

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

(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 and is not permitted to change its certification after bid opening. A bidder or offeror that certifies that it will comply with the applicable Buy America requirements is not eligible for a waiver of those requirements.

[56 FR 932, Jan. 9, 1991, as amended at 68 FR 9799, Feb. 28, 2003]

**§ 661.15 Investigation procedures.**

(a) It is presumed that a bidder 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 with the bidder'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.

(c) In appropriate circumstances, FTA may determine on its own to initiate an investigation without receiving a petition from a third party.

(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 to document its compliance with its Buy America certificate. The successful bidder 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.

(e) The grantee shall reply to the request under paragraph (d) of this section within 15 working days of the request. The investigated party may correspond directly with FTA during the course of investigation, if it informs the grantee that it intends to do so,

and if the grantee agrees to such action in writing. The grantee must inform FTA, in writing, that the investigated party will respond directly to FTA. An investigated party may provide confidential or proprietary information (see paragraph (l) of this section) directly to FTA while providing other information required to be submitted as part of the investigation through the grantee.

(f) Any additional information requested or required by FTA must be submitted within 5 working days after the receipt of such request unless specifically exempted by FTA.

(g) The grantee's reply (or that of the bidder) 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 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.

(h) The failure of a party to comply with the time limits stated in this section may result in resolution of the investigation without consideration of untimely filed comments.

(i) During the course of an investigation, with appropriate notification to affected parties, FTA may conduct site visits of manufacturing facilities and final assembly locations as it considers appropriate.

(j) FTA will, upon request, make available to any interested party information bearing on the substance of the investigation which has been submitted by the petitioner, interested parties or grantees, except to the extent that withholding of information is permitted or required by law or regulation.

(k) If a party submitting information considers that the information submitted contains proprietary material which should be withheld, a statement advising FTA of this fact may be included, and the alleged proprietary information must be identified wherever it appears. Any comments on the information provided shall be submitted within a maximum of ten days.

**§ 661.17**

(l) For purposes of paragraph (j) of this section, confidential or proprietary material is any material or data whose disclosure could reasonably be expected to cause substantial competitive harm to the party claiming that the material is confidential or proprietary.

(m) When a petition for investigation has been filed before award, the grantee will not make an award before the resolution of the investigation, unless the grantee determines that:

(1) The items to be procured are urgently required;

(2) Delivery of performance will be unduly delayed by failure to make the award promptly; or

(3) Failure to make prompt award will otherwise cause undue harm to the grantee or the Federal Government.

(n) In the event that the grantee determines that the award is to be made during the pendency of an investigation, the grantee will notify FTA before making such award. FTA reserves the right not to participate in the funding of any contract awarded during the pendency of an investigation.

(o) Initial decisions by FTA will be in written form. Reconsideration of an initial decision of FTA may be requested by any party involved in an investigation. FTA will only reconsider a decision only if the party requesting reconsideration submits new matters of fact or points of law that were not known or available to the party during the investigation. A request for reconsideration of a decision of FTA shall be filed not later than ten (10) working days after the initial written decision. A request for reconsideration will be subject to the procedures in this section consistent with the need for prompt resolution of the matter.

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

If 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. If a bidder takes these necessary steps, it will not be allowed to change its original bid price. If a bidder does not take the necessary steps, it will not be awarded the con-

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tract if the contract has not yet been awarded, and it is in breach of contract if a contract has been awarded.

**§ 661.18 Intentional violations.**

A person shall be ineligible to receive any contract or subcontract made with funds authorized under the Intermodal Surface Transportation Efficiency Act of 1991 pursuant to part 29 of this title if it has been determined by a court or Federal agency that the person intentionally—

(a) Affixed a label bearing a “Made in America” inscription, or an inscription with the same meaning, to a product not made in the United States, but sold in or shipped to the United States and used in projects to which this section applies, or

(b) Otherwise represented that any such product was produced in the United States.

[61 FR 6303, Feb. 16, 1996]

**§ 661.19 Sanctions.**

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.

**§ 661.20 Rights of third parties.**

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.

**§ 661.21 State Buy America provisions.**

(a) Except as provided in paragraph (b) of this section, any State may impose more stringent Buy America or buy national requirements than contained in section 165 of the Act and the regulations in this part.

(b) FTA will not participate in contracts governed by the following:

(1) State Buy America or Buy National preference provisions which are not as strict as the Federal requirements.

(2) State and local Buy National or Buy America preference provisions