

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

[Docket No. FTA-98-4454]

RIN 2132-AA62

**Buy America Requirements;
Amendment of Certification
Procedures****AGENCY:** Federal Transit Administration, DOT.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This notice of proposed rulemaking (NPRM) seeks to amend the Federal Transit Administration's (FTA) Buy America regulation in conformance with a provision in the Transportation Equity Act for the 21st Century (TEA-21), which allows bidders to correct inadvertent errors in their Buy America certifications after bid opening. This NPRM describes and requests comment on FTA's proposed implementation of this provision of TEA-21.

DATES: Comments requested by April 19, 1999.

ADDRESSES: Written comments must refer to the docket number appearing above and must be submitted to the United States Department of Transportation, Central Dockets Office, PL-401, 400 Seventh Street SW., Washington, DC 20590. All comments received will be available for inspection at the above address from 10 a.m. to 5 p.m., Monday through Friday, except Federal Holidays. Those desiring the agency to acknowledge receipt of their comments should include a self-addressed stamped postcard with their comments.

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>.

FOR FURTHER INFORMATION CONTACT: Rita Daguillard, Office of Chief Counsel,

Federal Transit Administration,
(202)366-1936.

SUPPLEMENTARY INFORMATION:**I. FTA's Buy America Certification Requirements**

FTA's Buy America requirements, set out at 49 U.S.C. 5323(j) and 49 CFR part 661, require that all steel, iron and manufactured goods purchased with FTA funds be produced in the United States. Under 49 CFR 661.13, FTA recipients are responsible for ensuring that their suppliers are in compliance with these requirements. Section 661.13(b) provides that recipients must notify potential bidders of the Buy America requirements in all specifications for FTA-funded procurements, and must require that bidders submit, as a condition of responsiveness of their bids, a completed Buy America certification. Accordingly, bids that are not accompanied by a completed Buy America certification must be rejected as nonresponsive to the recipient's specifications. The aim of this provision is to preserve the integrity of the procurement process by allowing recipients to know with absolute certainty at bid opening whether or not a bidder is able to comply with Buy America, and by preventing any possible fraud or manipulation that may occur if a bidder is allowed to change its certification after seeing the other bids.

The regulation contains no provision for a waiver of § 661.13(b), nor has FTA ever allowed such a waiver to be granted. Since the promulgation of FTA's Buy America regulation in 1978, submission of a completed Buy America certificate has been a condition of responsiveness in FTA-funded contracts. Bids at variance with the condition uniformly have been treated as nonresponsive. Thus, bidders have been allowed under no circumstances to correct errors, even unintentional ones, in their Buy America certificates after bid opening.

II. Section 3020(b) of TEA-21

Section 3020(b) of the Transportation Equity Act for the 21st Century (TEA-21) (Pub. L. 105-178) amends FTA's Buy America requirements by adding to 49 U.S.C. 5323(j) the following new paragraph:

(7) Opportunity to correct inadvertent error.—The Secretary may allow a manufacturer or supplier of steel, iron, or manufactured goods to correct after bid opening any certification of noncompliance or failure to properly complete the certification (but not including failure to sign the certification) under this subsection if

such manufacturer or supplier attests under penalty of perjury that such manufacturer or supplier submitted an incorrect certification as the result of an inadvertent or clerical error. The burden of establishing inadvertent or clerical error is on the manufacturer or supplier.

Thus, section 3020(b) creates a limited exception to 49 CFR 661.13(b), which requires rejection of a bid that is not accompanied by a completed Buy America certificate. Pursuant to section 3020(b), FTA proposes to amend 49 CFR 661.13(b) to provide manufacturers and suppliers an opportunity to correct certifications of noncompliance or incomplete certifications that are the result of an inadvertent or clerical error. As provided in section 3020(b), manufacturers and suppliers will not be allowed to correct unsigned certificates, which must continue to be rejected as nonresponsive.

It should also be noted that section 3035 of TEA-21 provides that all buses manufactured after September 1, 1999, that are purchased with FTA funds, must conform to FTA's guidance of March 18, 1997. Because section 3035 merely sets a statutory deadline for compliance with previously issued administrative guidance on the final assembly of buses, and does not alter FTA's regulatory requirements for domestic manufacture, FTA has determined that an amendment of the Buy America regulation pursuant to section 3035 is not required.

III. FTA's Proposed Amendment

Section 3020(b) states that a manufacturer or supplier must attest under penalty of perjury that the submission of an incorrect certification of noncompliance or an incomplete certification is the result of an inadvertent or clerical error, and that the burden of establishing inadvertent or clerical error is on the manufacturer or supplier. Consequently, FTA proposes to require that a manufacturer or supplier claiming inadvertent or clerical error submit to FTA, within 10 days after bid opening, an 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 recipient. FTA may request additional information from the bidder or manufacturer, if necessary. FTA will endeavor to render a determination within 10 days of receipt of the bidder's or manufacturer's submission. Consistent with 49 CFR

section 661.15(m), which sets strict limits on contract awards during the pendency of an investigation, the proposed rule provides that the grantee may not make an award until FTA has rendered its decision, unless the grantee determines that: the items to be procured are urgently required; delivery of performance will be unduly delayed by failure to make a prompt award; or, failure to make prompt award will cause undue harm to the grantee or the Federal Government.

FTA believes that this procedure will ensure that requests to correct inadvertent and clerical errors are processed in a timely manner that will not unduly delay the award of contracts, and that is fair to both grantees and bidders. Moreover, consistent with section 3020(b), it places the burden of establishing inadvertent or clerical error on the bidder or manufacturer, who must submit evidence of and attest under oath to the occurrence of an inadvertent or clerical error.

FTA requests comment on this proposed procedure. FTA particularly seeks comment on what type of evidence of inadvertent or clerical error should be required from bidders, and what factors FTA should consider in making its determination. FTA also requests comment on whether grantees should play any role in this decision-making process.

IV. Regulatory Impacts

A. 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 regulatory policies and procedures. 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. Because this rule does not mandate a business process change or require modifications to computer systems, its issuance will not affect a recipient's ability to respond to Year 2000 issues.

B. 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.

C. 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 proposed to be 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 these regulations an appropriate notice of the Buy America provision. Such specifications shall require, as a condition of responsiveness, that the bidder or offeror submit with the bid a completed Buy America certificate in accordance with § 661.6 or § 661.12 of this part, as appropriate.

(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 § 661.15(m).

Issued on: February 12, 1999.

Gordon J. Linton,

Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[I.D. 020899A]

RIN 0648-AL42

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Compliance with Sustainable Fisheries Act Provisions for Management Plans in the South Atlantic; Comprehensive Amendment to the Fishery Management Plans of the South Atlantic Region

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability of a comprehensive amendment to fishery management plans (FMPs) for the South Atlantic Region addressing certain requirements of the Sustainable Fisheries Act; request for comments.

SUMMARY: NMFS announces that the South Atlantic Fishery Management Council (Council) has submitted to NMFS for review, approval, and implementation a comprehensive amendment to its FMPs that addresses the requirements of the Sustainable Fisheries Act other than those regarding essential fish habitat. Among several SFA requirements, this amendment would set criteria for determining when a fish stock is overfished and, in the case of a fishery approaching an overfished condition or that is overfished, establish measures to prevent or end overfishing and rebuild the fishery. Written comments are requested from the public.

DATES: Written comments must be received on or before April 19, 1999.

ADDRESSES: Comments must be mailed to the Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702.