirement, you have to get kids in grade school. In high school, it is too late. Sixth or seventh grade, you have to get their attention.

There are a lot of privately funded programs ongoing to make this happen, but the Government is doing nothing to support it that I know of.

Mrs. NAPOLITANO. I hate to pick on you, but the next question, will not the open competition take all the projects away, even with higher investment expenditure?

Mr. LUFFY. Well, even with Buy America—I didn't understand the question.

Mrs. NAPOLITANO. The reference is to the foreign competition, because they can't underbid. The competition, because they will come in and it will be open, foreign companies can still come in and underbid, would that affect it?

Mr. LUFFY. Even with the Buy America in place, you are saying? Well, it depends on the limits of Buy America, obviously. Right now it is 25 percent higher. If that percentage was increased, no. As a matter of fact, it is pretty close, even at that, depending on the project. The complications here is that there are some jobs, even today, because there is a lot of capacity, say, in steel girder making, steel girders are the steel that is on the Wilson Bridge. There is a local supplier up in Lancaster, Pennsylvania, that is very competitive. Even with steel competition from a foreign country, High Steel is the name of the company, they would still be low, in my opinion, given an advantage of Buy America.

But there are other jobs like SAS and other major projects where 25 percent isn't enough. It needs to be higher.

Mrs. NAPOLITANO. Then would you suggest that that be part of the actual Federal requirement, is that certain areas that you know are a necessity have a higher percentage?

Mr. LUFFY. Yes, absolutely. I think we could define specific types of projects. But the percentage needs to be higher on almost all types of bridge structures.

Mrs. NAPOLITANO. Do you gentlemen agree?

Mr. TRENERY. If I could amplify on one comment. The 25 percent criteria between U.S. and foreign, we applaud that. But we have come across so many instances where that is not applied. We have the systems procurement approach being applied, which so-called levels the playing field, and therefore there is no 25 percent. I have had companies that are under our coalition that have lost contracts to a foreign firm that is producing overseas for less than 10 percent, because they will get a waiver or get put under a systems procurement. So therefore, the 25 percent differential doesn't even get to be applied.

So that is why we talk about leveling the playing field and making sure the regulations are fully applied to everybody.

Mr. LUFFY. I just want to add one thing. The point specifically on, say, the Oakland Bay Bridge project, where they break these projects up, if that percentage would have been applied across the whole project, it would have gone to a domestic fabricator.

Mrs. NAPOLITANO. Across the project, instead of being broken up and considered separately?

Mr. LUFFY. Yes, it had to be a 25 percent improvement across the whole project, well, then it would have become a domestic fabrication project. The arithmetic can get complicated, but it is a matter of, you are increasing the size of the denominator when you apply it across the whole project.

Mrs. NAPOLITANO. There are a lot of issues connected with it. When I was reading some of the material given to us to review prior to the hearing, it leaves a lot of questions unanswered. Because we continue to say to the American public, we are trying to improve our economy, trying to provide jobs, trying to provide more funding for job training, and there are no jobs. Somewhere along the line, we need to include the business sector, as you have indicated, together with education, together with companies who, I am sorry, the bottom line is the money, that we need to ensure that we protect our American jobs and that we continue having hearings where we will bring this to the forefront, so people understand what really is important to us and to this Country.

So with that, unless you have any further statements, gentlemen, we thank you for your participation and thank you very much for being so patient. This meeting is adjourned.

[Whereupon, at 5:40 p.m., the Subcommittee was adjourned.]

1

Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
Subcommittee on Highways and Transit
"Buy America"
4/24/07

--Thank you Mr. Chairman.

--As you know, Arizona is now the fastest growing state with pressing infrastructure needs.

--Our rapid growth has created an urgent need for highways.....a need that is out-pacing our ability to pay for them.

--According to the Arizona Department of Transportation, over the next 20 years, we will need at least $9 billion for just 12 of our major highway corridors....and these corridors represent just 36% of our state's total highway miles.

--Making matters worse, Arizona is a "donor-state." We send more money to the federal highway trust fund than we receive in the form of highway funding. At last count, we are receiving

just 90.5% of our fuel taxes back in the form of highway funding.

--With highway dollars in such short supply, clearly we need to figure out how to maximize them, without outsourcing or otherwise compromising our commitment to American industry.

--I look forward to hearing from today's witnesses about how we can best address these concerns.

--I yield back the balance of my time.

Statement of
J. Richard Capka, Administrator
Federal Highway Administration
United States Department of Transportation
Hearing on Buy America Requirements in Federal Highway and Transit Programs
Before the
Committee on Transportation and Infrastructure
Subcommittee on Highways and Transit
United States House of Representatives
April 24, 2007

Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee, thank you for the opportunity to testify today on the Federal Highway Administration's (FHWA) application of Buy America requirements in the Federal-aid highway program. FHWA supports Buy America's goal of ensuring that investments of Federal funds in infrastructure strengthen the national economy and benefit American workers and industry.

BACKGROUND

Federal domestic procurement requirements have been in existence since 1933. The original requirements, commonly referred to as the "Buy American" requirements, are found in sections 10a-10d of title 41, United States Code (U.S.C.), and apply only to direct Federal procurement activities. A direct Federal procurement occurs when a Federal government agency makes the purchase or awards a contract. Construction contracts done under the Federal Lands Highways program are examples of Federal direct procurements.

Section 401 of the Surface Transportation Assistance Act (STAA) of 1978 (Public Law 95-599) expanded domestic procurement coverage to the Federal-aid highway program by establishing "Buy America" requirements.

The current Buy America requirement is based on section 165 of the STAA of 1982 (Public Law 97-424), as amended. Section 165 initially covered cement, steel, and manufactured products. Due to concerns about an inadequate domestic supply of cement, section 165 was amended in 1983 to limit the coverage to steel materials and products only. Subsequently, section 1048(a) of the Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 (Public Law 102-240) amended section 165 to include iron. Further, section 1041(a) of ISTEA defined the action of applying a coating to a covered material and products (i.e., steel or iron) as a manufacturing process subject to Buy America requirements.

In August 2005, section 1903 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Public Law 109-59) codified the Buy America requirements as section 313 of title 23, U.S.C., but made no substantive changes to the requirements. FHWA's regulation implementing Buy America is found in 23 CFR 635.410. It applies to any construction contract that uses Federal-aid highway funds, including projects located on highways classified as local roads and rural minor collectors, transportation enhancement projects, and non-highway construction.

FHWA has issued two nationwide waivers of Buy America requirements: the first, in February of 1994, covered a list of specific ferryboat parts; and the second, in March of 1995, covered pig iron, scrap, raw alloy materials, and processed, pelletized, or reduced iron ore. These waivers are still in effect.

FHWA IMPLEMENTATION OF BUY AMERICA

Buy America requires that all steel or iron products that are permanently incorporated into a Federal-aid funded highway construction project be domestically manufactured.

Waivers of Buy America

Section 313(b) of title 23, U.S.C., provides that Buy America shall not apply: (1) if its application would be inconsistent with the public interest; (2) when such steel and iron materials or products are not produced in the United States in sufficient and reasonably available quantities, which are of a satisfactory quality; or (3) if inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent. FHWA implements this subsection with its waiver provision at 23 CFR 635.410(c).

Only under very limited circumstances will materials delivery delay be considered as grounds for a waiver. The cost differential between domestic and foreign products is also generally not grounds for a waiver. However, use of foreign steel or iron may be justified if an alternative bidding procedure, where the project is bid using one alternative based on foreign source products and one on domestic products, produces a domestic product bid 25 percent higher than the foreign product based bid. The 25 percent differential applies to the entire bid for the contract, not just the price differential of the steel.

The Buy America waiver process is initiated by the contracting agency--usually a State Department of Transportation (DOT). The State DOT submits a waiver request with supporting information to the FHWA Division Administrator sufficiently in advance of need (preferably during the preliminary engineering stage). For contract items greater than $50,000, FHWA Headquarters' concurrence is necessary, prior to the Division Administrator's approval. For contract items less than $50,000, the Division Administrator may approve the waiver without Headquarters' prior concurrence. The waiver request must include project number, project description, project cost, waiver item description, item cost, country of origin for the product, and reason for the waiver. It must also include an analysis of re-design of the project using alternate or approved equal domestic product.

FHWA review of any waiver request based on availability involves coordination with the appropriate industry associations to verify the non-availability of domestic suppliers for a given product. Depending on the product required, this could involve email or telephone coordination with several industry associations including the National Steel Bridge Alliance, the American Iron and Steel Institute, and the American Institute of Steel Construction. If the coordination with the industry associations confirms the State DOT's contention that there are no domestic suppliers for that material, FHWA Headquarters will provide informal concurrence in the waiver request to the Division Office, and the Division Administrator may grant the waiver. This informal system has allowed FHWA to verify or disprove the information provided by State DOTs in a timely and effective manner, without adverse effect on the delivery of Federal-aid construction projects.

The number of documented waiver requests is relatively small for the size of the Federal-aid highway program. For the period of January 2001 through February 2007, we processed an average of seven formal Buy America waiver requests per year. However, we receive numerous questions and correspondence on Buy America issues prior to a State's submittal of a formal request. In some cases our review process reveals a domestic supplier that a particular State may not have contacted, and we refer the State to that supplier. Where the need for a formal Buy America waiver request is resolved, informal requests are not officially tracked.

In recent years, the United States steel industry has gotten stronger. Thus, we anticipate that the number of Buy America waivers will decrease, as domestic manufacturers will be better able to meet a greater variety of specialized needs for steel.

Application of Buy America

Buy America requirements apply on a contract-by-contract basis, based on requirements in title 23, U.S.C., governing the Federal-aid obligation process. "Project" is defined in title 23 as "[a]n undertaking to construct a particular portion of a highway, or if the context so implies, the particular portion of a highway so constructed or any other undertaking eligible for assistance under [title 23, United States Code]." Federal funds are obligated to a project through the execution of a specific project agreement. Once a project agreement is executed, the State will then proceed to award a construction contract for the project work covered by the project agreement through competitive bidding. Thus, for purposes of obligating Federal funds to a project under the Federal-aid highway program, the terms "project" and "contract" are synonymous. For each Federal-aid contract that is let by the State, there is a corresponding project agreement describing the work and scope of the project being constructed. As a result, some projects, in a general sense of the word "project," may be comprised of multiple contracts. For example, a bridge replacement project may have different contracts for the different components of the structure, such as the substructure, superstructure, and deck. Each of these individual contracts, for purposes of the Federal-aid highway program, is considered to be an individual project.

The Buy America statute, now codified at 23 U.S.C. 313, is specifically tailored to the project obligation requirements of the Federal-aid highway program. Section 313 provides:

> Notwithstanding any other provision of law, the Secretary of Transportation shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act of 1982 (96 Stat. 2097) or this title and administered by the Department of Transportation,

unless steel, iron, and manufactured products used in such project are produced in the United States (emphasis added).

Since each Federal-aid contract is considered to be an individual project under the Federal-aid process, the application of Buy America is also on a contract-by-contract basis depending on whether Federal funds are to be used in the contract. Buy America only applies when the State uses Federal funds in a construction contract. When there is no Federal-aid assistance in a particular contract, FHWA's Buy America requirements do not apply, nor do other similar, project-specific, Federal requirements. Even if Federal funds are used in one project that constitutes a component of a series of projects, that does not mean every project in the series is subject to Federal requirements.

Moreover, section 145 of title 23 provides for the sovereign rights of a State to decide which projects will be Federally financed. The State DOTs have the discretion to develop transportation projects and programs, including decisions regarding contract scope and contract size, and State DOTs have always had the discretion of funding a given construction contract with or without Federal-aid.

States have many reasons to divide a project into a number of contracts. The decision may be determined by the amount of funding currently available for use, or the State may want to insure the availability of contracts suitable in size for a small business to carry out.

If a law were enacted to require the application of Buy America requirements to all contracts of, for example, a large bridge project (even if only one of the contracts was Federally funded), this would result in the imposition of FHWA contracting requirements on State-funded contracts, and invoke Federal involvement and oversight of State-funded contracts, no matter how little Federal funding was actually used. This would also create a conflict with the sovereign rights principles in title 23, mentioned above.

SECTION 1928(1) OF SAFETEA-LU

FHWA has been asked whether section 1928(1) of SAFETEA-LU requires the Agency to change its implementation of Buy America requirements. Section 1928(1) of SAFETEA-LU, provides that

> [i]t is the sense of Congress that – (1) the Buy America test required by section 165 of the Surface Transportation Assistance Act of 1982 (23 U.S.C. 101 note) needs to be applied to an entire bridge project and not only to the component parts of such project.

My counsel informs me that a "sense of Congress" provision is often used to provide guidance or direction to an Executive Branch agency for the agency to consider as it carries out the law. In this case, as in many others, the sense of Congress provision must be read in conjunction with the underlying Buy America provision, 23 U.S.C. 313.

It is significant that section 313 is clear on its face, and has been interpreted consistently for many years. In our view, the words of section 313 require us to apply the Buy America requirement on a contract-by-contact basis. Inasmuch as section 1928(l) expresses a sense of Congress that is contrary to section 313, we are compelled to follow the requirements of section 313.

FHWA is very respectful of Congressional direction, but the form in which the language in section 1928(1) was adopted is significant. According to my legal counsel, the case law is clear that a "sense of Congress" provision in enacted legislation is guidance and not positive, enforceable law. If Congress wanted section 1928(1) to be mandatory, it could have chosen to adopt a statute but, instead, chose not to do so. In section 1903 of SAFETEA-LU, Congress codified the Buy America requirements without any substantive change and without acknowledging the "sense of Congress" provision under section 1928(1). The "sense of Congress" provision does not amend the actual statutory text and so does not provide a basis for FHWA to change its long-standing practices in implementing the Buy America requirements and, indeed, application of all Federal requirements to Federal-aid highway funded projects.

If enacted as positive, enforceable law, this section would require a major departure from FHWA's long-standing application of Buy America. Section 1928 would require the application of Buy America requirements to bridge contracts involving no Federal funds merely because the State chose to use Federal funds in another contract involved in the construction of the bridge.

CONCLUSION

Since Buy America was enacted, FHWA has consistently ensured that the States apply its provisions whenever Federal-aid funds are obligated on a project contract. FHWA strongly supports the aims of the Buy America requirements for strengthening the national economy.

Mr. Chairman, members, thank you for this opportunity to testify. I will be pleased to answer any questions you may have.

TESTIMONY OF JOHN B. CATOE, JR., GENERAL MANAGER
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY
BEFORE THE
SUBCOMMITTEE ON HIGHWAYS & TRANSIT OF THE
HOUSE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
APRIL 24, 2007

Good afternoon, Mr. Chairman and Members of the Committee. Thank you very much for the opportunity to testify today on the experience of the Washington Metropolitan Area Transit Authority (WMATA) with the Buy America regulations under the purview of the Federal Transit Administration (FTA). As an FTA grantee, WMATA includes the Buy America requirements in all procurements over $100,000 that utilize federal funding. We appreciate the interest of Congress in ensuring a healthy U.S. transit manufacturing industry to supply the needs of the many U.S. transit systems across the country, so that we may do our job of getting people where they need to go quickly, safely and in an environmentally friendly manner.

WMATA BACKGROUND

By way of background, WMATA was created in 1967 as an Interstate Compact agency through enactment of legislation by the U.S. Congress, and by the Commonwealth of Virginia, the State of Maryland, and the District of Columbia. WMATA is the largest mass transit provider in the Washington, D.C. metropolitan area and the second largest subway and fifth largest bus system nationally. "America's Transit System" serves a population of over 3.5 million within a 1,500 square-mile area. On average, we provide 720,000 rail trips, 439,000 bus trips, and 4,400 paratransit trips every weekday. The Metrorail system operates a fleet of 964 rail cars on over 106 miles of rail, with 86 stations, and the Metrobus system operates a fleet of 1,525 buses in the District of Columbia, Maryland and Virginia.

THE CHANGING MARKETPLACE

The rail car industry has changed greatly since WMATA procured its first 300 rail cars in 1976 from a company in California, a company which is no longer in the transit business. Over the decades American manufacturers of rail cars and many rail car components have gone out of business, with their assets and/or designs acquired by manufacturers based in other countries. Today there are no U.S.-owned manufacturers of rapid transit or heavy rail cars, the type used on subway systems such as Metrorail.

Similarly, the bus manufacturing industry has changed since WMATA acquired four regional bus systems in 1973. Today there is only one U.S.-owned manufacturer of transit buses.

Buy America legislation and regulations have helped maintain American jobs in the rail car and bus industries, including the manufacture of component parts and final assembly.

WMATA AND BUY AMERICA

Historically, the Buy America regulations apply to a wide variety of WMATA procurements, including steel and manufactured goods and rolling stock (better known as railcars and buses). The Buy America regulations distinguish between procurements for steel, iron and manufactured products and for rolling stock. For example, when WMATA procures steel for use in the construction and maintenance of WMATA facilities and track work, the contractor must certify that the steel is of one hundred percent (100%) domestic origin. On the other hand, when procuring buses and rail cars, the contractor must certify that more than 60 percent of the components (by cost) will be produced in the United States and that final assembly takes place in the United States. WMATA conducts both pre-award and post-delivery audits to ensure that the rolling stock meets the Buy America requirements.

Subsequent to its initial rail car order, WMATA has purchased rail cars from companies based in Italy, Spain, and France. Each of these procurements fully complied with the Buy America requirements, with 60 percent of the components of domestic origin and the final assembly performed in facilities in the U.S. – in New York State and in Maryland. In WMATA's last railcar procurement, component parts were purchased from nearly 20 states across the country. For example, the floor heaters were from a company in New York City, the couplers from a company in North Carolina, and windows from a company in Pennsylvania.

Since 2001, WMATA bus procurements have included 345 low floor buses from a Canadian-owned company, 21 articulated buses from a (then) German-owned company, and 250 buses from another German-owned company. Again, each of these procurements fully complied with the Buy America requirements, with final assembly performed in facilities in Minnesota, Colorado, and New York State. WMATA currently has an active request for proposal for 500 buses.

ISSUES RAISED IN SAFETEA-LU AND THE SUBSEQUENT FTA RULEMAKING

A key issue raised by Congress in the SAFETEA-LU legislation is the definition of "end product," which the FTA addresses in its proposed changes to the Buy America regulations. WMATA believes that it is important that the final FTA regulations provide clarity, consistency and predictability with regard to this issue.

We believe, as do many transit agencies, that by removing the so-called "shifting" methodology from the regulation, there will be more predictability and competition in the marketplace benefiting both transit agencies and manufacturers. The representative list of end products to be included in the final regulation will have significant long-term consequences on the procurement process, including the extent of competition, time to procure items and cost to transit agencies. We would encourage FTA to provide a period of public comment on any revisions made to its draft list prior to finalizing the

Buy America rule, and to revisit this list periodically as technology and the marketplace continue to change.

WMATA'S EXPERIENCE WITH FTA ON BUY AMERICA ISSUES

Since Buy America was enacted, WMATA has included the requirements in its procurement documents and has been able to purchase equipment and materials within the parameters of Buy America regulations. When questions arise, WMATA staff communicates with the FTA, and the FTA is always an excellent source for assistance in applying the Buy America regulations. In the few instances where WMATA requested a waiver of the Buy America requirements, usually due to non-availability of a domestic source, the FTA has quickly acted upon WMATA's request. I would characterize our communications and working relationship with the FTA on Buy America issues as good.

WMATA also appreciates the opportunities provided by FTA to comment on the two notices of proposed rulemaking and the detailed treatment of the public comments in the subsequent *Federal Register* notices.

CLOSING

WMATA commends the FTA on its efforts to update the Buy America regulations and to solicit and incorporate input from the transit industry. These regulations are important not only to the manufacturing sector and its employees, but also to transit authorities and transit riders. We all have a vested interest in maintaining a healthy transit supply industry. I also commend the House Transportation and Infrastructure Committee and this subcommittee for its continuing efforts to provide appropriate legislation and oversight to ensure that we can continue to keep America moving on public transportation. Thank you again for the opportunity to appear before you today. I would be happy to answer any questions.

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Governor

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Flex your power!
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STATEMENT OF WILL KEMPTON
DIRECTOR
CALIFORNIA DEPARTMENT OF TRANSPORTATION (DEPARTMENT)
BEFORE THE
HOUSE TRANSPORTATION AND INFRASTRUCTURE COMMITTEE
SUBCOMMITTEE ON HIGHWAYS AND TRANSIT

APRIL 24, 2007

Introduction
Mr. Chairman, members of the Subcommittee:

My name is will Kempton. I am the Director of the California Department of Transportation, also known as Caltrans. I would like to thank you for the invitation to testify before you today.

As director of Caltrans, I am responsible for a budget of 12 billion dollars, an organization of more than 22,000 employees, and a transportation system that among other things, includes 50,000 miles of State highways, two of the five largest transit systems in the nation, three Amtrak routes and the two busiest ports in the United States. California is growing rapidly, by 2020 its population is expected to increase by 29 percent to 44 million people, annual vehicle miles traveled will increase by 38 percent to 475 billion miles and trade volumes through its ports will more than double. Responding to this growth is a priority for the State. Our objectives are to protect the existing investment, fuel the economy, and enhance the quality of life of our citizens. Achieving this will require a substantial effort. Governor Arnold Schwarzenegger's Strategic Growth Plan calls for investing 107 billion dollars over the next ten years. We are gearing up our program to accomplish this objective by expanding our contracting, labor and materials capacity.

The Department has just achieved a milestone in its history, having reached the 10 billion dollar mark in the value of contracts currently under construction. In addition, California voters have authorized the issuance of 19.925 billion dollars in bonds to upgrade the State's transportation system. As welcome as these new dollars are, they are just a down payment on the significant infrastructure needs in the State. Needs that remain greater than available funding.

The participation of the federal government has been, and will continue to be a key element in the success of the transportation program in the State of California. The Department strives to maintain a strong working relationship with the federal government, a critical partner in the movement of people and goods in California.

Federal Participation in the Current State Highway Program and Buy America Requirements

You have asked me to comment on the State's response to the Buy America provisions of the federal program. California's State Transportation Improvement Program and the State Highway Operation and Protection Program will allocate 2.89 billion dollars in highway work during the State Fiscal Year 2006-2007. This includes 1.6 billion dollars in federal contributions. The value of the State portion of these programs will increase significantly next year because of the Proposition 1B Bond Program.

Buy America requirements are included in construction contracts for all federally funded State highway projects, and requests for waivers are few in number. Over the last five years, the Department was granted a total of six Buy America waivers for three projects. All of these waivers relate to specialty items with questionable domestic availability. Two of these waivers involve the Toll Bridge Seismic Retrofit Program, which I will discuss in more detail later. It is important to note that even when waivers are requested and granted, the waivers are limited in scope, and Buy America requirements continues to apply to the majority of work under the construction contracts in which waivers are granted.

Buy America requirements are not included in California highway construction contracts that have no federal funding. The California legislature has not authorized the use of Buy America requirements in highway construction contracts solely funded by State and local dollars. The number of such contracts is increasing every year. Highway infrastructure needs are mounting, but available State dollars have remained relatively constant. That will change over the short term due to the availability of bond funding. However local funding, through sales tax measures directed at specific transportation improvements, is steadily increasing and combined State and local dollars regularly exceed the amount required to leverage available federal obligation authority. This results in an increasing number of highway construction contracts that do not have federal funding, and therefore have no Buy America requirements associated with the process.

However, the lack of a Buy America requirement in non-federal projects does not equate to non-use of American goods. For a conventional State highway project, domestic sources are likely for most materials, regardless of the presence or lack of a Buy America requirement in the construction contract. For example, reinforcing steel and steel piles used in State highway projects are usually sourced from a domestic supplier, as the cost of domestic sources remains competitive with international sources.

The Toll Bridge Seismic Retrofit Program

The impact of Buy America requirements can be seen in highway construction involving major steel structures. The State is the owner and operator of seven long span toll bridges, and many of these bridges use steel for major structural elements. This is in addition to reinforcing steel used in concrete elements of the bridges. These seven bridges are located in the San Francisco Bay Area. Over the past 12 years, the Department has been engaged in a major program involving construction on these bridges: The Toll Bridge Seismic Retrofit Program.

The Toll Bridge Seismic Retrofit Program involves an aggressive effort to retrofit the Department's toll bridges to address their vulnerability to earthquakes. In some cases, retrofit has been achieved through modifications of the existing bridges, while in other cases complete replacement of the bridges has been required.

Approximately 500 million dollars in federal funds have supported various parts of this 8.7 billion dollar undertaking. Federal funds represent around six percent of total funding for the program. Buy America requirements have been included in all construction contracts that have any amount of federal funding.

The seismic retrofit of the San Francisco-Oakland Bay Bridge provides a clear example of the effect of Buy America requirements on a construction contract involving major structural steel elements.

The Bay Bridge is the backbone of the regional transportation network in the Bay Area. It is the third busiest bridge in this country with average daily traffic of 280,000 vehicles. There are three major components to the Bay Bridge – the West Approach to the bridge, located in San Francisco, the West Span, a series of suspension spans between San Francisco and Yerba Buena Island, and the East Span, a combination of steel cantilever and steel truss spans between Yerba Buena Island and Oakland.

The East Span was seriously damaged in the 1989 Loma Prieta earthquake. This was a magnitude 6.9 earthquake with an epicenter near the San Andreas Fault, more than 60 miles away from the East Span. The Bay Bridge was closed for six weeks, with daily life and the regional economy experiencing serious disruption. Following this event the vulnerability of the East Span to another earthquake of similar magnitude was the motivating factor that initiated the Toll Bridge Seismic Retrofit Program. Without attention to this effort, the East Span is likely to suffer large-scale failure in the event of a major earthquake in the region.

The Department determined that replacement of the East Span was necessary to address the identified seismic vulnerability. This vulnerability is of great concern, as there is a high probability of a major earthquake striking the Bay Area in the near future. The United States Geological Survey estimates that there is a 62 percent probability of a major earthquake in the Bay Area in the next 25 years.

As part of the retrofit strategy, a design for a new East Span bridge was developed. From east to west, the new design begins in Oakland with a mile and one-half long concrete viaduct leading to a unique quarter-mile long self-anchored suspension bridge that connects to another quarter-mile long concrete viaduct on Yerba Buena Island. Construction of the East Span has been underway since 2002. Rapid completion of this project is one of the Department's highest priorities. The construction contract for the self-anchored suspension bridge was advertised in 2003 with a Buy America requirement included in the contract. Bids for the self-anchored suspension bridge were required to include two estimates: a cost utilizing domestic steel and a cost utilizing international steel. Only one bid was received, with a cost of 1.8 billion dollars utilizing domestic steel, and 1.4 billion dollars utilizing international steel. The Department was unable to award the contract as the costs for both alternatives were well in excess of available funding. However, the bid results clearly indicated the disparity that sometimes exists for domestic products versus foreign alternatives.

The construction community provided input that indicated the Buy America requirement had the effect of discouraging bidding on the self-anchored suspension bridge contract. Contractors believed the technical complexity of the steel elements of the self-anchored suspension bridge, and the limited availability of major domestic steel fabricators introduced a great deal of risk into bidding on the contract.

Additional funding for the program was identified in 2005. Because of the urgency associated with the project, a decision was made to reduce the risks identified by the construction community by eliminating federal funding from the self-anchored suspension bridge contract and readvertising the project without a Buy America requirement. Two bids were received in 2006. The American Bridge Company of Pittsburgh was the successful low bidder with a bid of 1.4 billion dollars. Steel fabrication for the self-anchored suspension bridge will occur in China, Korea, England and the United States.

It is interesting to note that, on completion of the entire East Span, the majority of the steel tonnage included in the project will still be domestic steel, as the quantity of domestically supplied reinforcing steel and steel piles will be greater than the quantity of major structural steel elements. Overall, our program will continue to require use of American products when federal funds are involved. Moreover, our experience on jobs working with State funds demonstrates that market forces continue to dictate a high level of usage of American products in these projects as well. Nonetheless, if special requirements for certain projects result in a distinct advantage for the use of foreign products primarily in the area of cost or production differentials, it may be necessary from a fiduciary perspective to use foreign suppliers for certain project work. This is good for us and it is good for the national economy.

Conclusion

Mr. Chairman, thank you again for the opportunity to appear before your Subcommittee. I would be happy to answer any questions.

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BUY AMERICA

(Federal Highway Administration)

THURSDAY, MARCH 31, 1988

House of Representatives,
Subcommittee on Investigations and Oversight,
Committee on Public Works and Transportation,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:00 a.m., in room 2167, Rayburn House Office Building, Hon. James L. Oberstar (chairman of the subcommittee) presiding.

Mr. Oberstar. The Subcommittee on Investigations and Oversight will come to order.

It was a little over five years ago, around 1:00 a.m., in the Capitol, as the House and Senate conferees met to iron out the last remaining item in the House-Senate Conference on the Federal Aid Highway Act Authorization. The Surface Transportation Assistance Act included a five percent increase in the fuel tax, and extended for five years, the Federal Aid Highway program. The last remaining item was debated in a little room off the Senate floor, where the House-Senate conferees were meeting.

That last item was the Buy America provision.

It was the final issue to be resolved. The Senate conferees were standing firm for elimination of the House provision which was 100 percent Buy America, and the House conferees were prepared to offer a compromise. The compromise offered was, if all the steel in the Federal Aid Highway program was to be American made steel, unless foreign steel could come in 26 percent below the American price.

The reason that percentage was picked was that just a few weeks previously, the International Trade Commission had ruled that the Japanese and European steel makers were subsidizing their exports to the United States to the tune of 26 percent below domestic market price. So, this Member picked that number out of the ITC report and offered it to the Senate conferees. Our beloved late Chairman Jim Howard was there, and colleagues Doug Applegate and John Paul Hammerschmidt. The Senate conferees swallowed hard and accepted the House offer—and we had a bill.

Today we meet to review the benefits and the effects of implementation of that provision in the Federal Aid Highway Act. This has been one of the signal victories for steel, in Federal legislation and programs, in the last six years. Buy America was an issue very vigorously promoted by the Congressional Steel Caucus, and their chairman, principal spokesman and vigorous advocate is our lead-off witness this morning: Chairman Joseph Gaydos.

This hearing is the first in a series of three hearings on the Buy America provisions, now in law, that come under the jurisdiction of the House Public Works and Transportation Committee.

We're going to hear today about the impact of that legislation on the Federal Aid Highway Program. Next month, we're going to look at the Department of Transportation's enforcement of Buy America in the mass transit program. And the final hearing of the series will be a look at how the Corps of Engineers is administering its responsibilities under the Corps Water Resources Development program and the Buy America provision in that program.

These three hearings will show a spectrum of Government agency response to the Buy America language. This will be a very good picture in the Federal Aid Highway Program; a very questionable picture in the mass transit program, where the law in fact is being circumvented; and a potentially very dangerous picture in the Buy America Act in the Corps of Engineers program, where there is deliberate evasion of the Buy America Act.

The result of these hearings, we hope, will be a new set of directions for the Federal agencies administering the Buy America Act. We want to find out what is strong and what is weak, what needs to be strengthened and what needs to be cured. How can this program be made more effective? To get to that determination, we need to know the facts.

What are the economic consequences for the steel industry, and those it employs, in the communities where steel remains. What are the consequences for the National economy and for the competitiveness of the American steel industry? We have seen some setbacks and misdirection in the administration of the Federal Buy America Act. Highway and Transit agencies have created conflicting regulatory climates.

For example, a lamppost that complies with Buy America provision if it is used in the Federal Aid Highway program, is not in compliance with Buy America provisions, if it is used on a transit project.

We cannot understand these inconsistencies. We'll try to get at why they exist, and how to cure them.

Compliance has been a mixed bag. Too often the process is operated in a kind of fishbowl, with enforcement mechanisms that leave no middle ground between "jawboning" on the one hand and contractor debarment on the other. Federal agencies that are unwilling to "jawbone" are also unwilling to put contractors out of business. There has to be a middle ground between these two extremes. We hope that the witnesses will show the committee, or offer the committee some suggestions, as to how to find that middle ground and a more effective enforcement of the Buy America language.

Industries bidding on Federal highway and transit projects have to get the unambiguous and clear message that failure to comply with Buy America will not be tolerated and will be costly to those who violate its provisions.

In the United States, highway and bridge programs consume some 2.5 million tons of steel annually. That's about four percent of all domestically produced steel. The multiplier effect is even more significant than the consumption of steel in the Federal Aid Highway program.

In new highway construction and transit programs, there is a significant multiplier effect on other industries from the Buy America provision that requires U.S. steel to be used in those programs. The Congressional Research Service, at the request of this subcommittee, indicated that in fiscal year 1988, each additional dollar spent on new highway construction and transit programs translates into some \$2.36 in highway and \$1.80 in direct and indirect domestic purchases, respectively. Each additional billion dollars spent on these programs generates some 51,600 more jobs for highway industries and 53,600 more for transit industries.

In other words, we are returning jobs, payroll taxes, to the domestic industry and the domestic economy.

Further, it should be noted that each million tons of steel produced domestically generates jobs that pay Social Security taxes, retirement benefits, contributions into unemployment compensation funds, and Trade Adjustment Assistance programs. Each 1 million tons of steel imported into the United States does not make that contribution. In fact, it subtracts from our Social Security, unemployment compensation and Trade Adjustment programs, and causes an outlay of dollars from the Federal Treasury to compensate for the jobs lost.

We in Congress had to be sensitive to the needs of the domestic economy and the requirements for an evenhanded and effective enforcement of the Buy America provision. That will be the purpose of these hearings today.

Mr. OBERSTAR. The Chair now recognizes the gentleman from Pennsylvania who has played a very, very strong and vigorous role in bringing us to the point of these hearings today.

Mr. Clinger?

Mr. CLINGER. Thank you very much, Mr. Chairman.

As you've already mentioned, this is the first in a series of hearings on the Buy America provisions and its application to programs under the jurisdiction of the Public Works and Transportation Committee.

While the notion of an open market has always been a basic tenet of this Country, and we always promote the idea of free trade, this committee has long realized that many foreign corporations doing business here possess a competitive advantage over domestic corporations because of cheap labor costs and because of governmental and financial subsidies and support.

The Public Works Committee cited the unfair competitive advantage enjoyed by many foreign corporations attempting to enter the American highway and transit market as the prime motive for the inclusion of the Buy America provision in the legislation that was eventually enacted as the Surface Transportation Assistance Act of 1978. Subsequent enactments, while modifying certain aspects of the underlying legislation, have preserved this central theme in the bill.

In the decades since Buy America requirements were first applied to surface transportation projects, market saturation at home and the rising U.S. dollar made the American market appear even more attractive and led to an even further influx of foreign competitors.

This continued encroachment, along with our huge trade deficit, is why the aim of Buy America is of continuing importance and why this review is so timely.

Certainly recent problems of interpretation of the Buy America provisions and the proposed revision of the rules applied to Corps of Engineers procurements indicate that current programs, or at least the rules under which they operate, may not be as clear cut as we once thought. Today's hearing will focus on the Buy America provision of the Surface Transportation Assistance Act of 1982, as applied to the Federal Highway program.

We will hear testimony on all aspects of the legislative requirements, how those requirements are carried out by FHWA, what problems exist, and how compliance with those requirements is monitored.

We'll also hear about the impact of the program on American industry, particularly the steel industry. This is of particular interest to me and to Chairman Gaydos as representatives of major steel producing states. The testimony we receive both today and in future hearings, I hope and trust, will help us to gain a better understanding of Buy America provisions, and how those provisions might best be utilized in the future.

Mr. CLINGER. Mr. Chairman, I join you in welcoming our colleague Chairman Gaydos, a fellow Pennsylvanian, who has been such a forceful and articulate advocate for the concerns of steel and for the necessity of maintaining a strong steel production capability in this Country.

We're delighted to have you with us, Chairman Gaydos.

Mr. GAYDOS. Thank you, Mr. Clinger.

Mr. OBERSTAR. Do you have an opening statement, Mr. Towns?

Mr. TOWNS. I really don't have an opening statement as such, but I would like to welcome my colleague Congressman Gaydos from Pennsylvania, one of the most respected members of this body, here this morning.

I'd like to say that unless the Federal Government gets involved in this process, it really won't work. We have to encourage and urge them to do so, and do so right away.

Mr. OBERSTAR. Thank you, Mr. Towns.

The gentlewoman from Maryland?

Mrs. BENTLEY. Thank you, Mr. Chairman.

Mr. Chairman, I'm going to ask unanimous consent to include my whole statement. I will not repeat the parts that you and Mr. Clinger already have referred to.

Mr. OBERSTAR. Without objection. It will be included in the record this morning.

Mrs. BENTLEY. Before I welcome Mr. Gaydos—as a member of the steel caucus we have worked very closely together and I have tremendous respect for him. I hope though, Mr. Chairman, that in the next segment of our hearings you will broaden the scope beyond steel.

As you know, I've been trying to get American cement included into in the requirements. I think that this is an industry that we need to look at as well. I'd appreciate it if you'd consider that.

I want to point out that just yesterday, before the Republican Platform Committee, I was testifying on the condition of the American industrial base. That's what all of this is part of. I quoted from an article in the Wall Street Journal for March 14. That article quotes a senior Pentagon official warning that in a major conflict, we would have to subcontract the war to Japan.

I think that's a very, very frightening statement. It's shocking, but it should not be surprising, considering the impact of targeting and dumping of product by foreign producers on our domestic industries. The loss of domestic industrial capacity also means the loss of defense production capacity. The steel mill that closes down because of low demand for U.S. cars and for low demand for highways, that steel mill is also needed to make steel for tanks and planes, jeeps and trucks.

This is all part of what we've been talking about: restoring our industrial base. This fact cannot be accomplished by just one political party. This is a task that demands a commitment by both the majority and minority parties in Congress. During the 100th Congress, we are faced with a number of serious problems and one of these is a trade deficit which contributes to the weakening domestic industrial base.

I am pleased to see that along with Congressman Gaydos, we'll have representatives of the steel industry. My home Congressional district includes Bethlehem Steel's Sparrows Point plant and shipyard. In recent years, Baltimore has experienced a reduction in steel production in America.

We need to reverse industrial closures, but it does involve many, many other industries, Mr. Chairman, and we must touch on those. Once again, Mr. Gaydos, I'm looking forward to your testimony.

[Mrs. Bentley's statement follows:]

OPENING STATEMENT OF REPRESENTATIVE HELEN DELICH BENTLEY BEFORE THE SUBCOMMITTEE ON INVESTIGATIONS AND OVERSIGHT, MARCH 31, 1988

Chairman Oberstar and Ranking Minority Member Mr. Clinger, I applaud your leadership for calling this subcommittee to review "Buy America" provisions administered by the Federal Highway Administration. Successful Implementation of these laws are critically important to the very survival of some of America's most basic industries.

Mr. Chairman, I ask that in future subcommittee hearings such as the one here today, we will focus on the many other components purchased by the U.S. Government other than steel. Steel is an important material covered by the "Buy America" provisions and must be effectively implemented, but steel is only one of the many domestic products that should be purchased by U.S. tax dollars when using federal funded projects.

Since my first term in Congress, I have been a strong supporter of "Buy America" provisions in many forms of federal legislation under consideration. These "Buy America" provisions are necessary to help our domestic industries compete with heavily subsidized foreign competition, nontariff failures and restrictive foreign policies. Thousands of American jobs have been lost or are in jeopardy as a result of unfair foreign competition, and many of these are tied to the Federal Highway program.

I remember very well the salesmanship that went into adding that 5 cents a gallon to the gasoline tax, and the whole thrust of it was we can rebuild American highways and American bridges, and we will be putting some 350,000 Americans back to work. Well, not if we keep buying all of the supplies from overseas.

All U.S. Government purchases should be limited to only materials made in America by American labor. I am convinced that every cent of our U.S. taxpayers' dollars should be spent in this country. This is necessary if we are to continue to have a strong tax base.

It was during this past Congress, the 99th, and also in the 100th Congress was successful in including in the Federal Highway Reauthorization language required "Buy America" provisions pertaining to the use of cement on of our Federal highways. This language was voted on and overwhelmingly by the House in consideration of the bill. Unfortunately, the other body delete the Bentley language.

Today, we have the Federal Highway program enforcement without U.S. produced cement. The cement industry in America is one industry compete unfairly with foreign cement. Illegal dumping of foreign products to exist, and the U.S. cement industry continues to decline. This is only one of America's declining domestic industries, and our laws are not designed it from happening.

Mr. Chairman this sort of problem must not be allowed to continue.

Yesterday, I testified before the Republican platform committee on the of the American industrial base. In my testimony, I cited the growing the Department of Defense on foreign component parts for weapons systems. *Street Journal* article of March 14, 1988, quoted a senior Pentagon official that in a major conflict, "we're going to subcontract the war to Japan."

This statement can best be described as "shocking"! It should not be considering the impact of targeting and dumping of product by foreign our domestic industries. The loss of domestic industrial capacity also means of defense production capacity. The steel mill that closes down because demand for U.S. cars, also is needed to make steel for tanks and planes, trucks.

Restoring our industrial base cannot be accomplished by one political is a task that demands the commitment of both the majority and minority Congress. During the 100th Congress, we are faced with a number of serious lems. One of these is the trade deficit which contributes to the weakening industrial base.

Because the trade deficit with foreign nations is at an all time high, our policies must be written and successfully implemented to combat this using foreign goods for federally assisted projects. Japan and Canada happen two of the leading nations contributing to that trade deficit, and these two volved in selling many of the components used in highway construction.

I am pleased to see that testifying here today are representatives of the dustry. My home congressional district includes the Bethlehem Steel Corp Sparrows Point Steel Mill and Shipyard. Baltimore has experienced the steel production in America. Both Bethlehem's Key Highway repair yard and land Shipbuilding's Fairfield facility have been forced to close.

Industrial closings such as these must be reversed. For this very reason, perative that "Buy America" provisions are effectively implemented by our agencies.

I look forward to the testimony presented here today and offer my full tion in carefully examining the problems involved with application of the America" provisions. Chairman Oberstar and Mr. Clinger, I commend you ranging this hearing today.

Mr. OBERSTAR. Thank you for those opening remarks.

We shall have a focus on the issue that the gentlewoman

The first witness this morning is the gentleman from Pennsylvania, Chairman of the Congressional Steel Caucus, Mr. Gaydos, has been a driving force in legislation to protect the domestic industry from unfair foreign competition, Government-owned, ernment-subsidized competition, to protected by domestic countries that seek to discriminate against U.S. steel products gentleman has vigorously pushed for enforcement of existing eral laws that have been put in place to prevent unfair tion. This subcommittee is responsive to the gentleman's long ing concerns. This is the first major hearing in the Congress on Buy America provisions, and we particularly wanted to have gentleman from Pennsylvania as the lead-off witness in recognition of his longstanding, vigorous championship of American steel.

TESTIMONY OF HON. JOSEPH M. GAYDOS, A REPRESENTATIVE IN CONGRESS FROM PENNSYLVANIA, AND CHAIRMAN, CONGRESSIONAL STEEL CAUCUS

Mr. GAYDOS. I want to thank the Chairman of this illustrious subcommittee. He is one who is personally familiar with what the Steel Caucus has done over the years. I know that Mr. Towns is in full sympathy and support of what we stand for, including Mr. Clinger, and in particular Mrs. Bentley. They've been fighting our battle with us over the years.

It's very reassuring to know that we have the Chairman of this great subcommittee, who I think displayed his negotiating qualities some five or six years ago in the incident that he very hurriedly referred to, when we put in the first Surface Transportation Act's Buy America provision. There were so many people in concert that had a great desire to destroy the Buy America concept and completely strip it from the legislation. At that time, I believe, he was wearing two hats. He represented the committee and also the number one ambassador and representative of the Steel Caucus during that one or two o'clock debacle at the time.

Maybe this is the time to do it. I want to thank him publicly and as a matter of record for his persistence at that time in forcing the inclusion of Buy America into that Act. Even more important than that, one thing was getting it into the act, but making sure the Administration enforces it is another. That's where a lot of our difficulties lie today. We can go and make reference to the Defense Department and all the Buy Americas we have in there: indirect, direct, all kinds of limitations. The Administration and those responsible are very reluctant, in many instances, and skirt or ignore completely the fundamental Buy America provisions.

In the maritime industry, the same thing occurs. There are always those individuals wanting to get around the limitations of Buy America. The FAA now is the most recent example. They are now seriously considering, allowing all the maintenance and repair of American airplanes and all of the ramifications in foreign countries.

All those things seem to fall into the same category whereby again the necessity and the importance of individuals like the Chairman and the members I mentioned on this committee is shown. We call upon them to make sure that after we have at least the fundamentals in place, we can make sure that the Administration—regardless of which Administration—follows the letter of the law. That's the most important thing.

But may I have, Mr. Chairman—at this time I'd like to introduce to the committee, and put on record, the Executive Director of the Steel Caucus, Mr. Jack Andresen, who is here with me today.

I don't have to go into any extended explanations as to what the Steel Caucus stands for. You've done a magnificent job in that respect.

My statement is relatively short, Mr. Chairman. I know you have a full schedule——

Mr. OBERSTAR. We'd like to have you deliver the statement.

Mr. GAYDOS. Yes. I'll just read some excerpts from it, because I believe you have other things to do.

Good morning, Mr. Chairman. On behalf of the Steel Caucus, I want to thank you and the members of the committee for inviting me as the Chairman of the Congressional Steel Caucus to testify in support of keeping the Buy America provision in the Surface Transportation Act.

Since 1977, the Surface Transportation Act has been a catalyst for economic well-being through its assistance in the Federal Highway Administration's Bridge and Highway program. Incidentally, Mr. Chairman, all of the facts and figures that I cite and refer to in this prepared statement find their source in the CRS and the [illegible].

Currently, between $13 billion and $14 billion are spent on repairing and replacing Federal highways and bridges. That work calls for a lot of steel. Because of the Buy America provision, that's a lot of American steel. That $13 billion to $14 billion a year translates into 2 million to 2.5 million tons of steel a year for highways and another 0.5 million tons for bridges. To America's steel industry, that is obviously a significant amount. In real terms that [illegible] billion tons of steel means 6,000 to 7,000 new jobs in steel and [illegible] related industries.

That is particularly important in today's economy. The domestic steel industry in the past four years has made great progress [illegible]pending in excess of $8 million to modernize its steel-making facilities. This reinvestment in modernization comes on the heels of the steel industry's worst period since the 1930's. Total industry losses over the past 10 years have exceeded $10 billion, and steel employment has declined from 450,000 workers to 160,000.

Restructuring of the industry is paying off, however. In [illegible] with the exception of one company, the balance sheets of all the integrated steel producers were in the black. This was the first time.

Today, the U.S. steel industry is the most productive in the world. I cite that figure: 4.5 man-hours per ton of steel. I repeat, that's the most productive in the world.

Unless the Federal Government continues its efforts to limit the flow of our tax dollars to purchase foreign products at unfair or illegal prices, the steel industry cannot expect to see this kind of progress continue, despite the industry's best efforts. This is where strong Buy America provisions become important to American industries. Provisions like Buy America are not unique. Japan, Korea, and the countries of the European Economic Community employ similar mechanisms to impede the flow of foreign goods and services to their countries.

Some people, including Members of Congress, have criticized Buy America as being protectionist and anti-trade. Nothing could be further from the truth in our analysis. If anything, Buy America should be labelled as an insurance policy. It provides security in the marketplace for U.S. manufacturers and American workers.

It is the opinion of the Steel Caucus that the Highway and Bridge Program and Buy America is not only critical to the domestic steel industry, but to the Nation's general, overall economy as well.

The use of tax dollars to benefit Federal, State and local jurisdictions is an appropriate function of Government. Buy America provisions do not prevent foreign goods from entering U.S. markets, but they do, however, retain markets and jobs for U.S. manufacturers and workers. That is sound economic policy, in the opinion of the Steel Caucus.

The Federal Highway and Bridge projects have a significant impact on the domestic steel industry. Depending on the type of highway or bridge project, an expenditure of $1 billion can generate demand for direct steel mill products in excess of 150,000 tons. The greatest impact for steel demand occurs in new highway and bridge construction projects. On maintenance repair projects, steel requirements are significantly lower, approximately 70,000 tons of steel mill products per $1 billion spent.

Steel use in highway and bridge projects is relatively small in proportion to total steel use throughout the economy, but data shows that the effect from Federal expenditures on highway projects on steel demand is greater than on other sectors of the economy. Simply put, for every Federal dollar spent on highway projects, more steel is required as a direct input than for other goods and services. And that is amazing. Of all the sectors of the economy supplying inputs to highway and bridge projects, only engineering, petroleum refining, and wholesale trade supply more direct inputs than the domestic steel industry.

Therefore, the amount of steel may be small, but the impact the highway and bridge projects have on steel is more than very drastic. Obviously spending $1 billion or $13 billion to $14 billion on the highway and bridge construction is not going to save the industry. Only the industry can accomplish that. Spending billions of dollars on highways and bridges does, however, strengthen steel demand.

As we have seen in the past 15 months, strong steel demand leads to a strong, healthier, more productive steel industry.

The adverse impact that imports are having on our economy illustrates the degree of importance and profitability that our trading partners place on having unrestrained access to U.S. markets.

In conclusion, I cannot stress to the committee enough the need to preserve and, if possible, strengthen Buy America. Nothing else that the Congress has tried has worked as well.

Mr. Chairman, I'd like to see more of the $9.6 billion balance of the Highway Trust Fund spent. We have a growing infrastructure need in this country. Sooner or later this is going to have to be addressed. This committee is sensitive in this area.

In closing, Mr. Chairman, I would like to say the Federal Highway Administration's commitment to its program and Buy America has made and will continue to make a difference for American industry.

On behalf of the Congressional Steel Caucus, I want to commend the Federal Highway Administration for its longstanding commitment to the bridge and highway program and its enforcement of Buy America. Unlike other similar programs, the highway program is paying off, and I appreciate that.

Mr. Chairman, I would like to finally conclude by again lauding the efforts of you as an individual and your committee in general in riding herd and monitoring just how that clause is working, and your persistence in making sure that the intent of the clause is there, and that it does work and is applied.

I want to finally conclude by stating that even in today's newspaper there are articles involving the Japanese continual disregard of their limitations in this country—for instance, as I clipped from this morning's paper where we have the companies involved in dumping of small trucks in the American market, all of them Toyota Motors, Nissan Motors, Mazda, Isuzu, and Mitsubishi—the facts indicated they're dumping again. The point I'm trying to make is that if we have these Buy America provisions, along with the monitoring of this committee—if we enforce them and relatively in comparison, they're very minor and insignificant in relation to what other countries have—at least that's a step in the right direction.

Hopefully this is a harbinger of what other committees in the Congress are going to do. In conclusion, I can't muster more sincerity in telling this committee personally that under these circumstances and in this hearing, I thank you for what you've done, and what you have been doing. Thank you for saving us that day Friday night when you made sure that Buy America stayed in there. I want to assure you that the Steel Caucus, as an entity, collectively and individually, is going to be there to back up every move that you make and to help you, and to extend their eternal gratitude for what you're doing in this area.

Thank you very much. I'll respond to any questions you may have. Maybe you don't have any, or maybe you do. But thank you for allowing me to testify.

Mr. OBERSTAR. Thank you very, very much, Mr. Gaydos, for this splendid testimony with details, facts, and information that will add to the fund of knowledge that we are assembling during the course of these hearings to make the case for Buy America. It does the things that we intended it to do. Thank you very much for your kind and generous comments on this member's role in behalf of Buy America.

As you have said, very clearly Buy America retains markets for industry, retains jobs, contributes to the profitability of the steel industry, and strengthens overall steel demand. The multiplier effect you've also referred to is very significant. But I think a point that you made, and perhaps you have some examples that the Steel Caucus would like to further submit for the committee, is enforcement of existing law.

It is one thing, as you pointed out, to write a law. It's quite another thing for the Executive Branch to enforce that law. All too often laws are simply overlooked, circumvented, and evaded. The purpose of this hearing, and the purpose of this subcommittee, is to make sure that the laws the Congress writes are carried out by the Executive Branch.

You talk about foreign repair stations in aviation. This subcommittee and the Aviation Subcommittee both have focused on this practice, which is of great concern to us.

There is another matter that we're going to be looking into, and that is McDonell-Douglass Corporation, who is going to be making its new MD–80 DC–9 aircraft entirely in China, for sale in China, to be sure. But the next step is to build the parts there with cheap slave labor, bring them into the United States, undercut the domestic market, and then we being another cycle of erosion of another major industrial sector where the United States has preeminence in the world, but then we lose world market share and domestic market share.

We're not going to allow that to happen in steel and those sectors over which this subcommittee has jurisdiction, I want to assure you. But it's the evasion of existing law and regulation and failure of Government agencies to carry out their mandate. The Steel Caucus has focused on that subject, and we would like you—if you have any horror stories right at your fingertips—to cite them here, and we'll keep the record open so that you could submit additional matters for us to look into further following these hearings.

Mr. GAYDOS. Mr. Chairman, thank you for the invitation, and we will submit itemized, documented, and proven factual situations illustrating what you've just pointed out.

I want to say at this time, if I may, that I'll never forget the time when a bridge in the Chairman's Congressional district was being built. I remember the fuss that the Chairman raised, and brought to the Steel Caucus. He was so persistent in pursuing what he thought was right that that bridge eventually—there was a compromise effected, and American steel was used in that bridge. That was a substantial amount of it. I just want to commend again, as a matter of record, the long historical background that proves the Chairman's interest in the subject matter on this particular point.

We will submit for the record, Mr. Chairman, a lot of horror stories, and document them sufficiently so that they become effective in the overall package that you're trying to put together here justifying your stand on Buy America.

Mr. OBERSTAR. Thank you very much.

For the record, that was the Arrowhead Bridge between Duluth and Superior, MN, some 90,000 tons of steel. The State of Wisconsin was contracting it and slipped through with 10,000 tons of steel. The other 80,000 were American steel.

The gentleman from Pennsylvania.

Mr. CLINGER. Thank you very much.

I too want to join in thanking Chairman Gaydos for his very eloquent testimony here this morning.

I think you focused on a couple of very critical points, as Congresswoman Bentley also pointed out, we've seen an erosion of our industrial base here in this country. That erosion cannot be allowed to continue without running the very real risk of making the United States much less than a world power. Clearly, you cannot be a world power or a significant player on the world scene if you don't have a healthy, viable steel industry.

I think that is what the Steel Caucus keeps reminding us of. Steel is a basic part of our industrial base and a basic industry for our overall ability to compete.

The other point that I think bears emphasizing is the fact that it may have been true, in years past, that the steel industry was not as productive and had not adopted the technology to make them more competitive in the world market. That is no longer true. I think that you, Mr. Gaydos, and I can testify to that fact from personal observation of the steel industries in our own districts. Herculean efforts have been put forth to make the industry competitive on a fair basis with any steel producer in the world.

STATEMENT OF JAMES S. SIMPSON
ADMINISTRATOR
FEDERAL TRANSIT ADMINISTRATION
U.S. DEPARTMENT OF TRANSPORTATION
BEFORE
THE SUBCOMMITTEE ON HIGHWAYS AND TRANSIT
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

BUY AMERICA IMPLEMENTATION

April 24, 2007

Good afternoon, Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee. Thank you for this opportunity to testify today regarding the Federal Transit Administration's (FTA) implementation of Buy America and program changes initiated by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). This is my first appearance before this Subcommittee since taking office on August 10, 2006, and it is a great honor for me.

FTA has worked hard to implement SAFETEA-LU amendments to the Buy America provisions consistent with Congressional intent. On November 28, 2005, shortly after SAFETEA-LU was signed into law, FTA issued a Notice of Proposed Rulemaking (NPRM). This NPRM proposed to add language on microprocessor waivers, remove two general waiver categories, allow for post-award waivers, require greater detail for public interest waivers, and specify that final decisions by FTA are subject to judicial review. In addition, the NPRM proposed to clarify the definitions of end product, negotiated procurement, and contractor, and provide a list representative of end products. The NPRM also proposed addressing the procurement of systems under the definition of end product, negotiated procurement, and contractor to ensure that major system procurements are not used to circumvent the Buy America requirements. Finally, the NPRM proposed a minor clarification to pre-award and post-delivery review of rolling stock purchases.

Due to the complexity of many of the Buy America issues addressed in the NPRM, the divergence of opinion on important areas, and the potential for "unintended consequences" to affected industries and grantees, FTA decided to split its rulemaking into two parts—one part to address routine matters and the second part to address the more complex issues that deserved careful consideration and further public comment.

To address routine matters in an expeditious manner, FTA issued a Final Rule on March 21, 2006. This Final Rule implemented several SAFETEA-LU mandates. The Final Rule--

- Removed the general waiver for Canadian-made Chrysler 15 passenger vans and wagons, as mandated in SAFETEA-LU.

- Defined a "negotiated procurement" as a contract awarded using other than sealed bidding procedures, a definition consistent with the Federal Acquisition Regulations.

- Stated that for negotiated procurements, compliance with the Buy America requirements shall be determined on the basis of the certification submitted with the final offer or final revised proposal. However, where a grantee awards on the basis of initial proposals without discussion, the certification submitted with the initial proposal shall control.

- Defined a "contractor" to mean any party to a third party government contract other than the grantee," a definition that is consistent with the Contract Disputes Act.

- Made FTA's Buy America decisions subject to administrative and judicial review.

- Allowed procurements of up to 20 vehicles for transit agencies in non-urbanized areas and urbanized areas with populations of 200,000 or less to meet contract specifications without resident factory inspection.

To address the more complex issues that received the most stakeholder comments during the initial rulemaking comment period, FTA issued a second NPRM on November 30, 2006. Proposals in this second NPRM involve:

- Establishing a process whereby FTA would publish justifications for public interest waivers in the Federal Register and providing notice and opportunity for comment.

- Clarifying that any waiver of the Buy America requirements for a microprocessor, computer, or microcomputer applies only to a device used solely for the purpose of processing or storing data and does not extend to the product or device containing a microprocessor, computer or microcomputer.

- Providing a process that would allow grantees to request a non-availability waiver after contract award when a bidder or offeror had originally certified compliance with Buy America requirements in good faith, but can no longer comply with its certification and contractual obligations due to commercial impossibility or impracticability.

- Defining the term "end product" with regard to components and subcomponents.

- Determining when and whether a system can be an "end product."

- Developing a representative list of "end products."

- Clarifying "final assembly" requirements for rolling stock and a list of representative examples of rolling stock.

- Expanding FTA's list of eligible communications, train control, and traction power equipment.

When issuing the second NPRM, FTA strived to address concerns raised by Chairman Oberstar, Representatives Young and LaTourette on behalf of transit stakeholders in their February 7, 2006 letter. That letter emphasized the need for the Buy America rulemaking to achieve two objectives: (1) develop a clearer and more consistent definition of end product; and (2) ensure that major system procurements are not used to circumvent Buy America requirements. Stakeholder concerns with respect to an end product focused on its shifting nature. Under the shifting methodology, the same item can be an end product under one procurement contract, but a component, or even a subcomponent under the terms of another contract. Stakeholders want a non-shift approach. They want the characterization of an item as an end product, component, or subcomponent to consistently remain with the item, rather than being changeable. FTA designed its proposals to meet that objective as well as the objective related to major system procurements.

FTA relied on Congressional concerns and public comment from the first NPRM to develop the proposed definitions for "end product" and "system" in the second NPRM. That being said, with infrastructure projects that are made primarily of steel and iron such as track-work or a steel bridge, there would be absolutely no change in the Buy America requirements between the current "shift" approach and the proposed "non-shift" methodology. In either case, the requirements for infrastructure projects are clear: "all steel and iron manufacturing processes must take place in the United States," whether the item is an end product, a component, or a subcomponent.

Furthermore, when procuring end products such as rail cars or buses, there would be little or no difference in the Buy America requirements under a "non-shift" approach from the current "shift" method. Under FTA's Buy America requirements for rolling stock, sixty percent of all components, by cost, must be of U.S. origin and final assembly of the vehicle must take place in the United States.

In fact, any change between the "non-shift" and "shift" approaches to the end product analysis would occur primarily in the procurement of replacement parts. Under FTA's current Buy America methodology, if a grantee procures a replacement part for a bus, rail car, or other rolling stock end product, then the general requirements for manufactured products apply. In that case, the replacement part component, such as a bus engine, "shifts" to become an end product and all manufacturing processes for the engine must take place in the United States. All of the components of the engine must be manufactured domestically, regardless of the origin of the subcomponents. Alternatively, FTA's proposed "non-shift" methodology for replacement parts, in this example a bus engine, would always remain a component instead of shifting to an end product. This would mean that the replacement part component, *i.e.,* the bus engine, would have to be manufactured in the United States, but its subcomponents could be foreign-sourced.

FTA believes a "non-shift" approach to end product analysis will achieve the goals of enhancing consistency, stability, and favorable price structures in the transit industry with minimal disruption to current practices while still maintaining the legislative intent of Buy America. However, the task to shape a workable definition of end product still remains as FTA considers comments received as a result of its second NPRM.

Regarding the definition of "system," FTA agreed with a majority of comments received on the first NPRM that FTA should continue its longstanding practice of including a system as a definable end product. FTA also agreed with comments on the first NPRM urging FTA to develop a rule to "ensure that major system procurements are not used to circumvent the Buy America requirements," and that Congress did not intend to expressly prohibit the designation of a system as an end product. In response to those comments, FTA's second NPRM proposed to define a "system" as the minimum set of components and interconnections needed to perform all of the functions specified by the grantee in its procurement.

To address concerns expressed in comments that an end product system could be so large, and incorporate so many different levels of equipment such as stations, track, vehicles, fare collection equipment, etc., so as to circumvent the requirements of Buy America, FTA will continue to carefully review system procurements in Buy America cases to determine whether an integrated system actually exists, and, if so, which items of equipment constitute the system. This review process will serve to further avoid the problem of "super systems" and thwart any potential abuses.

Although the initial comment period for the second NPRM was scheduled to close on January 29, 2007, FTA extended the comment period to February 28, 2007, providing a full three months for stakeholders to review the agency's proposal and to submit their views. In addition, FTA conducted a public meeting in February of this year at which the second NPRM was discussed and questions from the audience addressed. Now that the comment period has closed, FTA is in the process of considering comments received and will address them in the Final Rule.

In conclusion, FTA occupies a central role in implementing the Buy America requirements for public transportation facilities and equipment. On the one hand, we understand the law's purpose of protecting our domestic manufacturing base. On the other hand, we recognize the need of the transit industry to purchase vehicles and equipment that are cost-efficient, technologically-advanced, and worthy of the taxpayer dollar. Our challenge in the Buy America process is to develop a rule that meets all of these goals, while at the same time meets the needs of the transit-riding public.

Chairman DeFazio, Ranking Member Duncan, and Members of the Subcommittee, FTA has, and is, using all of the resources and capabilities it has available to administer the Buy America requirements in a way that best reflects legislative intent, while at the same time protecting American jobs and ensuring the best use of American tax dollars. I look forward to continuing to work with Congress to carry out this vital mission and I would be pleased to respond to your questions.

Prepared Remarks of Mr. Richard Trenery, President
U.S. Transit Suppliers Coalition
Before the
U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC
April 24, 2007

Mr. Chairman and members of the Committee, my name is Richard Trenery and I am vice president and regional manager for Cubic Transportation Systems, Inc. Based in San Diego, Cubic is the world's leading turnkey solution provider of automated fare collection systems for public transport including bus, bus rapid transit, light rail, commuter rail, heavy rail, ferry and parking. Cubic's solutions and services include system design, central computer systems, equipment design and manufacturing, device-level software, integration, test, installation, warranty, maintenance, computer hosting services, call centre services, card management and distribution services, financial clearing and settlement, multi-application support and outsourcing services. Every year, nearly 10 billion rides are taken worldwide using Cubic fare collection systems. While most international technology transfer in the transit industry is from foreign markets into the US Cubic is perhaps the preeminent example of a domestic manufacturer that is successfully bringing US technology to world markets in Europe, Asia and elsewhere.

I also serve as president of the U.S. Transit Suppliers Coalition, a trade association consisting of more than two dozen U.S. manufacturers that supply products for mass transit programs. The Coalition strongly supports the Buy America statutory requirements for the purchase of products manufactured in the U.S. in federally-funded transit contracts. It is as a representative of the Coalition that I'd like to take a few minutes to share our story with you, explain our concerns and urge continued congressional vigilance as to ongoing enforcement of Buy America

First a bit of history: "Buy America" represents a 30-year consensus amongst private and public sector interests on Capitol Hill and within the industry itself. Since its inception, this important statute has served as the basis for the investment of hundreds of millions of dollars in American manufacturing facilities and the creation of thousands of manufacturing jobs. The goal is to maintain a vibrant domestic economy and higher rates of employment, accomplished in part by Federal Transit Administration -funded projects. It is also to ensure that US transit systems have an assured source of domestic supply to meet their ongoing needs.

Several years ago the U.S. Transit Suppliers Coalition was formed out of necessity: Despite "Buy America's" obvious value, it had become clear to many observers that "Buy America" as administered had been increasingly misinterpreted, exploited and manipulated to the detriment of U.S. workers and the economy.

Since that time the Coalition has worked to do its part to preserve existing transit supplier jobs, encourage the recycling of taxpayer dollars in the U.S. and help strengthen the nation's economy. Our member companies worked with decision-makers, including members of this committee, toward the goal of preserving the spirit and intent of the "Buy America" provisions in federal law relating to public transit. We pushed for a relatively simple legislative "tune-up" of "Buy America" to realign the statute with the realities of today's marketplace: after there has occurred much technological change in the twenty years since the original Buy America legislation and regulations were enacted.

The Coalition responded with a positive approach designed to clarify "Buy America" and make it more open and accountable. Our coalition advocated a common-sense solution centered around three key improvements to the law:

Keep Buy America up with the times –Amend the law to eliminate any confusion and reflect the current marketplace.
Close existing loopholes –Eliminate the temporary and overly broad microprocessor exemption and minimize use of an ambiguous and broadly defined "complex system" as an end-product. These loopholes often allowed companies that do not manufacture public transit equipment in the U.S. to profit from taxpayer dollars.
Put "teeth" in the law –Require open and accountable enforcement procedures.

Through advertising, congressional meetings, industry events, newspaper articles and coverage by television shows such as *Lou Dobbs*, the Coalition worked to educate stakeholders and opinion leaders and spread the word about Buy America reform. At long last, in passing SAFETEA-LU, Congress made clear that it too wanted the FTA to specifically promulgate regulations that would ensure that the Buy America requirements and goals would not be circumvented by an expansive use of the microprocessor waiver and the bundling of complex systems into so-called end products as a means to circumvent Buy-America compliance. I want to thank this Committee in particular for its careful and thoughtful consideration of our views and its specific language, both legislatively and by letter, directing that the FTA follow congressional guidance in its rulemaking process.

Mr. Chairman, as you are aware, the FTA is now in the process of reviewing public comments submitted in response to the FTA's Second Notice of Proposed Rulemaking. We believe that the FTA's Second Notice of Proposed Rulemaking is a step in the right direction toward compliance with the letter and spirit of the congressional directive as it applies to Buy America. However, we continue to have concerns with two critical elements of the SNPRM.

First, FTA's proposed factors that can be used to distinguish between when a system truly is an end product and when it is designated as an end product as a way to avoid Buy America requirements is an acknowledgement of the problem and a step in the right direction toward a workable definition. However, in its SNPRM, FTA continues to propose a definition of "end product" that includes systems. This clearly undermines the spirit and intent of Buy America.

The inherent problem with FTA's proposal is that it does not definitively state how these factors will be used to determine whether a system is being improperly designated as an "end product." While the Coalition proposed a bright line test that would provide clear guidance to grantees and contractors, the FTA's proposed rule provides no such clear guidance and leaves the entire determination to the discretion of the FTA. This was not the intent of Congress. Moreover, it will create confusion in the marketplace and no doubt will result in numerous administrative challenges. To avoid this result, FTA should institute mandatory tests which would define certain characteristics of end products: We recommend the following:

(1) the solicitation provides separate line item pricing for individual product elements,

(2) the solicitation provides for performance warranties for individual or separable product elements (other than warranties relating to degraded mode operation), thereby demonstrating that individual elements can fully perform independently, or

(3) items identified in the solicitation that constitute the system are regularly sold separately and can function independently of the system.

In solicitations where circumstances as I have described are present, then those individual items or elements identified in the solicitation shall be considered end products rather than the system."

If examination of one or more of these factors in the context of a proposed system characterization suggests that the individual system elements could be treated as a discrete end product, then the grantee and the FTA should so determine that the system characterization is inappropriate. This should not be discretionary.

As I've described, the Coalition is concerned that the definitions of "end product" and "system" in the FTA's proposal continue to allow contractors and grantees to reach the improper conclusion that a fare collection system is an end product. One way to eliminate the possibility of reaching such an incorrect conclusion is to set up a bright line test as I've described. Another way is to simply state in either the definition of "end product" or "system" that if a product is listed as an "End Product" it will remain an end product (and cannot be considered a component or a subcomponent) when included in a solicitation for a system. This is another straightforward bright line test that does not depend upon FTA's discretionary judgment and cannot be misconstrued by contractors and grantees.

However, FTA's proposal -- establishing factors that it may consider in determining whether a system constitutes an end product or is instead made up of independent end products -- does not provide mandatory bright lines for contractors and grantees to follow in determining whether a system is an end product. The Coalition believes that such bright lines are necessary to avoid the current practice of designating a complex system, such as a fare collection system, as an "end product" when the system is in fact made up of independent products that come with separate performance warranties and can and do function on a standalone basis. It is this practice, which undermines the Buy America statutory requirements that caused Congress to step in and direct the FTA to stop, by issuing new rules.

Put simply, Congress perceived the old interpretation of major systems and end products as a circumvention of Buy America and directed FTA to define "end product" in a way that major systems cannot be used to reduce the number of items that must be manufactured in the U.S. Again, a mandatory "bright line" test is required to put an end to existing confusion and avoid dependence on FTA's discretionary judgment.

Second, we strongly supported the FTA's proposed description of the microprocessor waiver, limiting its applicability to microprocessors, computers, microcomputers or other devices which are used solely for the purpose of processing or storing data. In the past, contractors and grantees had in several instances misinterpreted the waiver to include devices that incorporated microprocessors, but performed functions beyond the processing and storage of data. This misinterpretation greatly expanded the number of foreign-made products that could be purchased on federally-funded transit projects. In SAFETEA-LU, Congress acted to stop this practice and instructed FTA to clarify the waiver so that it was limited to microprocessors used for the processing and storage of data. FTA's proposed language addressed Congressional concerns.

However, FTA's discussion of "input/output" facilities in the Supplementary Information section of the SNPRM creates confusion by suggesting that input/output devices are included in the microprocessor waiver. Such devices do more than process or store data and, if exempted will open the door to an expansive misinterpretation of the waiver and allow an increase in foreign-made products purchased using U.S. taxpayer dollars. To avoid an unintended increase in the scope of the waiver, FTA must make clear that the waiver is limited solely to devices used for processing or storing of data.

Mr. Chairman, my industry and thousands of taxpaying U.S. workers thank this committee for its inspired leadership role regarding reforming Buy America. We trust that you will continue to monitor the FTA as it finalizes its Buy America regulations, and we look forward to continuing to manufacture products that help keep this country on the move. Thank you.

Statement of
American Iron and Steel Institute (AISI)
Committee on Pipe and Tube Imports (CPTI)
Steel Manufacturers Association (SMA)

Submitted for the Record
U.S. House Committee on Transportation and Infrastructure
Subcommittee on Highways and Transit
Buy America Act
May 1, 2007

On behalf of our member companies, we would like to thank Chairman DeFazio of the Subcommittee on Highways and Transit and Chairman Oberstar of the full Committee on Transportation and Infrastructure for allowing us the opportunity to submit a statement for the record on the Buy America Act and suggested improvements. While we continue to be strong supporters of the Act, we believe that legislative corrections can provide better guidance and direction to U.S. DOT that would direct the Department to carry out the Act as Congress intended to ensure that, when taxpayer money is spent on direct Federal Government procurement and infrastructure projects, these expenditures stimulate United States production and job creation. We would like to provide the following recommendations:

EXEMPTIONS/WAIVERS FROM BUY AMERICA

Under present policy, there is an informal notice procedure for FHWA to notify the industry of Buy America waivers. We believe that this process should be formalized through legislation. The actions of the committee on the Technical Corrections bill (H.R. 1195) addressed that issue and we are very much in support of that change which requires that the Secretary publish, in the Federal Register, a detailed written justification as to why the waiver is needed and provide the public with a reasonable period of time for notice and comment. This requirement, along with the requirement for an Annual Report from the Secretary to the appropriate House and Senate Committees, guarantees transparency for the waiver process.

There is another parallel, almost identical, Buy America provision with respect to the Federal Transit Administration (FTA) under 49 USC 5323(j)(1).

Last year in SAFETEA-LU, Congress required the Secretary of Transportation to provide written justification whenever he or she waives Buy America requirements for the FTA under the statutory public interest waiver, and to

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provide the public with a reasonable time for notice and comment. This transparency requirement did not extend to any other FTA statutory Buy America waivers (insufficient quality or quantity, cost greater than 25%, rolling stock), nor does it extend to any statutory waivers by the FHWA. We recommend that the Committee ensure that the transparency procedure apply to FTA as well.

PROJECT COMPONENTS VS. ENTIRE PROJECT

The Federal Highway Administration has interpreted the Buy America statute to read that the price based waiver test need only be applied to bridge project segments, not the bridge itself. The law provides for a cost of steel waiver, allowing foreign steel to be used if the price of a domestic bid exceeds a foreign bid by 25%. Under the FHWA interpretation, the 25% test only applies to segments of the bridge project, not the overall bridge as intended by Congress.

We do not object to breaking major bridge projects into smaller contracts but in determining the 25% waiver, it needs to apply to the entire bridge project. Anything less, allows for a variety of interpretations. If state DOT's can break major bridge contracts into segments and apply Buy America selectively to the segments, than they will be able to structure contracts to avoid using domestically produced steel.

We appreciate and support the work of the Committee and the House in addressing this situation in House Report 110-062, section 1928 "Sense of the Congress "

To complement and strengthen that action we urge the adoption of H.R. 1984 that has been introduced by Congressman Brian Baird (D-WA) "to amend title 23, U.S. Code, to clarify that the Buy America Provision applies to an entire bridge project." This legislation would close the segmentation loophole and make explicit in the law that the Buy America price waiver test applies to the entire bridge, not merely to the project sections.

Congressman Baird's legislation closes two major loopholes by: "clarifying that Buy America applies to any project that receives federal funding at any time; and, clarifying that Buy America applies to an entire bridge project, and not just component parts of the project".

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FEDERALLY FUNDED PROJECTS VS. STATE FUNDED PROJECTS

We are concerned that states may initially finance major projects using only state funds, thereby avoiding the requirements of Buy America, followed by the use of federal funds to complete the project after the contracts have been signed.

In response to these potential situations we recommend that states be required to provide public financial disclosure when they make a decision to use federal funds for major projects. In cases of state funded projects, it is important to be able to demonstrate that federal funds, both direct assistance and federal loan guarantees were not used in any part of the project design and construction.

We thank you for the opportunity to weigh in on such a critical issue to the domestic steel industry, its workers and steel producing communities throughout the country, and salute Chairmen DeFazio and Oberstar for their work to enforce and strengthen Buy America.

The Buy America program has ensured that quality made U.S. materials have been used in a variety of federally supported programs throughout its history. Over the decades this program has not only resulted in the use of American products, but has contributed to the employment of thousands of U.S. workers. Our industry remains committed to work with the 110th Congress to ensure that this program continues and that every effort is made to strengthen the program for future generations.

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Statement of Conn Abnee
Executive Director National Steel Bridge Alliance

Submitted to:

Committee on Transportation and Infrastructure
Subcommittee on Highways
U.S. House of Representatives

Hearing on Buy America

April 24, 2007

Mr. Chairman, thank you for this opportunity to submit testimony as part of today's hearing on the Buy America law.

The National Steel Bridge Alliance is a non-profit association of steel mills and bridge fabricators working together to support steel in the design and construction of bridges. For the past four years, I have served as executive director. During that time, NSBA members have increasingly focused on growing threats to the integrity of the Buy America law, initially due to a number of issues raised by the California Department of Transportation's (Caltrans) management of the San Francisco-Oakland Bay Bridge bid process. Your hearing today is extremely timely. We stand on the verge of a wholesale circumvention of the Buy American laws in the road and bridge construction industry.

What is the threat?

Simply put, states are increasingly exploiting the waiver provisions in the original Buy America law in favor of using foreign steel on major bridge projects . This seriously concerns us as the Federal Highway Administration (FHWA) claims it is without the legal power to challenge this development.

More than 20 years ago, Congressman (now Chairman) James Oberstar led the effort to insert the Buy America provision into law, in response to his concern about federal transportation dollars being used to support the construction of a bridge in Duluth, Minnesota. He has been a passionate advocate ever since. More recently, Congressman Baird became involved in this issue, precisely out of a similar concern that state transportation departments were gaming the system in order to use foreign steel on major projects.

Mr. Chairman, the American steel bridge fabricating industry has undertaken significant investment in facilities and technology. We are now as productive and technologically advanced as any other country in the world. But the playing field is not level. Our international competitors enjoy foreign government support of their industry, lower wages, and weak environmental and safety regulations. The Buy America law was designed to ensure a more competitive playing field for federally funded transportation projects. The key word is competitive. It intentionally did not create an absolute requirement that domestic steel be used in transportation projects. Instead, it ensured by way of a number of waiver provisions based upon price, supply, non-federally funded projects, and the discretion of the Secretary that there will be competition on bids and recourse during times of emergency and short supply. It is precisely these waiver conditions and a dispute over the definition of a bridge that are being exploited or misinterpreted to circumvent congressional intent.

Three Loopholes to Buy America

States are increasingly playing bookkeeping games to finance major bridge projects using only state funds, thereby avoiding the requirements of Buy America. We have seen this in Washington state with the Tacoma Narrows Bridge, in California with the San Francisco-Oakland Bay Bridge, and in Louisiana with the Huey Long Bridge.

This state creativity takes advantage of the Federal Highway Administration's interpretation of the Buy America statute, that the price based waiver test need only be applied to bridge project segments, not the bridge itself. The law provides for a cost of steel waiver allowing foreign steel to be used if the price of a domestic bid exceeds a foreign bid by 25%. Under the FHWA interpretation the 25% test only applies to segments of the bridge project, not the overall bridge as intended by Congress.

We do not object to breaking major bridge projects into smaller contracts, but the 25% threshold for a waiver must apply to the entire bridge project. Anything less creates the opportunity for states to go around Buy America. If state DOT's can break major bridge contracts into segments and apply Buy America selectively to the segments, than they are able to structure contracts to avoid American steel completely.

This state shell game with bridge financing leads to our third concern, the lack of transparency in the Buy America waiver process. Under present policy, there is an informal notice procedure for FHWA to notify the industry of proposed Buy America waivers. FHWA has agreed with NSBA that this process should be formalized. There are huge information gaps in cases where a Buy America waiver is granted due to price and in cases where states consider federally funding a major project, but decide late in the process to use only state funds.

The San Francisco-Oakland Bay Bridge project raised all three of these issues. Caltrans went back and forth on whether to use federal funds to construct the bridge, thus creating widespread confusion and distrust among potential bidders. It divided the project in segments "to control costs" and asserted that Buy America would apply only to project segments, not the shore to shore bridge crossing. Underscoring this mischief, Caltrans resisted providing information about the status of funds.

For a fabricator, bidding a project of this scale is an extraordinarily expensive undertaking, requiring an investment of easily more than $200,000 with no guarantee of success. It as a very significant business decision and while they understand the risk, they also are entitled to accurate information about fundamental factors such as whether it will be federally or state funded. The Bay Bridge suffered from a lack of bid competition in part because the very apparent intent by the State to use foreign steel is a disincentive for US fabricators to bid.

The Bay Bridge is only the largest example of Buy America problems we see throughout the bridge industry. We have concerns about current projects in Texas and Louisiana and looking ahead we are aware of major projects in early design stages all around the country that will be funded by SAFETEA-LU. It is critical that the cracks in Buy America be addressed to ensure that these projects comply.

Recommendations

Going forward, we have three recommendations for the Subcommittee to consider to restore integrity to Buy America.

First, adopt the legislation introduced by Congressman Baird to close the segmentation loophole and make explicit in the law that the Buy America price waiver test applies to an entire bridge, not merely to project sections.

Second, deliver transparency to the waiver process by statutory authorization requiring the Federal Highway Administration to provide public notice and allow public comment.

And third, in response to the growing trend of states playing shell games on whether a project will be state or federally funded, require states to provide public financial disclosure on decisions to use federal funds for major projects. It is imperative to demonstrate that federal dollars, both direct assistance and federal loan guarantees, are not used in any part of bridge design and construction.

Mr. Chairman, as you know, these recommendations are not new to the Committee. Congress has attempted to be clear to FHWA with regard to the intent of the Buy America law in its application to bridge projects as written in the SAFETEA-LU bill. We have appreciated your strong support. Further, the need for transparency has also been recognized and we are hopeful that the provision in the technical corrections bill will soon become law. It is the action of states deciding at the last minute to forego federal funding for bridge projects that needs special attention. We are sensitive to the Constitutional challenges and, while we would like a Buy America law in every state, we realize that is not within the power of the Federal government. We do believe, however, that clear disclosure is a fair requirement and urge the Subcommittee to explore how that might be accomplished to restore trust and integrity to the system.

Mr. Chairman, NSBA appreciates your strong support for Buy America and your leadership of this Subcommittee. We are also deeply grateful to the relentless commitment of Congressman Baird to this issue as well as the support from Congressman Oberstar and Congressman Mica. We look forward to working with you and other members on this issue.

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