

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.