

**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/>.

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**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.

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(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