

(b) The acquisition must be made in order to acquire capability for national security purposes.

■ 5. Section 225.7009-5 is added to read as follows:

**225.7009-5 Contract clause.**

Use the clause at 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings, in solicitations and contracts, unless—

(a) The items being acquired are commercial items other than ball or roller bearings acquired as end items;

(b) The items being acquired do not contain ball and roller bearings; or

(c) A waiver has been granted in accordance with 225.7009-4.

**PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 6. Section 252.212-7001 is amended by revising the clause date and, in paragraph (b), by revising entry “252.225-7016” to read as follows:

**252.212-7001 Contract Terms and Conditions Required To Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items.**

\* \* \* \* \*

Contract Terms and Conditions Required to Implement Statutes or Executive Orders Applicable to Defense Acquisitions of Commercial Items (Mar 2006)

\* \* \* \* \*

(b) \* \* \*  
 \_\_252.225-7016 Restriction on Acquisition of Ball and Roller Bearings (MAR 2006) (Section 8065 of Public Law 107-117 and the same restriction in subsequent DoD appropriations acts).

\* \* \* \* \*

■ 7. Section 252.225-7016 is revised to read as follows:

**252.225-7016 Restriction on Acquisition of Ball and Roller Bearings.**

As prescribed in 225.7009-5, use the following clause:

Restriction on Acquisition of Ball and Roller Bearings (Mar 2006)

(a) *Definitions.* As used in this clause:  
 (1) *Bearing components* means the bearing element, retainer, inner race, or outer race.

(2) *Component*, other than bearing components, means any item supplied to the Government as part of an end product or of another component.

(3) *End product* means supplies delivered under a line item of this contract.

(b) Except as provided in paragraph (c) of this clause, all ball and roller

bearings and ball and roller bearing components delivered under this contract, either as end items or components of end items, shall be wholly manufactured in the United States, its outlying areas, or Canada. Unless otherwise specified in this contract, raw materials, such as preformed bar, tube, or rod stock and lubricants, need not be mined or produced in the United States, its outlying areas, or Canada.

(c) The restriction in paragraph (b) of this clause does not apply to ball or roller bearings that are acquired as—

(1) Commercial components of a noncommercial end product; or

(2) Commercial or noncommercial components of a commercial component of a noncommercial end product.

(d) The restriction in paragraph (b) of this clause may be waived upon request from the Contractor in accordance with subsection 225.7009-4 of the Defense Federal Acquisition Regulation Supplement.

(e) The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts, except those for—

(1) Commercial items; or

(2) Items that do not contain ball or roller bearings. (End of clause)

[FR Doc. 06-2641 Filed 3-20-06; 8:45 am]

BILLING CODE 5001-08-P

**DEPARTMENT OF TRANSPORTATION**

**Federal Transit Administration**

**49 CFR Parts 661 and 663**

[Docket No. FTA-2005-23082]

RIN 2132-AA80

**Buy America Requirements; Amendments to Definitions**

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends 49 CFR Parts 661 and 663 as required by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) [Pub. L. 109-59, August 10, 2005]. The Federal Transit Administration (FTA) proposed certain changes to the Buy America requirements on November 21, 2005 (70 FR 71246). This final rule addresses fewer issues than were proposed in the Notice of Proposed Rulemaking (NPRM) because of the complexity of a number of recommendations and issues presented during the comment period. Thus, FTA

is publishing a final rule on those issues that received little or no public comment. FTA will publish a new NPRM in the **Federal Register** and hold a public meeting to address the issues raised in the NPRM published on November 21, 2005, but not addressed herein. Thereafter, FTA will publish a final rule with respect to such issues.

**DATES:** *Effective Date:* The effective date of this rule is March 21, 2006.

**FOR FURTHER INFORMATION CONTACT:** Joseph Pixley, Chief Counsel's Office, Federal Transit Administration, 400 Seventh Street, SW., Room 9316, Washington, DC 20590, (202) 366-4011 or *Joseph.Pixley@fta.dot.gov*.

**SUPPLEMENTARY INFORMATION:**

**Availability of the Final Rule and Comments**

A copy of this rule and comments and material received from the public, as well as any documents indicated in the preamble as being available in the docket, are part of docket FTA-2005-23082 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may retrieve the rule and comments online through the Document Management System (DMS) at: *http://dms.dot.gov*. Enter docket number 23082 in the search field. The DMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

An electronic copy of this document may also be downloaded by using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may also reach the Office of the Federal Register's home page at: *http://www.nara.gov/fedreg* and the Government Printing Office's Web page at: *http://www.gpoaccess.gov/fr/index.html*.

**I. Background**

On November 28, 2005, FTA published an NPRM in the **Federal Register** (70 FR 71246) discussing a number of proposals as mandated by SAFETEA-LU and 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, the divergence of opinion on important areas, and the

potential for “unintended consequences” to affected industries and grantees, several commenters recommended that FTA issue an “interim final rule” to allow commenters and FTA more time to consider the potential impact of the proposed changes. FTA acknowledges these concerns. Therefore, this final rule addresses fewer issues than proposed in the NPRM. FTA identified several subject areas that represent the more routine issues proposed in the NPRM. These topics include: (1) Administrative review; (2) the definition of “negotiated procurement;” (3) the definition of “contractor;” (4) repeal of the general waiver for Chrysler vehicles; (5) certification under negotiated procurements; (6) preaward and postaward review of rolling stock purchases; and (7) miscellaneous corrections and clarifications to the Buy America regulations. Accordingly, this final rule addresses the above subject areas only.

FTA will issue a new NPRM this calendar year to address the following issues: (1) Justification for public interest waiver; (2) microprocessor and post-award waivers; (3) definition of “final assembly;” (4) proposed changes to “communication equipment;” and (5) the definition of “end product” and a representative list of end products. In addition to the new NPRM, FTA will hold a public meeting in Washington, DC to discuss its new proposal. The meeting date and location will be contained in the **Federal Register** notice for the new NPRM.

#### *Administrative Review*

In the NPRM, FTA requested comments on its proposal to implement the SAFETEA-LU requirement that parties adversely affected by an agency action may seek judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 702 *et seq.* FTA received four comments on this issue, two of which concurred with FTA’s proposed change to the regulation. The other two comments, which were identical, expressed the view that administrative review without remedies such as injunctions, damages or cancellations was essentially “meaningless.”

*FTA Response:* The comments that express disagreement with FTA’s proposal appear to misunderstand the requirements of SAFETEA-LU, which merely state that “[a] party adversely affected by an agency action under this subsection shall have the right to seek judicial review” under the APA. As the other two commenters recognized, FTA’s proposed wording to section

661.20, fully implements the requirement that FTA’s Buy America decisions are subject to judicial review.

The two adverse commenters also appear to misinterpret the proposed language in § 661.20 as implying that FTA will not take action if it finds that a grantee has “awarded business based on an improperly justified Buy America waiver.” To the contrary, under the Agency’s existing regulations at 49 CFR 661.17, “[i]f a successful bidder fails to demonstrate that it is in compliance with its certification, it will be required to take the necessary steps in order to achieve compliance” without changing its bid price. Furthermore, “[a] willful refusal to comply with a certification by a successful bidder may lead to the initiation of debarment or suspension proceedings under part 29 of this title.” See 49 CFR 661.19. In short, FTA already has a full range of administrative tools at its disposal to enforce Buy America compliance to include possible cancellation of Federal funding of a project, and suspension and debarment actions for willful violations. Any further “enforcement” language in the proposed new rule in section 661.20 is, therefore, unnecessary.

Accordingly, FTA adopts as final the changes proposed in the NPRM with respect to administrative review.

#### *Repeal of General Waiver for Chrysler Vans*

In the NPRM, FTA sought comment on the repeal of two general waivers for Chrysler vehicles from the Buy America regulations, as mandated by SAFETEA-LU. None of the commenters opposed this change. Accordingly, FTA adopts as final the changes proposed in the NPRM with respect to general waivers for Chrysler vehicles.

#### *Definition of Negotiated Procurement*

In the NPRM, FTA requested comments on its proposal to adopt a “flexible” definition of negotiated contracts used in the Federal Acquisition Regulation (FAR) part 15. The proposed definition states: “Negotiated Procurement means a contract awarded using other than sealed bidding procedures.” Of the twelve comments received on this issue, five agreed with FTA’s proposed definition.

Two commenters proposed an alternative definition of negotiated procurements as \* \* \* “a contract in which (a) potentially differing proposals from offerors are evaluated, (b) the evaluations are based on more factors than the two normally used in a sealed bidding procurement (specification

compliance and price), and (c) the evaluation process could include discussions or negotiations between the buyer and seller, amended specification and revised proposals, before a final award is made.”

Three other commenters offered individual definitions, as follows:

“A negotiated procurement means a contract awarded under selection procedures that allow the Contracting Officer to conduct discussions or negotiations;”

“A negotiated procurement means a solicitation issued or contract awarded using other than sealed bidding procedures;” and,

“A negotiated procurement means a contract awarded on a best value basis using other than sealed bidding procedures.”

The final commenter recommended that FTA include a definition of sealed bidding.

*FTA Response:* A number of comments recommend alternative definitions of the term “negotiated procurement” to reflect standard practices in a particular industry or personal preference and to include such terms as “best value,” “discussions,” “revised proposals,” among other terms. However, FTA believes that its proposed definition is broad enough to incorporate all of these recommended definitions. In addition, to the extent possible, FTA prefers to base any proposed definition on existing precedents in public contracting law and practice. FTA believes that basing the definition of “negotiated procurement” on the example in FAR part 15 serves this purpose. Furthermore, in keeping with the requirements of 49 CFR 18.36(b), which states that FTA grantees and subgrantees “will use their own procurement procedures which reflect applicable State and local laws and regulations” in third party contracts, FTA prefers a broad, flexible definition of “negotiated procurement,” which will not conflict with or limit specific local practices.

FTA disagrees with the comment that the Agency should also define the term “sealed bidding” on the grounds that such defined term is unnecessary. The Department’s regulations on third party contracting requirements already provide descriptions of “Procurement by sealed bids” and “Procurement by competitive proposals.” See 49 CFR 18.36(d)(2) and (3) (emphasis in original). FTA believes that these regulatory descriptions of sealed bidding and negotiated procurement methods suffice for purposes of the Agency’s Buy America practices. Accordingly, FTA adopts as final the

changes proposed in the NPRM with respect to the definition of “negotiated procurement.”

#### Definition of Contractor

In the NPRM, FTA sought comments on two alternative definitions of the term “contractor.” The first proposed definition comes from the definition of contractor in FAR 9.403 (suspension & debarment section). FTA’s proposed definition states:

Contractor means any individual or other legal entity that directly or indirectly (e.g., through an affiliate) submits bids or offers for or is awarded, or reasonably may be expected to submit bids or offers for or be awarded, a federally funded third party contract or subcontract under a federally funded third party contract; or, conducts business, or reasonably may be expected to conduct business, with an FTA grantee, as an agent or representative of another contractor.

The second proposed definition is based on the definition of “contractor” in the Contract Disputes Act (CDA), 41 U.S.C. 601(4) which states: “Contractor means any party to a third party government contract other than the government.”

FTA received eight comments on this issue. Only one of the commenters supported the first proposed definition based on FAR 9.403. Four commenters believed that the proposed FAR definition is worded too broadly and includes parties to whom a contract has not yet been issued, or has no business relationship with a grantee. As an alternative, one commenter suggested that FTA adopt a definition from FAR 33.102(e) which defines “interested party” as “an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.”

Two commenters supported FTA’s other proposed definition of “contractor” adopted from the Contract Disputes Act. Six commenters believed that the Contract Disputes Act definition lacks clarity, as it does not contain a definition of the term “contract,” or confuses the term “any party” with “third party.” One commenter noted that some grantee contracts are entered into with other governments, acting as a contractor. Four of the commenters proposed an alternative definition which defines a contractor as “any entity engaged in a federally assisted agreement with an FTA grantee under authority of Title 49, Code of Federal Regulation, Section 18.36 or similar authority. This term does not encompass entities based on their engagement in grants, sub-grants, or cooperative agreements, nor does it

encompass prospective contractors such as bidders or offerors.”

The remaining commenter recommended defining a contractor as “a party entering into an agreement for the provision of goods or performance of services with a FTA grantee, other than grant agreements or subgrant agreements.”

*FTA Response:* FTA concurs with the commenters who advise against adopting a definition of “contractor” from FAR 9.403. Accordingly, FTA will not do so. Moreover, FTA will not implement the recommended alternative definition from FAR 33.102(e), “interested party,” as this term refers to disappointed bidders and offerors “wishing to protest” a contract award. Indeed, FAR 33.102(e) pertains to Federal agency bid protest procedures. FTA agrees with those commenters who stated that the proposed definition of “contractor” should not include prospective contractors such as bidders or offerors.

FTA will, therefore, adopt a definition of “contractor” based on the Contract Disputes Act. FTA agrees with one commenter who stated that the proposed definition has the benefit of simplicity. As stated earlier, to the extent possible, FTA prefers to base any proposed definitions and regulatory requirements on existing precedents in public contracting law and practice. For example, contrary to the comments that the CDA-based definition “lacks clarity” or does not exclude “potential contractors” such as bidders or offerors, Federal courts have long defined the term “contractor,” e.g., a party to a government contract other than the government, as a party in privity of contract with the government; the term “contractor” does not include bidders, offerors, subcontractors, or performance bond and prime contractor’s sureties. See generally *Johnson Controls v. U.S.*, 44 Fed. Cl. 334, 340 (1999) (cited cases omitted); *Monchamp Corp. v. U.S.*, 19 Cl.Ct. 797 (1990). Under the plain meaning of the CDA usage, a contractor is simply the party that executes a government contract with the government. Thus, there is a large body of Federal law on which the FTA may rely on to clarify the term “contractor” in the unlikely event that should be necessary. [Note: To date, FTA has not formally addressed the definition of “contractor” as a substantive matter in Buy America practice, other than in the instant rulemaking. In fact, the Buy America provisions at 49 U.S.C. 5323(j) and 49 CFR part 661, heretofore, do not include the term “contractor.” FTA’s Buy America regulations refer to “bidders, offerors, and suppliers.”]

Moreover, FTA does not believe it is necessary to define the term “contract,” as some commenters have suggested. FTA has already defined that term in several guidance documents. In particular, FTA Circular 4220.1E “Third Party Contracting Requirements,” dated June 19, 2003, defines “third party contract,” which is the Federally-assisted procurement applicable to Buy America, as follows: “‘Third party contract’ refers to any purchase order or contract awarded by a grantee to a vendor or contractor using Federal financial assistance awarded by FTA.” In another instance, FTA has stated that “[c]ontracts do not include grants and cooperative agreements.” See FTA’s Best Practices Procurement Manual, dated November 6, 2001, para. 1.2 “Identifying a Contract.” FTA believes that these definitions of “contract” suffice for purposes of its Buy America practices.

FTA agrees with one commenter who noted that the proposed CDA-based definition of contractor as “a party to a government contract other than the government” may create some confusion as “some grantee contracts are entered into with another government, acting as a contractor.” However, the term “other than the government” in the CDA definition does not mean “any government,” but rather, in the context of a direct Federal procurement, the United States Government, the entity which issued the solicitation and is the other party to the contract. See *Serra v. GSA*, 667 F. Supp. 1042, 1048 (S.D.N.Y. 1987). Indeed, the FAR expressly recognizes that agencies of the United States may contract with other State, local, and tribal governments. See FAR 31.107.

Nevertheless, to avoid confusion and to make the term “contractor” more applicable to the scenario of third party contracts, FTA will substitute the terms “any” with “a” and “other than the government” with “other than the grantee”; FTA will also delete the term “government” from “third party government contract.” These changes should make clear that a “contractor” for Buy America purposes is a party in privity of contract with the grantee, on an FTA-funded procurement. Accordingly, FTA adopts as final the following definition at § 661.3:

Contractor means a party to a third party contract other than the grantee.

#### Certification Under Negotiated Procurement

In the NPRM, FTA sought comments on its proposal to implement the SAFETEA-LU requirement that “in any case in which a negotiated procurement

is used, compliance with the Buy America requirements shall be determined on the basis of the certification submitted with the final offer." FTA proposed the following language to the Buy America regulations:

In the case of a negotiated procurement, a certification submitted as part of an initial proposal may be superseded by a subsequent certification(s) submitted with a revised proposal or offer. 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.

FTA received six comments on this issue, two of which favored the language proposed by FTA. The four remaining comments recommended simplifying FTA's proposal. Two commenters suggested the following language: "In the case of a negotiated procurement, 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." One of these commenters stated that this proposed language will permit cases, in which, during a negotiated procurement, a certification is not submitted with initial offers, but no award is made on the basis of initial offers.

Two other commenters made similar suggestions that FTA's proposed language should recognize circumstances where an initial offer fails to include any Buy America certification. Both of these commenters agreed that in an award made on initial proposals, a grantee could not award a contract to an offeror that failed to include a Buy America certification with its initial proposal. However, both commenters stated that where a grantee reserved the right to conduct discussions with offerors, the grantee need not eliminate a proposal from the competitive range simply because there was no Buy America certification. Another commenter suggested that language on "initial proposals" may be eliminated entirely because "the initial offer becomes the final offer when a grantee awards on the basis of initial proposals. Thus, it is not necessary to restate this fact."

One commenter recommended that the language on certification under negotiated procurements be expanded to include design-build contracts. In such

cases, the commenter suggested that "the governing certificate shall be the one submitted with the final offer or final revised proposal; after 70% design the contractor would be eligible for a Post Award Non-Availability Waiver by providing evidence demonstrating that the material has become unavailable or compliance is impracticable due to cost."

*FTA Response:* FTA agrees with the commenters who suggest that the Agency's proposed language in the NPRM should be simplified as follows:

In the case of a negotiated procurement, 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.

Regarding the comment that language on "initial proposals" may be eliminated as unnecessary, FTA agrees that in an award made on the basis of initial proposals, "initial" and "final" offers are one and the same, technically speaking. However, FTA believes that the additional language on "initial proposals" puts grantees and suppliers squarely on notice of the absolute necessity of submitting Buy America certifications with any final offer or final revised proposal, in any type of negotiated procurement.

As to the commenters who expressed concern that the proposed language should be modified to address situations where an initial proposal does not include any Buy America certification, FTA does not believe this is necessary. FTA agrees with one commenter who states that the simplified version of the regulation "will permit cases, in which, during a negotiated procurement, a certification is not submitted with initial offers, but no award is made on the basis of initial offers." In other words, the proposed rule makes clear that proposers must include certifications with final offers and final revised proposals. Offerors will not be excluded for failing to include certifications with initial proposals, where grantees do not award on the basis of initial proposals. This is consistent with current FTA guidance on this issue. See FTA Buy America decision in "Palm Beach County," July 27, 2004 [if a grantee "enters into discussions requiring submission of final offers, any offeror could change its original proposal to include a Buy America certification, or change the original certification," prior to submission of best and final offers].

Similarly, FTA does not share the concern of the commenter who stated that some grantees may unfairly eliminate proposals from the competitive range "simply because there was no Buy America certification." Again, FTA has issued guidance on this specific issue. See "Palm Beach County," *supra* [failure to include certificate with initial proposal does not affect grantees' obligation to perform some form of technical evaluation]. FTA believes that further clarification of the rule on this point is unnecessary.

As to the comment which recommends that the proposed rule should include language pertaining to design-build contracts, FTA finds this is non-responsive and beyond the scope of the present rulemaking. Although FTA's administrative decisions have addressed design-build contracts, the current Buy America regulations at 49 CFR part 661 do not mention design-build contracts. Implementation of rules specifically for design-build contracts may be appropriate at a later date.

Accordingly, the final rule at § 661.13(b)(2) will read as follows:

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.

FTA inadvertently omitted § 661.13(b)(3) in the NPRM's proposed regulatory text. This section remains unchanged and is brought forward in the final rule.

#### *Preaward and Postdelivery Review of Rolling Stock Purchases*

SAFETEA-LU amends 49 U.S.C. 5323(m) by mandating that rolling stock procurements of 20 vehicles or fewer that serve rural (other than urbanized) areas, or urbanized areas of 200,000 people or fewer, are subject to the same post-delivery certification requirements that apply to procurements of "10 or fewer buses," i.e. no resident factory inspector is required. In the NPRM, FTA proposed the following language and sought comment on this proposed change.

For procurements of (1) Ten or fewer buses; or (2) procurements of 20 vehicles or fewer serving rural (other than urbanized) areas, or urbanized areas of 200,000 people or fewer; or (3) any number of primary manufacturer standard production and unmodified vans, after visually inspecting and road testing the vehicles, the vehicles meet the contract specifications.

FTA received five comments on this issue, three of which concurred with FTA's proposed modification. One commenter suggested that the language be expanded to include "not just the requirement for a resident inspector, but the post-delivery audit requirement as well." The final commenter supported the proposed language but requested clarification as to the nature and time within which the "20 vehicles or fewer" requirement is calculated.

*FTA Response:* FTA considers the SAFETEA-LU requirement to be self-explanatory and limited in scope. FTA does not understand the comment which recommends that the language of FTA's proposed rule be expanded "to include not just the requirement for a resident inspector, but the post-delivery audit requirement as well." To the extent that the commenter is recommending that FTA eliminate the requirement for post-delivery audits in this type of smaller procurement, FTA disagrees. In particular, 49 U.S.C. 5323(m) states, in part, that the "Secretary of Transportation shall prescribe regulations requiring a preaward and postdelivery review \* \* \* Under this subsection, independent inspections and review are required." (emphasis added). Historically, FTA has interpreted Congressional intent, here, as requiring preaward and postaward audits in all cases. FTA does not believe that SAFETEA-LU provides authority to eliminate either of the audit requirements.

In response to the comment which raised questions concerning the length of time the "20 vehicles or fewer" requirement is calculated, FTA believes that such questions are best addressed through FTA's existing administrative process of providing guidance on Buy America issues on a case-by-case basis, consistent with current practice.

Accordingly, FTA adopts the changes addressed in the NPRM (see 70 FR 71253, (November 28, 2005)). The NPRM addressed this subject in the preamble which generated comments; however, FTA inadvertently omitted a § 663.37 in the NPRM's proposed regulatory text. FTA has considered the comments received and is adopting regulatory text for § 663.37 in the final rule.

#### *Miscellaneous—Corrections and Clarifications*

In the NPRM, FTA proposed minor corrections and clarifications to the Buy America regulations in the following areas: (1) Deleting references to an older version of FTA's implementing statute, and replacing them with references to

SAFETEA-LU; (2) Adding the word "iron," after the word "steel" in the certification requirement for procurement of steel or manufactured products; and (3) adding the term "offeror" and "offer" where appropriate throughout the regulations, to reflect the use of negotiated procurement methods in FTA funded projects.

FTA received three comments on this issue, all of whom supported FTA's proposed changes. However, one commenter recommended that FTA also define the terms "bidder," "offeror" and "proposer," rather than continue to state that these are "terms of art." FTA declines to define these additional terms in the regulation, as unnecessary. These terms have generally recognized meanings in the public contracting realm. It is self-evident that a "bidder" refers to a party that participates in a sealed bidding procurement. "Offeror" and "proposer" are generally synonymous terms referring to parties that participate in negotiated procurements.

## **II. Regulatory Analyses and Notices**

### *Statutory/Legal Authority for This Rulemaking*

This rule is authorized under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59) amended Section 5323(j) and (m) of Title 49, United States Code and requires FTA to revise its regulations with respect to Buy America requirements.

### *Executive Order 12866 and DOT Regulatory Policies and Procedures*

This rule is a nonsignificant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This rule is also nonsignificant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034). This rule imposes no new compliance costs on the regulated industry; it merely clarifies terms existing in the Buy America regulations and adds terms consistent with SAFETEA-LU.

### *Executive Order 13132*

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("Federalism"). This rule does not include any regulation that has substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various

levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

### *Executive Order 13175*

This rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments"). Because this rule does not have tribal implications and does not impose direct compliance costs, the funding and consultation requirements of Executive Order 13175 do not apply.

### *Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act (5 U.S.C. 601-611) requires each agency to analyze regulations and proposals to assess their impact on small businesses and other small entities to determine whether the rule or proposal will have a significant economic impact on a substantial number of small entities. This rule imposes no new costs. Therefore, FTA certifies that this proposal does not require further analysis under the Regulatory Flexibility Act.

### *Unfunded Mandates Reform Act of 1995*

This rule does not propose unfunded mandates under the Unfunded Mandates Reform Act of 1995. If the proposals are adopted into a final rule, it will not result in costs of \$100 million or more (adjusted annually for inflation), in the aggregate, to any of the following: State, local, or Native American tribal governments, or the private sector.

### *Paperwork Reduction Act*

This rule proposes no new information collection requirements.

### *Environmental Assessment*

The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321-4347), requires Federal agencies to consider the consequences of major federal actions and prepare a detailed statement on actions significantly affecting the quality of the human environment. There are no significant environmental impacts associated with this rule.

### *Privacy Act*

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act

Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

**List of Subjects in 49 CFR Parts 661 and 663**

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

■ For the reasons described in the preamble, parts 661 and 663 of Title 49 of the Code of Federal Regulations are amended as follows:

**PART 661—[AMENDED]**

■ 1. The authority citation for part 661 is revised 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, sec. 3020(b), Pub. L. 105-178, and sec. 3023(i) and (k), Pub. L. 109-59); 49 CFR 1.51.

■ 2. Revise § 661.3 to read as follows:

**§ 661.3 Definitions.**

As used in this part:  
*Act* means the Surface Transportation Assistance Act of 1982 (Pub. L. 97-424), as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Pub. L. 109-59).

*Administrator* means the Administrator of FTA, or designee.

*Component* means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.

*Contractor* means a party to a third party contract other than the grantee.

*FTA* means the Federal Transit Administration.

*Grantee* means any entity that is a recipient of FTA funds.

*Manufactured product* means an item produced as a result of the manufacturing process.

*Manufacturing process* means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.

*Negotiated procurement* means a contract awarded using other than sealed bidding procedures.

*Rolling stock* means transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services.

*SAFETEA-LU* means the Safe, Accountable, Flexible, Efficient

Transportation Equity Act: A Legacy for Users (Pub. L. 109-59).

*United States* means the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

■ 3. Revise 661.6 to read as follows:

**§ 661.6 Certification requirements for procurement of steel or manufactured products.**

If steel, iron, or manufactured products (as defined in §§ 661.3 and 661.5 of this part) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder or offeror in accordance with the requirement contained in § 661.13(b) of this part.

**Certificate of Compliance With Section 165(a)**

The bidder or offeror hereby certifies that it will comply with the requirements of section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, and the applicable regulations in 49 CFR part 661.

Date \_\_\_\_\_  
Signature \_\_\_\_\_  
Company \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

**Certificate for Non-Compliance With Section 165(a)**

The bidder or offeror hereby certifies that it cannot comply with the requirements of section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, but it may qualify for an exception to the requirement pursuant to section 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended, and the applicable regulations in 49 CFR 661.7.

Date \_\_\_\_\_  
Signature \_\_\_\_\_  
Company \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

**§ 661.7 [Amended]**

■ 4. In § 661.7, Appendix A, remove paragraphs (b) and (c) and redesignate paragraphs (d) and (e) as paragraphs (b) and (c), respectively.

■ 5. In § 661.9, revise paragraphs (b) and (d) to read as follows:

**§ 661.9 Application for waivers.**

(b) A bidder or offeror who seeks to establish grounds for an exception must seek the exception, in a timely manner, through the grantee.

\* \* \* \* \*

(d) FTA will consider a request for a waiver from a potential bidder, offeror, or supplier only if the waiver is being sought under § 661.7 (f) or (g) of this part.

\* \* \* \* \*

■ 6. Revise § 661.12 to read as follows:

**§ 661.12 Certification requirement for procurement of buses, other rolling stock and associated equipment.**

If buses or other rolling stock (including train control, communication, and traction power equipment) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder in accordance with the requirement contained in § 661.13(b) of this part.

**Certificate of Compliance With Section 165(b)(3)**

The bidder or offeror hereby certifies that it will comply with the requirements of section 165(b)(3), of the Surface Transportation Assistance Act of 1982, as amended, and the applicable regulations of 49 CFR 661.11.

Date \_\_\_\_\_  
Signature \_\_\_\_\_  
Company \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

**Certificate for Non-Compliance with Section 165(b)(3)**

The bidder or offeror hereby certifies that it cannot comply with the requirements of section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, but may qualify for an exception to the requirement consistent with section 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act, as amended, and the applicable regulations in 49 CFR 661.7.

Date \_\_\_\_\_  
Signature \_\_\_\_\_  
Company \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

■ 7. In § 661.13, revise paragraphs (b) introductory text (b)(1), (b)(2), and (c), add new paragraph (b)(1)(i), and add and reserve paragraph (b)(1)(ii) to read as follows:

**§ 661.13 Grantee responsibility.**

\* \* \* \* \*

(b) The grantee shall include in its bid or request for proposal (RFP) 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 or offer 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 of submission or a final offer, 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.

(i) 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).

(ii) [reserved]

(2) 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.

(3) \* \* \*

(c) Whether or not a bidder or offeror certifies that it will comply with the applicable requirement, such bidder or offeror is bound by its original certification (in the case of a sealed bidding procurement) or its certification submitted with its final offer (in the case of a negotiated procurement) and is not permitted to change its certification after bid opening or submission of a final offer. Where a bidder or offeror certifies that it will comply with the applicable Buy America requirements, the bidder, offeror, or grantee is not eligible for a waiver of those requirements.

■ 8. In § 661.15, revise paragraphs (a), (b), (d), and (g) to read as follows:

**§ 661.15 Investigation procedures.**

(a) It is presumed that a bidder or offeror who has submitted the required Buy America certificate is complying with the Buy America provision. A false certification is a criminal act in violation of 18 U.S.C. 1001.

(b) Any party may petition FTA to investigate the compliance of a successful bidder or offeror with the bidder's or offeror's certification. That party ("the petitioner") must include in the petition a statement of the grounds of the petition and any supporting documentation. If FTA determines that the information presented in the petition indicates that the presumption in paragraph (a) of this section has been overcome, FTA will initiate an investigation.

\* \* \* \* \*

(d) When FTA determines under paragraph (b) or (c) of this section to conduct an investigation, it requests that the grantee require the successful bidder or offeror to document its compliance with its Buy America certificate. The successful bidder or offeror has the burden of proof to establish that it is in compliance. Documentation of compliance is based on the specific circumstances of each investigation, and FTA will specify the documentation required in each case.

\* \* \* \* \*

(g) The grantee's reply (or that of the bidder or offeror) will be transmitted to the petitioner. The petitioner may submit comments on the reply to FTA within 10 working days after receipt of the reply. The grantee and the low bidder or offeror will be furnished with a copy of the petitioner's comments, and their comments must be received by FTA within 5 working days after receipt of the petitioner's comments.

\* \* \* \* \*

■ 9. Revise § 661.17 to read as follows:

**§ 661.17 Failure to comply with certification.**

If a successful bidder or offeror fails to demonstrate that it is in compliance with its certification, it will be required to take the necessary steps in order to achieve compliance. If a bidder or offeror takes these necessary steps, it will not be allowed to change its original bid price or the price of its final offer. If a bidder or offeror does not take the necessary steps, it will not be awarded the contract if the contract has not yet been awarded, and it is in breach

of contract if a contract has been awarded.

■ 10. Revise § 661.19 to read as follows:

**§ 661.19 Sanctions.**

A willful refusal to comply with a certification by a successful bidder or offeror may lead to the initiation of debarment or suspension proceedings under part 29 of this title.

■ 11. Revise § 661.20 to read as follows:

**§ 661.20 Rights of parties.**

(a) A party adversely affected by an FTA action under this subsection shall have the right to seek review under the Administrative Procedure Act (APA), 5 U.S.C. 702 *et seq.*

(b) Except as provided in paragraph (a) of this section, the sole right of any third party under the Buy America provision is to petition FTA under the provisions of § 661.15 of this part. No third party has any additional right, at law or equity, for any remedy including, but not limited to, injunctions, damages, or cancellation of the Federal grant or contracts of the grantee.

**PART 663—[AMENDED]**

■ 12. The authority citation for part 663 is revised to read as follows:

**Authority:** 49 U.S.C. 1608(j); 23 U.S.C. 103(e)(f); Pub. L. 96-184, 93 Stat. 1320; Pub. L. 101-551, 104 Stat. 2733; sec. 3023(m), Pub. L. 109-59; 49 CFR 1.51.

■ 13. In § 663.37, revise paragraph (c) to read as follows:

**§ 663.37 Post-delivery purchaser's requirements certification.**

\* \* \* \* \*

(c) For procurements of:

- (1) Ten or fewer buses; or
- (2) Procurements of twenty vehicles or fewer serving rural (other than urbanized) areas, or urbanized areas of 200,000 people or fewer; or

(3) Any number of primary manufacturer standard production and unmodified vans, after visually inspecting and road testing the vehicles, the vehicles meet the contract specifications.

Issued in Washington, DC this 14th day of March, 2006.

**David Horner,**  
*Chief Counsel.*

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