

DEPARTMENT OF TRANSPORTATION**Federal Transit Administration****49 CFR Part 661**

[FTA Docket No. FTA-98-4454]

RIN 2132-AA62

**Buy America Requirements;
Amendment to Certification
Procedures****AGENCY:** Federal Transit Administration (FTA), DOT.**ACTION:** Final rule.

SUMMARY: This final rule implements a provision of the Buy America statute which allows bidders or offerors the opportunity to correct inadvertent or clerical errors in their Buy America certifications after bid opening.

EFFECTIVE DATE: April 29, 2003.

ADDRESSES: Electronic Access: Internet users can access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help. An electronic copy of this document may be downloaded using a modem and suitable communication software from the Government Printing Office's electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the **Federal Register's** Home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's database at: [http://www/access.gpo.gov/nara](http://www.access.gpo.gov/nara). Electronic access to this final rule and other Buy America guidance material is located at <http://www.fta.dot.gov/library/legal/buyamer/>.

FOR FURTHER INFORMATION CONTACT: Meghan G. Ludtke, Office of the Chief Counsel, FTA, Room 9316, (202) 366-1936 (telephone) or (202) 366-3809 (fax).

SUPPLEMENTARY INFORMATION:**I. Background**

Section 3020(b) of Transportation Equity Act for the Twenty-First Century created a limited exception to the certification requirements, found at 49 CFR 661.13(b), that require rejection of a bid that is not accompanied by a completed Buy America certificate. To implement section 3020(b), the Federal Transit Administration (FTA) proposed an amendment to 49 CFR 661.13(b) which would provide bidders or offerors an opportunity to correct certifications of noncompliance or incomplete certifications that are the result of an

inadvertent or clerical error. 64 FR 8051 (Feb. 18, 1999). FTA proposed that a bidder or offeror claiming inadvertent or clerical error submit to FTA, within 10 days of bid opening, an explanation of the circumstances surrounding the flawed certification and an affidavit stating that the submission resulted from an inadvertent or clerical error.

The proposed rule follows:

Sec. 661.13 Grantee responsibility.

* * * * *

(b) The grantee shall include in its bid specification for procurement within the scope of these regulations an appropriate notice of the Buy America provision. Such specifications shall require, as a condition of responsiveness, that the bidder or offeror submit with the bid a completed Buy America certificate in accordance with Sec. 661.6 or Sec. 661.12 of this part, as appropriate.

(1) A bidder or offeror who has submitted an incomplete Buy America certificate or an incorrect certificate of noncompliance through inadvertent or clerical error (but not including failure to sign the certificate), may submit to the FTA Chief Counsel within ten (10) days of bid opening a written explanation of the circumstances surrounding the submission of the incomplete or incorrect certification of noncompliance, and an affidavit, sworn under penalty of perjury, stating that the submission resulted from inadvertent or clerical error. The bidder or offeror will simultaneously send a copy of this information to the FTA grantee.

(2) The FTA Chief Counsel may request additional information from the bidder or manufacturer, if necessary. The Chief Counsel will endeavor to make a determination within ten (10) days of receipt of the bidder's or manufacturer's submission. The grantee may not make a contract award until the FTA Chief Counsel issues his/her determination, except as provided in Sec. 661.15(m).

II. Discussion of Comments

FTA received eight comments to this NPRM, four in favor, three against, and one which advocated a strict reading of the statute: three transit agencies and the American Public Transportation Association (APTA) supported the proposed change; one transit agency and two manufacturers were against the changes; and another manufacturer commented on a narrow reading of the statute. The comments are available online from the Docket Management System, as described above, by searching for Docket No. FTA-98-4454.

The four commenters who supported the amendment offered a few suggestions for the final rule. One suggested that any claim for correction should be made as soon as it is discovered, but certainly within 10 days. Another argued that ten days is too long. FTA believes that ten days is

an appropriate amount of time to allow a proper submission without overly burdening the grantee by delaying the procurement indefinitely. FTA agrees that submissions should be made as soon as they are discovered; however, in order to enforce this regulation and make it practicable, we have chosen 10 days as the outside time limit, and hope that petitioners will submit their requests for change as soon as possible, but not beyond ten days. It should be noted that this is ten calendar days, not ten business days. Another comment suggested that petitions be submitted to the regional office. In order to ensure uniformity of application, FTA believes that they should be submitted to headquarters. Two commenters said that the grantees' role should be limited to providing background information. FTA concurs with this position and will request information and assistance from our grantees when necessary; however, the grantee will have no official role in the implementation of this part of the regulation. Three commenters suggested that documentation evidencing intent should be required, such as information about where the product will be manufactured, details of the bidders selection process, invoices or other working documents. FTA concurs with these suggestions.

Another commenter suggested that the petition should be sent to all other bidders so that they may comment. FTA believes that this would unduly lengthen the process without availing it of pertinent information or fulfilling the goal of the statute. FTA does not want to open up the fact of a certification correction for debate among interested but uninformed parties. One commenter who supports the amendment also requested that FTA make a change to the rule that would allow parties to change their certification under changed circumstances when the materials are no longer available in the U.S. This change goes beyond the scope of the statute.

One commenter argued that the amendment would allow non-responsive bidders to become the low responsive bidder and therefore, create unfair competition. This is not correct. A bidder who certifies non-compliance is not necessarily non-responsive. Further, the final rule clearly states that petitions to correct are prohibited where the bidder or offeror has certified to both compliance and non-compliance, or failed to certify to either. Another commenter suggests that there is a huge potential for abuse where a transit agency has doubts about a certification of compliance, the bidder could claim inadvertent error. This abuse will be

avoided because an application for change will only be permitted where the bidder certified non-compliance when they intended to certify compliance. Another commenter argued for a very strict reading of the rule, including that only bidders who certify non-compliance could change their certifications, and only date, company name, and title of the official are subject to correction. This commenter also suggests that the standard should be clear and convincing and that at least two employees should be required to testify in support of the assertion of clerical error. The statute narrowly points to incomplete certificates or incorrect certificates of non-compliance. Therefore, it is FTA's position that the rule should apply accordingly: a bidder who fails to properly fill out his certificate (either certificate of compliance or non-compliance) may petition to complete that certificate to fill in the name, date, or title, but not the signature. A bidder who submits a certificate of non-compliance but meant to certify compliance may petition to switch to compliance. FTA made changes to the final rule to clarify this point, please see the discussion below.

III. Final Rule Amendments and Application

The comments against the amendment indicate that the NPRM was not clear. For that reason, FTA has made a few changes intended to clarify the rule. The final rule explicitly states that a bidder may not request approval of a correction of a certificate when that party fails to sign the certificate, files a certification of both compliance and non-compliance, or files neither certificate. The rule does not allow anyone to change a certificate wrongly filed for a reason other than clerical or inadvertent error. These changes allow correction of a certification when there has been a clerical or inadvertent error, as Congress mandated, while prohibiting situations where the bidder would gain a competitive advantage over any other bidders.

FTA has also added a reference to 28 U.S.C. 1746, which allows a party submitting an affidavit or sworn statement to the government to do so in an abbreviated form, without a notary, when the language from the statute is used. Specifically, it provides that,

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other

than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: 'I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)'.

(2) If executed within the United States, its territories, possessions, or commonwealths: 'I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)'.

Id. This change should ease the burden on the petitioning party and remain consistent with other federally required submissions. FTA has also eliminated the statement that "FTA will endeavor to make a determination within ten days," because while that is a true statement, it is not a requirement, and thus does not belong in the regulation.

FTA has added a provision that evidence illustrating original intent must be supplied with the petition. The bidder or offeror will submit evidence of intent, such as information about the origin of the product, invoices, or other working documents. FTA has also added a provision clearly stating that ignorance of the law is not considered an inadvertent or clerical error. When a bidder certifies wrongly because they do not understand the law, that bidder is bound by its certification and cannot request that it be changed.

It should be noted that while there are references to bidders and offerors in the rule, FTA only refers to bid opening, and not best and final offer (BAFO), in the case of a request for proposals (RFP). This was done because there are times when awards are made after receipt of proposals, but before BAFO. It is FTA's position that certifications submitted with a bid are final, and may not be changed except as described in this rule amendment, while certifications submitted as part of the negotiation process of an RFP may be superseded by subsequent certifications, with the final valid certification being the last one submitted before award. Therefore, this provision applies to RFPs in the same fashion it applies to sealed bids—a bidder or offeror may petition to correct the controlling certification.

IV. Regulatory Impacts

Regulatory Analyses and Notices

FTA has determined that this action is not significant under Executive Order

12866 or the regulatory policies and procedures of Department of Transportation. Because this rule merely allows the correction of inadvertent or clerical errors in Buy America certifications, it is anticipated that the impact of this rulemaking will be minimal; therefore, a full regulatory evaluation is not required. There are not sufficient Federalism implications to warrant the preparation of a Federalism Assessment under Executive Order 12612.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, FTA certifies that this rule will not have a significant impact on a substantial number of small entities within the meaning of the Act, because, based on its past experience with handling inquiries regarding inadvertent or clerical errors, FTA is anticipating only a very small number of requests for correction of Buy America certifications.

Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1995.

List of Subjects in 49 CFR Part 661

Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements.

V. Amendment of 49 CFR Part 661

Accordingly, for the reasons described in the preamble, part 661 of Title 49 of the Code of Federal Regulations is amended as follows:

PART 661—[AMENDED]

1. By revising the authority citation to read as follows:

Authority: 49 U.S.C. 5323(j) (formerly sec. 165, Pub. L. 97–424; as amended by sec. 337, Pub. L. 100–17, sec. 1048, Pub. L. 102–240, and sec. 3020(b), Pub. L. 105–178); 49 CFR 1.51.

2. By revising § 661.13(b) to read as follows:

§ 661.13 Grantee responsibility

* * * * *

(b) The grantee shall include in its bid specification for procurement within the scope of this part an appropriate notice of the Buy America provision. Such specifications shall require, as a condition of responsiveness, that the bidder or offeror submit with the bid a completed Buy America certificate in accordance with § 661.6 or § 661.12 of this part, as appropriate.

(1) A bidder or offeror who has submitted an incomplete Buy America certificate or an incorrect certificate of noncompliance through inadvertent or clerical error (but not including failure to sign the certificate, submission of certificates of both compliance and non-compliance, or failure to submit any certification), may submit to the FTA Chief Counsel within ten (10) days of bid opening a written explanation of the circumstances surrounding the submission of the incomplete or incorrect certification in accordance

with 28 U.S.C. 1746, sworn under penalty of perjury, stating that the submission resulted from inadvertent or clerical error. The bidder or offeror will also submit evidence of intent, such as information about the origin of the product, invoices, or other working documents. The bidder or offeror will simultaneously send a copy of this information to the FTA grantee.

(2) The FTA Chief Counsel may request additional information from the bidder or offeror, if necessary. The grantee may not make a contract award

until the FTA Chief Counsel issues his/her determination, except as provided in § 661.15(m).

(3) Certification based on ignorance of the proper application of the Buy America requirements is not an inadvertent or clerical error.

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Issued on: February 21, 2003.

Jennifer L. Dorn,
Administrator.

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