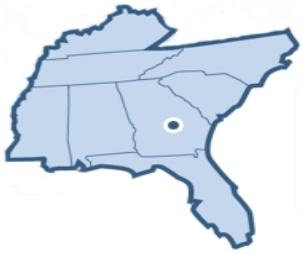
Augusta Public Transit (APT)

Process and Procedure Manual 2020



Region 4

Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee,
The Commonwealth of Puerto Rico and the United States Virgin Islands

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Purchasing Policy Statement

This policy applies to the procurement of all goods and services.

It is the policy of the Augusta Board of Commissioners to:

- Ensure compliance with the Augusta Georgia Procurement Code, Article 10 as well as other state and federal laws applying to purchasing;
- Provide equal access to all vendors participating through competitive acquisition of good and services;
- Conduct the procurement process and investment recovery in a manner that promotes and Fosters public confidence in the integrity of the Authority's procurement procedures; and
- Protect the interests of taxpayers without regard to any undue influence or political pressures.
- Ensure compliance with Federal Transit Administration (FTA) which follows 2 CFR §§200.318 (*General Procurement Standards*) through 200.326 (*Contract Provisions*).

Augusta, Georgia shall maintain purchasing procedures that comply with all state and federal law and reflect the policy directive of the Augusta Georgia Board of Commissioners.

G A Sams Date: 7/29/2020
Geri A. Sams, Procurement Director

Donna B Williams Date: 7-29-2020
Donna Williams, Finance Director

WHAT's NEW IN PROCUREMENT?

1. Revised information relating to need to search System for Award Management prior to award
2. Updated Buy America information noting that requirements apply to capital leases
3. Updated information on piggyback, state-led, or joint procurements based on FAST Act
4. Updated information on Altoona testing pass/fail requirements per FAST Act
5. Included transit vehicle manufacturer (TVM) definition and additional related information
6. 2 CFR Part 200 - Changes in Procurement Requirements
7. **EXHIBIT 7 (Replaces Section 4 in its entirety – FTA BEST PRACTICES)**
   SECTIONS 3 and 4– GENERAL PROCUREMENT PRACTICE

2 CFR Part 200
Changes in Procurement Requirements

Grace Period:

The revision of the 2 CFR Part 200 procurement requirements is so significant for nonprofit organizations that all non-Federal entities have a two (2) year grace period to implement the new procurement requirements. For example if your organization's year end is August 31, the

procurement requirements must be implemented by August 31, 2017. Even though there is a 2 year grace period, all organizations must currently document whether the organization is in compliance with the old or new standard, and must meet the documented standard.

Synopsis of Changes:

Recipients may choose from the following procurement methods, provided they comply with the recipient's State and local laws and regulations. Micro and small purchase thresholds may vary by State and local governments. If a recipient has the legal authority under State law to implement a micro-purchase and small purchase program, they must comply with their State and local requirements. If a State has lower threshold requirements than FTA has established, the recipient must comply with those State levels. However, the FTA threshold is a ceiling, and procurements using FTA funds that exceed the FTA threshold will not be considered micro-purchase or small purchases, even if the State threshold is higher.

There is no Federal requirement that a recipient use the sealed bid or competitive proposal method for any of its federally funded procurements. There is a mixture of history and tradition behind the use of sealed bidding in the public sector that is frequently embodied in legislative requirements at both the Federal and State levels. Although Federal legislative requirements mandating the use of this method have been relaxed in recent years, many States still require its use for many commodities or services being procured and it is still the "preferred" method for the acquisition of construction services in the public sector, including by FTA. Sealed bidding is perceived to be a faster, more objective method of procurement. Recipients of FTA funds are advised to check State and local laws and ordinances to determine what flexibility or constraints, if any, exist regarding use of the various procurement methods. Although Federal law permits a variety of procurement methods, a recipient may be restricted by State and local law on the methods available to it in a given situation. Provided recipients properly comply with the applicable Federal requirements, FTA will defer to the judgment of its recipients in deciding which method to use for each of its procurements.

FTA Circular 4220.1F has not been updated to incorporate the provisions of the Uniform Administrative Requirements, 2 CFR Part 200. Until that update is issued, when there is a conflict between

guidance contained in Circular 4220.1F and the Uniform Administrative Requirements, the Uniform Administrative Requirements supersede C.4220.1F. Information on procurement thresholds for

federally-funded procurements:

- Micro-purchase threshold is $3,500 or less if awarded prior to June 20, 2018, or $10,000 or less for contracts awarded after June 20, 2018.
- Simplified Acquisition (small purchase) threshold is $150,000 or less, if awarded prior to June 20, 2018, or $250,000 or less for procurements awarded after June 20, 2018.

Procurements funded by awards issued on or before December 25, 2014, are

subject to the previous simplified acquisition threshold of $100,000. (per 49 CFR 18.36(d)

The major revision to the procurement requirements are that there five (5) methods of procurement with dollar thresholds associated to each method of procurement. Section 200.320 found below describes the five methods of procurements:

1) Micro-purchase (less than to $3,000),
2) Small purchase (less than $150,000),
3) Sealed bids purchases (more than $150,000),
4) Competitive proposal purchases (more than $150,000), and
5) Noncompetitive purchases (special circumstances which are applicable for all purchase levels).

All five procurement types must comply with the Procurement Standards in section 200.318, also found below, which can be summarized generally as follows:

- the purchase complies with the organization's documented procedures in place,
- purchases are necessary,
- open competition (to the extent required by each method),
- a conflict of interest policy and
- proper documentation for the purchases.

In section 200.88 simplified acquisitions threshold is used to describe small purchases and micro-purchases. Simplified acquisition threshold means the dollar amount below which an organization may purchase property or services using small purchase methods (less than $150,000). Since micro-purchases are less than to $3,000, micro-purchases can also use the simplified acquisition threshold. All purchases under the simplified acquisition threshold (including micro-purchases) require:

- fewer terms and conditions,
- have a lesser competition standard than purchases over the simplified acquisition threshold,
- can be solicited informally,
- and do not require a cost or price analysis

For example, purchases of supplies or services under $3,000 are treated as micro-purchases. If the organization entity considers the costs to be reasonable, the purchase orders may be awarded without soliciting any competitive quotations. No rate competitive quotations are necessary for the purchase. A cost or price analysis is also not required. The organization must, to the extent practicable, distribute these purchases equitable among qualified suppliers

All purchases between $3,000 and $150,000 the **small purchase** procedures can used and is stated in section 200.320 (b) which describes the procedures as relatively simple and informal.

- It states that "price or rate quotations must be obtained from an adequate number of qualified sources."
- It leaves the discretion of the organization's written policy to determine the "adequate" number of qualified sources (i.e., any number greater than one) and the methods of methods of obtaining the price or rate quotations (e.g., it can be in writing, orally, vendor price list on website, or generated via online search engine).
- Section 200.323 also excludes the small purchases from any requirements for cost or price analysis.
    - For example, a purchase order for supplies in the amount $10,000 can treated a small purchase order.
    - This purchase order requires a rate quote from at least two sources, which can be obtained in writing from two suppliers or research done on a public websites. A cost or price analysis is not required.
    - In addition, if the chlorine is of special quality that is offered by only one company or only one company can deliver in the time frame required for the project, the purchase order can be made under the sole source purchase provision in section 200.320 (f).

For purchases greater than the simplified acquisition threshold of $150,000, either **sealed bids** or **competitive proposals** purchases apply. The sealed bid method is the preferred method for procuring construction and is not a typical procurement method for local centers. **Sealed bids** are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid,

- conforming with all the material terms and conditions of the invitation for bids,
- and is the lowest in price.
- For detail information please review the information below in section 200.320 Methods of procurement to be followed.

Competitive proposals are used to solicit multiple offers and can be awarded either a fixed price or cost-reimbursement type contract. Competitive proposal are for bids over $500,000 and is generally used when conditions are not appropriate for the use of sealed bids. Requests for proposals (RFPs) are typical used for competitive proposals. For competitive proposals where qualification of the vendor is more important than the price of the service a request for qualification (RFQ) maybe more appropriate. For detail information please review the information below in section 200.320 Methods of procurement to be followed.

The final method of procurement is the sole source method. This procurement method is noncompetitive and should only be used for the following types of procurement:

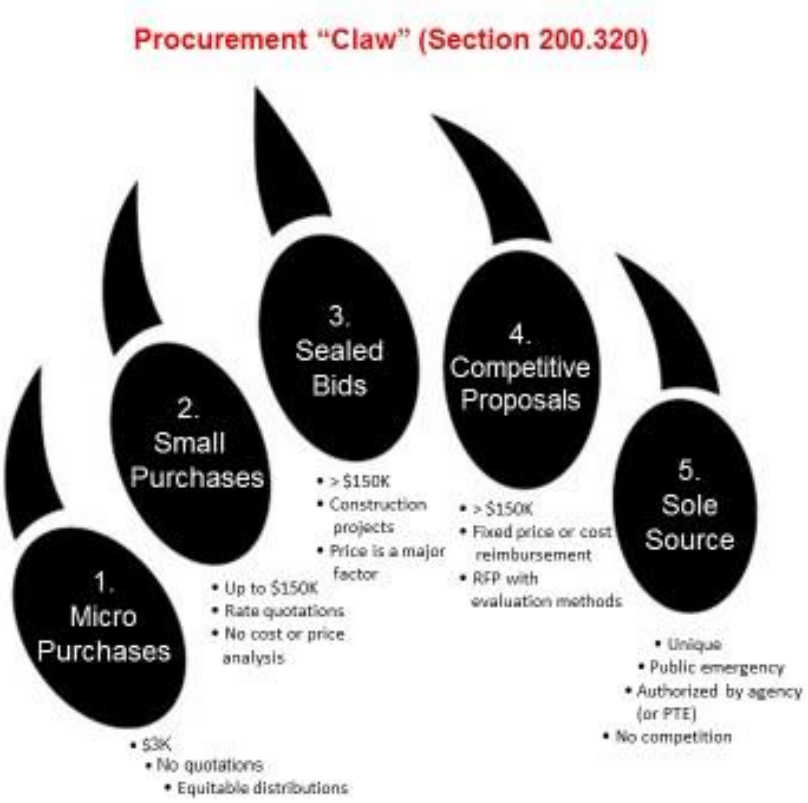
- Unique type of service or product that can only be provided by a specific vendor,
- Public emergency where the service and product must be performed or produced without delayed.
- Upon the written request by the organization, the federal awarding agency or pass- through entity expressly authorized sole sourcing, or
- After solicitation of a number of sources, competition is determined to be inadequate

After solicitation of a number of sources, competition is determined to be inadequate.

Finally, to promote cost-effective and efficient procurement, organizations are encouraged to use shared services by entering into state/local intergovernmental agreements, or inter-entity agreements. This method is appropriate for common procurement or shared goods and services. An example of a local intergovernmental agreement is TIPS (The Inter-local Purchasing System) https://www.tips-usa.com/, with the lead agency being Region 8 Education Service Center (ESC). Organizations should review the website using the link above and determine if TIPS is beneficial for the organization to join.

The chart below is a visual representation of the new procurement regulations, which can be found on the internet as the procurement Bearclaw. Provided below in direct quotations are from 2 CFR Part 200 Subpart D Post-Federal Award Requirements citations 200.317 through 200.323.

If you need financial technical assistance on this subject or other financial grant related topics, please contact Mark Hernandez at mhernandez@taasa.org or (737) 333-9941 or send questions to financial@taasa.org for additional information.



2 CFR Part 200 Subpart D Post-Federal Award Requirements -Procurement Standards (Direct quotes)

200.317 Procurements by states.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered *materials* and ensure that every purchase order or other contract includes any clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§200.318 General procurement standards through 200.326 Contract provisions.

200.318 General procurement standards.

(a) The non-Federal entity must use its own documented procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j)(1) The non-Federal entity may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and material type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract

must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

200.319 Competition.

(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;
(2) Requiring unnecessary experience and excessive bonding;
(3) Noncompetitive pricing practices between firms or between affiliated companies;
(4) Noncompetitive contracts to consultants that are on retainer contracts;
(5) Organizational conflicts of interest;
(6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and
(7) Any arbitrary action in the procurement process.

(b) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

200.320 Methods of procurement to be followed.
The non-Federal entity must use one of the following methods of procurement.

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed $3,000 (or $2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.
(1) In order for sealed bidding to be feasible, the following conditions should be present:
(i) A complete, adequate, and realistic specification or purchase description is available;
(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and
(iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:
(i) The invitation for bids will be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids;
(ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;
(iii) All bids will be publicly opened at the time and place prescribed in the invitation for bids;
(iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
(v) Any or all bids may be rejected if there is a sound documented reason.

(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:
(1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;
(2) Proposals must be solicited from an adequate number of qualified sources;
(3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;
(4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and (5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It

cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(e) [Reserved]

(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

(1) The item is available only from a single source;

(2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or

(4) After solicitation of a number of sources, competition is determined inadequate.

200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

200.322 Procurement of recovered materials.

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR .part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired by the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

200.323 Contract cost and price.

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

SECTION 1 - PURPOSE AND APPLICATION

1-101 PURPOSE

The purpose of this manual is to provide specific procurement guidance when Augusta uses FTA funds in support of Augusta's public transit system, Augusta Public Transit (APT). This manual is a supplement of Augusta's procurement policies and procedures. Efforts have been made to identify procurement process roles and responsibilities of Augusta procurement staff and transit staff.

When the procurement transaction involves the expenditure of State or Federal funds, the transaction shall be conducted in accordance with any applicable mandatory State or Federal laws and authorized regulations. Notwithstanding where State and Federal assistance or contract funds are used in procurement transaction, any applicable local requirements that are more restrictive than State or Federal requirements, but not in conflict therewith shall be followed.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with 2 CFR §200.322 (*Procurement of Recovered Materials*) and ensure that every purchase order or other contract includes any clauses required by section 2 CFR §200.326 (*Contract Provisions*). All other non- Federal entities, including subrecipients of a state, will follow 2 CFR §§200.318 (*General Procurement Standards*) through 200.326 (*Contract Provisions*).

Non-state recipients: The non-Federal entity must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, and conform to applicable Federal law and the standards identified in 2 CFR Part 200.

1-102 APPLICATION and BASIC REQUIREMENTS

The proceeding policy and these procedures apply to the procurement of all goods and services entered into by APT. It is consistent with and governed by Augusta, Georgia Code, Chapter 10 and conform to Federal law, including 2 CFR Part 200, 49 CFR Part 18, FTA C 4220.1F "Third party Contracting Guidance," and the Master Agreement. When applicable the Federal Transit Administration Circular 4220.1F. The policy shall apply to all expenditures of public funds for purchasing irrespective of the source of the funds. Nothing in this policy shall prevent APT from complying with the terms and conditions of any grant, gift, or bequest that is otherwise consistent with law. Contracts awarded or procurements funded by FTA funds must comply with the requirements outlined in FTA Circular 4220 per the Master Agreement; for contracts awarded or procurements funded by FTA funds, FTA requirements shall prevail over any provisions contained within this Procurement Policy that conflict with the FTA requirements. For all contracts awarded or procurements funded by FTA funds, costs must be necessary and reasonable, allocable to the project, authorized or not prohibited by Federal law or regulation, and must comply with Federal cost principles applicable to APT.

What are the basic requirements?

Recipients must have written procurement procedures which reflect applicable state, local, and tribal laws and regulations, and conform to applicable federal law and the standards identified in 2 CFR Part 200

The Uniform Guidance requirements being the point reference over FTA C. 4220.1F where there is conflicting information between the two.

1-103 SUB-RECIPIENTS

APT shall maintain oversight of all sub-recipients and shall ensure compliance with all federal requirements. The DBE Liaison shall provide assistance to APT, as needed or requested.

1-104 SIGNATURE AUTHORITY

Authority of Administrator to make small purchases. The Administrator shall have authority to make purchases, approve annual bids and enter into professional services agreements without Commission approval for products, services and annual bids not exceeding $25,000.

Authority of General Counsel to settle small cases. The General Counsel shall have authority to settle pending and potential litigation not exceeding $25,000 without Commission approval. *Commission approves purchases and contracts of $25,000 or more*

Authority to approve, sign and execute contracts by type.

NOTE CHANGES: SEE SECTION 4 - EXHIBIT 7

FTA Circular 4220.1F has not been updated to incorporate the provisions of the Uniform Administrative Requirements, 2 CFR Part 200. Until that update is issued, when there is a conflict between guidance contained in Circular 4220.1F and the Uniform Administrative Requirements, the Uniform Administrative Requirements supersede C.4220.1F. Information on procurement thresholds for federally-funded procurements: • Micro-purchase threshold is $3,500 or less if awarded prior to June 20, 2018, or $10,000 or less for contracts awarded after June 20, 2018. • Simplified Acquisition (small purchase) threshold is $150,000 or less, if awarded prior to June 20, 2018, or $250,000 or less for procurements awarded after June 20, 2018. Procurements funded by awards issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of $100,000. (per 49 CFR 18.36(d)

(a) *Generally*. The following section establishes five (5) types of purchases: (1) major purchases, (2) standard purchases, (3) small purchase, (4) using agency purchase, and (5) emergency purchases.
Each type of purchase has its parameters involving: (1) value of purchase, (2) level of approval required within the organization for the purchase, (3) level of budget authorization given for the purchase, (4) level of authority required for the source selection process, and (5) person within the organization charged with the responsibility to sign the purchase contract document.

(b) *Major purchase contracts*. Capital equipment, construction and all services purchase contracts with a value of one-hundred thousand dollars ($100,000) or more must have:
(1) Specific project concept approval by the Commission;
(2) Specific budget approval (listed in budget) or special funding authorization by the Commission;
(3) Commission approval of the source selection method and award of contract; and
(4) Contract to be signed by the Mayor.

(c) *Standard purchase contracts*. Goods and services purchase contracts with a value less than one-hundred thousand dollars ($100,000) but more than ten thousand ($10,000) must have:
(1) General project concept approval by the Commission and/or Augusta, Georgia Administrator; and
(2) General budget approval by the Commission and specific budget approval of the Administrator, or special funding authorization by the Commission or the Administrator (if the transfer of funds is necessary and general project concept not approved previously by the Commission); and
(3) Administrator approval of source selection method and award of contract; and
(4) Contract to be signed by the Mayor.

(d) *Small purchase contracts*. Small purchases equal to, or less than, ten thousand dollars ($10,000) but more than one-thousand dollars ($1,000) must have:
(1) General project concept approval by the Commission and/or the Administrator; and

(2) General budget approval by the Commission (e.g. could be specified within a larger account) and specific budget approval of using agency head as designee of the Administrator, or special funding authorization by the Administrator (when transfer of funds is necessary and general project concept not previously approved by the Commission or Administrator); and
(3) Using agency head approval of source selection method and Administrator award of contract; and
(4) Small purchase orders to be signed by the Procurement Director or designee.

(e) *Using agency purchase contracts.* Using agency purchases (as defined elsewhere) of one-thousand dollars ($1,000) or less must have:
(1) General budget approval by the Commission (e.g. could be specified within a larger account) and/or or special funding authorization by the Administrator; and
(2) Using agency head approval of the source selection method and award of contract; and
(3) Purchase order approved by the Procurement Director.

(f) *Emergency purchase contracts.* Emergency purchases (as defined elsewhere) regardless of the amount of the purchase must have:
(1) Specific project concept approval by the Commission or the Administrator; and
(2) General budget approval by the Commission (e.g. could be unspecified within a larger account) and specific budget approval of the using agency head as the Administrator's designee; and
(3) Using agency head approval of the source selection method and award of contract if during non-standard working hours, or by the Administrator during normal working hours; and
(4) Contract/small purchase order to be signed by the Administrator, using agency head, or Mayor based on the value of the purchase.

SECTION 2 - DEFINITIONS

2-201 DEFINITIONS

Abstract of Bids: Document used to record the results of sealed bids for each bidder, which is subsequently made available for public inspection, after completion of the bid process.

APT: Augusta Public Transit; includes actions and or responsibilities to be taken by the Transit Contract Manager

Blind Trust: An independently managed trust in which the beneficiary has management rights and in which the beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.

Brand Name or Equal Specification: A specification limited to one or more items by manufacturer's names or catalogue numbers to describe the standard of quality, performance, and other salient characteristics needed to meet requirements of APT, and which provides for the submission of equivalent products.

Brand Name Specification: A specification limited to one or more items by manufacturer's names or catalog numbers effectively becoming a sole source.

Best Value Criteria: See Evaluation Criteria.

Business: Any for profit or non-profit corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.

City: Augusta, Georgia; Augusta, Georgia Commission

Commission: will mean the Board of Commissioners of Augusta, Georgia.

Confidential Information: Any information which is available to a director, officer, employee, or agent of APT only because of the person's status as a director, officer, employee, or agent of APT and is not a matter of public knowledge or available to the public on request or that is deemed to be confidential as a matter of the operation of Federal or State law.

Construction: The process of building, altering, repairing, improving, or demolishing any structure or building, or other improvements of any kind to any real property. It does not include the routine operation, routine maintenance of existing structures, buildings, or real property.

Contract: All types of agreements between APT and other parties, regardless of what they may be called, for the procurement of supplies, services, or construction.

Contractor: Any person having a contract with APT or a using agency thereof; provided, however, the term "Contractor" shall not include any individual who is paid a salary and/or benefits by APT pursuant to a contract that provides for that individual's employment by APT.

Disadvantaged Business Enterprise (DBE): A for-profit small business concern:

(a) that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals;

(b) whose management and daily business operations are controlled by one or more of the socially and

economically disadvantaged individuals who own it; and

(c) which has been certified as such by an organization acceptable by APT.

For the purpose of this definition, the phrases "small business concern" and "socially and economically disadvantaged individual" shall have the meanings given to those phrases in 49 C.F.R. §26.5.

Employee: Shall mean an individual employed by Augusta, Georgia Board of Commission.

Engineering Services: Those professional services within the scope of the practice of engineering as defined in Georgia Occupation Code, as amended.

Evaluation Criteria: Qualitative factors than evaluation committee will use to evaluate/score a solicitation and select the most qualified proposer. May include such factors as past experiences, references, management and technical capabilities, price, quality and performance requirements. Also called Best Value criteria

FTA: Federal Transit Administration – an operating administration of the U.S. Department of Transportation.

Gratuity: A payment, loan, subscription, advance, deposit of money, service, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.

Immediate Family: Spouse, children, parents, brothers and sisters.

Invitation to Bids (ITB): All documents, whether attached or incorporated by reference, utilized for soliciting sealed bids.

Large Purchase: Purchases over $100,000 may include: Invitation to Bids (ITB), Request for Proposals (RFP), and Architectural and Engineering Services (A&E).-
See FTA Section 200.320
Sealed bids purchases (more than $150,000),
Competitive proposal purchases (more than $150,000), and
Noncompetitive purchases (special circumstances which are applicable for all purchase levels).

Local Government: Includes a public transit agency as well as county, municipality, city, town, township, special district, council of governments (whether or not incorporated as a private nonprofit organization under State law), regional or interstate government entity, or any agency or instrumentality thereof.

Lowest Responsible Bidder: The responsive and responsible bidder whose bid is most economical for the purpose intended, according to criteria set forth in the solicitation. Determination of this status may involve all or some of the following factors: price, conformity to specifications, financial ability to meet the agreement, previous performance, facilities and equipment, availability of repair parts, experience, delivery promise, terms of payments, compatibility as required, other costs, and other objective and accountable factors which are reasonable.

Micro-Purchase: Purchases / contracts that do not exceed $3,000. May be made with Telephone Quotes (See 2 CFR Part 200 Section 200.320).

Noncompetitive Proposals (sole source): Procurement only if you can justify not soliciting additional competition in the manner explicitly defined in FTA Circular 4220.1F.

Person: Any business, individual, union, committee, club, other organization, or group of individuals.

Administrator: Shall mean the administrator of Augusta, Georgia

Price Analysis: The evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

Pricing Data: Factual information concerning prices for items substantially similar to those being procured. Prices in this definition refer to offered or proposed selling prices, historical selling prices and current selling prices. The definition refers to data relevant to both prime and subcontract prices.

Procurement: The buying, purchasing, renting, leasing or otherwise acquiring of any supplies, services, or construction. It also includes all functions that pertain to the obtaining of any supply, service or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contract, and all phases of contract administration.

Purchase: Will mean the procurement by purchase, lease, or otherwise of real or personal property by APT, and awarding of contracts for construction, alterations, supplies, equipment, repairs or maintenance, or for rendering any services to APT.

Qualified Products List: An approved list of supplies, services, or construction items escribed by model or catalog numbers, which, prior to competitive solicitation, APT has determined will meet the applicable specification requirements.

Recipient: Means APT or any organization receiving funds directly from FTA.

Request for Proposal *(RFP)*: All documents, whether attached or incorporated by reference, utilized for soliciting proposals.

Request for Qualifications *(RFQ)*: All documents, whether attached or incorporated by reference, utilized for soliciting statement of qualifications.

Responsible Bidder or Offeror: A person or company who has the capability in all respects to perform fully the requirement, and the tenacity, perseverance, experience, integrity, reliability, capacity, facilities, equipment, and financial ability which will assure good faith performance.

Responsive Bidder: A person who has submitted a bid which conforms in all material respects to the requirements set forth in the solicitation.

Sale: Will mean the sale, lease, or other disposition of any real or personal property by APT.

Services: The furnishing of labor, time, or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include employment agreements or collective bargaining agreements

SealedPurchase

Small Purchase: Purchases / contracts between $3,000 and $10,000. Although FTA imposes the small purchase threshold at $150,000, it is APT's policy to adopt a $10,000 ceiling for such purchases (See 2 CFR Part 200 Section 200.320).

Specification: Any description of the physical or functional characteristics or of the nature of a supply, service or

construction item. It may include a description of any requirement for inspecting, testing, or preparing a supply, service, or construction item for delivery.

Statute of Frauds: Generally, the Statue of Frauds is whether contracts should be oral or written. In order to be enforceable, the Statute of Frauds requires certain contracts to be written and signed by the party charged with performing the contract. For example, contracts for the sale of goods in excess of $500 must be in writing in order to be enforceable. (See Best Practices Procurement Manual, Section 1.2.2 for a list of other instances where Statute of Frauds apply.)

Sub recipient: Any organization receiving FTA funds from APT, but does not include contractors or subcontractors. Sub agreement is the actual agreement between APT and the sub recipient[2]

Supplies: All property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding land or a permanent interest in land.

Using Agency: Any department, commission, board, or public agency requiring supplies, services, or construction procured pursuant to this Policy.

Telephone Quote: quote for micro-purchase obtained by calling vendor, verbally stating specifications for goods or services in order to solicit a quote. Documentation for telephone quote must be recorded on "Micro Purchase" form.

Third party contract: Any purchase order or contract awarded by APT to a vendor or contractor using Federal financial assistance awarded by FTA.

U.S. DOT: United States Department of Transportation

Written Quote: Document submitted by vendor to APT in writing via fax, mail, or electronic means may be used for Micro or Small purchases.

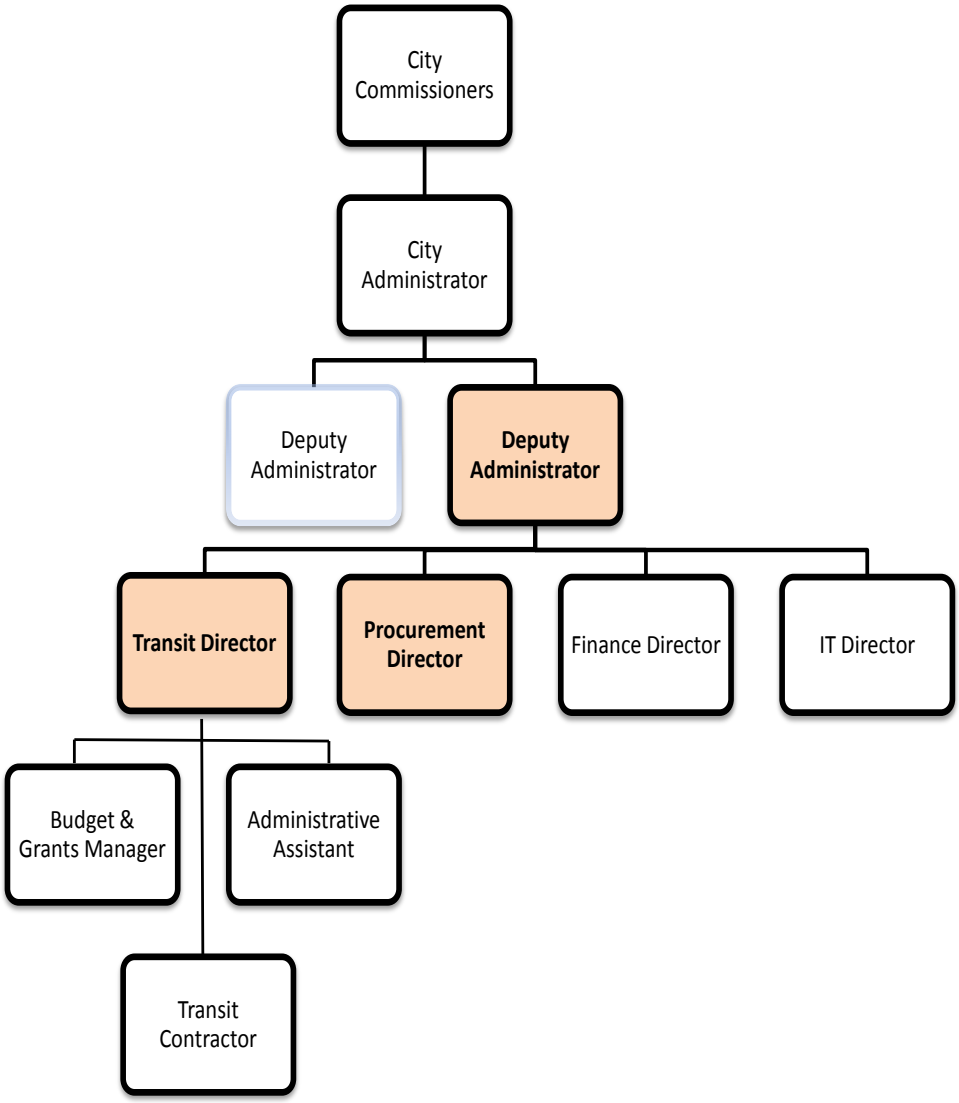
SECTION 3
ORGANIZATIONAL CHART AND ROLES RESPONSIBITIES AND DELEGATION OF AUTHORITY

3-301 ORGANIZATIONAL CHART

The chart on Page 11 illustrates the relationship of departments within the Deputy Administrator's management scope.

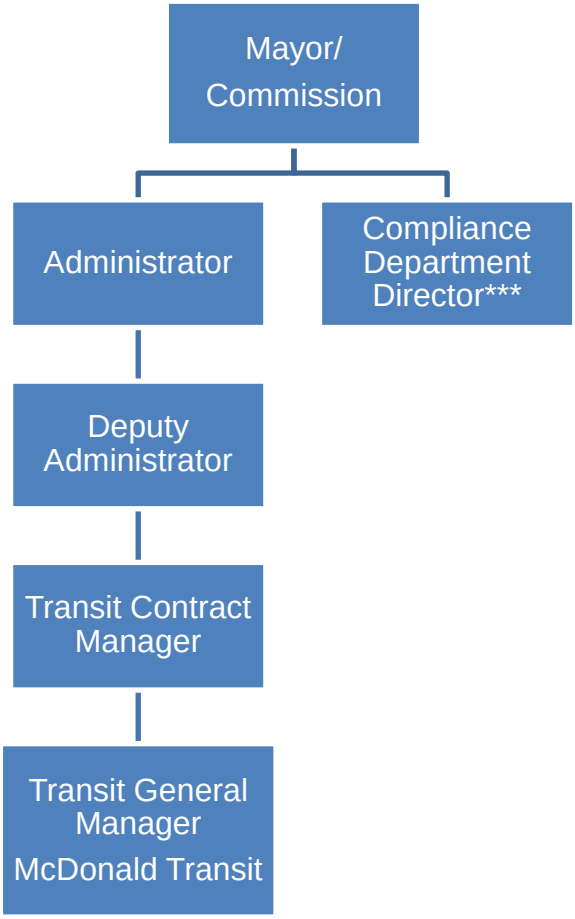
3-302 ROLES, RESPONSIBILITIES, AND DELEGATION OF AUTHORITY

Augusta of Augusta utilizes two Deputy Administrators (DA) in its governance structure. The DA's report to Augusta's Administrator. One Deputy Administrator is responsible for the Departments of Finance, Procurement, Information Technology and Transit. With respect to managing the various procurement processes associated with federal compliance, the DA has delegated certain authority to the Transit Department to oversee the procurement process to ensure compliance to federal regulations including FTA Circular 4220.1F and 2 CFR Part 200, as amended. The flowchart on Page 26 depicts a typical flow process for the Department of Transit's federal procurements.

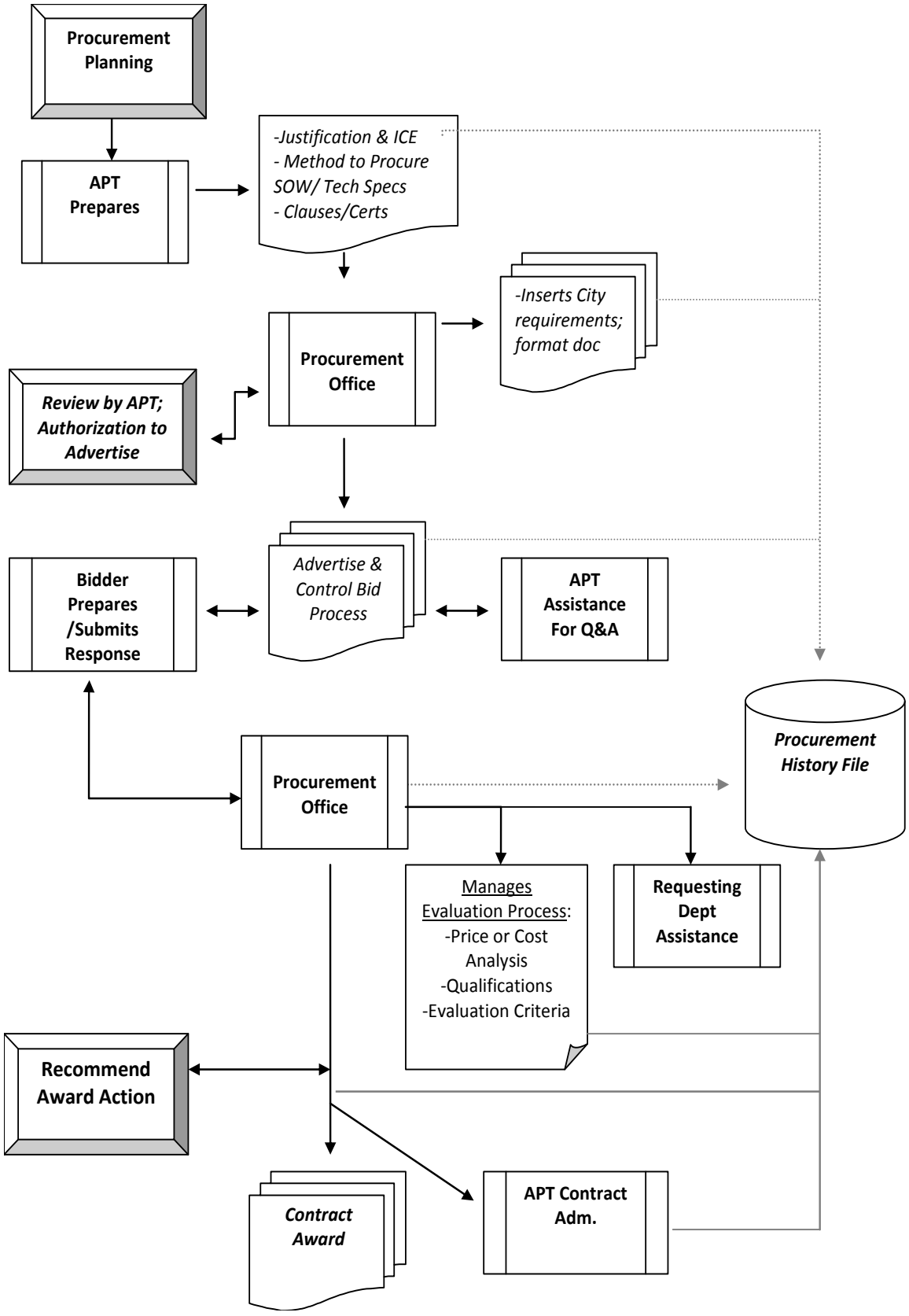

City Commissioners
City Administrator
Deputy Administrator
Deputy Administrator
Transit Director
Procurement Director
Finance Director
IT Director
Budget & Grants Manager
Administrative Assistant
Transit Contractor

Organizational Chart

Augusta, Georgia



*** The Compliance Department Director is a direct report to the Mayor and Commission concerning all matters regarding Equal Employment Opportunity, Disadvantaged Business Enterprises/ Local Small Business Opportunity Program, and the Americans with Disabilities Act.


Procurement Planning
APT Prepares
-Justification & ICE
- Method to Procure
SOW/ Tech Specs
- Clauses/Certs
-Inserts City requirements; format doc
Procurement Office
Review by APT; Authorization to Advertise
Advertise & Control Bid Process
APT Assistance For Q&A
Bidder Prepares /Submits Response
Procurement History File
Procurement Office
Manages Evaluation Process:
-Price or Cost Analysis
-Qualifications
-Evaluation Criteria
Requesting Dept Assistance
Recommend Award Action
Contract Award
APT Contract Adm.

3-303 ETHICS/STANDARD OF CONDUCT

It is the policy of APT to adopt an arm's length relationship in regard to all suppliers, vendors, service companies, and passengers, with whom APT may have a relationship as part of its normal daily operations. It is important that APT not only remain free from all conflict of interest situations, but that APT must also remain free from the appearance of a conflict of interest see attachments II and JJ.

3-304 PERSONAL CONFLICTS OF INTEREST

No employee within APT may participate in such activities as contract specifications, solicitations, selection, or award, if a real or apparent conflict of interest would be involved. Such a conflict would arise when any of the following parties has a financial or other interest in the entity selected for award: (1) an employee, officer, board member, or agent of APT; (2) any member of his or her immediate family; (3) his or her partner; (4) an organization that employs, or intends to employ, any of the above.

No employee within APT will make investments or act for personal gain based upon special knowledge obtained, whether directly or inadvertently, as a result of employment with APT.

No employee within APT will have any relationship or engage in any activity that might involve or lead to personal obligations that could impair the objectivity of such person's judgment, or imply to others that favoritism or obligations exist between such persons and third party contractors.

3-305 PROPER PERSONAL CONDUCT

No employee within APT will solicit or accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub agreements. Unsolicited gifts or items of nominal intrinsic value may be accepted. Entertainment in any form must not be accepted if either party might feel obligation or if third party might infer that an obligation exists.

3-306 ORGANIZATION CONFICTS OF INTEREST

When conducting business with third party contractors, disclosing information that may give them an unfair competitive advantage or that may impair its objectivity in performing contract work is prohibited.

Furnishing advice or services to a firm bidding on or planning to bid on a contract with APT, or which is currently doing business with APT is prohibited. Accepting employment with such third parties is considered a strong conflict of interest (bias) situation, and may result in extreme disciplinary action.

3-307 ISSUANCES OF STANDARDS OF CONDUCT

APT will issue these standards as a pre-employment orientation document to be read and signed by each employee involved in the procurement process, and placed into his/her personnel file.

3-308 SANCTIONS FOR VIOLATION OF ETHIC / STANDARDS OF CONDUCT

Anyone violating the regulations for proper ethics and standards of conduct will receive appropriate disciplinary action (i.e. written warning, termination, dismissal).

3-309 DISADVANTAGED BUSINESS ENTERPRISES

APT maintains a Disadvantaged Business Enterprises program. The program is updated, in accordance with 49 C.F.R. Part 26 and 200.321

200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

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SEE UPDATE – EXHIBIT 7 (Replaces Section 4 in its entirety – FTA BEST PRACTICES)
SECTIONS 3 and 4 – GENERAL PROCUREMENT PRACTICE

4-101 GENERAL PROCUREMENT PRACTICES

This section will discuss the revised procurement requirements found in Subpart D Post-Federal Award Requirements. If you need financial technical assistance on this subject or other financial grant related topics, please contact Mark Hernandez at mhernandez@taasa.org or (737) 333-9941 or send questions to financial@taasa.org for additional information.

Grace Period:
The revision of the 2 CFR Part 200 procurement requirements is so significant for nonprofit organizations that all non-Federal entities have a two (2) year grace period to implement the new procurement requirements. For example if your organization's year end is August 31, the new procurement requirements must be implemented by August 31, 2017. Even though there is a 2 year grace period, all organizations must currently document whether the organization is in compliance with the old or new standard, and must meet the documented standard.

Synopsis of Changes:

FTA Circular 4220.1F has not been updated to incorporate the provisions of the Uniform Administrative Requirements, 2 CFR Part 200. Until that update is issued, when there is a conflict between guidance contained in Circular 4220.1F and the Uniform Administrative Requirements, the Uniform Administrative Requirements supersede C.4220.1F. Information on procurement thresholds for federally-funded procurements: • Micro-purchase threshold is $3,500 or less if awarded prior to June 20, 2018, or $10,000 or less for contracts awarded after June 20, 2018. • Simplified Acquisition (small purchase) threshold is $150,000 or less, if awarded prior to June 20, 2018, or $250,000 or less for procurements awarded after June 20, 2018. Procurements funded by awards issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of $100,000. (per 49 CFR 18.36(d)

The major revision to the procurement requirements are that there five (5) methods of procurement with dollar thresholds associated to each method of procurement. Section 200.320 found below describes the five methods of procurements:

1) **Micro-purchase** (less than to $3,000),
2) **Small purchase** (less than $150,000),
3) **Sealed bids purchases** (more than $150,000),
4) **Competitive proposal purchases** (more than $150,000), and
5) **Noncompetitive purchases** (special circumstances which are applicable for all purchase levels).

All five procurement types must comply with the Procurement Standards in section 200.318, also found below, which can be summarized generally as follows:

- the purchase complies with the organization's documented procedures in place,
- purchases are necessary,
- open competition (to the extent required by each method),
- a conflict of interest policy and
- proper documentation for the purchases.

In section 200.88 simplified acquisitions threshold is used to describe small purchases and micro-purchases. Simplified acquisition threshold means the dollar amount below which an organization may purchase property or services using

small purchase methods (less than $150,000). Since micro-purchases are less than to $3,000, micro-purchases can also use the simplified acquisition threshold. All purchases under the simplified acquisition threshold (including micro-purchases) require:

- fewer terms and conditions,
- have a lesser competition standard than purchases over the simplified acquisition threshold,
- can be solicited informally,
- and do not require a cost or price analysis.

For example, purchases of supplies or services under $3,000 are treated as **micro-purchases.** If the organization entity considers the costs to be reasonable, the purchase orders may be awarded without soliciting any competitive quotations. No rate competitive quotations are necessary for the purchase. A cost or price analysis is also not required. The organization must, to the extent practicable, distribute these purchases equitable among qualified suppliers.

All purchases between $3,000 and $150,000 the **small purchase** procedures can used and is stated in section 200.320 (b) which describes the procedures as relatively simple and informal. It states that "price or rate quotations must be obtained from an adequate number of qualified sources."

- It leaves the discretion of the organization's written policy to determine the "adequate" number of qualified sources (i.e., any number greater than one) and the methods of methods of obtaining the price or rate quotations (e.g., it can be in writing, orally, vendor price list on website, or generated via online search engine).
- Section 200.323 also excludes the small purchases from any requirements for cost or price analysis.
    - For example, a purchase order for supplies in the amount $10,000 can treated a small purchase order. o This purchase order requires a rate quote from at least two sources, which can be obtained in writing from two suppliers or research done on a public websites. A cost or price analysis is not required.
    - In addition, if the chlorine is of special quality that is offered by only one company or only one company can deliver in the time frame required for the project, the purchase order can be made under the sole source purchase provision in section 200.320 (f).

For purchases greater than the simplified acquisition threshold of $150,000, either **sealed bids** or **competitive proposals** purchases apply. The sealed bid method is the preferred method for procuring construction and is not a typical procurement method for local centers. **Sealed bids** are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid,

- conforming with all the material terms and conditions of the invitation for bids, and is the lowest in price.
- For detail information please review the information below in section 200.320 Methods of procurement to be followed.

Competitive proposals are used to solicit multiple offers and can be awarded either a fixed price or cost-reimbursement type contract. Competitive proposal are for bids over $500,000 and is generally used when conditions are not appropriate for the use of sealed bids. Requests for proposals (RFPs) are typical used for competitive proposals. For competitive proposals where qualification of the vendor is more important than the price of the service a request for qualification (RFQ) maybe more appropriate. For detail information please review the information below in section 200.320 Methods of procurement to be followed.

The final method of procurement is the sole source method. This procurement method is noncompetitive and should only be used for the following types of procurement:

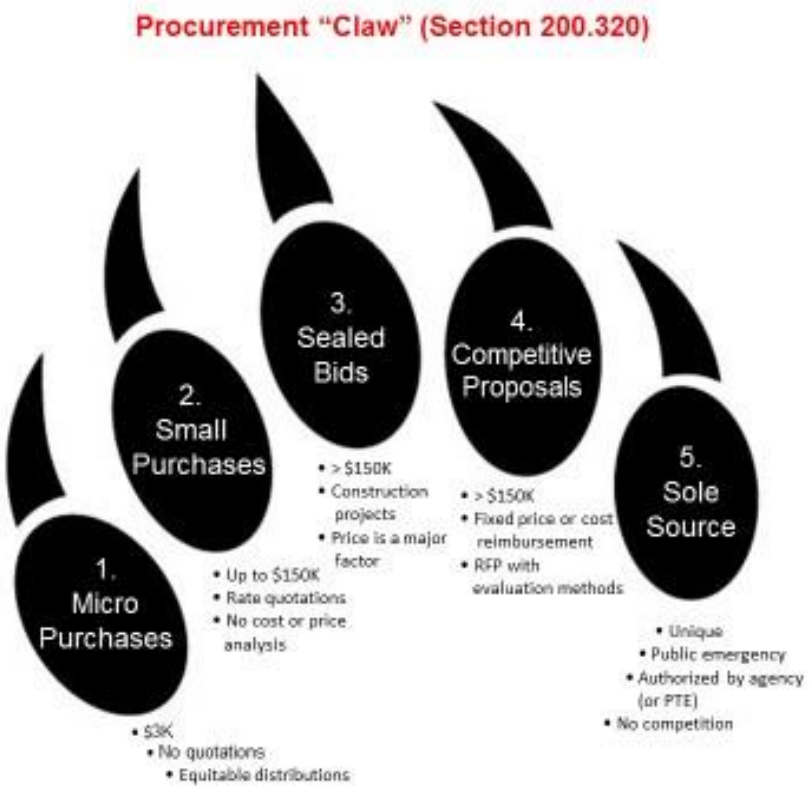
- Unique type of service or product that can only be provided by a specific vendor,
- Public emergency where the service and product must be performed or produced without delayed.
- Upon the written request by the organization, the federal awarding agency or passthrough entity expressly authorized sole sourcing, or
- After solicitation of a number of sources, competition is determined to be inadequate.

Finally, to promote cost-effective and efficient procurement, organizations are encouraged to use shared services by

entering into state/local intergovernmental agreements, or inter-entity agreements. This method is appropriate for common procurement or shared goods and services. An example of a local intergovernmental agreement is TIPS (The Inter-local Purchasing System) https://www.tips-usa.com/, with the lead agency being Region 8 Education Service Center (ESC). Organizations should review the website using the link above and determine if TIPS is beneficial for the organization to join.

The chart below is a visual representation of the new procurement regulations, which can be found on the internet as the procurement Bearclaw. Provided below in direct quotations are from 2 CFR Part 200 Subpart D Post-Federal Award Requirements citations 200.317 through 200.323.

If you need financial technical assistance on this subject or other financial grant related topics, please contact Mark Hernandez at mhernandez@taasa.org or (737) 333-9941 or send questions to financial@taasa.org for additional information.



2 CFR Part 200 Subpart D Post-Federal Award Requirements -Procurement Standards (Direct quotes)

200.317 Procurements by states.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered *materials* and ensure that every purchase order or other contract includes any clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§200.318 General procurement standards through 200.326 Contract provisions.

200.318 General procurement standards.

(a) The non-Federal entity must use its own documented procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or interentity agreements where appropriate for procurement or use of common or shared goods and services.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j)(1) The non-Federal entity may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and material type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive

profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

200.319 Competition.

(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(b) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

200.320 Methods of procurement to be followed.

The non-Federal entity must use one of the following methods of procurement.

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed $3,000 (or $2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:

(i) The invitation for bids will be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids;

(ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) Any or all bids may be rejected if there is a sound documented reason.

(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(2) Proposals must be solicited from an adequate number of qualified sources;

(3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

(4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) The non-Federal entity may use competitive proposal procedures for qualificationsbased procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional

services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(e) [Reserved]

(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

(1) The item is available only from a single source;

(2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or

(4) After solicitation of a number of sources, competition is determined inadequate.

200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

200.322 Procurement of recovered materials.

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired by the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

200.323 Contract cost and price.

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

A. Awards to Responsible Contractors

APT will assist the Procurement Department in ensuring that all procurement activities be entered into with responsible businesses, persons, and contractors. A responsible contractor is one which:

- Has adequate financial resources, or the ability to obtain such resources as required during the performance of the contract, if adequate security is not otherwise furnished;
- Is able to comply with the required or proposed delivery or performance schedule;
- Has a satisfactory record of performance or the equivalent, and
- Has a satisfactory record of and reputation of integrity.

B. Review of Procurement Requests to Avoid Duplicate or Unnecessary Purchases

APT has purchasing procedures for micro-purchases, small purchases, and large purchases (RFQ/RFP/ A&E), respectively. Purchase requests for micro purchases are approved by the Transit Contract Manager. Small and large purchases are prepared by the Transit Contract Manager and approved by the Deputy Administrator. Because of the collaborative effort involved in conducting RFQ / RFP / A&E, it is not possible to make duplicate purchases under this process. In all cases, APT will ensure no staff member can independently request, approve, and receive purchases.

C. Competition; Non-Collusive Bids and Proposals

All purchases and sales, whether by formal advertising or otherwise, will be made on a competitive basis to the maximum practicable extent. In the event identical bids are submitted on any contract for the sale or purchase of property, the Procurement Director will report such fact to Augusta, Georgia's General Counsel if there is any reason to suspect collusion. Augusta, Georgia conduct it purchases in accordance to:

A. Micro-Purchases

Micro-purchases are purchases or contracts that do not exceed $3,000. Purchases below that threshold may be made without obtaining competitive quotes, if APT determines that the price is fair and reasonable. The Davis-Bacon Act must be applied to construction contracts over $2,000. Minimum documentation requirements include determination that the price is fair and reasonable, and how this determination was made.

Whenever feasible, it is APT's preference to complete a "Micro-Purchase" form documenting at least three telephone quotes, or obtain copies of at least three written quotes for such purchases. (See definition of written quote.) Subsequently, the Purchaser will complete a "Purchase Order" form. All micro-purchases with only 1 quote must include the "Fair and Reasonable Price Determination" Stamp, signed, dated, and the reason checked off.

If submitted electronically, the written quote must be printed. If the quote is obtained by telephone, the dates, names of vendors, addresses, phone numbers, and contact persons must be submitted for at least 3 vendors, and documented on the "Micro-Purchase" form.

Supporting documentation must be submitted with the purchase order to Accounting. Copies of purchase documents will be maintained in APT procurement files.

B. Small Purchases

Small purchases, as defined in U.S. DOT / FTA 4220.1F, are purchases of services, supplies, or other property that exceed $3,000, but not more than $150,000. APT will adopt a maximum threshold of $10,000 for small purchases. A minimum of three written quotes is necessary for small purchases.
Written quotes are documents submitted by the vendor to APT in writing via fax, mail, or electronic means. Documentation must be submitted to Accounting and also retained in APT files.

C. Large Purchases

FTA Circular 4220.1F states that purchases over $150,000 must provide for full and open competition. APT's policy is $10,000 and greater for large purchases. These contracts will be solicited by sealed bid or request for proposals. Independent estimates must be made before receiving bids or proposals, which may include bidders' estimates of the total cost of the service or project.

1. *General Requirements for all Large Purchases*

   a. Practices deemed restrictive of competition, and therefore not allowable include:

   - Unreasonable requirements placed on firms in order for them to qualify to do business;
   - Unnecessary experience and excessive bonding requirements;
   - Noncompetitive pricing between firms or between affiliated companies;
   - Noncompetitive awards to any person or firm on retainer contracts;
   - Organizational conflicts of interest (also applies to micro and small purchases);
   - Restrictive use of brand names (also applies to micro and small purchases);
   - Any arbitrary action in the procurement process (also applies to micro and small purchases);
   - Geographic preferences (With the exception of Architectural and Engineering services).

   b. Pre-qualification Criteria

   If firms are required to pre-qualify to bid, or submit competitive proposals, the procedures and criteria for pre-qualifying will be kept on file and made available to potential bidders. APT will in such cases maintain a current list of pre-qualified firms, and will not preclude potential bidders from qualifying during the solicitation period.

   c. Specifications, Plans, and Drawings

   Plans, drawings, or specifications will state only APT's actual minimum needs and will describe the property or service to be acquired or sold, as the case may be, in a manner which will encourage maximum competition and eliminate, insofar as possible, any restrictive features which might limit acceptable offers to a relatively few bidders.

   Where APT's requirements for a commodity can only be estimated, and bids are to be submitted based upon that estimate, the specifications for the commodity may provide that APT's requirements may vary within a given range from the estimate. Specifications and drawings with references to brand names, or items manufactured by a single company, will be used to the minimum extent feasible.

   d. Purchase Description

   A purchase description may be used in lieu of a specification where the use of a specification is

not feasible. A purchase description should set forth the essential characteristics and functions of the items or materials required. Purchase descriptions will not be written so as to specify a product, or a particular feature of a product, explicit to one manufacturer, unless it is determined that the particular feature is essential to APT's requirements, and that similar products of other companies lacking the particular feature would not meet the minimum requirements of the item.

Generally, the minimum acceptable purchase description is the identification of a requirement by use of a brand name followed by the words "**or equal.**" Where a "brand name or equal" purchase description is used, the "salient characteristics" of the brand name must be described so that bidders may offer an "or equal" product. Known, acceptable products should be listed.

e. Alternate Articles

Invitations for bids and requests for proposals may provide for alternate bids or proposals on different articles or quantities of material (e.g., where two or more articles will be equally acceptable to APT depending upon relative price); however, the alternate articles or quantities must be precisely described to assure that the same degree of competition is obtainable.

f. Formal Advertising

Formal advertising means purchases and sales by competitive bids and awards, and involves the following steps:

- Determining whether an Invitation for Bid, Request for Proposal, or an Architectural and Engineering services process is appropriate;
- Preparation of the invitation for bids, describing APT's requirements clearly, accurately, and completely, but avoiding unnecessary restrictive specifications or requirements which might unduly limit the number of bidders;
- Publicizing the invitation for bids, through distribution to prospective bidders and advertising;
- Submission of bids by prospective contractors; and
- Awarding the contract, after the bids are publicly opened, to that responsible bidder whose bid, conforming with all material terms, and conditions of the invitations for bids, is the lowest in price, and;
- Where specified in the bidding documents, factors such as DBE participation, discounts, transportation costs, and life cycle costs will be considered in determining which bid is lowest.

g. Written Record of Procurement History

The purpose of maintaining written procurement records is to ensure a full history of the transaction is recorded and available in order to:

- Support actions taken by various employees of APT in connection with the purchase, sale, or contract;
- Provide information for reviews conducted by the Board or others having the right to conduct such reviews; and
- Furnish essential facts in the event of legal proceedings.

As provided for in FTA Circular 4220.1F, the extent of documentation should be reasonable. Documents included in a procurement history should be commensurate with the size and complexity of the procurement itself. FTA recognizes that these written records will vary greatly for different procurements. For example, a receipt or bill accompanying a $100 credit card purchase might contain all of the required information to support that procurement. Procurements that are more substantial may require extensive documentation.

Dependent upon the type of procurement activity, the following provides a listing of associated documents that will be maintained by the Procurement Department and located at Augusta's administrative offices.

- A copy of valid approval or request for the purchase, sale, or request, or appropriate preference
- Rationale for the method of procurement (e.g. sole source, IFB, RFP, piggyback, State GSA)
- Independent cost estimate
- Procurement selection and evaluation criteria
- Method of advertising
- Copy of advertisement language
- A list of the bidders solicited or a memorandum explaining why the list of bidders was limited
- A copy of the invitation for bids, or request for proposal, including any drawings and specifications
- Addenda issued
- Questions and answers provided to vendors
- Pre-bid or pre-proposal agenda, attendees, and meeting minutes
- One copy of each signed bid or proposal received
- A record of the abstract of bids
- Documentation of late bids
- Documentation of bid protests
- Written determination of reasonable and responsible responses
- Copies of certifications (e.g. Lobbying, Buy America, TVM, DBE program approval, and other rolling stock certification requirements)
- Debarment and Suspension verification documentation
- Evaluation discussions and scoring sheets
- Cost analysis
- A document showing the reasons for the selection of the successful contractor
- A copy of the contract or award
- Copy of insurance forms
- Copy of bid or other simple bonds
- All pertinent correspondence
- Copies of all changes or supplements to the contract, with supporting documents
- Any additional documents reflecting actions peculiar to the specific purchase or sale.

2. *Methods of Procurement for Large Purchases*

a. Invitation for Bid (IFB)

In order to ensure that the sealed bidding process is feasible, APT will make every effort to ensure:

- a complete, adequate, and realistic specification or purchase description is provided
- Two or more responsible bidders are willing and able to compete effectively for the business
- The procurement lends itself to a firm fixed price contract when feasible, and the selection of the successful bidder can be made principally on the basis of price
- No discussion with bidders is needed

Contents of Invitation for Bid: Invitation for Bids will contain the following information, if applicable to the purchase involved:

- APT's address and name of issuing activity;
- Date of issuance;
- Date, hour, and place of opening;
- Description of the supplies or services to be furnished Time of delivery or performance requirements;
- Permission, if any, to submit alternate bids;

- Permission, if any, to submit telegraphic bids;
- Bid Guarantee, performance bond, and payment bond requirements
- Directions for obtaining copies of any documents, such as plans, drawings, and specifications, which have been incorporated by reference
- A statement that APT reserves the right to reject any or all bids; and
- A statement that APT reserves the right to cancel the invitation to bids, at its sole discretion, without penalty.
- A statement that bids received after the exact time set for opening are "*late bids*," and will not be considered for award, except in certain circumstances, such as registered or certified mail that was not delivered on a timely basis, or it was determined that there was mishandling on APT's part.
- A statement that any modifications or bid withdrawals must be received prior to the set time for bid opening.
- Standard contract provisions provided by the Federal Transit Administration, as applicable. APT will access boilerplate instructions and conditions that contain general and special provisions for certain contract types.
- In the case of sales, the invitation for bids will contain a description of the property to be sold by APT in sufficient detail to permit full and free competition.

Methods for Soliciting Invitations for Bids - Formal advertising is required in a newspaper of general circulation in the metropolitan area. A reasonable number of copies of invitations for bids, including specifications and other pertinent information, will be maintained at APT's administrative office. Upon request, prospective contractors not initially solicited may be provided copies of such invitations for bids to the extent they are available.

Receipt and Safeguarding of Bids - will be as follows:

- All bids (including modifications) received prior to the time of opening will be kept secure, and except as provided in the paragraph below, unopened.
- If an invitation for bids is canceled, or if a bidder effectively withdraws their bid in accordance with the specifications set forth, all bids, or the withdrawn bid, as the case may be, will be returned to the bidder(s).
- Unidentified bids may be opened solely for the purpose of identification, and then only by an official specifically designated for this purpose by the Procurement Director.
- If a sealed bid is opened by mistake, the person who opens the bid will immediately write his/her signature and position on the envelope, along with the date and time opened, as well as an explanation of why/how it was opened. The envelope will then be delivered to the Procurement Director, and will be resealed.

Opening of Bids - The following steps are taken in regard to the opening of bids:-

- The Procurement Director and/or a designee will decide and set the time for bid opening, and will so declare to those present. He/she or a designated official of the Procurement Department will then personally and publicly open all bids received prior to that time, and when practicable, read them aloud to the persons present, and have the bids recorded. The original of each bid will be carefully safeguarded until the Abstract of Bids has been made and its accuracy verified.
- Examination of bids by interested persons will be permitted if it does not interfere unduly with the performance of the Department's business. However, original bids will not be allowed to pass out of the hands of an official of the Procurement Department, unless a duplicate bid is not available for public inspection. In such cases, the original bid may be examined by the public only under the immediate supervision of an official of the Procurement Department, and under conditions that preclude possibility of a substitution, addition, deletion, or alteration in the bid.

- Bids will not be opened if a protest is received within the time limits specified in the protest procedures within this document.

Recording of Bids - All legitimate bids will be abstracted and recorded on the "Abstract to Bids" document. Information recorded will include:-

- An identification of the invitation for bids;
- Opening date
- General description of the item/contract being purchased or sold
- Names of each bidder
- Prices bid
- And any other information required by bid evaluation

When the items are too numerous to warrant the recording of all bids completely, entry should be made of the opening date, general description of the material, item number, and the price bid. The abstract will be completed as soon as practicable after the bids have been opened. When all bids have been opened, the Procurement Director will so certify on the abstract.

Award of Bids - In the awarding of bids, Augusta will execute the following actions:

- Unless all bids are rejected, award will be made by the Procurement Director, within the time for acceptance specified in the bid, or extension thereof, to the responsible bidder whose bid, conforming to the invitation for bids, is the lowest bidder. Awards given to the "other than lowest bidder" are addressed in a succeeding section in this document.
- Awards will be formally documented in writing and transmitted via mail. All provisions of the invitation for bids, including any acceptable additions or changes made by a bidder in the bid will be clearly and accurately set forth (either expressly, or by reference in the formal award document),
- since the award is an acceptance of the bid, and the bid and award constitute the contract.

Amendment of Invitation for Bids - If after issuance of an invitation for bids, but before the time for bid opening, it becomes necessary to make changes in quantity, specification, delivery schedules, opening dates, etc., or to correct a defective or ambiguous invitation, such changes will be accomplished by issuance of an amendment to the invitation for bids. The amendment will be sent to everyone to whom invitations have been furnished. The following actions will also be taken:-

- Before issuing an amendment to an invitation for bids, the period of time remaining until bid opening, and the need for extending this period must be considered.
- Where only a short time remains before the time set for bid opening, consideration should be given to notifying bidders of an extension of time by telegram, facsimile, telephone, or electronic mail. Such notification should be confirmed in the amendment.
- Acknowledgement of receipt of the amendment of invitation for bid should be received from each bidder.
- Any information given to a prospective bidder concerning an invitation for bids will be furnished promptly to all other prospective bidders, as an amendment to the invitation, if such information is necessary to the bidder in submitting bids on the invitation, or if the lack of such information would be prejudicial to uninformed bidders.
- No award will be made on the invitation, unless such amendment has been issued in sufficient time, to permit all prospective bidders to consider such information in submitting, or modifying their bids.

Cancellation of Invitations Before Opening - The Procurement Department will include in all solicitations for invitations for bid, a statement that Augusta reserves that right to cancel the solicitation without penalty, at its sole discretion.

Since cancellations of an invitation for bids usually involves the loss of time, effort, and money

spent by Augusta and bidders in carrying the bidding process up to the point of cancellation:

- Invitations for bids should not be canceled unless cancellation is clearly in the public interest, such as where there is no longer a requirement for the supplies or services, or where amendments to the invitation would be of such magnitude that a new invitation is desirable.
- When an invitation is canceled prior to bid opening, bids that have been received will be returned unopened to the bidders, and a notice of cancellation will be sent to all prospective bidders.
- The notice of cancellation will identify the invitation for bid, briefly explain the reason for cancellation, and where appropriate, assure prospective bidders that they will be given an opportunity to bid on any re-solicitation of bids or any future requirements for the type of material or services involved.

Modification or Withdrawal of Bids - Bids may be modified or withdrawn in writing, by telegraphic, by telecommunication, by facsimile, or by electronic mail. Modifications or withdrawals must be received by the Procurement Department no later than the exact time set for opening of bids. Acceptable procedures for modification or withdrawal of bids are as follows:

- Modifications received by telegram, including a record of those telephoned by the telegraph company, or by facsimile transmission, or by printed electronic mail, will be sealed in an envelope by an official of the Procurement Department who will write thereon the date and time of receipt and by whom, the invitation for bid number, and his/her signature. No information contained therein will be disclosed prior to the time set for bid opening.
- A bid may be withdrawn in person by a bidder or his/her authorized representative, provided his/her identity is made known, and he/she signs a receipt for the return of the bid, but only if the withdrawal is prior to the exact time set for opening of bids.

Rejection of All Bids - Augusta recognizes that the preservation of the integrity of the competitive bid system indicates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, or in the case of a sale, to that responsible bidder who made the highest responsive bid.

Every effort will be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective bidders of any resulting modification or cancellation, thereby preventing the unnecessary exposure of bid prices.

Invitations for bids may be canceled after opening but prior to award, and all bids rejected, where the Procurement Department determines in writing that:-

- Inadequate or ambiguous specifications were given in the invitation;
- The supplies or services being purchased are no longer required;
- All otherwise acceptable bids received are at unreasonable prices;
- Reasonable evidence exists that bids were not independently arrived at in
- open competition, were collusive, or were submitted in bad faith; or
- For other reasons, cancellation is clearly in the best interest of Augusta.

Rejection of Individual Bids - Any bid which fails to conform to the essential requirements or specifications of the invitation for bids will be rejected, unless the invitation authorized the submission of alternate bids. Alternate bids must meet the requirements specified in the invitation. Other reasons for rejection of individual bid may include:-

- Any bid which fails to conform to the delivery schedule or permissible alternates thereto stated in the IFB will be rejected as non-responsive.
- Bids where the bidder attempts to impose conditions that would modify requirements of the IFB, or limit his/her liability to Augusta
- Fails to state a price and in lieu thereof, states that the price will be “price in effect at time of delivery” or equivalent; or _

- States a price but qualifies such price as being subject to "price in effect at time of delivery," or equivalent. A low bidder may be requested to delete objectionable conditions from his/her bid, provided these conditions do not go to the substance, as distinguishable from the form of the bid, or work an injustice on other bidders. A condition goes to the substance of a bid, where it affects price, quantity, quality, or delivery of the item offered.
- Any bid may be rejected if it is determined that the price is unreasonably high.
- Low bids received for concerns determined to be not responsible, as stated in the section on Responsible Bidders, will be rejected.
- Where a bid guarantee is required and a bidder fails to furnish it in accordance with the requirements of the IFB, the bid will be rejected.

The originals of all rejected bids, and any written findings with respect to such rejection, will be preserved in the contract file.

Disposition of Late Bids - Late bids which are not considered for award will be held unopened until after award, and then returned to the bidder, unless other disposition is requested, or agreed to by the bidder. An unidentified bid however may be opened solely for the purpose of identification. The following will, if available, be included in the contract file with respect to each late bid:

- A statement of the date and hour of mailing, filing, or delivery, as the case may be;
- A statement of the date and hour of receipt;
- The determination of whether or not the late bid was considered for award, with supporting facts;
- A statement of the disposition of the late bid; and
- The envelope or covering, if the late bid was considered for award.

Minor Informalities or Irregularities in Bids - A minor informality is one which is merely a matter of form, or is some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on the price, quantity, quality, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to other bidders. The Procurement Director will either give the bidder an opportunity to correct the deficiency, or waive any such deficiency, where it is to Augusta's advantage.

Mistakes in Bids - After opening of bids, the Procurement Director will examine all bids for mistakes. In cases of apparent mistakes, and in cases where there is reason to believe that a mistake may have been made, he/she will request from the bidder a verification of the bid, calling attention to the suspected mistake. If the bidder alleges a mistake, the matter will be processed in the manner set forth below. Such actions will be taken prior to award:

The Procurement Director may correct any clerical mistake apparent on the face of a bid, if he/she has first obtained from the bidder, verification of the bid actually intended. Examples of such apparent mistakes are:

- Obvious error in placing decimal point;
- Obvious reversal of price f.o.b. destination and the price f.o.b. factory;
- Obvious error in destination of unit.

Correction will be reflected in the award document.

The Procurement Director, with the advice of Augusta Georgia's General Counsel, is authorized to make the following administrative determination in connection with mistakes in bids, other than apparent clerical mistakes, alleged after opening of bids and prior to award:

- Where an official of Augusta knows, or has reason to suspect, that a mistake in a bid has been made, a "Request for verification in bid" may be submitted to assure that the bid as confirmed

is without error, or to elicit the allegation of a mistake by the bidder. In such case, a written request to the bidder that it verify its bid price will be prepared and submitted.

- Where the bidder requests permission to withdraw a bid, and clear and convincing evidence establishing the existence of a mistake, a determination permitting the bidder to withdraw his/her bid may be made;
- If the evidence is clear and convincing, as to the existence of a mistake, and as to the bid actually intended, and if the bid, (whether corrected or uncorrected) is the lowest bid received, a determination may be made to correct the bid and not permit its withdrawal.
- Where the bidder requests permission to correct a mistake in his/her bid, and clear and convincing evidence establishes the existence of a mistake, and as to the bid actually intended, a determination permitting the bidder to correct the mistake may be made; provided that, in the event such correction would not result in displacing one or more lower bids. If the evidence of the mistake, and the bid actually intended are not ascertainable substantially from the invitation and bid itself as opposed to evidence brought to City in response to a request for verification, correction will not be allowed.
- If the evidence is clear and convincing only as to the mistake, but not as to the intended bid determination permitting the bidder to withdraw his/her bid may be made.
- Where the evidence is not clear and convincing that the bid as submitted was not the bid intended, a determination may be made requiring that the bid be considered for award in the form submitted.

Change Order Policy - Changes to contract agreements after the award is announced must be approved by the Transit Contract Manager. All change orders must be documented in writing be supported by a written justification, including a cost or price analysis, and signed and dated by the authorized officials.

b. Request for Proposals (RFP)

Large purchases may be procured through competitive proposal/request for proposals, when conditions are not appropriate for the use of sealed bids. In such cases, either a fixed price, or cost reimbursement type contract is awarded.

Publicizing the Proposal: Proposals will be advertised in metropolitan newspapers, as well as solicitation from an adequate number of qualified sources.

Selection Criteria – The Procurement Department will list, in the request for proposals, the selection criteria. Price should always be a selection criterion.

The Procurement Department may list selection criteria in the request for proposals, in order of priority with weights, if any.

Evaluation of Proposals - Criteria for evaluation of proposals will be established prior to a request for proposals, and may include:

- Responsibility criteria, such as financial, human, and physical capabilities to perform the contract.
- Technical criteria - may include the technical experience of the proposer, the suitability of the products or methods proposed for APT's needs, or objective performance criteria (fuel efficiency, percent savings guaranteed, proven ridership increases, etc.).
- Price criteria - price must be evaluated unless the Brooks Act applies (where price is only considered after the most qualified proposer is selected for procurement of A&E services). Awards will be made to the responsible firm whose proposal is most advantageous to APT's program, with price and other factors considered.
- Compliance criteria - will include responsiveness to proposal requirements.

- Management criteria - may include the qualifications of the project managers, the budget and schedule performance proposed and recorded on past projects, and the projected effectiveness of the management plan proposed.

- Award of Proposals – Augusta will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed agreement. Consideration will be given to such factors as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. Additionally, as stated above, awards will be made to the responsible firm whose proposal is most advantageous to APT's program with price and other factors considered.

- Request for Revised Proposals - In the event APT finds it necessary to revise an initial request for proposal because of deficiencies, the decision to do so will be approved by the Transit Contract Manager, and the deficiencies must be listed and explained.
  - A complete revised proposal, including price (except under the Brooks Act) will be requested from each offeror in the competitive range.
  - Unless explicitly stated otherwise, the revised offer extinguishes the prior offer.
  - The proposer should identify all changes in the revised offer.

APT may exercise the right to request revised proposals as many times as necessary in order to obtain the most advantageous offer.

- Discussions and Clarifications (negotiations) – Augusta will exercise its right to hold discussions for clarifications with all offerors in the competitive range. At such time, negotiations and bargaining may be made. At which time, the offeror will have an opportunity to revise or modify his/her proposal. The discussions and negotiations may initially be written or oral, with appropriate documentation following the discussions. Strict confidentiality in such cases will be maintained. Emphasis will be made known to the offeror that the name and number of proposals received is not normally considered a public record and need not be released to competitors or the public at large.

- Request for Best and Final Offer - A best and final offer (BAFO) may be requested from each offeror in the competitive range at the conclusion of discussions (negotiations) with those offerors. If an offeror does not respond to the request, Augusta may consider the most recent offer to be the best and final offer. The request for best and final offer will include:
  - Specific notice that discussions are concluded;
  - Notice that this is the opportunity for the offeror to submit a best and final offer;
  - A definite, common cutoff date and time that allow a reasonable opportunity for the preparation and submission of the best and final offer, and
  - Notice that the final offer must be received at the place designated by the time and date set in the request and is subject to any provisions dealing with the submissions, modifications, and withdrawals of proposals set forth in the solicitation.

  Following receipt of the best and final offers, officials of Augusta will evaluate them in accordance with terms of the solicitation and recommend award in accordance with those terms. Augusta will make every attempt to submit only one request for best and final offer, however, in the event additional technical or price/cost related issues surface as a result of the offerors' final submissions or other factors that preclude a reasonable justification for contractor selection and award, Augusta may submit request for subsequent best and final offers, as it may be clearly in the best interest of Augusta.

- Award Based on Initial Proposals – Augusta may accept one of the initial proposals if it can be demonstrated that acceptance of the most favorable initial proposal without discussion will result

in a fair and reasonable price. Solicitations for proposals will contain a notice that award may be made without discussion of proposals received, and that proposals should be submitted initially on the most favorable terms possible, from a price and technical standpoint.-

- Withdrawal of Proposal - In order to avoid frivolous offers, or offers submitted with the sole intention of casting light on other offers, the solicitation for the request for proposals will state a date and time by which offers must be submitted, and a period following that date during which offers remain firm. Proposers will be allowed to withdraw or modify their proposals up to the time due. However, it will also be stated that after that date all proposals are firm and cannot be withdrawn, regardless of whether the proposer has had second thoughts.

- Debriefing Unsuccessful Offerors – Augusta will maintain complete records on its award decision, and how it came to that decision. Augusta will remain as objective as possible in making that decision. In the event a proposer was excluded from competitive range, and requests a debriefing, the Transit Contract Manager and Procurement Director will offer a candid explanation of the process. However, if the Procurement Department foresees that a dispute is probable, it is not required to notify or debrief unsuccessful offerors.

c. Procurement of Architectural and Engineering Services (A&E)

When procuring architectural, engineering, or related services, APT will use competitive proposal procedures based on the Brooks Act, as defined in 40 U.S.C. §541. Other types of services considered A&E services include program management, construction management, feasibility studies, preliminary engineering, design, surveying, mapping, and services which require performance by a registered or licensed architect or engineer. Provided a sufficient number of qualified firms are eligible to compete for the third party contract, the contractor's geographic location may be a selection criterion.

The Brooks Act requires that:
- An offeror's qualifications are evaluated;
- Price is excluded as an evaluation factor;
- Negotiations be conducted with only the most qualified offeror; and
- Failing agreement on price, negotiations with the next most qualified offeror must be conducted until a contract award can be made to the most qualified offeror whose price is fair and reasonable to Augusta.

This "qualification based procurement method" can only be used for the procurement of A&E services. This method of procurement cannot be used to obtain other types of services even though a firm that provides A&E services is also a potential source to perform other types of services.

d. The Traditional Construction Process - Design/Bid/Build

It has been traditional in the construction industry to employ an *architect/engineer (A/E)* to complete a detailed design of the entire project before soliciting bids from construction contractors. This traditional approach is known as *sequential design and construction*. This sequential design/construction approach requires that a detailed design package of the entire project be complete before bids are solicited from construction contractors. Following award of the construction contract, the A/E is often retained by the owner for the construction phase, and acts as the owner's agent, to inspect the construction work to ensure that the structures are built according to the designs and specifications.

Advantages - A major advantage of the sequential design and construction approach is that complex or one- of- a- kind projects can be thoroughly planned and thought through before construction begins. The traditional approach thus produces, in the design phase of the project, the most accurate estimate of final project costs, and this is an advantage of the traditional technique. If problems are encountered with design aspects for the latter stages of the project, the earlier design features or phases can be

modified before any construction work has been done, thus avoiding construction contractor claims and delays. Another advantage is that the Agency is given a fixed price for completion of the entire project before construction begins. There may also be advantages in obtaining the necessary financing and project approvals. Overall management of the project should also be simplified by this approach.

Disadvantages - Sequential design and construction requires a longer time to complete the project than *phased design and construction ("fast tracking").* And since time pressures are often the most intense issues confronting the Agency, the sequential method may not be feasible. Alternative contracting approaches have arisen to shorten the project completion time. These include *phased design and construction ("fast tracking")*, which often involves the use of a *construction manager*, and *turnkey (design-build)* contracting.

Note: The FTA Circular 4220.1F, Chapter VI, paragraph 3.h. Design-Build, requires that the type of procurement method used be based on the estimated value of the design vs. construction work. If the estimated value of the construction work exceeds the value of the design work, then a qualifications based method may not be used to award the contract. However, a qualifications method may be used to determine prospective contractors capable of performing the project and thus qualified to submit detailed technical and price proposals in step two. **(Posted: December, 2014)**

e. Turnkey or Design/Build Contracting

This contracting technique has seen increasing use in recent years. Between 1987 and 1992 there was a 300 percent increase in design-build projects, which indicates a growing importance of turnkey projects in the construction industry. According to statistics provided by the Engineering News Record, by 1995, 30 percent of all non-residential construction was using the turnkey method. The growing importance of turnkey methods was attributed to its benefits in saving time and costs with no reduction of quality relative to conventional project approaches. It must be noted, however, that not all States permit design-build contracting by State agencies.

In this scheme, a transit agency contracts with a single private entity, the turnkey contractor, for the design, construction and delivery of a complete and operational project. In some instances, the contractor is required to operate and maintain the system for a defined period of time. The private contractor is typically a consortium of private companies offering engineering and design, construction, manufacture of vehicles, finance and related support services. The developer-contractor will be selected competitively based on "performance-type" (non-detailed) specifications which describe the owner's objectives and requirements**.** Developers will submit proposed designs with their competitive proposals, and owners must select between competing design approaches and prices.

It should be noted that one of the drawbacks of design-build is that the owner does not have an independent source (the *A/E* in traditional construction) overseeing design implementation and verifying conformance with the drawings and specifications.

Awards to Other than the Lowest Bidder

APT may award a third party contract to other than lowest bidder, when such an award is in the best interest of Augusta.

D. Procurement by Noncompetitive Proposals (Sole Source)

Procurement by noncompetitive proposals may be used when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies:

- The item is available only from a single source (i.e. utility services, checking prior procurements for the same or similar items, no identical or compatible parts or equipment available from any other source);

- The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (i.e. health and safety concerns); and
- FTA authorizes noncompetitive negotiations.
- After solicitation of a number of sources, competition is determined inadequate, and after determining that the solicitation process was conducted appropriately, Augusta may enter into negotiations with a single bidder.

Sole Source Justifications

All sole source procurements must include a written justification and cost or price analysis.

Single bids

In the event APT advertises through Invitation for Bid, or Request for Proposals, and receives only one bid, before award of such bid, the Transit Contract Manager will re-evaluate the process to determine if the requirements were too restrictive or if the invitation or proposal inadvertently disqualifies some potential competitors. Other factors that will be taken into consideration are the market conditions during the period of procurement, and comments from respective bidders regarding the requirements in the bid.

If it is determined that the initial invitation or proposal inadvertently disqualified some potential competitors, the requirements will be revised, and re-advertised. If after evaluation it is determined that the process and requirements set forth were not unnecessarily restrictive, Augusta may make a decision to award the contract to the single bidder. In such a case, a cost or price analysis will be performed, and determination that the price is fair and reasonable will be established, using the guidelines in the section on cost and price analysis. Documentation as to the reason for the single bid will be maintained.

SECTION 5 – PROTEST PROCEDURES

5-101 PROTEST PROCEDURES

Protests concerning Augusta's purchasing policies, the contract requirements, the specifications, the bidding procedures, or the contract award, or any other request for explanation or clarification must be submitted in writing and must include the following information:-

- The name and address of the protester.
- The name and telephone number of the protester's contact person having responsibility.
- A complete statement of the grounds of the protest with full documentation of the protester's claim.

A. Pre-award Protests

Pre-award protests must be received by Augusta no less than ten (10) working days before the scheduled bid opening. Augusta will respond to the protest in writing and render its final decision at least five (5) working days prior to bid opening. Augusta will report such protests to the FTA regional office.

B. Post-award Protests

Post-award protests will be received no later than five (5) working days after notification of the award bid. Augusta will have ten (10) working days after receipt of the formal protest package to evaluate, and issue a response, except in cases where the Board has awarded the original bid. In such cases, the decision to protest will be handled at the next regularly scheduled Board meeting, following completion of the staff review of the protests. Augusta will report such protests to the FTA regional office.

C. Appeals to FTA

It is the responsibility of Augusta to settle contract issues and disputes. Augusta is committed to using good sound administrative practices and business judgments, as well as professional ethics. Reviews of protests by FTA will be limited to alleged failure by Augusta to have followed proper protest procedures, or its failure to review a complaint or protest. Protesters dissatisfied with Augusta's final decision may appeal to FTA regional or Headquarters Office within five (5) working days of the date the protester knew or should have known of the violation.-

Note: *Guidance note regarding notifying FTA of Protests and Appeals to FTA*:

FTA's involvement in bid protests is limited. The Uniform Guidance, as adopted by DOT, no longer includes the language in 49 C.F.R. §18.36(b)(12) that provided for a direct appeal to FTA of a recipient's final decision on a bid protest. The Uniform Guidance provides that:

"The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction." – 2 C.F.R. § 200.318(k)

SECTION 6– CONTRACT ADMINISTRATION

6-601 CONTRACT ADMINISTRATION

APT will actively manage all contracts and establish and maintain contract files. These files will contain documentation necessary for the Triennial Review including FTA certifications for Buy America, Lobbying, Bus Testing, FMVSS, TVM, Altoona Test Reports, Buy America content audits, purchaser's certifications, and Debarment/Suspension contractor review (EPLS listing). The Transit Contract Manager may elect to assign certain contract administration responsibilities to the Grants Manager. See Appendix 1

On July 20, 2015, Augusta implemented an electronic Contract Management System as part of its recent upgrade to "One Solution". Augusta has also hired a Compliance Officer to assist the Transit Department with contracting as related to "Contract Administration System (FTA C 4220.1F, III.3). This system and the team (Transit and Procurement) will ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State and local requirements. *Our targeted date for total implementation is February 2016.*

The electronic contract administration is a shared function between the transit offices and the procurement office that has contract authority. Each office has specific responsibilities and duties for contract administration (see flow chart and matrix). Duties such as tracking contract deliverables, schedules, progress payments with required incurred cost documentation, insurance, inspections, warranties, etc. are outlined as it relates to job functionary and authority.

The new system will be maintain adequate technical capacity to carry out its project and comply with the Common Grant Rules, the recipient's third party contracting capability must be adequate to undertake its procurements effectively and efficiently in compliance with applicable Federal, State, and local requirements. The Common Grant rules require the recipient to maintain a contract administration system to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State and local requirements.

The system will include and not limited to the following:

A. incorporation of all contract administration functions from pre-solicitation planning to contract award and administration through close out;

B. expansion of the contracting authority delegations to include contract administration personnel through the use of a standard letter of delegation listing all functions of responsibility and describing allowed contractual actions by the contract administrator. The designee will be required to sign the letter, which will become permanent procurement record;

C. implementation of a written requisition for initiating all new procurement actions, identifying the project manager, funding source, scope of work, and independent cost estimate or identification of the estimator responsible for the independent cost estimate;

D. a detailed review and written approval of solicitations and supporting contract administration files;

E. a change control system to ensure contract modifications are priced, negotiated and executed in compliance with regulations, and in a timely manner.

F. Issuance of contract administration and project management delegation letters for each contract, which details the responsibilities and authority in the administrative and technical management of the contract. The delegation letters will be maintained in the official contract file.

G. The TPPM was expanded to include Checklists and Templates for use by department personnel to ensure consist and accurate execution of their duties.

H. The checklists shall include: planning; solicitation file contents; contract file contents; general terms and conditions; bid / proposal evaluation requirements; contractor responsibility review; cost or price analysis; sole source justification; procurement summary; contract closeout; contractor performance evaluation.

I. The templates shall include: procurement summary; sole source justification; award letter; notice to proceed letter; contract modification; cure notice (see TPPM – Appendix)

6-601 SYSTEM FOR AWARD MANAGEMENT (SAM)

The System for Award Management (SAM) is a Federal Government owned and operated free web site that consolidates the capabilities in Central Contractor Registration (CCR)/FedReg, Online Representations and Certifications Applications (ORCA) and the Excluded Parties List System (EPLS). Future phases of SAM will add the capabilities of other systems used in Federal procurement and awards processes.

Both current and potential government vendors are required to register in SAM in order to be awarded contracts by the Government. Vendors are required to complete a one-time registration to provide basic information relevant to procurement and financial transactions. Vendors must update or renew their registration annually to maintain an active status. SAM is also a marketing tool for businesses. SAM allows Government agencies and contractors to search for your company based on your ability, size, location, experience, ownership, and more. SAM allows users to search for firms certified by the SBA under the 8(a) Development and HUBZone Programs. SAM also incorporates the ORCA system which is web-based system where the vendor provides required information about the firm (e.g., accounting procedures; travel policies) and verifies that the firm meets certain Federal requirements (e.g., complies with equal opportunity legislation).

SAM validates the vendor's information and electronically shares the secure and encrypted data with the Federal agencies' finance offices to facilitate paperless payments through electronic funds transfer (EFT). Additionally, SAM shares the data with Government procurement and electronic business systems. A vendor only needs to input business information in one database), which will then automatically populate the SBA database. Please note that if you are interested in receiving Small Disadvantaged Business, HUBZone, or 8(a) certifications, you will need to refer separately to SBA to complete that process.

NOTE: If you had an active record in CCR, you have an active record in SAM. You do not need to do anything in SAM at this time, unless a change in your business circumstances requires updates to your Entity record(s) in order for you to be paid or to receive an award or you need to renew your Entity's or Entities' records. SAM will send notifications to the registered user via email 60, 30, and 15 days prior to expiration of the Entity. To update or renew your Entity records(s) in SAM you will need to create a SAM User Account and link it to your migrated Entity records. You do not need a user account to search for registered entities in SAM by typing the DUNS number or business name into the search box.

Please visit the SAM page here: **www.sam.gov** Please note that the DOT OSDBU does not manage the SAM system, so we are unable to provide assistance to users regarding their accounts. Information on the SAM help desk can be found on the SAM Help page: **SAM Help Page**

6-603 EXCLUDED PARTIES LIST SYSTEM (EPLS)

Augusta is required to ensure that no party listed on the Federal Government's Excluded Parties List is awarded a contract funded with Federal assistance. To ensure this does not happen, we are required to check the Excluded Parties List System (EPLS) prior to award. The EPLS is updated continuously so it is to be checked on a real-time basis before awarding a contract. The EPLS Website is located at **http://www.epls.gov**.

To view the Contract Administration Planning Process (see Appendix 1)

SECTION 7 – CONTRACT CLAUSES

7-701 CONTRACT CLAUSES

A. Required Contract Clauses

APT's Transit Contract Manager maintains a current list of required contract clauses applicable to contract type as required by the FTA. This position will provide a complete listing of each applicable clause and required supporting certification for all FTA-funded procurements to the County's procurement department.

B. General Contract Clauses

APT will secure, when applicable, a boilerplate of general contract clauses for purchases where such a boilerplate would be beneficial during the solicitation.

C. Special Contract Clauses and Additional Special Contract Clauses

Special contract clauses may be applied selectively to purchases based on contract type or some other variable criteria. In the case of special contract clauses, the Transit Contract Manager may consult FTA rules and regulations and/or Augusta General Counsel, before such clauses are incorporated into any contract agreement.

For FTA clause requirements see: Attachment D

SECTION 8 – PROCURING EQUIPMENT OR MATERIALS USING OPTION CLAUSES

8-801 PROCURING EQUIPMENT OR MATERIALS USING OPTION CLAUSES

A. Definition of Option Contract

An option is a unilateral right in a contract by which, for a specified time, APT may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract.

B. FTA Requirements for Option Contracts

If APT elects to use option clauses in contracts, the FTA requires the following:

- Evaluation of Options. The option quantities or periods contained in the contractor's bid or offer must be evaluated in order to determine contract award. When options have not been evaluated as part of the award, the exercise of such options will be considered sole source procurement, and will be subject to a cost or price analysis before exercising.
- Exercise of Options. APT will ensure that the exercise of an option is in accordance with the terms and conditions of the option stated in the initial contract award. It will also be determined that the option price is better than prices available in the market or that the option is the more advantageous offer prior to the option being exercised.

C. Purchasing Options on Other Grantee's Bus Procurement (Piggybacking, GSA)

In the event APT elects to purchase options on another grantee's bus procurement, APT may use said options after first determining that the original contract price remains fair and reasonable, and the original contract provisions are adequate for compliance with all Federal requirements. APT is not required to perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects APT to determine whether the contract price or prices originally established are still fair and reasonable before using those rights. APT will utilize the piggybacking guidance as set forth in the FTA's "Best Practices Procurement Manual" and Triennial Review Workshop for further information about procurements through assignment of another's contract rights.

SECTION 9 – CONTRACT GUIDANCE

9-901 CONTRACT GUIDANCE

A. Maximum Length of Service and/or Supply Contracts

APT will not enter into either service or supply contracts with a period of performance exceeding five (5) years, inclusive of options, without prior written approval from FTA.

In instances where APT may find it feasible to extend a contract beyond five years, the Transit Contract Manager will request a waiver from the FTA regional office. Full documentation and justification for such waivers will be submitted in writing.

Contracts for rolling stock are not permitted for longer than five years. Specifically, APT may not exercise any options for rolling stock after five years from the date of the original award execution. However, delivery of vehicles is allowed after this date, as long as the contract or options for these vehicles were executed within five years of the original agreement execution date.

The five-year limitation does not apply to construction contracts or to leases of real property, (which period may extend beyond five years, as long as APT has "satisfactory
continuing control over ownership of the property.") Such lease agreements do not need prior approval of FTA.

B. Purchasing Extended Warranties with Capital Grant Funds

APT will not purchase any extended warranties with capital grant funds, unless it can be determined that such warranties do not exceed industry-accepted standards, and service agreements will extend the life of equipment or increase its value. For the most part, warranties and service agreements will be treated as a normal expense of operations.

In the case of warranty provisions for bus procurements, APT will adopt the American Public Transit Association's (APTA) Standard Bus Procurement Guidelines, which have been accepted as industry standard by FTA, and are summarized as follows:

- Complete Bus - 1 year or 50,000 miles
- Body and Chassis (structural integrity) - 3 years or 150,000 miles
- Body and Chassis (corrosion/fatigue) - 12 years or 500,000 miles
- Propulsion System (i.e. engine, transmission, axles) - 5 years or 300,000 miles
- Major Subsystems (i.e. brakes, signs, heat, A/C, doors, air compressor/dryer, W/C lifts, ramps, starter, alternator) - 3 years or 150,000 miles

All RFPs, IFBs, and other solicitation documents and contracts will be maintained in the procurement files for purchase of such warranties or extended services.

C. Payment Provisions In Contracts

1. Using Advance Payments

APT will not enter into any contractual agreement to pay any or part of the payments prior to costs incurred by the contractor, unless prior written concurrence is obtained from the FTA Administrator.

2. Using Progress Payments

The two major types of progress payments are payments based on costs, and payments based on completion of work. FTA considers both types as contract financing methods. Instances in which APT may use progress payments in accordance with FTA guidelines are:

- When payments are only made to the contractor for costs incurred in the performance of the contract, and
- When APT is allowed to obtain title to property (materials, work in progress, and finished goods) for which progress payments are made. In lieu of obtaining a title, APT may require an irrevocable letter of credit or equivalent means to protect its interest.

3. Prompt Payment

In accordance with 49 CFR 26.29, Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs, grantees must have a contract clause that requires primes to pay subcontractors for satisfactory performance of their contract work no later than 30 days from receipt of payment for such work from the grantee. Grantees must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. Therefore, APT will use one of the following methods to comply with this requirement:

- Decline withholding of retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.
- Decline withholding of retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed.
- Withhold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor. In the event APT decides to withhold payments on a contract, it will ensure that the amount of money withheld bears a reasonable relationship to the unsatisfactory work (e.g. the amount withheld will represent a reasonable estimate of the contractor's potential liability). The amount withheld will not be so great however, such that it impairs the contractor's ability to perform.

4. Final Payment

Final payment will be made to the contractor when it has satisfied all of the deliverable requirements called for by all provisions of the contract, including all required documentation. Before making final payment, APT may obtain a signed release from the contractor releasing it from further claims by the contractor.

9-902 CONTRACT TYPES

All FTA related procurements must use the *Contract/Purchase Order File Index Forms* as provided in the appendix. These checklists will be used by the Transit Department and reviewed by Procurement to ensure contract clauses and federal flowdown languages are included in each contract as required.

Fixed Price v. Cost Reimbursement

Procurement by the Sealed Bid/Invitation for Bids (IFB) method when certain conditions are present.

Among those listed is the condition that:

a. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

b. Paragraph 9.d of FTA Circular 4420.1E authorizes procurement by the Competitive Proposal/Request for Proposals (RFP) method and either a fixed price or cost reimbursement type contract may be awarded.

c. Paragraph 7.i of FTA Circular 4420.1E requires that departments must document their reasons for selecting the contract type as a part of the written record of procurement history.

d. Paragraph 10.e of FTA Circular 4420.1E prohibits the cost plus a percentage of cost method of contracting. There are two broad categories of contract types: fixed-price contracts and cost-reimbursement contracts. Within these two families of contract types there are a number of subtypes offering differing degrees of incentives. At the extremes are the firm-fixed-price contract, in which the contractor has complete responsibility for the costs of performance and the resulting profit or loss, and the cost-plus-fixed-fee contract, in which the contractor has virtually no risk for performance costs and the fee (profit) is fixed. Between these two extremes are the various incentive-type contracts where the degree of cost risk and profit incentive can be tailored to meet almost any specific program situation.

Fixed-price contracts

These contracts are appropriate for acquiring commercial items, or for supplies or services which can be clearly defined with either performance/functional specifications or design specifications, and where performance uncertainties do not impose unreasonably high risks upon the contractor.

Cost-reimbursement contracts

These contracts are one in which Augusta does not contract for the performance of a specified amount of work for a predetermined price, but agrees instead to pay the contractor's reasonable, allocable and allowable costs of performance regardless of whether the work is completed. Augusta/Department assumes a high risk of incurring cost overruns, while the contractor has almost no risk of financial losses.

Cost-type contracts are suitable when

(a) you are unable to accurately describe the work to be done, or

(b) there is an inability to accurately estimate the costs of performance. If either of these conditions is present, the cost-reimbursement contract is the proper type of contract. *Cost-type contracts are ideally suited to complex requirements because the parties can devote their attention to accomplishing the work rather than on the claims process, which will be significant on larger, complex projects*

Time and Materials Contracts

Departments will use time and materials contracts only:

(1) After a determination that no other type of contract is suitable;
(2) The contract specifies a ceiling price, and the contractor shall not exceed that price except at its own risk; and
(3) The *Method of Procurement Decision Matrix Form* (Attachment 3) must be submitted to the Purchasing Agent and included with the file for this type of contract.

Labor / Hour Contracts

Labor / hour contracts are a variation of the time and materials contract, differing only in that materials are not supplied by the contractor. You should use this type of contract only when no other would be suitable, and you need to document your determination if you choose to use this type of contract.

Cost Plus Percentage of Cost Contracts (CPPC)

The FTA Circular 4420.1E clearly prohibits the use of this contracting method.

Out of Scope Changes

An “out of scope change” is a contract amendment or change order that is not within the scope of the original contract is considered a sole source procurement. Please use the sole source policies for this type of action. FTA Circular 4220.1E, paragraph 9(f).

Contract Term Limitation

Augusta shall not enter into any contract for rolling stock or replacement parts with a period of performance exceeding five (5) years inclusive of options. All other types of contracts (supply, service, leases of real property, revenue and construction, etc.) will be based on sound business judgment. Length of contracts shall be for not more than the amount of time required to accomplish the purpose of the contract, and will also include consideration for competition, pricing, fairness, and public perception. Once a contract has been awarded, an

extension of the contract term length that amounts to an out of scope change, will require a sole source justification.

Revenue Contract

Revenue contracts are those third party contracts whose primary purpose is to either generate revenues in connection with a transit related activity, or to create business opportunities utilizing an FTA funded asset. A requires these contracts to be awarded utilizing competitive selection procedures and principles. The extent of and type of competition required is within the discretionary judgment of Augusta.

Tag-ons

The use of tag-ons, or the addition of work including supplies, equipment or services, that is beyond the scope of the original contract that amounts to a cardinal change as generally interpreted in Federal practice the various Boards of Contract Appeals, is prohibited and applies to the original buyer as well as to others. In scope "tag-on" changes are not considered tag-ons.

Piggybacking

Piggybacking is an assignment of existing contract rights to purchase supplies, equipment or services. Piggybacking is permissible when the solicitation document and resultant contract contain an assignability use that provides for the assignment of all or a portion of the specified deliverables as originally advertised, completed, evaluated, and awarded. If the supplies were solicited, competed and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, then both the solicitation and contract award must contain both a minimum and a maximum quantity that represents the reasonably foreseeable needs of the party(s) to the solicitation and contract. If Augusta and another party jointly licit and award an IDIQ contract, then there must be a total minimum and maximum.

E-Commerce

E-Commerce is an allowable means to conduct procurements. If an E-Commerce solicitation will be utilized, full and open competition must be addressed in compliance with the Federal Circular 4200.1E. A written procedure will be required prior to use of E-Commerce. Please call the Purchasing Office prior to use of this alternative.

6.13 Other Contract Types

APT may enter into any other type of contract permitted by the FTA, State law or Regulations permits.

SECTION 10
PERFORMING INDEPENDENT COST ESTIMATES, COST AND OR PRICE ANALYSES

10–1001 COST ESTIMATE

Independent Cost Estimate

APT will conduct an independent cost estimate (ICE) for all procurements regardless of dollar amount. The ICE is a tool to assist in the determination of the reasonableness or unreasonableness of a bid or proposal being evaluated. Independent cost estimates can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of items like drawings, specifications and prior data. The independent cost estimate is especially critical whenever there is no price competition (e.g., for architect-engineer procurements where only one price proposal is received), or where offerors are submitting price proposals for goods or services that are not exactly comparable (e.g., for procurements of high-technology items or professional services). It is also useful in competitive procurements to alert the agency when all competitors are submitting unreasonably high cost proposals.

APT will conduct a cost or price analysis in connection with every Federal procurement action, including contract modifications. For small and micro purchases, refer to the appropriate sections.

10-1002 COST ANALYSIS

ICE and cost/price analysis not required for procurements under $150,000

Cost Analysis

1. When to Perform a Cost Analysis

A cost analysis will be performed when:

- The offeror is required to submit the elements (i.e., Labor Hours, Overhead, Materials, etc.) of the estimated cost, e.g., under professional consulting and architectural and engineering services contracts; or
- Adequate price competition (2 or more bids or proposals) is lacking, and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public, or on the basis of prices set by law or regulation.

A price analysis may be used in all other instances to determine the reasonableness of the proposed contract.

2. Cost Analysis Process

Some common elements in performing cost analysis may include the following:
- Making an estimate based on inspection of the product itself (with technical guidance), review of drawings, specifications, and prior data (such as cost data from prior procurements);
- Review of each element of cost to determine whether the offeror's estimate contains an accurate and reasonable prediction of the cost incurred during performance; and/or
- Adding a rate of profit to the cost that has been determined to be fair.

All reasonable costs of performance can be considered, however, the cost will be consistent with

Federal cost principles found in Federal Acquisition Regulation Part.

10-1003 PRICE ANALYSIS

A. Price Analysis

Some common price analysis techniques that may be considered may include:

- Comparison of proposed prices received in response to the solicitation;
- Comparison with competitive, published price lists, published market price of commodities, similar indexes, and discount or rebate arrangements;
- Comparison of proposed prices with the cost estimate performed prior to solicitation, if it can be performed such that it can render a reasonable determination that the price is reasonable; and
- Comparison of proposed prices received with prior procurement actions for the same or similar end items, with consideration given to:
    - Changes in economic conditions between the times of the two procurements;
    - Differences in quantities; and
    - Inclusion on nonrecurring cost in the prices, such as design, capital equipment, production facilities, etc. To make a fair comparison, nonrecurring costs may be removed from both prices.

B. Profit

APT will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

C. Federal Cost Principles

APT will make every effort to ensure that all cost estimates included in negotiated prices are consistent with Federal cost principles. In doing so, APT will reference past and current cost principles that comply with applicable Federal cost principles.

The cost plus a percentage of cost and percentage of construction cost methods of contracting will not be used.

SECTION 11 – PURCHASING/LEASING BUSES WITH FTA FUNDS

11 – 1101 RENTAL/LEASING

In certain situations, APT's equipment requirements may be more economically filled by rental/lease than by purchase. The decision to rent rather than purchase must be made on a case-by-case basis, and should only be used when it is in APT's best interest. A lease may qualify for capital assistance if it meets the following criteria:

- The capital asset to be acquired by lease is eligible for capital assistance
- There is or will be no existing Federal interest in the capital asset as of the date the lease will take effect
- Leasing the capital asset is more cost-effective than purchase or construction of the asset.

APT identify in the grant all leasing needs and will obtain FTA review of the cost-effectiveness determination ***prior*** to entering into any capital lease.

A lease versus purchase analysis should be appropriate to the size and complexity of the procurement. In determining whether the lease of equipment is feasible, the following factors must be considered:

- Estimated length of the period the equipment is required and the amount of time of actual equipment usage;
- Financial and operating advantages of alternative types and makes of equipment;
- Total rental/lease cost for the estimated period of use;
- Net purchase price, if acquired by purchase;
- Transportation and installation costs;
- Maintenance and other service costs;
- Trade-in or salvage value;
- Imputed interest costs; and
- Availability of a servicing facility especially for highly complex equipment (can APT service the equipment if it is purchased?)

11 – 1102 PURCHASING/LEASING BUSES WITH FTA FUNDS (BUS TESTING)

To the extent applicable, APT agrees to comply with the requirements of 49 U.S.C. § 5323(c) and FTA regulations, "Bus Testing," 49 C.F.R. Part 665, and any revision thereto, for buses purchased or leased with FTA funds. APT will certify to FTA that any new bus model required to be tested has been tested at the FTA-sponsored test facility in Altoona, Pennsylvania.

A new bus model is a bus design variation of a bus design (usually designated by the manufacturer by a specific name and/or model number) that has not been in use in U.S. mass transit service prior to October 1, 1988, or that has been in service prior to that date, but is being procured with a major change in configuration or components. A new bus model must be tested.

Bus testing requirements apply to different mass transit vehicles including vans, other small vehicles, medium-light-duty mid-size buses, and heavy-duty small and large buses. Bus testing does not apply to unmodified mass-produced vans, bus prototypes, some electric buses, or trolley buses (meaning genuine trolleys, not replica trolleys popular today).

APT will maintain documentation in the procurement files to demonstrate how this requirement has been implemented. This documentation will indicate whether a bus model has been tested and whether testing is required. For buses that require testing, a copy of the test report must be obtained prior to acceptance of the buses and expenditure of Federal funds.

SECTION 12
BUY AMERICA PRE AWARD AND POST DELIVERY REQUIREMENTS

12 – 1201 BUY AMERICA PRE-AWARD AND POST DELIVERY REQUREMENTS

APT will utilize FTA's reference documents (per the hyperlink) to manage the Buy America requirements for rolling stock. http://www.fta.dot.gov/legislation_law/12921_5424.html

Note: *Buy America certifications in solicitations and receive signed certifications from contractors as part of bid responsiveness in applicable procurements over $150,000 that included iron, steel or manufactured products?*

Procurement files for inclusion of required Buy America certifications in solicitations and receipt of signed certifications from bidders for:

- all purchases of steel, iron, and manufactured products greater than $150,000, regardless of whether they involve capital, operating, or planning funds
- contractors and subcontractors if the contract or subcontract is more than $150,000, including labor and options
- purchases made using an intergovernmental agreement and jointly purchased manufactured products
- purchases of used itemsIf a bidder or offeror cannot certify compliance with Buy America requirements, document if the recipient received a waiver of the Buy America statute before it awarded the contract to the bidder or offeror.

SECTION 13
PUBLIC ACCESS TO PROCUREMENT INFORMATION

Procurement information shall be a public record to the extent provided in Augusta, Georgia Code, Chapter 10, - Section 1-10-5 and, except for procurement information which may be withheld from disclosure by APT pursuant to federal or state law, shall be available to the public as provided in such statutes.

SECTION 14
RESPONSIBILITY OF BIDDERS AND PROPOSERS

14-1401 DETERMINATION OF RESPONSIBILITY.

The level of responsibility of the bidder or proposer shall be ascertained for each contract awarded by Augusta, Georgia based upon full disclosure to the Procurement Director concerning the person's capacity to meet the terms of the contract and based upon the person's past record of performance on similar contracts, the bidder's quality of work, general reputation in the community, financial responsibility, and previous employment or use by Augusta, Georgia. If an offeror who otherwise would have been awarded a contract is found non-responsible, a written determination of non-responsibility, setting forth the basis of the finding, shall be prepared by the Procurement Director or the using agency and submitted to the Procurement Director. The failure of an offeror to promptly supply information in connection with an inquiry with respect to the level of responsibility may be grounds for a determination of non-responsibility with respect to such bidder or offeror or proposer. A copy of the determination shall be sent promptly to the non-responsible offeror. The final determination shall be made a part of Augusta, Georgia's contract file and be made a public record.

14-1402 DETERMINATION OF NON-RESPONSIBILITY.

If a bidder or offeror who otherwise would have been awarded a contract is found non-responsible, a written determination of non-responsibility, setting forth the basis of the finding, shall be prepared by the Purchasing Manager. The unreasonable failure of a bidder or offeror to supply prompt information in connection with an inquiry with respect to responsibility may be grounds for a determination of Non-responsibility with respect to such bidder or offeror. A copy of the determination shall be sent promptly to the non-responsible bidder or offeror. The final determination shall be made part of the contract file and be made a public record.

14-1403 RIGHT OF NONDISCLOSURE.

Except as required by the Open Records Act, information furnished by an offeror pursuant to this Section shall not be disclosed outside of the Procurement Department, or using agency, by Augusta, Georgia staff without prior written consent by the offeror.

SECTION 15
GRATUITIES AND KICKBACKS

15-1501 GRATUITIES.

It shall be unethical for any person to offer, give or agree to give any employee or former employee or for any employee or former employee to solicit, demand, accept or agree to accept from another person a gratuity or an offer of employment in connection with any decisions, approval, disapproval, recommendation, preparation of any procurement, influencing the content of any specification or procurement standard, rendering of any advice, investigation or acting any advisory capacity or in any in any matter related to a contract, subcontract, solicitation or proposal.

15-1502 KICKBACKS.

It shall be unethical for any payment, gratuity or offer of employment to be made by or on behalf of a subcontractor or contractor or any person associated therewith as an inducement for the award of a contract or subcontract. This prohibition against gratuities and kickbacks shall be contained in every solicitation and contract.

SECTION 16
BUY AMERICA – ROLLING STOCK

16-1601 BUY AMERICA

Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA funded projects are produced in the United States. Grantees must conduct pre-award and post-delivery audits of purchases of revenue rolling stock in order to verify that Buy America provisions, Federal Motor Vehicle Safety Standards, and purchaser's requirements are met..

AREAS TO BE EXAMINED

1. Buy America Provisions and Certifications

2. Pre-Award and Post-Delivery Audits of Revenue Rolling Stock

SECTION 17
CHANGE ORDERS and OTHER WORK

Out of Scope Changes

An “out of scope change” is a contract amendment or change order that is not within the scope of the original contract is considered a sole source procurement. Please use the sole source policies for this type of action. FTA Circular 4220.1E, paragraph 9(f).

(Excerpt: General Conditions - Appendix 4)

Article 7 OTHER WORK

Related Work at Site:

7.1. OWNER may perform other work related to the Project at the site by OWNER's own forces, have other work performed by aided OWNERs or let other direct contracts therefor which shall contain General Conditions similar to these. If the fact that such other work is to be performed was not noted in the Contract Documents, written notice thereof will be given to CONTRACTOR prior to starting any such other work, and, if CONTRACTOR believes that such performance will involve additional expense to CONTRACTOR or requires additional time and the parties are unable to agree as to the extent thereof, CONTRACTOR may make a claim therefor as provided in Articles 11 and 12.

7.1.2. CONTRACTOR shall afford each utility OWNER and other contractor who is a party to such a direct contract for OWNER, if OWNER is performing the additional work with OWNER's employees, proper and safe access to the site and a reasonable opportunity for the introduction and storage of materials and equipment and the execution of such work, and shall properly connect and coordinate the Work with theirs. CONTRACTOR shall do all cutting, fitting and patching of the Work that may be required to make its several parts come together properly and integrate with such other work. CONTRACTOR shall not endanger any work of others by cutting, excavating or otherwise altering their work and will only cut or alter their work with the written consent of PROFESSIONAL and the others whose work will be affected. The duties and responsibilities of CONTRACTOR under this paragraph are for the benefit of such utility OWNERs and other contractors to the extent that there are comparable provisions for the benefit of CONTRACTOR in said direct contracts between OWNER and such utility OWNERs and other contractors.

7.2. If any part of CONTRACTOR's Work depends for proper execution or results upon the work of any such other contractor or utility OWNER (or OWNER), CONTRACTOR shall inspect and promptly report to PROFESSIONAL in writing any delays, defects or deficiencies in such work that render it unavailable or unsuitable for such proper execution and results. CONTRACTOR's failure so to report will constitute an acceptance of the other work as fit and proper for integration with CONTRACTOR's Work except for latent or non-apparent defects and deficiencies in the other work.

Coordination:

7.4. If OWNER contracts with others for the performance of other work on the Project at the site, the person or organization who will have authority and responsibility for coordination of the activities among the various prime contractors will be identified in the Supplementary Conditions, and the specific matters to be covered by such authority and responsibility will be itemized, and the extent of such authority and responsibilities will be provided in the Supplementary Conditions. Unless otherwise provided in the Supplementary Conditions, neither OWNER nor PROFESSIONAL shall have any authority or responsibility in respect of such coordination.

ARTICLE 8 – OWNER'S RESPONSIBILITIES

8.1. Except as otherwise provided in these General Conditions, OWNER shall issue all communications to CONTRACTOR through the PROGRAM MANAGER or PROFESSIONAL.

8.2. In case of termination of the employment of PROFESSIONAL, OWNER shall appoint a

PROFESSIONAL against whom CONTRACTOR makes no reasonable objection, whose status under the Contract Documents shall be that of the former PROFESSIONAL. Any dispute in connection with such appointment shall be subject to arbitration.

8.3. OWNER shall furnish the data required of OWNER under the Contract Documents promptly and shall make payments to CONTRACTOR promptly after they are due as provided in paragraphs 14.4 and 14.13.

8.4. OWNER's duties in respect of providing lands and easements and providing Engineering surveys to establish reference points are set forth in paragraphs 4.1 and 4.4. Paragraph 4.2 refers to OWNER's identifying and making available to CONTRACTOR copies of reports of explorations and tests of subsurface conditions at the site and in existing structures which have been utilized by PROFESSIONAL in preparing the Drawings and Specifications.

8.5. OWNER's responsibilities in respect of purchasing and maintaining liability and property insurance are set forth in paragraphs 5.5 through 5.8.

8.6. OWNER is obligated to execute Change Orders as indicated in paragraph 10.3.

8.7. OWNER's responsibility in respect of certain inspections, tests and approvals is set forth in paragraph 13.4.

8.8. In connection with OWNER's right to stop Work or suspend Work, see paragraphs 13.10 and 15.1. Paragraph 15.2 deals with OWNER's right to terminate services of CONTRACTOR under certain circumstances.

ARTICLE 9 - PROFESSIONAL'S STATUS DURING CONSTRUCTION

OWNER's Representative:

9.1. PROFESSIONAL will be OWNER's representative during the construction period. The duties and responsibilities and the limitations of authority of PROFESSIONAL as OWNER's representative during construction are set forth in the Contract Documents and shall not be extended without written consent of OWNER and PROFESSIONAL.

Visits to Site:

9.2. PROFESSIONAL will make visits to the site at intervals appropriate to the various stages of construction to observe the premises and quality of the executed Work and to determine, in general, if the Work is proceeding in accordance with the Contract Documents. PROFESSIONAL will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. PROFESSIONAL's efforts will be directed toward providing for OWNER a greater degree of confidence that the completed Work will conform to the Contract Documents. On the basis of such visits and on-site observations as an experienced and qualified design PROFESSIONAL, PROFESSIONAL will keep OWNER informed of the progress of the Work and will endeavor to guard OWNER against defects and deficiencies in the Work.

Project Representation:

9.3. If OWNER and PROFESSIONAL agree, PROFESSIONAL will furnish a Resident Project Representative to assist PROFESSIONAL in observing the performance of the Work. The duties, responsibilities and limitations of authority of any such Resident Project Representative and assistants will be as provided in the Supplementary Conditions. If OWNER designates another agent to represent OWNER at the site who is not PROFESSIONAL's agent or employee, the duties, responsibilities and limitations of authority of such other person will be as provided in the Supplementary Conditions.

Clarifications and Interpretations:

9.4. PROFESSIONAL shall issue such written clarifications or interpretations of the Contract Documents (in the

form of Drawings or otherwise) as may be determined necessary, or as reasonably requested by CONTRACTOR, which shall be consistent with or reasonably inferable from the overall intent of the Contract Documents. If CONTRACTOR believes that a written clarification and interpretation entitles it to an increase in the Contract Price and/or Contract Time, CONTRACTOR may make a claim as provided for in Articles 11 or 12.

Authorized Variations in Work:

9.5. PROFESSIONAL may authorize minor variations in the Work from the requirements of the Contract Documents which do not involve an adjustment in the Contract Price or the Contract Time and are consistent with the overall intent of the Contract Documents. These may be accomplished by a Field Order and will be binding on OWNER and also on CONTRACTOR who shall perform the Work involved promptly. If CONTRACTOR believes that a Field Order justifies an increase in the Contract Price or an extension of the Contract Time and the parties are unable to agree as to the amount or extent thereof, CONTRACTOR may make a claim therefor as provided in Article 11 or 12.

Rejecting Defective Work:

9.6. PROFESSIONAL will have authority to disapprove or reject Work which PROFESSIONAL believes to be defective and will also have authority to require special inspection or testing of the Work as provided in paragraph 13.9, whether or not the Work is fabricated, installed or completed.

Shop Drawings, Change Orders and Payments:

9.7. In connection with PROFESSIONAL's responsibility for Shop Drawings and samples, see paragraphs 6.23 through 6.29 inclusive.

9.8. In connection with PROFESSIONAL's responsibilities as to Change Orders, see Articles 10, 11 and 12.

9.9. In connection with PROFESSIONAL's responsibilities in respect of Applications for Payment, etc., see Article 14.

Determinations for Unit Prices:

9.10. PROFESSIONAL will determine the actual quantities and classifications of Unit Price Work performed by CONTRACTOR. PROFESSIONAL will review with CONTRACTOR PROFESSIONAL's preliminary determinations on such matters before rendering a written decision thereon (by recommendation of an Application for Payment or otherwise). PROFESSIONAL's written decisions thereon will be final and binding upon OWNER and CONTRACTOR, unless, within ten days after the date of any such decision, either OWNER or CONTRACTOR delivers to the other party to the Agreement and to PROFESSIONAL written notice of intention to appeal from such a decision.

Decisions on Disputes:

9.11. PROFESSIONAL will be the initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the Work thereunder. Claims, disputes and other matters relating to the acceptability of the Work or the interpretation of the requirements of the Contract Documents pertaining to the performance and furnishing of the Work and claims under Articles 11 and 12 in respect of changes to the Contract Price or Contract Time will be referred initially to PROFESSIONAL in writing with a request for a formal decision in accordance with this paragraph, which PROFESSIONAL will render in writing within a reasonable time. Written notice of each such claim, dispute and other matter will be delivered by the claimant to PROFESSIONAL and the other party to the Agreement promptly (but in no event later than thirty days after the occurrence of the event giving rise thereto) and written supporting data will be submitted to PROFESSIONAL and the other party within sixty days after such occurrence unless PROFESSIONAL allows an additional period of time to ascertain more accurate data in support of the claim.

9.12. When functioning as interpreter and judge under paragraphs 9.10 and 9.11, PROFESSIONAL will not show partiality to OWNER or CONTRACTOR and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity. The rendering of a decision by PROFESSIONAL pursuant to paragraphs 9.10 and 9.11 with respect to any such claim, dispute or other matter (except any which have been waived by the making or acceptance of

final payment as provided in paragraph 14.16) will be a condition precedent to any exercise by OWNER or CONTRACTOR of such rights or remedies as either may otherwise have under the Contract Documents or by Laws or Regulations in respect of any such claim, dispute or other matter.

Limitations on PROFESSIONAL's Responsibilities:

9.13. Neither PROFESSIONAL's authority to act under this Article or elsewhere in the Contract Documents nor any decision made in good faith to exercise such authority shall give rise to any duty or responsibility of PROFESSIONAL to CONTRACTOR, any Subcontractor, any of their agents or employees.

9.14. PROFESSIONAL shall not be responsible for the construction means, methods, techniques, sequences, or procedures or the safety precautions and programs used. PROFESSIONAL shall not be responsible for CONTRACTOR's failure to perform the Work in accordance with the Contract Documents.

9.15. PROFESSIONAL shall not be responsible for the acts or omissions of CONTRACTOR, any Subcontractors, any agents or employees, or any other persons performing any of the Work.

ARTICLE 10--CHANGES IN THE WORK

10.1. Without invalidating the Contract, OWNER may at any time or from time to time order additions, deletions, or revisions in the Work. The OWNER shall provide CONTRACTOR with a proposal request, identifying the Work to be added, deleted or revised. Upon receipt, CONTRACTOR shall promptly submit a written proposal for the changed work prepared in accordance with Articles 11 and 12. If the proposal request calls only for the deletion of Work, the OWNER may order the partial suspension of any Work related to the proposed deletion, in which case CONTRACTOR must cease performance as directed; CONTRACTOR shall not be entitled to claim lost profits on deleted work. All changed Work shall be executed under the applicable conditions of the Contract Documents.

10.2. Additional Work performed by CONTRACTOR without authorization of a Change Order will not entitle CONTRACTOR to an increase in the Contract Price or an extension of the Contract Time, except in the case of an emergency as provided in Article 6. The effect of this paragraph shall remain paramount and shall prevail irrespective of any conflicting provisions contained in these Contract Documents.

10.3. Upon agreement as to changes in the Work to be performed, Work performed in an emergency as provided in Article 6, and any other claim of CONTRACTOR for a change in the Contract Time or the Contract Price, PROFESSIONAL will prepare a written Change Order to be signed by PROFESSIONAL and CONTRACTOR and submitted to OWNER for approval.

10.4. In the absence of an agreement as provided in 10.3, OWNER may, at its sole discretion, issue a Work Change Directive to CONTRACTOR. Pricing of the Work Change Directive will be in accordance with Section 11.3. The Work Change Directive will specify a price, and if applicable a time extension, determined to be reasonable by OWNER. If CONTRACTOR fails to sign such Work Change Directive, CONTRACTOR may submit a claim in accordance with Articles 11 and 12, but CONTRACTOR shall nevertheless be obligated to fully perform the work as directed by the Work Change Directive.

10.5. CONTRACTOR shall proceed diligently with performance of the Work as directed by OWNER, regardless of pending claim actions, unless otherwise agreed to in writing.

10.6. If notice of any change affecting the general scope of the Work or the provisions of the Contract Documents (including, but not limited to, Contract Price or Contract Time) is required by the provisions of any Bond to be given to a surety, the giving of any such notice will be CONTRACTOR's responsibility, and the amount of each applicable Bond will be adjusted accordingly.

ARTICLE 11 – CHANGE OF CONTRACT PRICE

11.1. The Contract Price constitutes the total compensation (subject to written authorized adjustments) payable to CONTRACTOR for performing the Work. All duties, responsibilities and obligations assigned to or undertaken by CONTRACTOR shall be at CONTRACTOR's expense without change in the Contract Price.

11.2. The Contract Price may only be changed by a Change Order or by a Written Amendment. Any claim for an increase or decrease in the Contract Price shall be based on written notice delivered by the party making the claim to the other party and to PROFESSIONAL promptly (but in no event later than thirty days) after the occurrence of the event giving rise to the claim and stating the general nature of the claim. Notice of the amount of the claim with supporting data shall be delivered within sixty days after such occurrence (unless PROFESSIONAL allows an additional period of time to ascertain more accurate data in support of the claim) and shall be accompanied by claimant's written statement that the amount claimed covers all known amounts (direct, indirect and consequential) to which the claimant is entitled as a result of the occurrence of said event. All claims for adjustment in the Contract Price shall be determined by PROFESSIONAL in accordance with paragraph 9.11 if OWNER and CONTRACTOR cannot otherwise agree on the amount involved. No claim for an adjustment in the Contract Price will be valid if not submitted in accordance with this paragraph 11.2.

11.3. The value of any Work covered by a Change Order or of any claim for an adjustment in the Contract Price will be determined by the following procedures:

11.3.1. Designated Unit Price (Field Measure). CONTRACTOR and OWNER recognize and acknowledge that the quantities shown for those items designated in the Bid Proposal as unit price items are approximations prepared by OWNER for bid purposes and that the actual compensation payable to CONTRACTOR for the utilization of such items is based upon the application of unit prices to the actual quantities of items involved as measured in the field and required to complete the Work as originally defined in the Contract Documents.

11.3.2. When it is determined by OWNER that an addition, deletion, or revision to the Work, as defined in these Contract Documents, is required and affects the quantities required for items designed in the Bid Proposal as unit price items, CONTRACTOR and OWNER agree that the compensation payable to CONTRACTOR for such unit price items shall be adjusted accordingly by a Change Order based upon the application of the appropriate unit prices shown in the Bid Proposal to the quantity of the unit price item required to complete the Work as defined in the Contract Documents.

11.3.3. Other Unit Prices. For items not designated in the bid proposal as unit prices, OWNER and CONTRACTOR may establish unit prices as agreed on by Change Order.

11.3.4. Lump Sum. When it is determined by OWNER that an addition, deletion or revision to the Work is required which results in a change in Work designated in the Bid Proposal as a lump sum item, the amount of increase or decrease in the lump sum price shall be established by mutual agreement of the parties.

11.3.5. If the pricing methods specified in 11.3 are inapplicable, or if the parties are unable to agree on a price for the changed work, a reasonable price for the same shall be established by OWNER in accordance with 11.4 and 11.5. OWNER shall then process a unilateral Change Order, specifying the said reasonable price, in accordance with 11.4 through 11.6. CONTRACTOR shall perform the Work as directed in the Change Order.

11.3.6. Failure on the part of CONTRACTOR to construct any item to plan or authorized dimensions within the specification tolerances shall result in: reconstruction to acceptable tolerances at no additional costs to OWNER; acceptance at no pay; or acceptance at reduced final pay quantity or reduced unit price, all at the discretion of OWNER. Determinations of aggregate monetary change for items identified as lump sum quantities shall be made by OWNER based upon an analysis of the scope of CONTRACTOR's failure to construct to plan or authorized dimensions.

Cost of the Work:

11.4. The term Cost of the Work means the sum of all costs necessarily incurred and paid by CONTRACTOR in the proper performance of the Work. Except as otherwise may be agreed to in writing by OWNER, such costs shall be in amounts no higher than those prevailing in the locality of the Project, shall include only the following items and shall not include any of the costs itemized in paragraph 11.5:

11.4.1. Payroll costs for employees in the direct employ of CONTRACTOR in the performance of the Work under schedules of job classifications agreed upon by OWNER and CONTRACTOR. Payroll costs for employees not employed full time on the Work shall be apportioned on the basis of their time spent on the Work. Payroll costs shall include, but not be limited to, salaries and wages plus the cost of fringe benefits which shall include social security contributions, unemployment, excise and payroll taxes, workers' or workmen's compensation, health and retirement benefits, bonuses, sick leave, vacation and holiday pay applicable thereto. Such employees shall include superintendents and foremen at the site. The expenses of performing Work after regular working hours, on Saturday, Sunday or legal holidays, shall be included in the above to the extent authorized by OWNER.

11.4.2. Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and Suppliers' field services required in connection therewith. All cash discounts shall accrue to CONTRACTOR unless OWNER deposits funds with CONTRACTOR with which to make payments, in which case the cash discounts shall accrue to OWNER. Trade discounts, rebates and refunds and all returns from sale of surplus materials and equipment shall accrue to OWNER, and CONTRACTOR shall make provisions so that they may be obtained.

11.4.3. Payments made by CONTRACTOR to the Subcontractors for Work performed by Subcontractors. If required by OWNER, CONTRACTOR shall obtain competitive bids from Subcontractors acceptable to CONTRACTOR and shall deliver such bids to OWNER who then determines, with the advice of PROFESSIONAL, which bids will be accepted. If a subcontract provides that the Subcontractor is to be paid on the basis of Cost of the Work Plus a Fee, the Subcontractor's Cost of the Work shall be determined in the same manner as CONTRACTOR's Cost of the Work. All subcontracts shall be subject to the other provisions of the Contract Documents insofar as applicable.

11.4.4. Costs of special consultants (including but not limited to engineers, architects, testing laboratories, surveyors, attorneys and accountants) employed for services specifically related to the Work.

11.4.5. Supplemental costs including the following:

11.4.5.1. The proportion of necessary transportation, travel and subsistence expenses of CONTRACTOR's employees incurred in discharge of duties connected with the Work.

11.4.5.2. Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office and temporary facilities at the site and hand tools not owned by the workers, which are consumed in the performance of the Work, and cost less market value of such items used but not consumed which remain the property of CONTRACTOR.

11.4.5.3. Rentals of all construction equipment and machinery and the parts thereof whether rented from CONTRACTOR or others in accordance with rental agreements approved by OWNER with the advice of PROFESSIONAL, and the costs of transportation, loading, unloading, installation, dismantling and removal thereof-all in accordance with terms of said rental agreements. The rental of any such equipment, machinery or parts shall cease when the use thereof is no longer necessary for the Work.

11.4.5.4. Sales, consumer, use or similar taxes related to the Work, and for which CONTRACTOR is liable, imposed by Laws and Regulations.

11.4.5.5. Deposits lost for causes other than negligence of CONTRACTOR, any Subcontractor or anyone

directly or indirectly employed by any of them or for whose acts any of them may be liable, and royalty payments and fees for permits and licenses.

11.4.5.6. Losses and damages (and related expenses), not compensated by insurance or otherwise, to the Work or otherwise sustained by CONTRACTOR in connection with the performance and furnishing of the Work (except losses and damages within the deductible amounts of property insurance established by OWNER in accordance with paragraph 5.6) provided they have resulted from causes other than the negligence of CONTRACTOR, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable. Such losses shall include settlements made with the written consent and approval of OWNER. No such losses, damages and expenses shall be included in the Cost of the Work for the purpose of determining CONTRACTOR's Fee. If, however, any such loss or damage requires reconstruction and CONTRACTOR is placed in charge thereof, CONTRACTOR shall be paid for services a fee proportionate to that stated in paragraph 11.6.2.

11.4.5.7. The cost of utilities, fuel and sanitary facilities at the site.

11.4.5.8. Minor expenses such as telegrams, long distance telephone calls, telephone service at the site, expressage and similar petty cash items in connection with the Work.

11.4.5.9. Cost of premiums for additional Bonds and insurance required because of changes in the Work and premiums of property insurance coverage within the limits of the deductible amounts established by OWNER in accordance with paragraph 5.6.

11.5. The term Cost of the Work shall not include any of the following:

11.5.1. Payroll costs and other compensation of CONTRACTOR's officers, executives, principals (of partnership and sole proprietorships), general managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agents, expeditors, timekeepers, clerks and other personnel employed by CONTRACTOR whether at the site or in CONTRACTOR's principal or a branch office for general administration of the Work and not specifically included in the agreed upon schedule of job classifications referred to in paragraph 11.4.1 or specifically covered by paragraph 11.4.4-all of which are to be considered administrative costs covered by CONTRACTOR's Fee.

11.5.2. Expenses of CONTRACTOR's principal area branch offices other than CONTRACTOR's office at the site.

11.5.3. Any part of CONTRACTOR's capital expenses, including interest on CONTRACTOR'S capital used for the Change Order Work and charges against CONTRACTOR for delinquent payments.

11.5.4. Cost of premiums for all Bonds and for all insurance whether or not CONTRACTOR is required by the Contract Documents to purchase and maintain the same (except for the cost of premiums covered by subparagraph 11.4.5.9 above).

11.5.5. Costs due to the negligence of CONTRACTOR, any Subcontractor, or anyone directly or indirectly, employed by any of them or for whose acts any of them may be liable, including but not limited to, the correction of defective Work, disposal of materials or equipment wrongly supplied and making good any damage to property.

11.5.6. Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in paragraph 11.4.

CONTRACTOR's Fee:

11.6. CONTRACTOR's Fee allowed to CONTRACTOR for overhead and profit shall be determined as follows:

11.6.1. a mutually acceptable fixed fee, or if none can be agreed upon;

11.6.2. a fee based on the following percentages of the various portions of the Cost of the Work:

11.6.2.1. for costs incurred under paragraphs 11.4.1 and 11.4.2, CONTRACTOR's Fee shall be fifteen percent,

11.6.2.2. for costs incurred under paragraph 11.4.3, CONTRACTOR's Fee shall five percent; and if a subcontract is on the basis of Cost of the Work Plus a Fee, the maximum allowable to CONTRACTOR on account of overhead and profit of all Subcontractors shall be fifteen percent,

11.6.2.3. no fee shall be payable on the basis of costs itemized under paragraphs 11.4.4, 11.4.5 and 11.3,

11.6.2.4. the amount of credit to be allowed by CONTRACTOR to OWNER for any such change which results in a net decrease in cost will be the amount of the actual net decrease plus a deduction in CONTRACTOR's Fee by an amount equal to ten percent of the net decrease, and

11.6.2.5. when both additions and credits are involved in any one change, the adjustment in CONTRACTOR's Fee shall be computed on the basis of the net change in accordance with paragraphs 11.6.2.1 through 11.6.2.4, inclusive.

11.7. For all changes, CONTRACTOR shall submit an itemized cost breakdown, together with supporting data in such detail and form as prescribed by the Project Manager. When a credit is due, the amount of credit to be allowed by CONTRACTOR to OWNER for any such change which results in a net decrease in cost will be the amount of the actual net decrease in direct cost as determined by the Project Manager, plus the applicable reduction in overhead and profit. When both additions and credits are involved in any change, the combined overhead and profit shall be calculated on the basis of the net change, whether an increase or decrease. In any event, the minimum detail shall be an itemization of all man-hours required by discipline/trade with the unit cost per man-hour and total labor price, labor burden, equipment hours and rate for each piece of equipment, material by units of measure and price per unit, other costs specifically itemized, plus the overhead and profit markup.

Cash Allowances:

11.8. It is understood that CONTRACTOR has included in the Contract Price all allowances so named in the Contract Documents and shall cause the Work so covered to be done by such Subcontractors or Suppliers and for such sums within the limit of the allowances as may be acceptable to PROFESSIONAL CONTRACTOR agrees that:

11.8.1. The allowances include the cost to CONTRACTOR (less any applicable trade discounts) of materials and equipment required by the allowances to be delivered at the site and all applicable taxes; and

11.8.2. CONTRACTOR's costs for unloading and handling on the site, labor, installation costs, overhead, profit and other expenses contemplated for the allowances have been included in the Contract Price and not in the allowances. No demand for additional payment on account of any thereof will be valid.

Prior to final payment, an appropriate Change Order will be issued as recommended by PROFESSIONAL to reflect actual amounts due CONTRACTOR on account of Work covered by allowances, and the Contract Price shall be correspondingly adjusted.

Unit Price Work:

11.9.1. Where the Contract Documents provide that all or part of the Work is to be Unit Price Work, initially the Contract Price will be deemed to include for all Unit Price Work an amount equal to the sum of the established unit prices for each separately identified item of Unit Price Work times the estimated quantity of each item as indicated in the Agreement. The estimated quantities of items of Unit Price Work are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial Contract Price. Determinations of the actual quantities and classifications of Unit Price Work performed by CONTRACTOR will be made by PROFESSIONAL in accordance with Paragraph 9.10.

11.9.2. Each unit price will be deemed to include an amount considered by CONTRACTOR to be adequate to cover CONTRACTOR's overhead and profit for each separately identified item.

11.9.3. Where the quantity of any item of Unit Price Work performed by CONTRACTOR differs materially and significantly from the estimated quantity of such item indicated in the Agreement and there is no corresponding adjustment with respect to any other item of Work and if CONTRACTOR believes that CONTRACTOR has incurred additional expense as a result thereof, CONTRACTOR may make a claim for an increase in the Contract Price in accordance with Article 11 if the parties are unable to agree as to the amount of any such increase.

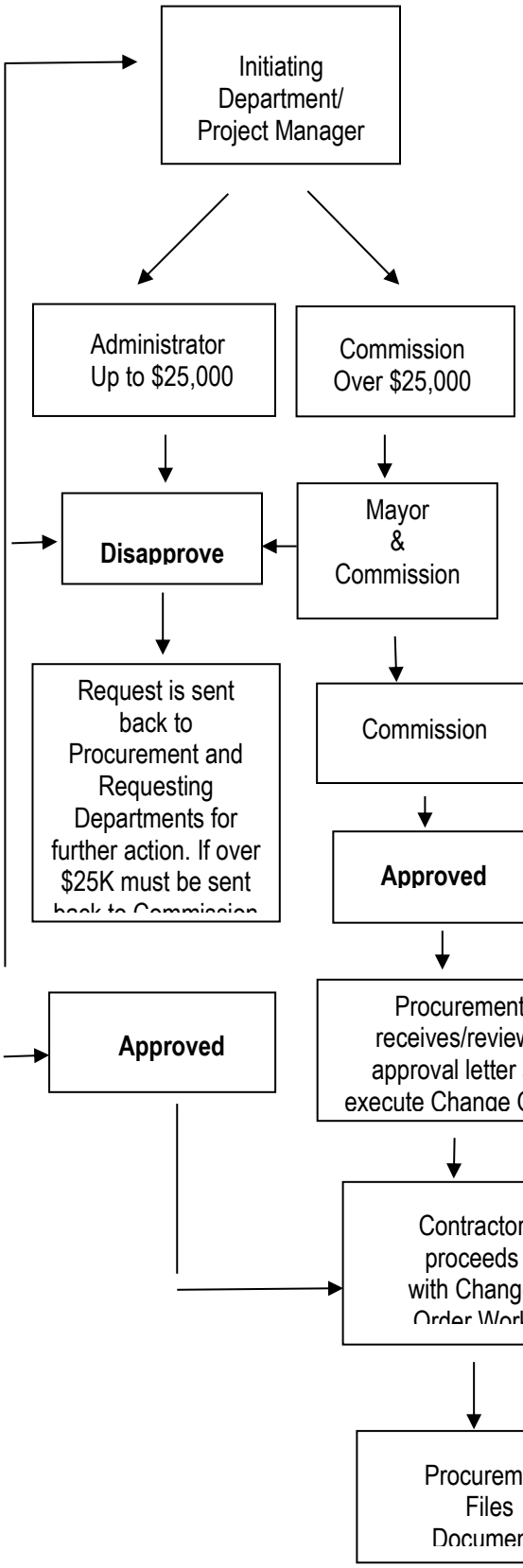
ARTICLE 12--CHANGE OF CONTRACT TIME

12.1. The Contract Time may only be changed by a Change Order. Any request for an extension in the Contract Time shall be made in writing and delivered to PROFESSIONAL and OWNER within seven (7) calendar days of the occurrence first happening and resulting in the claim. Written supporting data will be submitted to PROFESSIONAL and OWNER within fifteen (15) calendar days after such occurrence unless the OWNER allows additional time. All claims submitted by CONTRACTOR for adjustments to the Contract Time must set forth in detail the reasons for and causes of the delay and clearly indicate why the subject delay was beyond CONTRACTOR’s control or fault.

12.2. If CONTRACTOR is delayed at any time in the performance, progress, commencement, or completion of the Work by any act or neglect of OWNER or PROFESSIONAL, or by an employee of either, or by any separate CONTRACTOR employed by OWNER, or by changes ordered in the Work, or by labor disputes, fire, unavoidable casualties, utility conflicts which could not have been identified or foreseen by CONTRACTOR using reasonable diligence, or any causes beyond CONTRACTOR’s control or fault, then the Contract Time shall be extended by Change Order for such reasonable time as OWNER may determine. CONTRACTOR shall be entitled to an extension of time for such causes only for the number of days of delay which OWNER may determine to be due solely to such causes and only to the extent such occurrences actually delay the completion of the Work and then only if CONTRACTOR shall have strictly complied with all the requirements of the Contract Documents. Provided, however, notwithstanding anything in the Contract Documents to the contrary, no interruption, interference, inefficiency, suspension or delay in the performance, progress, commencement or completion of the Work for any cause whatsoever, including those for which OWNER or PROFESSIONAL may be responsible in whole or in part, shall relieve CONTRACTOR of its duty to perform or give rise to any right to damages or additional compensation from OWNER. CONTRACTOR’s sole and exclusive remedy against OWNER for interruption, interference, inefficiency, suspension or delay of any aspect of the Work shall be the right to seek an extension to the Contract Time in accordance with the procedures set forth herein.

Change Orders

Flow Chart & Related Activities



Potential Need for change order arises
Identify the Need for a Change Order

A. Limited Change in Work
B. Change in Price
C. Change in Time

Change identified and options evaluated
Obtain approvals per Change Order
Change formalized with Change Order
Meet with Contractor to discuss the change and negotiate price/time
Project Manager (PM) recommends/approves changes for construction projects. PM forwards to Director for approval with supporting documentation/justification of the change in work, price and time. Director Approves Change Order (**Mandatory Approval for Project oversight)**

Change Orders for consideration below $25,000 may be approved by the Administrator upon recommendation by the User Department Director.

If the Change Order is over $25,000, it will go before the Mayor and Commission for approval. (Allow 10 days for Commission)

Change Order is received in final for consideration.

Finance Department approves; submit proper budget and assign Sales Tax Funds & Project #/Job Ledger #
Sent to Purchasing for Change to the Purchase Order
Sent to Committee to Commission

See Section 17 - Articles:
7 - Other Work
8 - Owner's Responsibilities
9 - Professional's Status during Construction
10 -Changes in the Work

SECTION 18

BOND REQUIREMENTS

Augusta, Georgia Code (Excerpt)

Sec. 1-10-8. Compliance with State and Federal Requirement.
When the procurement transaction involves the expenditure of State or Federal funds, the transaction shall be conducted in accordance with any applicable mandatory State or Federal laws and authorized regulations. Notwithstanding where State and Federal assistance or contract funds are used in procurement transaction, **any applicable local requirements that are more restrictive than State or Federal requirements, but not in conflict therewith shall be followed.**

Bonds for FTA projects shall be followed in the following manner:

FTA Bonding Requirements

Applicability to Contracts

For those construction or facility improvement contracts or subcontracts exceeding $100,000, FTA may accept the bonding policy and requirements of the recipient, provided that they meet the minimum requirements for construction contracts as follows:

a. A bid guarantee from each bidder equivalent to five (5) percent of the bid price. The "bid guarantees" shall consist of a firm commitment such as a bid bond, certifies check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

b. A performance bond on the part to the Contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

c. A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment, as required by law, of all persons supplying labor and material in the execution of the work provided for in the contract. Payment bond amounts required from Contractors are as follows:

    1. 50% of the contract price if the contract price is not more than $1 million;
    2. 40% of the contract price if the contract price is more than $1 million but not more than $5 million; or
    3. $2.5 million if the contract price is more than $5 million.

d. A cash deposit, certified check or other negotiable instrument may be accepted by a grantee in lieu of performance and payment bonds, provided the grantee has established a procedure to assure that the interest of FTA is adequately protected. An irrevocable letter of credit would also satisfy the requirement for a bond.

Flow Down

Bonding requirements flow down to the first tier contractors.

Model Clauses/Language

FTA does not prescribe specific wording to be included in third party contracts. FTA has prepared sample clauses as follows:

Bid Bond Requirements (Construction)

a. Bid Security

A Bid Bond must be issued by a fully qualified surety company acceptable to (Recipient) and listed as a company currently authorized under 31 CFR, Part 223 as possessing a Certificate of Authority as described

thereunder.

b. Rights Reserved

In submitting this Bid, it is understood and agreed by bidder that the right is reserved by (Recipient) to reject any and all bids, or part of any bid, and it is agreed that the Bid may not be withdrawn for a period of [ninety (90)] days subsequent to the opening of bids, without the written consent of (Recipient).

It is also understood and agreed that if the undersigned bidder should withdraw any part or all of his bid within [ninety (90)] days after the bid opening without the written consent of (Recipient), shall refuse or be unable to enter into this Contract, as provided above, or refuse or be unable to furnish adequate and acceptable Performance Bonds and Labor and Material Payments Bonds, as provided above, or refuse or be unable to furnish adequate and acceptable insurance, as provided above, he shall forfeit his bid security to the extent of (Recipient's) damages occasioned by such withdrawal, or refusal, or inability to enter into an agreement, or provide adequate security therefor.

It is further understood and agreed that to the extent the defaulting bidder's Bid Bond, Certified Check, Cashier's Check, Treasurer's Check, and/or Official Bank Check (excluding any income generated thereby which has been retained by (Recipient) as provided in [Item x "Bid Security" of the Instructions to Bidders]) shall prove inadequate to fully recompense (Recipient) for the damages occasioned by default, then the undersigned bidder agrees to indemnify (Recipient) and pay over to (Recipient) the difference between the bid security and (Recipient's) total damages, so as to make (Recipient) whole.

The undersigned understands that any material alteration of any of the above or any of the material contained on this form, other than that requested will render the bid unresponsive.

Performance and Payment Bonding Requirements (Construction)

The Contractor shall be required to obtain performance and payment bonds as follows:

a. Performance bonds

1. The penal amount of performance bonds shall be 100 percent of the original contract price, unless the (Recipient) determines that a lesser amount would be adequate for the protection of the (Recipient).

2. The (Recipient) may require additional performance bond protection when a contract price is increased. The increase in protection shall generally equal 100 percent of the increase in contract price. The (Recipient) may secure additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

a. Payment bonds

1. The penal amount of the payment bonds shall equal:
   i. Fifty percent of the contract price if the contract price is not more than $1 million.
   ii. Forty percent of the contract price if the contract price is more than $1 million but not more than $5 million; or
   iii. Two and one half million if the contract price is more than $5 million.
2. If the original contract price is $5 million or less, the (Recipient) may require additional protection as required by subparagraph 1 if the contract price is increased.

Performance and Payment Bonding Requirements (Non-Construction)

The Contractor may be required to obtain performance and payment bonds when necessary to protect the (Recipient's) interest.

a. The following situations may warrant a performance bond:

    1. (Recipient) property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).
    2. A contractor sells assets to or merges with another concern, and the (Recipient), after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.
    3. Substantial progress payments are made before delivery of end items starts.
    4. Contracts are for dismantling, demolition, or removal of improvements.

b. When it is determined that a performance bond is required, the Contractor shall be required to obtain performance bonds as follows:
    1. The penal amount of performance bonds shall be 100 percent of the original contract price, unless the (Recipient) determines that a lesser amount would be adequate for the protection of the (Recipient).
    2. The (Recipient) may require additional performance bond protection when a contract price is increased. The increase in protection shall generally equal 100 percent of the increase in contract price. The (Recipient) may secure additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

c. A payment bond is required only when a performance bond is required, and if the use of payment bond is in the (Recipient's) interest.

d. When it is determined that a payment bond is required, the Contractor shall be required to obtain payment bonds as follows:

    1. The penal amount of payment bonds shall equal:
        i. Fifty percent of the contract price if the contract price is not more than $1 million;
        ii. Forty percent of the contract price if the contract price is more than $1 million but not more than $5 million; or
        iii. Two and one half million if the contract price is increased.

Advance Payment Bonding Requirements

The Contractor may be required to obtain an advance payment bond if the contract contains an advance payment provision and a performance bond is not furnished. The (recipient) shall determine the amount of the advance payment bond necessary to protect the (Recipient).

Patent Infringement Bonding Requirements (Patent Indemnity)

The Contractor may be required to obtain a patent indemnity bond if a performance bond is not furnished and the financial responsibility of the Contractor is unknown or doubtful. The (recipient) shall determine the amount of the patent indemnity to protect the (Recipient).

Warranty of the Work and Maintenance Bonds

1. The Contractor warrants to (Recipient), the Architect and/or Engineer that all materials and equipment furnished under this Contract will be of highest quality and new unless otherwise specified by (Recipient), free from faults and defects and in conformance with the Contract Documents. All work not so conforming to these standards shall be considered defective. If required by the [Project Manager], the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

2. The Work furnished must be of first quality and the workmanship must be the best obtainable in the various trades. The Work must be of safe, substantial and durable construction in all respects. The Contractor hereby guarantees the Work against defective materials or faulty workmanship for a minimum period of one (1) year after Final Payment by (Recipient) and shall replace or repair any defective materials or equipment or faulty workmanship during the period of the guarantee at no cost to

   (Recipient). As additional security for these guarantees, the Contractor shall, prior to the release of Final Payment [as provided in Item X below], furnish separate Maintenance (or Guarantee) Bonds in form acceptable to (Recipient) written by the same corporate surety that provides the Performance Bond and Labor and Material Payment Bond for this Contract. These bonds shall secure the Contractor's obligation to replace or repair defective materials and faulty workmanship for a minimum period of one (1) year after Final Payment and shall be written in an amount equal to ONE HUNDRED PERCENT (100%) of the CONTRACT SUM, as adjusted (if at all).

SECTION 19

SOLE SOURCE PROCUREMENT

19.1 General Provisions – Sole Source

Procurement of construction, goods, and services without competition is authorized under limited conditions and subject to written justification documenting the conditions which preclude competition.

A. A competitive procurement is not required if:

i. The goods or services, including construction, needed by the Augusta Public Transit Department (APT) are available from only one responsible source and no other type of goods or services, including construction, will satisfy the needs of the Augusta Public Transit Department (APT); or

ii. The Augusta Public Transit Department (APT) determines that public exigency or emergency for the requirement will not permit a delay resulting from competitive procedures as set forth in Section 4; or

iii. If after solicitation of a number of sources, competition is determined inadequate. This determination may be made by the Procurement Director based upon industry research, and the formal or informal solicitation of potential sources. The file must reflect a documented finding that adequate competition cannot be obtained in the time frame necessary to meet the needs of the Augusta Public Transit Department (APT); or

iv. The FTA authorizes noncompetitive negotiations; or

v. To exercise an option that was not awarded as part of the base contract award as set forth in Section 9.

B. The Procurement Director may determine that competition is adequate even if a single Bid or Proposal was received in response to a solicitation if after review:

i. The Procurement Director determines that the specifications were not restrictive; and

ii. That the other identified sources unilaterally chose not to submit a Bid or proposal. If a single Bid is received under these circumstances, the Procurement Director may negotiate the price. The Procurement Director will be responsible for determining price reasonableness.

19.2 Single Available Source

A. The Procurement Director may award a contract by using the noncompetitive negotiation procedures upon making a determination that there is only one reasonably available source for goods or services, including construction. This determination requires a reasonable basis to conclude that the Augusta Public Transit Department's minimum needs can only be satisfied by the goods or services, including construction, proposed to be procured, and that the proposed sole source Contractor is the only source reasonably capable of providing the required goods or services, including construction.

B. If the reason for making a procurement on a sole source basis is based on the particular source's ownership or control of limited rights in data, patent rights, copyrights, or trade secrets applicable to the required goods or services, including construction, the Procurement Director shall require that the written findings clearly demonstrate the need for the specific goods or services, including construction, and that one of the following applies:

i. The requirements cannot be modified to allow a competitive procurement; or

ii. It is in the best interests of the Augusta Public Transit Department (APT) to meet its requirements through procurement of the specific goods or services, including construction, and that the proposed Contractor is the only reasonably available source for the specific goods or services, including construction.

C. Sole Source justifications are to be issued by the using department and require the approval of the Transit Director, Purchasing & Supply Chain prior to processing. With the concurrence of the General Counsel, justification for sole source procurement shall address all of the goods and/or services, including construction, being procured under a single contract. For Small Purchases and Micro Purchases approval is required by the Administrator, Purchasing. General Counsel occurrence is not required for Small Purchases and Micro Purchases. The justification of the sole source procurement for certain goods or services, including construction, shall not be used to avoid competitive procedures for obtaining other goods or services, including construction, which do not qualify for sole source procurement.

D. Each sole source justification which shall be included in the contract file shall include the following:

i. Description of the requirement;

ii. History of prior purchases and its nature (competitive vs. noncompetitive);

iii. The specific exception to competitive procedures that applies;

iv. An explanation of the unique nature of the procurement or other factors that qualify the requirement for sole source procurement;

v. An explanation of the proposed Contractor's unique qualifications or other factors that qualify the proposed Contractor as a sole source for the procurement;

vi. Cost Analysis – see the most recent effective version of FTA Circular 4220.1, Chapter VI, Section 6, paragraph a, as amended, for further explanation; and

vii. Any other pertinent facts or reasons supporting the use of sole source procurement.

9.3 Sole Source Solicitation

A. The Procurement Director shall not be required to publicize a solicitation for a sole source procurement.

B. The Procurement Director shall, in writing, request a Proposal for a sole source procurement. The request to the sole source Contractor shall contain the scope of work and refer to or attach all terms and conditions of the solicitation, including all applicable representations and certifications.

C. The Procurement Director shall ensure that each sole source contract contains all of the required clauses, representations, and certifications in accordance with the requirements of these Regulations.

SECTION 20

LEASE vs PURCHASE

Proposed procurements will be reviewed to avoid duplicative or repetitive purchases to the greatest extent feasible and consistent with good procurement practices. Consideration should be given to consolidating or breaking out procurements to obtain more economic pricing. Where appropriate, analysis will be made of lease versus purchase alternatives or any other appropriate methodology to determine the most economical approach.

Procurement activity will be reviewed by the Director of Transit and Procurement from time to time to determine if certain classes of purchases should be consolidated or broken out to obtain more economic pricing. Where appropriate, analysis will also be made of lease versus purchase alternatives or any other appropriate methodology to determine the most economical approach.

Since equipment leases are considered "third party contracts" within the meaning of FTA Circular 4220.1E, the requirements of that Circular applies to such procurements. FTA Circular 4220.1E requires a lease versus purchase analysis to determine the most economical approach to any given procurement. FTA Circular 5010.1C, Chapter II-3(d), deals with maintenance requirements under leases. The FTA Master Agreement references regulations dealing with Capital Leases (49 CFR Part 639).

Note: Review Updated Buy America information noting that requirements apply to capital leases

Lease vs. purchase alternatives - It is usually less economical to lease equipment than to purchase it. However, there are some instances where this is not true. For example, short-term leases of equipment which is required for a short time or for a unique task may be reasonable and economically sound. It may also be advisable to lease equipment that undergoes rapid technological change such as personal computers and other IT related equipment. In some cases, it is easier to have equipment maintained if it is leased. But long term leases and leases for items that should be purchased and capitalized but cannot be because of budget constraints are not economically prudent. If a decision is made to lease equipment, a lease vs. purchase analysis should be made. The analysis should be appropriate to the size and complexity of the procurement. In determining whether the lease of equipment is feasible, **the following factors must be considered:**

- Estimated length of the period the equipment is required and the amount of time of actual equipment usage;
- Technological obsolescence of the equipment;
- Financial and operating advantages of alternative types and makes of equipment;
- Total rental cost for the estimated period of use;
- Net purchase price, if acquired by purchase;
- Maintenance, storage and other service costs;
- Trade-in or salvage value;
- Imputed interest costs;
- Availability of a servicing facility especially for highly complex equipment (can the Agency service the equipment if it is purchased).

After all factors being considered, a decision can be made to Lease or Purchase See the Lease vs Purchase Form – Appendices GG

SECTION 21

LIQUIDATED DAMAGES

As part of an overall risk management program, Augusta, Georgia shall determine whether or not to include a liquidated damages provision for a specific FTA-funded procurement. The amount of liquidated damages shall be reasonably calculated to reflect the anticipated damages that Augusta, Georgia might suffer as the result of an inadequacy or delay in contract performance, and such damages would be difficult or impossible to determine. Liquidated damages may be imposed for an entire FTA-funded contract or imposed for a readily identifiable milestone or deliverable. The measurement period may be other than a day, where appropriate. The solicitation document shall clearly identify the conditions of which the liquidated damages will be imposed and the established damages rate that will be charged. The procurement file shall document the calculation rationale and ensure it is reasonable, proper and not arbitrary or punitive. FTA C 4220.1F CH. IV, 2.b.(6)(b)1

1. The Transit Director/Project Manager will determine whether the use of a liquidated damages provision is appropriate for each specific procurement. The amount of liquidated damages must be reasonable, shall be set at a specific rate for each day of overrun in contract time for a public works/construction contract or for delivery of goods, or for each instance of an incident giving rise to imposition of liquidated damages in a service contract, and the rate must be specified in the contract. If liquidated damages are assessed in a federally funded contract, the Transit Director/Project Manager in consultation with the Finance Manager will ensure that, as appropriate, the liquidated damages recovered are credited to the project unless the Federal Transit Administration permits otherwise.

2. A liquidated damages clause may be used if it is determined that:

   a. The time of delivery of goods or services to APT Transit is critical, and Foothill Transit can expect to suffer damage if the delivery is delinquent.

   b. The extent or amount of such damage would be difficult or impossible to determine.

SECTION 22

PIGGYBACKING

PIGGYBACKING (where the contract resulted from an open and competitive advertisement, evaluation, and award). Piggybacking is an assignment of existing contract rights to purchase supplies, equipment, or services. Augusta Public Transit (APT), where possible, will seek to take advantage of existing contracts awarded by other governmental entities for goods and services.

EXISTING CONTRACTS.

Permissible Actions. Within the conditions set forth below, FTA permits a recipient to use existing contract rights held by another recipient:

Assignment of Contract Rights.

Acquisition through Assigned Contract Rights. Although **FTA does not encourage the practice**, a recipient may find it useful to acquire contract rights through assignment by another recipient. A recipient that obtains contractual rights through assignment may use them after first determining the contract price remains fair and reasonable, and that the contract provisions are adequate for compliance with all Federal requirements. The recipient need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the recipient to determine whether the contract price or prices originally established are still fair and reasonable before using those rights. The recipient using assigned contract rights is responsible for ensuring the contractor's compliance with FTA's Buy America requirements and execution of all the required pre-award and post delivery Buy America review certifications…. Before proceeding with the assignment, however, FTA does expect the recipient seeking the assignment to review the original contract to be sure that the quantities the assigning recipient acquired, coupled with the quantities the acquiring recipient seeks, do not exceed the amounts available under the assigning recipient's contract." [FTA C 4220. IF, ¶ V, 7.a.(2); BPPM Appendix B.16]

Reference is made to Attachment A Augusta Public Transit's Piggybacking Worksheet, which must be completed and placed in the contract file.

SECTION 23

Design Bid Build

Design-Bid-Build procurement method requires separate contracts for design services and for construction.

Basic Requirement:

(1) Design Services: For design services, the recipient must use qualifications-based procurement procedures, in compliance with applicable Federal, State and local law and regulations.

(1) Qualifications-Based Procurement Procedures Required

The recipient must use qualifications-based procurement procedures not only when contracting for A&E services, but also for other services listed in 49 U.S.C. Section 5325(b)(1) that are directly in support of, directly connected to, directly related to, or lead to construction, alteration, or repair of real property.

For example, a contractor performing program management, project design, construction management, or engineering services in which that contractor would select the finished products to be acquired for an FTA assisted construction project must be selected through qualifications-based procurement procedures.

(2) Qualifications-Based Procurement Procedures

- Qualifications. An offeror's qualifications are evaluated to determine contract award.
- Price. Price is excluded as an evaluation factor.
- Most Qualified. Negotiations are first conducted with only the most qualified offeror.
- Next Most Qualified Only after failing to agree on a fair and reasonable price may negotiations be conducted with the next most qualified offeror. Then, if necessary, negotiations with successive offerors in descending order may be conducted until contract award can be made to the offeror whose price the recipient believes is fair and reasonable.
- Effect of State Laws To the extent that a State has (prior to August 10, 2005) adopted by law, an equivalent State qualifications-based procurement requirement for acquiring architectural, engineering, and design services, State procedures, rather than Federal "Brooks Act" procedures (40 U.S.C. Sections 1101 through 1104), may be used.

(2) Construction: Because the recipient may not use qualifications-based procurement procedures for the actual construction, alteration or repair of real property, the recipient generally must use competitive procedures for the construction. These may include sealed bidding or competitive negotiation procurement methods, as appropriate.

SECTION 24

Design Build

The Design-Build procurement method consists of contracting for design and construction simultaneously with contract award to a single contractor, consortium, joint venture, team, or partnership that will be responsible for both the project's design and construction. FTA's enabling legislation expressly authorizes the use of FTA capital assistance to support design-build projects "after the recipient complies with Government requirements," 49 U.S.C. Section 5325 (d)(2).

Basic Requirement:

(1) Procurement Method Determined by Value: First, the recipient must separate the various contract activities to be undertaken and classify them as design or construction, and then calculate the estimated total value of each. Because both design and construction are included in a single procurement, the FTA expects the recipient to use the procurement method appropriate for the services having the greatest cost, even though other necessary services would not typically be procured by that method.

(a) Construction Predominant. The construction costs of a design-build project are usually predominant so that the recipient would be expected to use competitive negotiations or sealed bids for the entire procurement rather than the qualifications-based "Brooks Act" procurement procedures. Specifically, when construction costs will be predominant, unless FTA determines otherwise in writing, an FTA recipient may not use qualifications-based procurement procedures to acquire architectural engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural and engineering, surveying, mapping, or related A&E services unless required by State law adopted before August 10, 2005.

(b) Design Services Predominant. In the less usual circumstance in which the cost of most work to be performed will consist of costs for architectural and engineering, program management, construction Management, feasibility studies, preliminary engineering, design, architectural engineering, surveying, mapping, or related A&E services, FTA expects the recipient to use qualifications-based procurement procedures based on the "Brooks Act," 40 U.S.C. Sections 1101 through 1104.

(2) Selection Processes. The recipient may structure its design-build procurement using one or more steps.

(a) One-Step Method. The recipient may undertake its design-build procurement in a single step.

(b) Two-Step Method. May use for large design-build projects, as authorized for Federal Government use by 41 U.S.C. Section 253m.. Method consists of:

1. Review of Technical Qualifications and Approach. The first step is a review of the prospective contractors' technical qualifications and technical approach to the project. The recipient may then narrow the competitive range to those prospective contractors with satisfactory qualifications that demonstrate a technically satisfactory approach.
2. Review of Complete Proposals. The second step consists of soliciting and reviewing complete proposals, including price, submitted by prospective contractors first determined to be qualified.

By using the two-step method, it will not be necessary for the recipient to undertake extensive proposal reviews, nor will prospective offerors need to engage in expensive proposal drafting. This two-step selection procedure is separate and distinct from prequalification and is but one procurement method available to the recipient.

Augusta will abide by the following procedures:

- Must obtain price or rate quotations from an adequate number (at least three) of qualified (and potential) sources.
- ☐ **Independent Cost Estimate**

  … must make independent cost estimates before receiving bids or proposals. [FTA C 4220.1F Ch. VI, 6.]
- The Invitation for bids is publicly advertised.
- Bids are solicited from an adequate number of know suppliers.
- The Invitation for bids, including any specifications and pertinent attachments, describes the property or services sought in sufficient detail that a prospective bidder will be able to submit a proper bid.
- ☐ **Clear, Accurate, and Complete Specification**
  The solicitation and the contract awarded thereunder must include a clear and accurate description of the recipient's technical requirements for the property or services to be acquired in a manner that provides for full and open competition. [FTA C 4220.1F, Ch. VI, 2.a.]

  ☐ **Non-Collusion Declaration**

- Bidders are allowed sufficient time to prepare bids before the date of bid opening.
  - Greater than 14 days
- All bids are publicly opened at the time and place prescribed in the Invitation For Bids.
  - Include time, date, and place of bid opening in Solicitation
  - Complete a **sign-in form**
- (Prior to Award) Must preform a cost analysis in connection with every procurement action, including contract modifications. [FTA C 4220.1f, Ch. VI, 6]

  ☐ **Cost Analysis** breaks down the total price into its components, looking at the supplier's costs to determine the profit margin contained in that price. Cost Analysis is used if it is determined that competition is inadequate or price is inconsistent with the expected range established by ICE.

  ☐ **Price Analysis** looks at the supplier's price in comparison to other market prices. Price Analysis is used if it is determined that competition was adequate and price was within the expected range established by the ICE.
- A firm fixed price contract is usually awarded in writing to the lowest responsive and responsible bidder, but a fixed prices incentive contract or inclusion of an economic price adjustment provision can sometimes be appropriate. When specified in the bidding documents, factors such as transportation costs and life cycle costs affect the determination of the lowest bid; payment discounts are used to determine the low bid only when prior experience those such discounts are typically taken.

  ☐ **Responsiveness Checklist**
- Any or all bids may be rejected if there is a sound, documented business reason.

SECTION 25

Tag Ons

Tag-ons.

Reference: FTA C 4220. IF V-7.b(2)
Augusta **prohibits the use of cardinal changes (tag-ons)**. This applies to the original buyer as well as to others. Tag-on is defined as the addition of work, supplies, equipment, or services that is beyond the scope of the original contract and is subject to a non-competitive procurement process. Changes in quantity do not necessarily constitute tag-ons. See FTA C 4220.1F V-7.b2 (ac) for further guidance.

SECTION 26

State/Local Government Purchasing Schedules

By using the collective purchasing power of the federal government, the General Services Administration (GSA) can help smaller government entities meet their mission while reducing costs and maximizing efficiency. The GSA's Cooperative Purchasing Program allows state, local and tribal governments to benefit from pre-vetted vendors on a variety of information technology products and services as well as security and law enforcement products and services offered through specific GSA Schedule contracts. Eligible groups may buy from approved vendors, at any time, for any reason, using any funds available.

Under this collective purchasing program, state and local government entities may buy equipment and related services from contracts awarded under Schedules 70 and 84. Specific information on the benefits of these services follows:

- GSA Schedules
- Blanket Purchase Agreements
- Contractor Team Arrangements
- Disaster Recovery Purchasing

Augusta, Georgia may procure supplies, services or construction items through contracts established by the Procurement Division of the State of Georgia where such contracts and contractors substantially meet the requirements of the AUGUSTA, GA. CODE.

Compliance with state and federal requirement.

When the procurement transaction involves the expenditure of State or Federal funds, the transaction shall be conducted in accordance with any applicable mandatory State or Federal laws and authorized regulations. Notwithstanding where State and Federal assistance or contract funds are used in procurement transaction, any applicable local requirements that are more restrictive than State or Federal requirements, but not in conflict therewith, shall be followed.

By using the purchasing power of the federal government, GSA can help cities and towns meet their mission while reducing costs and maximizing efficiency. Multiple authorized programs allow state and local governments to use GSA Schedules for select goods and services.

Check out the links below for more information on conditions for the use of these programs, the Schedules included (when limited to select Schedules), and ordering procedures. GSA eLibrary designates vendors who are participating in the state and local Disaster and Cooperative Purchasing programs with an icon next to their names, as shown.

Programs

Program Name	Description of Program
Cooperative Purchasing	A variety of Information Technology products and services, as well as security and law enforcement products and services, are available through Schedule 70 and Schedule 84.
Disaster Purchasing	Items can be purchased directly from Schedule contractors to aid in recovery from Presidentially-declared major disasters or acts of terrorism.
Public Health Emergencies (PHEs)	Goods and services can be purchased from all Schedules, using federal grants, in direct response to HHS declared public health emergencies.
1122 Program	Equipment in support of counterdrug, homeland security and emergency response activities is available through select GSA Schedules and Special Item Numbers (SINs), as well as vehicles from Autochoice.

CONTACTS

National Customer Service Center (800) 488-3111 mashelpdesk@gsa.gov http://www.gsa.gov/portal/content/197989	**HELP WITH GSA SCHEDULES** Contacts and Resources **PURCHASING PROGRAMS** Assisted Acquisition Overview GSA SmartPay® **E-TOOLS** GSA *Advantage!*® eBuy GSA eLibrary eOffer/eMod Vendor Support Center Schedule Sales Query

SECTION 27

Veteran's Preference

The following paragraph will be added to **ALL** RFPs/RFQ/ITBs etc. The paragraph is covered in FTA C 4220.1F Chapter 53 Section 5325(k) of MAP-21.

Recipients and sub-recipients of Federal financial assistance under this chapter shall ensure that contractors working on a capital project funded using such assistance give a hiring preference, to the extent practicable, to veterans (as defined in section 2108 of title 5) who have the requisite skills and abilities to perform the construction work required under the contract. This subsection shall not be understood, construed or enforced in any manner that would require an employer to give preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, an individual with a disability, or former employee.

Section 5325

§ 5325. Contract requirements

(a) COMPETITION.--Recipients of assistance under this chapter shall conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary

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(b) ARCHITECTURAL, ENGINEERING, AND DESIGN CONTRACTS.-

(1)..PROCEDURES FOR AWARDING CONTRACT.--A contract or requirement for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services for a project for which Federal assistance is provided under this chapter shall be awarded in the same way as a contract for architectural and engineering services is negotiated under chapter 11 of title 40 or an equivalent qualifications-based requirement of a State adopted before August 10, 2005.

(2)..ADDITIONAL REQUIREMENTS. --When awarding a contract described in paragraph (1), recipients of assistance under this chapter shall comply with the following requirements:

a) PERFORMANCE OF AUDITS.--Any contract or subcontract awarded under this chapter shall be performed and audited in compliance with cost principles contained in part 31 of the Federal Acquisition Regulation, or any successor thereto.

b) RECT COST RATES.--A recipient of funds under a contract or subcontract awarded under this chapter shall accept indirect cost rates established in accordance with the Federal Acquisition Regulation for 1-year applicable accounting periods by a cognizant Federal or State government agency, if such rates are not currently under dispute.

c) APPLICATION OF RATES.--A.fter a firm's indirect cost rates are accepted under subparagraph (B), the recipient of the funds shall apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment, and shall not be limited by administrative or de facto ceilings.

d) PRENOTIFICATION; CONFIDENTIALITY OF DATA.--A recipient requesting or using the cost and rate data described in subparagraph (C) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided by the group of agencies sharing cost data under this subparagraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.

e). EFFICIENT PROCUREMENT.--A recipient may award a procurement contract under this chapter to other than the lowest bidder if the award furthers an objective consistent with the purposes of this chapter, including improved long-term operating efficiency and lower long-term costs.

f) DESIGN-BUILD PROJECTS.-

1. TERM DEFINED.--In this subsection, the term "design-build project"--

a) means a project under which a recipient enters into a contract with a seller, firm, or consortium of firms to design and build a public transportation system, or an operable segment of such system, that meets specific performance criteria; and

b) may include an option to finance, or operate for a period of time, the system or segment or any combination of designing, building, operating, or maintaining such system or segment.

2. FINANCIAL ASSISTANCE FOR CAPITAL COSTS.--Federal financial assistance under this chapter may be provided for the capital costs of a design-build project after the recipient complies with Government requirements.

3. MULTIYEAR ROLLING STOCK.-

1).CONTRACTS.--A recipient procuring rolling stock with Government :financial assistance under this chapter may make a multiyear contract to buy the rolling stock and replacement parts under which the recipient has an option to buy additional rolling stock or replacement parts for–

a) not more than 5 years after the date of the original contract for bus procurements; and

b) not more than 7 years after the date of the original contract for rail procurements, provided that such option does not allow for significant changes or alterations to the rolling stock.

3. COOPERATION AMONG RECIPIENTS.--The Secretary shall allow at least two recipients to act on a cooperative basis to procure rolling stock in compliance with this subsection and other Government procurement requirements.

4. ACQUIRING ROLLING STOCK.--A recipient of financial assistance under this chapter may enter into a contract to expend that assistance to acquire rolling stock-

1. based on--

a) initial capital costs; or

b) performance, standardization, life cycle costs, and other factors; or

c) with a party selected through a competitive procurement process.

5. EXAMINATION OF RECORDS.--Upon request, the Secretary and the Comptroller General, or any of their representatives, shall have access to and the right to examine and inspect all records, documents, and papers, including contracts, related to a project for which a grant is made under this chapter.

6. GRANT PROHIBITION.--A grant awarded under this chapter or the Federal Public Transportation Act of 2012 may not be used to support a procurement that uses an exclusionary or discriminatory specification.

7. BUS DEALER REQUIREMENTS.--No State law requiring buses to be purchased through in-State dealers shall apply to vehicles purchased with a grant under this chapter.

8. AWARDS TO RESPONSIBLE CONTRACTORS:

IN GENERAL. - Federal financial assistance under this chapter may be provided for contracts only if a recipient

awards such contracts to responsible contractors possessing the ability to successfully perform under the terms and conditions of a proposed procurement.

9. CRITERIA.--Before making an award to a contractor under paragraph (1), a recipient shall consider-

a) the integrity of the contractor;

b) the contractor's compliance with public policy;

c) the contractor's past performance; and

d) the contractor's financial and technical resources.

9. VETERANS EMPLOYMENT - Recipients and subrecipients of Federal financial assistance under this chapter shall ensure that contractors working on a capital project funded using such assistance give a hiring preference, to the extent practicable, to veterans (as defined in section 2108 of title 5) who have the requisite skills and abilities to perform the construction work required under the contract. This subsection shall not be understood, construed or enforced in any manner that would require an employer to give a preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, an individual with a disability, or a former employee.

Section 5326

§ 5326. Transit asset management

A) DEFINITIONS. In this section the following definitions shall apply:

1. CAPITAL ASSET. The term 'capital asset' includes equipment, rolling stock, infrastructure, and facilities for use in public transportation and owned or leased by a recipient or subrecipient of Federal financial assistance under this chapter.

2. TRANSIT ASSET MANAGEMENT PLAN. The term "transit asset management plan" means a plan developed by a recipient of funding under this chapter that-a) includes, at a minimum, capital asset inventories and condition assessments, decision support tools, and investment prioritization; and b) the recipient certifies complies with the rule issued under this section.

3. TRANSIT ASSET MANAGEMENT SYSTEM: The term "transit asset management system" means a strategic and systematic process of operating, maintaining, and improving public transportation capital assets effectively throughout the life cycle of such assets.

4. TRANSIT ASSET MANAGEMENT SYSTEM: The Secretary shall establish and implement a national transit asset management system, which shall include-

a) a definition of the term 'state of good repair' that includes objective standards for measuring the condition of capital assets of recipients, including equipment, rolling stock, infrastructure, and facilities.

b) a requirement that recipients and subrecipients of Federal financial assistance under this chapter develop a transit asset management plan;

c) a requirement that each designated recipient of Federal financial assistance under this chapter report on the condition of the system of the recipient and provide a description of any change in condition since the last report;

d) an analytical process or decision support tool for use by public transportation systems that-

1. allows for the estimation of capital investment needs of such systems over time; and

2. assists with asset investment prioritization by such systems; and

3. technical assistance to recipients of Federal financial assistance under this chapter.

5. PERFORMANCE MEASURES AND TARGETS:

IN GENERAL. Not later than 1year after the date of enactment of the Federal Public Transportation Act of 2012, the Secretary shall issue a final rule to establish performance measures based on the state of good repair standards established under subsection (b)(1).

SECTION 28

DISADVANTAGED BUSINESS ENTERPRISES PROGRAM

Augusta will comply with 49 CFR Part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. Augusta will create a level playing field on which DBEs can compete fairly for DOT-assisted contracts.

Please review FTA's Final Report Vol. 79 No. 191 Dated October 2, 2014 (Docket No. OST-2012-0147)
Disadvantaged Business Enterprise Program Implementation Modifications -
http://www.fta.dot.gov/civilrights/12326.html

Excerpts from Augusta Code

Sec. 1-10-109. Purpose.

The purpose of this Disadvantaged Business Enterprises program is to comply with U.S. Department of Transportation (DOT), Federal Transit Administration (FTA), Federal Aviation Administration (FAA) and other federal and state mandated DBE requirements for certain DOT, FTA, FAA, and other federal and state assisted contracts as required by 49 C.F.R. Part 26, *et. seq.* and/or 49 C.F.R. Part 23, *et. seq.*

Sec. 1-10-110. Definitions.

(a) *Generally*. Those definitions set forth in Chapter 10 of the Code of Ordinances shall also apply to this Article, except as provided in this section.

(b) *Specifically.*

(1) Airport Concessionaire Disadvantaged Business Enterprises (ACDBEs) means a concession that is a for-profit small business concern that is at least fifty-one percent (51%) owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which fifty-one percent (51%) of the stock is owned by one or more such individual; and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

(2) Department of Transportation (DOT) means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) and the Federal Aviation Administration (FAA).

(3) Disadvantaged Business Enterprise (DBE) means a for-profit small business concern that is at least fifty-one percent (51%) owned by one or more individuals who are both socially and economically disadvantaged, or in the case of a corporation, in which fifty-one percent (51%) of the stock is owned by one or more such individuals; and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

(4) DOT assisted contract means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letter of credit or loan guarantees, except a contract solely for the purchase of land.

(5) Good faith efforts means efforts to achieve a DBE goal or other requirement which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

Sec. 1-10-111 Limitations.

This DBE program is only for DOT, FTA and FAA assisted contracts and other federal or state funded contracts having mandatory DBE requirements.

Sec. 1-10-112. Policy statement.

Augusta, Georgia is committed to ensuring that all DBE requirements of federal and state funded contracts will be implemented by Augusta, Georgia. The Director of minority and small business opportunities shall serve as the DBE Liaison Officer and is responsible for accomplishing the objectives of this program. The objectives of this DBE program are:

(a) To ensure nondiscrimination in the award and administration of DOT, FTA, FAA and other contracts covered by this program, including highway, transit, and airport financial assistance programs;

(b) To create a level playing field on which DBEs can compete fairly for DOT, FTA, FAA and other contracts covered by this program;

(c) To ensure that the this DBE program is narrowly tailored in accordance with applicable law;

(d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;

(e) To help remove barriers to the participation of DBEs in DOT, FTA, FAA and other contracts covered by this program;

(f) To assist in the development of firms that can compete successfully in the marketplace outside the DBE program; and

(g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

Sec. 1-10-113. DBE liaison officer.

The Chief Executive Officer concerning DBE Program matters for Augusta, Georgia shall be the Mayor of Augusta, Georgia. Augusta shall have a DBE Liaison Officer who shall have direct, independent access to the Mayor concerning DBE Program matters. The DBE Liaison Officer shall have the following duties and responsibilities:

(a) Gathering and reporting statistical data and other information as required by DOT, FTA, FAA and other contracts covered by this program.

(b) Reviewing third party contracts and purchase requisitions for compliance with this program.

(c) Working with all departments to set overall annual goals or as required by federal law.

(d) Ensuring that bid notices and requests for proposals are available to DBEs in a timely manner.

(e) Identifying contracts and procurements so that DBE goals are included in solicitations covered by this DBE Program.

(f) Analyzing Augusta, Georgia's progress toward attainment and identifying ways to improve progress.

(g) Participating in pre-bid meetings.

(h) Advising the Commission on DBE matters and achievement.

(i) Providing DBEs with information and assistance in preparing bids, obtaining bonding and insurance.

(j) Planning and participating in DBE training seminars.

(k) Certifying DBEs according to the criteria set by DOT and FTA and acting as liaison to the Uniform Certification Process in Georgia.

(l) Providing outreach to DBEs and community organizations to advise them of opportunities.

(m) Maintaining the DBE bidder's list for DOT, FTA and other contracts covered by this program as provided in § 1-10-117.

(n) Ensuring that all aspects of this DBE Program are complied with by participants and using agencies.

Sec. 1-10-114. DBE financial institutions.

For projects containing federal or state mandated DBE requirements, Augusta, Georgia must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in Augusta, Georgia and must make reasonable efforts to use these institutions and encourage prime contractors to use these institutions.

Sec. 1-10-115. Prompt payment mechanisms.

(a) For projects containing federal or state mandated DBE requirements, Augusta, Georgia will include a contract clause requiring prime contractors to pay subcontractors for satisfactory performance for their contracts no later than thirty (30) days from receipt of each payment made by Augusta, Georgia to the prime contractor.

(b) Augusta, Georgia will ensure prompt and full payment of retainage from the prime contractor to the subcontractor within thirty (30) days after the subcontractor's work is satisfactorily completed by using one or more of the following methods:

i. Declining to hold retainage from prime contractors and prohibiting prime contractors from holding retainage from subcontractors.

ii. Declining to hold retainage from prime contractors and requiring a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within thirty (30) days after the subcontractor's work is satisfactorily completed.

iii. Holding retainage from prime contractors and providing for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within thirty (30) days after Augusta, Georgia's payment to the prime contractor.

iv. Requiring a contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes.

v. Requiring a contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(c) Augusta, Georgia shall have the power and authority to enforce all of the provisions of this subsection and may implement suspension and debarment for non-compliance as provided in Article 8.

Sec. 1-10-116. Wage requirements for federally funded projects.

Wage requirements. When a project has federal funds, the prevailing wages paid shall correspond as nearly as practicable to those prescribed in the Federal Davis Bacon Act when required. The wage scale shall be posted by the contractor in a prominent and easily accessible place at the site of work in accordance with Federal Government requirements.

Sec. 1-10-117. DBE bidder's list for federally assisted contracts.

1. The DBE Liaison Officer will maintain a bidder's list, consisting of information about all DBE and non-DBE firms that bid or quote on federally assisted contracts. The purpose of this requirement is to allow use of the bidder's list approach to calculating overall goals. The bidder's list will include the name, address, DBE/non-DBE status, age, and annual gross receipts of firms and the types of work each firm has been certified to perform as a DBE. The DBE Liaison Officer shall revise the bidder's list at least annually and make updated information available to contractors and the public.

2. The DBE Liaison Officer may collect this information in the following ways:

    1. Including a contract clause in all DOT and FTA assisted contracts requiring prime bidders to report the name, address, DBE/non-DBE status and gross receipts of all firms who quote to them on subcontracts.

    2. Submitting surveys of a statistically sound sample of firms in the Augusta, Georgia regional area.

    3. Including a notice in solicitations and on the Augusta, Georgia website requesting that firms quoting on subcontracts submit their name, address, DBE/non-DBE status and gross receipts directly to the DBE Liaison Officer.

Sec. 1-10-118. Overconcentration of DBE firms in certain types of work.

(a) The DBE Liaison Officer shall annually review the availability of DBE and non-DBE firms in the different types of work which Augusta, Georgia utilizes and make a preliminary determination as to whether DBE firms may be so over concentrated in a certain type of work as to unduly burden the opportunity of non–DBE firms to participate in one or more types of work. Any preliminary determination by the DBE Liaison Officer shall be submitted to the concerned DOT or FTA operating administration for a final determination of overconcentration.

(b) Subject to approval required in subsection (c) below, when an overconcentration of DBE firms in a certain type of work is determined to exist, the DBE Liaison Officer may provide: technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which there is an overconcentration of DBE firms.

(c) Before implementing any of the measures provided in subsection (b) above, the DBE Liaison Officer shall obtain the approval of the concerned DOT or FTA operating administration.

Sec. 1-10-119. Compliance with DBE Program requirements.

(a) All prime contractors and subcontractors choosing to participate in a project subject to this DBE Program must comply with all parts of this program as well as all federal, state and local law applicable to such projects.

(b) The DBE Liaison Officer shall, for every project subject to this DBE Program, keep and maintain a running tally of actual DBE attainments (e.g., payments actually made to DBE firms), including a means of comparing these attainments to commitments. In reports of DBE participation to the Department, the DBE Liaison Officer shall display both commitments and attainments.

(c) Augusta, Georgia shall not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any solicitation, bid or contract on the basis of race, color, sex, or national origin.

(d) The DBE Liaison Officer is responsible for submitting DOT form 4630 to the FTA and FHWA on a quarterly basis and to the FAA as required by 49 C.F.R. Part 26 or 49 C.F.R. Part 23.

Sec. 1-10-120. DBE Program overall goals.

(a) The DBE Liaison Officer shall establish an annual overall goal for this program in accordance with 49 C.F.R. Part 26 and shall annually submit such goal to FHWA, FTA or FAA as appropriate. Neither quotas nor set-asides for DBEs are permitted in this program. Augusta, Georgia may only use the means authorized by 49 C.F.R. Part 26.51 to meet overall goals.

(b) For ACDBE projects the DBE Liaison Officer shall establish goals in compliance with 49 C.F.R. Part 23.21, *et. seq.*

Sec. 1-10-121. Severability.

Should any section, paragraph, subdivision, clause, phrase, or provision of this chapter be adjudged invalid or held unconstitutional by a court of competent jurisdiction, such declaration shall not affect the validity of this chapter as a whole or any part or provisions thereof, other than the part so decided to be invalid or unconstitutional.

SECTION 29

PROCUREMENT QUESTIONS
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PURPOSE

States: When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with 2 CFR §200.322 (*Procurement of Recovered Materials*) and ensure that every purchase order or other contract includes any clauses required by section 2 CFR §200.326 (*Contract Provisions*). All other non- Federal entities, including subrecipients of a state, will follow 2 CFR §§200.318 (*General Procurement Standards*) through 200.326 (*Contract Provisions*).

Non-state recipients: The non-Federal entity must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, and conform to applicable Federal law and the standards identified in 2 CFR Part 200.

QUESTIONS TO BE EXAMINED

1. Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?
2. Does the recipient maintain written standards of conduct for its representatives engaged in the selection, award, and administration of FTA-funded contracts?
3. Does the recipient have and follow written procurement protest procedures?
4. Does the recipient make awards only to responsible contractors?
5. Does the recipient maintain records sufficient to detail the history of each procurement?
6. Does the recipient ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders?
7. Does the recipient ensure that it conducts all procurement transactions in a manner that provides full and open competition and does not restrict competition in its procurement process*?*
8. Did the recipient appropriately use each method of procurement?
9. Does the recipient procure A&E services in accordance with 49 U.S.C. §5325(b)?
10. Does the recipient develop cost estimates and conduct cost and/or price analysis for each procurement action above the Simplified Acquisition Threshold?
11. Did the recipient include applicable federal clauses in FTA-funded procurements exceeding the micro-purchase limit and construction contracts over $2,000?
12. Did the recipient include required certifications in solicitations and receive signed certifications from bidders as part of their bid or proposal, as applicable?
13. Did the recipient appropriately include and account for liquidated damages in its procurements?

14. Did the recipient approve, evaluate, and document change orders to procurements?

15. If the recipient included options in an FTA-funded procurement, did it base the amount on its reasonably foreseeable need and evaluate the option price prior to awarding the contract?

16. If the recipient procured bus or rail rolling stock or replacement parts with FTA funds, did it adhere to the time limitations on placing orders against the contracts?

17. If the recipient purchased FTA-funded assets through a "piggyback" procurement method, did it comply with applicable requirements regarding inclusion of Federal requirements, assignability, and price, and no cardinal changes?

18. If the recipient exercised an assigned option on a contract that was entered into before December 4, 2015, confirm that the assignment was incompliance with FTA's September 1, 2016 Policy Guidance on the implementation of the phased increase in domestic content contained in 49 USC §5323(j)?

19. Did the recipient ensure that appropriate FTA approval was acquired for advance payments and that adequate protection was exercised for progress payments?

20. If the recipient procured buses with FTA funds, did it comply with requirements for bus testing reports?

21. If the recipient procured rolling stock with FTA funds, did it comply with pre-award and post-delivery audit requirements?

22. Does the recipient perform oversight of its subrecipients' FTA-funded procurement activities?

INFORMATION NEEDED FROM RECIPIENT

Recipient Information Request

- Current procurement policies and procedures
- State statute regarding A&E (qualifications-based) procurements
- Procurement standards of conduct policies
- Procurement protest procedures
- List of FTA-funded procurements conducted since the last review. Identify the following items for each award:
    1. Date
    2. Dollar value
    3. Type (professional service, architectural & engineering, operations management services, rolling stock, construction, materials and supplies)
    4. Method: invitation for bid, request for proposal, pre-qualified bidders, sole source, single bid, brand name, award-to-other-than-low-bidder, piggyback, joint procurements, options
    5. New Start or Small Start-related procurement

6. Awarded by contractors or subrecipients

7. Change order, if applicableDBE goal, if applicable

- Listing of protests received or denied since last review

- List of revenue contracts awarded since the last review

BASIC REQUIREMENT:

States. When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with 2 CFR §200.322 (*Procurement of Recovered Materials*) and ensure that every purchase order or other contract includes any clauses required by 2 CFR

§200.326 (*Contract Provisions*). All other non-Federal entities, including subrecipients of a state, will follow 2 CFR §§200.318 (*General Procurement Standards*) through 200.326 (*Contract Provisions*).

Non-state recipients. The non-Federal entity must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, and conform to applicable Federal law and the standards identified in 2 CFR part 200.

2. *Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?*

APPLICABILITY

State and Non-state recipients

INDICATORS OF COMPLIANCE

a. *If the recipient is a state, does it have written procurement policies and procedures?*

b. *If the recipient is not a state, does it have written procurement policies and procedures that conform to 2 CFR §§200.318 (General Procurement Standards) through 200.326 (Contract Provisions)?*

DETERMINING COMPLIANCE

Request and review the recipient's procurement policies and procedures.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements with its non-Federal funds. The state will comply with 2 CFR §200.322 (*Procurement of Recovered Materials*) and ensure that every purchase order or other contract includes any clauses required by 2 CFR §200.326 (*Contract Provisions*) (see Question 11).

All other non-Federal entities, including subrecipients of a state, will follow 2 CFR §§200.318 (*General Procurement Standards*) through 200.326 (*Contract Provisions*). These documented procurement procedures must reflect applicable State, local, and tribal laws and regulations, and conform to applicable Federal law and the standards identified in 2 CFR part 200.

For non-state recipients, determine if the procurement policies and procedures contain provisions addressing the following:

- All procurement transactions must be conducted in a manner that provides full and open competition. Some of the situations considered to be restrictive of competition include but are not limited to:
    - Placing unreasonable requirements on firms in order for them to qualify to do business;
    - Requiring unnecessary experience and excessive bonding;
    - Noncompetitive pricing practices between firms or between affiliated companies;
    - Noncompetitive contracts to consultants that are on retainer contracts;Organizational conflicts of interest (In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements.);
    - Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
    - Any arbitrary action in the procurement process.
- Procedures to avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase.
- Where appropriate, an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.
- Award of contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.
- Federal funds may not be used to support a procurement that uses an exclusionary or discriminatory specification.
- Compliance with Buy America requirements in 49 U.S.C §5323(j) and 49 CFR parts 661 and 663.
- Prohibition of the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing

laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

- A contract or requirement for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services for a project for which Federal assistance is provided shall be awarded in the same way as a contract for architectural and engineering services is negotiated under chapter 11 of title 40 or an equivalent qualifications- based requirement of a State adopted before August 10, 2005 (i.e., the Brooks Act), including policies and procedures for conducting audits as required under 49 U.S.C. §5323(b)(2).

- Procedures for procurement transactions that ensure all solicitations:

    - Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement.

      The specific features of the named brand which must be met by offers must be clearly stated; and

    - Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

- Current prequalified lists of persons, firms, or products which are used in acquiring goods and services that include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

- Use of one of the following methods of procurement: (1) micro-purchases; (2) small purchase procedures; (3) sealed bid; (4) competitive proposals; or (4) non-competitive proposals.

- Procedures to resolve third-party contracting issues, including bid protest procedures.

- Recipients are encouraged, but not required to address the following issues in their procurement policies and procedures:

- To foster greater economy and efficiency, and in accordance with efforts to promote cost- effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

- The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

- The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

POTENTIAL DEFICIENCY DETERMINATIONS

The state or non-state recipient is deficient if it does not have written procurement policies and procedures.

DEFICIENCY CODE: 22: Procurement policies and procedures not evident

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office procurement policies that include all required provisions.

Non-state recipients are deficient if procurement policies and procedures contain provisions that are contrary to the provisions outlined above or those provisions are not addressed.

DEFICIENCY CODE 740: Procurement policies or procedures not current/complete

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the

FTA regional office revised procurement policies that include all required provisions.

GOVERNING DIRECTIVE

2 CFR §§ 200.317 through 200.326

§200.317 Procurements by states.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered *materials* and ensure that every purchase order or other contract includes any clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§ 200.318 General procurement standards through 200.326 Contract provisions.

§200.318 General procurement standards.

(a) The non-Federal entity must use its own documented procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company,

affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(g) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(h) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j)(1) The non-Federal entity may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and material type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

§200.319 Competition.

(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive

advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(b) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

§200.320 Methods of procurement to be followed.

The non-Federal entity must use one of the following methods of procurement.

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed $3,000 (or $2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). To the extent practicable, the non-Federal entity must distribute micro-purchases

equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:

(i) The invitation for bids will be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids;

(ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) Any or all bids may be rejected if there is a sound documented reason.

(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(2) Proposals must be solicited from an adequate number of qualified sources;

(3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

(4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.[Reserved]

(e)Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

(1) The item is available only from a single source;

(2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or

(4) After solicitation of a number of sources, competition is determined inadequate.

§200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

§200.322 Procurement of recovered materials.

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000

or the value of the quantity acquired by the preceding fiscal year exceeded $10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

§ 200.323 Contract cost and price.

(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

§200.324 Federal awarding agency or pass-through entity review.

(a) The non-Federal entity must make available, upon request of the Federal awarding agency or pass- through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(b) The non-Federal entity must make available upon request, for the Federal awarding agency or pass- through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

(1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;

(2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;

(3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a “brand name” product;

(4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

(6) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the

Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high- dollar funding, and third party contracts are awarded on a regular basis;

(7) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

§200.325 Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(a) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

(b) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

§200.326 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to Part 200— Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

Additional Guidance:
FTA Circular 4220.1F Chapter III

BASIC REQUIREMENT: The recipient must have and implement written standards of conduct for those involved in its procurement and contract administration actions.

3. *Does the recipient maintain written standards of conduct for its representatives engaged in the selection, award, and administration of FTA-funded contracts?*

APPLICABILITY
State and Non-state recipients

INDICATORS OF COMPLIANCE

a. *Does the recipient have written standards of conduct?*

b. *Do the recipient's standards of conduct include all required elements?*

DETERMINING COMPLIANCE

Request and review the recipient's standards of conduct for procurement-related actions. These may be contained in the recipient's policies and procedures, in a separate document(s), or different documents for employees and governing board members. Please note that state and/or local laws may have requirements that are more restrictive than the Federal requirements below. Recipients must adhere to those state and local requirements.

Review standards of conduct to ensure that, at a minimum, they:

- Preclude any employee officer, agent, or board member or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing from participating in the election, award, or administration of a contract supported with FTA assistance. Such a conflict would arise when any of those previously listed has a financial or other interest in a firm considered for a contract.

- Include information that the recipient's officers, employees, or agents may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal value.

- Provide for disciplinary action for violation of such standards by the recipient's officers, employees, or agents, or by contractors or subrecipients or their agents to the extent permitted by state or local law or regulations.

- If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not have written standards of conduct.

DEFICIENCY CODE 91: No written standards of conduct

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office written standards of conduct that include all required provisions.

The recipient is deficient if its written standards of conduct do not contain required elements.

DEFICIENCY CODE XXX: Incomplete standards of conduct

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office written standards of conduct that include all missing provisions.

GOVERNING DIRECTIVES
2 CFR 200.318 (c)(1) & (2)

"(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent
conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization."

FTA Master Agreement (23), Section 4:

"a. Standards of Conduct. At a minimum, the Recipient agrees to, and assures that its Subrecipients will, establish and maintain written Standards of Conduct covering conflicts of interest that:

(1) Apply to the following individuals who have a present or potential financial interest, or other significant interest, such as a present or potential employment interest in the selection, award, or administration of a third party contract or subcontract:

(a) The Recipient or its Subrecipients' officers, employees, board members, or agents engaged in the selection, award, or administration of any third party agreement,

(b) The immediate family members or partners of those listed above in section 4.a(1)(a) of this Master Agreement, and

(c) An entity or organization that employs or is about to employ any person that has a relationship with the Recipient or its Subrecipient listed above in sections 4.a(1)(a) and
(b) of this Master Agreement;

(2) Prohibit those individuals listed above in section 4.a(1) from:

(a) Engaging in any activities involving the Recipient or any of its Subrecipients' present or potential Third Party Participants at any tier, including selection, award, or administration of a third party agreement in which the individual has a present or potential financial or other significant interest, and

(b) Accepting a gratuity, favor, or anything of monetary value from a present or potential Third Party Participant in the Recipient's Underlying Agreement, unless the gift is unsolicited and has an insubstantial financial or nominal intrinsic value; and

(3) Establish penalties, sanctions, or other disciplinary actions for violations, as permitted by state or local law or regulations, that apply to those individuals listed above in section 4.a(1) and the Recipient or Subrecipient's Third Party Participants."

Additional Guidance:
FTA Circular. 4220.1F Chapter III

BASIC REQUIREMENT: The recipient must have and follow written protest procedures in compliance with all applicable state and local laws and regulations.

4. Does the recipient have and follow written procurement protest procedures?

APPLICABILITY
State and Non-State recipients

INDICATORS OF COMPLIANCE

a. Does the recipient have written protest procedures?

DETERMINING COMPLIANCE
Prior to the site visit, request and review the recipient's written protest procedures. Protest procedures may be contained in the recipient's policies and procedures or in a separate document.

b. Has the recipient received any procurement protests since the last Comprehensive Review? If yes, did it follow its protest procedures.

DETERMINING COMPLIANCE
Review milestone progress reports in TrAMS for protests noted. Onsite, ask the recipient for any bid protests received or denied. If there have been any protests during the review period, review related documentation to determine if the recipient followed its written protest procedures. If no protests were received, move to the next Question.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if it does not have written protest procedures.

DEFICIENCY CODE 152: No written protest procedures

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office written protest procedures.

The recipient is deficient if it has written protest procedures and received protests, but did not follow its procedures.

DEFICIENCY CODE XXX: Protest procedures not followed

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation of implemented procedures to ensure that its protest procedures are followed.

GOVERNING DIRECTIVES
2 CFR §200.318(k)

Section 200.318(k) provides that a recipient "alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the [recipient] of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the [recipient] unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction."

FTA recipients are responsible for resolving all contractual and administrative issues arising out of their third party procurements, including source evaluation and selection, protests of awards, disputes, and claims using good administrative practices and sound business judgment. FTA encourages the recipient to use appropriate alternative dispute resolution procedures.

Guidance note regarding notifying FTA of Protests and Appeals to FTA:

FTA's involvement in bid protests is limited. The Uniform Guidance, as adopted by DOT, no longer includes the language in 49 C.F.R. §18.36(b)(12) that provided for a direct appeal to FTA of a recipient's final decision on a bid protest. The Uniform Guidance provides that:

"The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction." – 2 C.F.R. § 200.318(k)

Thus, the FTA's role is limited to considering matters that are "primarily a Federal concern." Accordingly, Section (1)(b)(2)(a) of Chapter VII of FTA Circular 4220.1F, which provides for direct appeals to FTA, is no longer applicable.

BASIC REQUIREMENT: The recipient must only contract with responsible firms.

5. Does the recipient make awards only to responsible contractors?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. Do procurement files contain documentation that the recipient made written responsibility determinations prior to award, considering all required information?

DETERMINING COMPLIANCE
Review the recipient's policies and procedures for its process of conducting and documenting responsibility determinations. During the site visit, examine selected procurement files, in accordance with records sampling procedures, to determine if the recipient makes responsibility determinations prior to awarding contracts.

Examine responsibility determinations, to verify that a written responsibility determination was made for each successful bidder prior to award, and that consideration was given to matters such as:

- contractor integrity,
- compliance with public policy,
- record of past performance, and

b. financial and technical resources.*Prior to award, does the recipient have documentation that third party contractors are not suspended or debarred?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient determines that it is not awarding contracts to debarred or suspended contractors or individuals. During the site visit, review contract and subrecipient files to verify if this determination is being made by the recipient before entering into any third party contracts.

Document that the recipient verified that bidders were not excluded or disqualified by:

- checking SAM Exclusions (at SAM.gov), or
- collecting a certification, or
- adding a clause or condition to the covered transaction.

c. Did the recipient extend a contract with a contractor after it determined that the contractor had been suspended or debarred?

f. DETERMINING COMPLIANCE

During the site visit, ask the recipient if it has become aware of any situation in which an excluded party is participating in a covered transaction. For the procurements reviewed, check SAM.gov to determine if the contractors are suspended or debarred. Determine if the recipient received FTA approval to extend (other than a no-cost extension) or renew a contract with a suspended or debarred contractor prior to taking those actions.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not make written responsibility determinations that include the required elements prior to award.

DEFICIENCY CODE 344: Responsibility determination deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation of an implemented process to make adequate responsibility determinations prior to award of a contract. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has not verified that excluded parties are not participating prior to applicable awards or actions.

DEFICIENCY CODE 183: No verification that excluded parties are not participating

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for making excluded party determinations before entering into applicable transactions. For the next procurement, submit to FTA documentation that the required process was implemented.

The recipient is deficient if it extended (other than a no-cost time extension) or renewed a contract with a contractor subsequent to it becoming suspended or debarred, unless approved by FTA.

DEFICIENCY CODE 189: Excluded parties participating in covered transactions

SUGGESTED CORRECTIVE ACTION: The recipient must confer with the FTA regional office for any contract that was extended or renewed with a suspended or debarred contractor.

GOVERNING DIRECTIVES

49 U.S.C 5325(j) AWARDS TO RESPONSIBLE CONTRACTORS."(1) IN GENERAL. Federal financial assistance under this chapter may be provided for contracts only if a recipient awards such contracts to responsible contractors possessing the ability to successfully perform under the terms and conditions of a proposed procurement.

(2) CRITERIA. Before making an award to a contractor under paragraph (1), a recipient shall consider:

(A) the integrity of the contractor;

(B) the contractor's compliance with public policy;

(C) the contractor's past performance, including the performance reported in the Contractor Performance Assessment Reports required under section 5309(l)(2); and

(D) the contractor's financial and technical resources."

2 CFR 180.300

"What must I do before I enter into a covered transaction with another person at the next lower tier? When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by: (a) Checking SAM Exclusions; or (b) Collecting a certification from that person; or (c) Adding a clause or condition to the covered transaction with that person."

2 CFR 180.310

"What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction? (a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate. (b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the Federal agency responsible for the transaction grants an exception under §180.135."

Additional Guidance:
FTA Master Agreement (23), Section 4(b) FTA

Circular 4220.1F Chapter III. d. (1) (c)

BASIC REQUIREMENT: The recipient must maintain a written history of each procurement.

6. *Does the recipient maintain records sufficient to detail the history of each procurement?*

APPLICABILITY
All recipients

INDICATOR OF COMPLIANCE

a. *Does the recipient have policies and/or procedures for documenting procurement files? Do procurement files reviewed include required historical information?*

DETERMINING COMPLIANCE

Review recipient's policies and/or procedures for documenting procurement files to ensure that the policy requires, at a minimum, written documentation of the following:

- Rationale for the method of procurement (i.e., request for proposals, invitation for bids, sole source)
- Selection of contract type (i.e., fixed price, cost reimbursement)
- Reason for contractor selection or rejection
- Basis for the contract price (i.e., cost/price analysis)

During the site visit, examine selected procurement files, in accordance with records sampling procedures, to determine if procurement records include the minimum information listed above, as well as all documentation required in the recipient's policies and/or procedures.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if, for each procurement examined, procurement records do not contain the minimum documentation required and any additional information noted in the recipient's policies and/or procedures.

DEFICIENCY CODE 130: Incomplete written documentation of procurement history

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that the deficiencies identified in its record-keeping process have been corrected.

GOVERNING DIRECTIVE
2 CFR 200.318(i)

"The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price."

BASIC REQUIREMENT: Recipients must have oversight mechanisms to ensure that contractors perform in accordance with the terms of their contracts.

7. *Does the recipient ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders?*

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *Does the recipient conduct oversight of third party contractors to ensure performance in accordance with contract terms?*

DETERMINING COMPLIANCE

Prior to the site visit, review milestone progress reports in TrAMS and information provided by the recipient to determine if there were any contracts noted as having issues with the contractor not performing in accordance with the terms, conditions, and specification of their contracts or purchase orders. Review information in TrAMS on the resolution of disputes or claims. Ask the regional office if there are any procurements that should be reviewed for contractor performance issues. Prior to the site visit, request and review the recipient's policies and procedures, which should include procedures to ensure contract performance and to resolve third party contracting issues, for any described contract administration processes and responsibilities.

Onsite, select a sample of contracts to determine if contract administration and oversight procedures are being implemented as described in policies and procedures. Determine if the recipient is monitoring the contractor's on-time delivery of products or services as detailed in any contractual milestones. Determine if the recipient is analyzing the cause of cost overruns, scope changes, or slippages in delivery schedules or milestone dates.

For any procurements examined for which enforcement of contract administration remedies appeared to be warranted (i.e. liquidated damages, remedies related to milestone or delivery dates or performance standards), determine if appropriate actions were taken. In accordance with 2 CFR §200.318(j)(1), recipients must assert a high degree of oversight for time and materials type contracts in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if the recipient does not have documentation evidencing contract oversight pursuant to the its internal policies and/or procedures. For example, the recipient is deficient if non- performance of contractors is a persistent problem, with contractors either not performing in accordance with the terms and conditions of their contracts, or issues remain unresolved for a substantial length of time, where the recipient cannot demonstrate that it has taken remedial action in accordance with its policies and procedures.

DEFICIENCY CODE 558: Contract administration system not implemented

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office revised procurement procedures that include oversight procedures and remedies for non-performance, along with evidence of implementation.

GOVERNING DIRECTIVE
2 CFR 200.318(b)

"Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders."

BASIC REQUIREMENT: Procurement transactions must be non-restrictive.

8. *Does the recipient ensure that it conducts all procurement transactions in a manner that provides full and open competition and does not restrict competition in its procurement process?*

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *Does the recipient restrict competition by applying unreasonable requirements, requiring unnecessary experience or excessive bonding, or by specifying brand names only?*

DETERMINING COMPLIANCE
Prior to the site visit, request and review the recipient's written procurement policies and listing of FTA-funded procurements. During the site visit, review procurement files (including procurements that received two or fewer bids or responses), particularly legal notices and solicitation documents, to determine whether procurements were unreasonably restrictive.

If a procurement only received one or two responses, did the recipient analyze why it received so few bids? For example, did the recipient interview potential bidders regarding why they did not bid? Did the recipient conduct market research of potential bidders? Do the specifications include non-essential requirements that only a single manufacturer can meet? Did potential bidders submit pre-submission questions regarding compliance with the specifications or other contract requirements? Examine any bid protests and any questions and answers to solicitations to determine if there are any perceived restrictions from potential bidders.

Some of the situations considered to be restrictive of competition include but are not limited to:

- Placing unreasonable requirements on firms in order for them to qualify to do business;
- Requiring unnecessary experience and/or excessive bonding;
- Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement;
- Having overly burdensome requirements for approval of an equal product;
- Noncompetitive pricing practices between firms or between affiliated companies;
- Noncompetitive contracts to consultants that are on retainer contracts;
- Organizational conflicts of interest; and
- Any arbitrary action in the procurement process.

b. *Does the recipient include prohibited geographic preferences in procurements?*

DETERMINING COMPLIANCE

Prior to the site visit, request and review the recipient's listing of FTA-funded procurements. During the site visit, review procurement files for use of geographic preferences outside of the allowable exceptions. Examine any bid protests and any questions and answers to solicitations to determine if there are any potential geographic preference issues. These may include bid/evaluation preferences for, or restricting competition to, in-state or local firms. In-state licensing requirements do not constitute geographic preference.

When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

Section 418 of the fiscal year (FY) 2015 Appropriations Act and Section 415 of the Consolidated Appropriations Act, 2016, Public Law 114-113 (FY 2016 Appropriations Act) prohibit FTA from using FY2015 or FY2016 funds to implement, administer, or enforce the prohibition of geographic preferences under 49 CFR 18.36(c)(2), (now 2 CFR 200.319(b)) for construction hiring purposes. "Construction hiring purposes" means hiring of the construction labor workforce for a construction project. Section 418 applies to all FTA awards, including awards funded under the Hurricane Sandy Emergency Relief and Transportation Investment Generating Economic Recovery (TIGER) programs. Recipients are asked to provide the FTA Regional Office notice of using local hiring preferences on construction projects.

On March 6, 2015, US DOT announced an initiative to permit, on an experimental basis, FTA recipients and subrecipients to utilize various contracting requirements that generally have been disallowed due to concerns about adverse impacts on competition. This initiative, being initially carried out as a pilot program was extended until March 6, 2017. Unless accepted into the pilot program, FTA recipients may not include local hiring or geographic preferences in FTA-funded projects, except for construction hiring purposes and other exceptions described above.

c. *If the recipient uses prequalification lists for any of its procurements, does it do so properly?*

DETERMINING COMPLIANCE

Prior to the site visit, request and review the recipient's written procurement policies. During the site visit, review procurement files, particularly legal notices and solicitation documents, to determine whether responses to procurements are limited to pre-qualified firms.

If a recipient requires prospective bidders to prequalify, determine if it has documented that it has ensured that all prequalification lists include enough sources to ensure full and open competition. Determine if the recipient permitted potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date).

d. *If the recipient awarded revenue contracts during the review period did it use a competitive process for the award, as applicable?*

DETERMINING COMPLIANCE

Prior to the site visit, review procurement policies and procedures for a discussion of procedures for awarding revenue contracts. Review the list of revenue contracts awarded. On site, discuss with the recipient, and evaluate procurement files to determine if a competitive process was used when the recipient provided access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA-assisted property when there were several potential competitors for a limited opportunity.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it has conducted a procurement without providing for full and open competition. Examples of failure to provide for full and open competition include impermissible or unnecessary restrictive requirements in

specifications or on prospective bidders in any of the procurement files reviewed.

DEFICIENCY CODE 37: Lacking full and open competition for one or more methods of procurement

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office procurement procedures that ensure full and open competition in all procurement transactions.

The recipient is deficient if it has improperly included geographic preferences in its procurements.

DEFICIENCY CODE 57: Improper use of geographic preferences

SUGGESTED CORRECTIVE ACTION: The recipient must cease using inappropriate geographic preferences in FTA-funded procurements and submit to the FTA regional office documentation of a revised procurement process that prohibits the improper use of geographic preferences. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if its prequalification lists do not include enough qualified sources to ensure maximum open and free competition or it has precluded potentials bidders from qualifying during the solicitation process:

DEFICIENCY CODE 181: Inadequate prequalification criteria

SUGGESTED CORRECTIVE ACTION: The recipient must provide to the FTA regional office documentation demonstrating that deficiencies identified in its prequalification process have been corrected. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it provided access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA-assisted property and there were several potential competitors for a limited opportunity, but it did not conduct a competitive process.

DEFICIENCY CODE XXX: Lacking full and open competition for revenue contracts

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office with evidence that it has updated its procurement process to include procedures for competing revenue contracts when applicable. The recipient must obtain prior FTA regional office approval before entering into the next revenue contract.

GOVERNING DIRECTIVES
49 U.S.C. 5325(a). Contract requirements

"(a) Competition. Recipients of assistance under this chapter shall conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary."

49 U.S.C. 5325(h). Contract requirements

"(h) Grant prohibition. A grant awarded under this chapter or the Federal Public Transportation Act of 2012 2015 may not be used to support a procurement that uses an exclusionary or discriminatory specification."

2 CFR 200.319 (a)

"All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive

advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to: (1) Placing unreasonable requirements on firms in order for them to qualify to do business; (2) Requiring unnecessary experience and excessive bonding; (3) Noncompetitive pricing practices between firms or between affiliated companies; (4) Noncompetitive contracts to consultants that are on retainer contracts; (5) Organizational conflicts of interest; (6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and (7) Any arbitrary action in the procurement process."

2 CFR 200.319 (c)(1)

"When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated."

2 CFR 200.319 (b)

"The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract."

2 CFR 200.319 (d)

"The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period."

Master Agreement (23), Section 16

FTA Circular 4220.1F Chapter VI 2. (g)

"In-State or Local Geographic Restrictions. Specifying in-State or local geographical preferences, or evaluating bids or proposals in light of in-State or local geographic preferences, even if those preferences are imposed by State or local laws or regulations. In particular, 49 U.S.C. Section 5325(i) prohibits an FTA recipient from limiting its bus purchases to in-State dealers. Exceptions expressly mandated or encouraged by Federal law include the following: 1) Architectural Engineering (A&E) Services. Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project. 2) Licensing. A State may enforce its licensing requirements, provided that those State requirements do not conflict with Federal law. 3) Major Disaster or Emergency Relief. Federal assistance awarded under the Stafford Act, 42 U.S.C. Section 5150, to support contracts and agreements for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities permits a preference, to the extent feasible and practicable, for organizations, firms, and individuals residing or doing business primarily in the area affected by a major disaster or emergency."

FTA Circular 4220.1F Chapter 2. b. (4) Revenue Contracts.

"A revenue contract is a contract in which the recipient or subrecipient provides access to public transportation assets for the primary purpose of either producing revenues in connection with an activity related to public transportation, or creating business opportunities with the use of FTA assisted property. The recipient has broad latitude in determining

the extent and type of competition appropriate for a particular revenue contract. Nevertheless, to ensure fair and equal access to FTA assisted property and to maximize revenue derived from such property, the recipient should conduct its revenue contracting as follows: (a) Limited Contract Opportunities. If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the recipient should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity. (b) Open Contract Opportunities. If, however, one party seeks access to a public transportation asset (such as a utility that

might seek cable access in a subway system), and the recipient is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties. In the case of joint development, as explained below, FTA will work with the recipient to determine appropriate procedures, as necessary."

BASIC REQUIREMENT: The non-Federal entity must appropriately use one of the following methods of procurement: micro-purchase, small purchase, sealed bid, competitive proposals or non-competitive proposals.

9. Did the recipient appropriately use each method of procurement?

APPLICABILITY
Non-State recipients

INDICATORS OF COMPLIANCE

a. If the recipient used micro-purchase procedures, was it done in accordance with requirements?

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine the recipient's threshold for micro-purchases and if any FTA-funded micro-purchases were made. Review selected procurements to determine if:

- this method was only used for procurements $3,500 or less,
- the procurements were distributed equitably if there was more than one qualified supplier in the local area,
- the recipient documented its determination that the price was reasonable with a description of how that determination was made, and
- there was no evidence that procurements were split to avoid procurement requirements for purchases above the micro-purchase threshold (such as repeated purchases of the same item(s)).

b. If the recipient used small purchase procedures, was it done in accordance with requirements?

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine what the recipient's threshold is for small purchases and if any FTA-funded small purchases were made. Review selected procurements to determine if:

- this method was only used for procurements when appropriate (2 CFR Part 200 increased the simplified acquisition threshold to $150,000 for procurements funded by awards issued on or after December 26, 2014. Procurements funded by awards issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of $100,000. (per 49 CFR 18.36(d)),

- price or rate quotations were obtained from an adequate (at least two) number of qualified sources, and
- there was no evidence that procurements were split to avoid procurement requirements for purchases above the small purchase threshold (such as repeated purchases of the same item(s)).

c. *If the recipient used sealed bid procedures, was it done in accordance with requirements?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine what the recipient's procedures are for sealed bids and if any FTA-funded sealed bid purchases were made. Review selected procurements to determine if:

- bids were solicited from an adequate number of known suppliers,
- bids were publicly advertised,
- the invitation for bids defined the items or services in order for the bidder to properly respond,
- bids were publicly opened at the time and place prescribed in the invitation for bids,
- a firm fixed price contract (lump sum or unit price) was awarded to the lowest responsive and responsible bidder, and
- any or all bids were rejected only if there was a sound, documented reason

d. *If the recipient used competitive proposal procedures, was it done in accordance with requirements?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine what the recipient's procedures are for competitive proposals and if any FTA-funded competitive proposal purchases were made. Review selected procurements to determine if:

- requests for proposals were publicly advertised,
- evaluation criteria and their relative importance were identified,
- proposals were solicited from an adequate number of qualified sources,
- there was a written method for conducting technical evaluations of the proposals received and for selecting recipients
- contracts were awarded to the responsible firm whose proposal is most advantageous, with price and other factors considered.

For A&E procurements, price should not be a factor in the selection criteria. These procurements are reviewed in a following question of the review.

e. *Did the recipient include written justification of any non-competitive or sole source procurements in the procurement file?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine what the recipient's procedures are for non-competitive or sole source procurements and if any such procurements were made. Review selected procurements to determine if one of the following conditions was met:

- The recipient appropriately determined that the item was available from only a single source. Property or services are available from one source if one of the conditions described below is present:
    - *Unique or Innovative Concept*. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the recipient only from one source and in the past has not been available from another source.
    - *Patents or Restricted Data Rights*. Patent or data rights restrictions preclude competition.
    - *Substantial Duplication Costs*. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.
    - *Unacceptable Delay*. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.
- There was a public exigency or emergency for the requirement which would not permit a delay resulting from competitive solicitation. When relying on this provision, recipients may use a non-competitive procurement method only for its reasonable needs to address the exigency or emergency. For example, a recipient's facility receives an unprecedented 24-inches of snow in 24 hours in October and it does not have a snow removal contract in place. The recipient may enter into a non-competitive snow removal contract to clear the snow. However, the recipient may not use this emergency to justify entering into a non-competitive snow removal contract for the entire winter season.
- FTA expressly authorized noncompetitive proposals in response to a written request from the recipient.

Determine if the recipient included a written sole source justification in its procurement file.

f. If the recipient had awarded a contract to a single bidder, did it appropriately determine that the item was available only from a single source?

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine what the recipient's procedures are for single bid awards and if any such procurements were made.

Review selected procurements to determine if the procurement files include an explanation as to why a single bid was obtained and if the recipient's determination of adequate competition included a review of the specifications for undue restrictiveness and a survey of potential sources that chose not to submit a bid or proposal.

g. If the recipient awarded any time and materials type contracts during the review period, did it determine that it was the only method suitable and was a ceiling price identified?

(1) **DETERMINING COMPLIANCE**

Prior to the site visit, examine the procurement listing provided by the recipient to determine if any time and materials type contracts were awarded during the review period. During the site visit, examine at least one time and materials procurement file to determine if there was information noting that this was the only suitable type of procurement and that a ceiling price was included.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it made procurements using micro-purchase procedures but used this method for procurements over $3,500, did not make reasonable price determinations, did not distribute purchases equitably if applicable, and/or if there is evidence of splitting improperly:

DEFICIENCY CODE XXX: Improper micro-purchase procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement micro-purchase procedures. For the next micro-purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using small purchase procedures for procurements over $150,000, price or rate quotations were not obtained from an adequate number of qualified sources, and/or if there is evidence of splitting procurements to be within the small purchase threshold.

DEFICIENCY CODE XXX: Improper small purchase procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement small purchase procedures. For the next small purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using sealed bid procedures but bids were not publicly advertised and/or a fixed price contract was not awarded to the lowest responsive, responsible bidder.

DEFICIENCY CODE XXX: Improper sealed bid procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement sealed bid procedures. For the next sealed bid, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using competitive proposal procedures but requests for proposals were not publicly advertised, evaluation criteria and their relative importance were not identified in the solicitation documents, and/or price and other factors were not considered in the award.

DEFICIENCY CODE XXX: Improper competitive proposal procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement competitive proposal procedures. For the next competitive proposal, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made sole source procurements but does not have a sole-source justification in its procurement files, and/or if its justification does not include at least one of the conditions permitting the use of a sole source procurement.

DEFICIENCY CODE 290*:* Lacking required justification(s) and documentation for non- competitive award(s)

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence of an

implemented policy to ensure that future sole source procurements are properly conducted and documented. Where contracts are ongoing, confer with the FTA regional office to determine if the recipient should be directed not to exercise any options, or possibly terminate the existing contract for convenience, and rebid for the required goods and services in accordance with Federal requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it does not have the appropriate justification for single-bid awards.

DEFICIENCY CODE 290*:* Lacking required justification(s) and documentation for non- competitive award(s)

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence of an implemented policy to ensure that future single bid procurements are properly documented. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if FTA funds were used for a time and materials contract and the files do not support the recipient's decision or the contract does not specify a ceiling price.

DEFICIENCY CODE 281: Improper time and materials contract

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to include procedures for the proper use of FTA-assisted time and materials contracts. The recipient must obtain prior FTA regional office approval before entering into the next time and materials contract.

GOVERNING DIRECTIVES

2 CFR 200.320 (a) Procurement by micro-purchases.

"Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold *($3,000 or less prior to October 1, 2015; $3,500 or less effective October 1, 2015)*. To the extent practicable, the non-Federal entity must distribute micro- purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable."

FTA 4220.1F Chapter VI 3. a. (2) (b) Prohibited Divisions.

"The recipient may not divide or reduce the size of its procurement to avoid the additional procurement requirements applicable to larger acquisitions."

FTA 4220.1F Chapter VI 3. a. (2) (c) Documentation.

"FTA's only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made its determination. FTA does not require the recipient to provide its rationale for the procurement method used, selection of contract type, or reasons for contractor selection or rejection."

2 CFR 200.320 (b) Procurement by small purchase procedures.

"Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources."

2 CFR 200.320 (c) Procurement by sealed bids (formal advertising).

"Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply. (1) In order for sealed bidding to be feasible, the following conditions should be present: (i) A complete, adequate, and realistic specification or purchase
description is available; (ii) Two or more responsible bidders are willing and able to compete effectively for the business; and (iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price. (2) If sealed bids are used, the following requirements apply: (i) Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments,
the invitation for bids must be publicly advertised; (ii) The invitation for bids, which will include any
specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond; (iii) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly; (iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and (v) Any or all bids may be rejected if there is a sound documented reason."

2 CFR 200.320 (d) Procurement by competitive proposals.

"The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply: (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical; (2) Proposals must be solicited from an adequate number of qualified sources;
(3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients; (4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered"

2 CFR 200.320 (f) Procurement by noncompetitive proposals.

"Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply: (1) The item is available only from a single source; (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (3) The Federal awarding agency or pass-through

entity expressly authorizes noncompetitive proposals in response to a written request from the non- Federal entity; or (4) After solicitation of a number of sources, competition is determined inadequate."

FTA Circular 4220.1F Chapter VI 3. i. Other Than Full and Open Competition. *FTA Circular*

4220.1F Chapter VI 3. i. (1) (b) 2. Single Bid or Single Proposal.

"Upon receiving a single bid or single proposal in response to a solicitation, the recipient should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal.
a. Adequate Competition. FTA acknowledges competition to be adequate when the reasons for few responses were caused by conditions beyond the recipient's control. Many unrelated factors beyond the recipient's control might cause potential sources not to submit a bid or proposal. If the competition can be determined adequate, FTA's competition requirements will be fulfilled, and the procurement will qualify as a valid competitive award. b. Inadequate Competition. FTA acknowledges competition to be inadequate when, caused by conditions within the recipient's control. For example, if the specifications used were within the recipient's control and those specifications were unduly restrictive, competition will be inadequate."

2 CFR 200.318 (j)(1)

"The non-Federal entity may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to a non-Federal entity is the sum of:
(i) The actual cost of materials; and (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. (2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls."

BASIC REQUIREMENT: If the recipient procures services for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services (collectively referred to as "A&E services") for an FTA-funded project, it must use a qualifications-based method. This method is not to be used for procuring services other than A&E.

10. Does the recipient procure A&E services in accordance with 49 U.S.C. §5325(b)?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *If the recipient is a state, does it have and follow a statute prescribing a formal procedure for the procurement of A&E services, adopted prior to August 10, 2005 that it is an equivalent qualifications-based requirement of the Brooks Act?*

b. *If the recipient is not a state or is a state that does not have a procedure for the procurement of A&E services adopted prior to August 10, 2005, does it use competitive proposals based on the Brooks Act when procuring A&E services?*

DETERMINING COMPLIANCE

A&E services include program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services. FTA interprets 49 U.S.C. Section 5325(b) to authorize the use of qualifications-based procurement procedures only for those services that directly support or are directly connected or related to construction, alteration, or repair of real property. Unless FTA determines otherwise in writing, neither a recipient or its subrecipients may use qualifications-based procurement procedures to acquire other types of services if those services are not directly in support of, directly connected to, directly related to, or do not lead to construction, alteration, or repair of real property. For design/build procurements, FTA expects recipients and their subrecipients to use the procurement method appropriate for the services having the greater cost, even though the other necessary services would not typically be procured by that method.

When using FTA assistance to contract for A&E services, states are required to use competitive proposal procedures based on the Brooks Act or an equivalent qualifications-based requirement adopted before August 10, 2005.

For qualifications-based procurements under the Brooks Act, (unlike other two-step procurement procedures in which price is an evaluation factor), an offeror's qualifications are evaluated to determine contract award. Price must not be considered during the selection phase in these procurements. Firms are selected based only on their qualifications. Price is then negotiated with the most qualified firm. If an agreement cannot be reached, then the recipient may negotiate with the next most qualified firm and so on until an agreement is reached on a price that the State determines is fair and reasonable.

Recipients may make multiple awards to cover needs for various disciplines under an "on-call" type of contract. Typically, these contracts would not be used to procure design and engineering work for major projects. Large projects should be competed separately, with the most highly qualified A&E firm chosen for that specific project. On-call contracts would be suited for smaller jobs that would be too expensive (administratively) to compete individually. The Brooks Act does not permit a recipient to enter into a contract with multiple "qualified" A&E firms with work assignments to be distributed among the various firms. An on-call A&E contract means that the recipient has identified the most qualified firm and has entered into a contract with that firm for future A&E work, as needed.

Solicitations for on-call awards must describe how the work will be assigned, and not leave the process undefined. For example, if company A is initially evaluated as being the best for geothermal work, then all such work should be given to that company as tasks are defined, assuming the company can perform within the timeframes required for the task. The procurement officials should not leave it to someone's judgement later to withhold work from company A and give it to company B based on a subjective judgement that company B would be better than company A for this job even though company A was evaluated first, initially. The selected companies also should not be allowed to update their qualifications during the term of the contract and so be rated higher than they were initially. There should be a finite period for these contract awards, after which a new round of qualifications-based awards would be made.

Prior to the site visit, review State statutes, the state management plan, and other documentation of procurement procedures for procedures for contracting for A&E service through qualifications- based requirements. For recipients that are not a state, review their procedures for qualifications- based procurements. Review the list of procurements provided in advance of the review for procurements that would likely require these types of procedures. On site, discuss with the recipient, and evaluate procurement files to determine if these procedures were used when procuring applicable services, but not used when procuring services that do not meet the definition of A&E services.

Determine if A&E services were procured using a qualifications-based process in accordance with the Brooks Act, where firms are ranked based only on their qualifications and price is then negotiated with the most qualified firm. If an agreement cannot be reached, then the recipient may negotiate with the next most qualified firm and so on until an agreement is reached on a price that the recipient determines is fair and reasonable.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it is a state with a policy for A&E procurements adopted prior to August 10, 2005 but it is not following it or it is not following the Brooks Act, when procuring applicable services. The State also is deficient if it is using a qualifications-based method for procuring non-A&E services and does not have a State statute authorizing that type of procurement.

> DEFICIENCY CODE 349: Qualifications-based procurement deficiencies
>
> SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office procedures for following qualifications-based procedures when using FTA assistance to contract for A&E services. For the next procurement, the State must submit to the FTA regional office documentation that the required process was implemented.

A non-State recipient is deficient if it does not follow the Brooks Act when using FTA assistance to contract for A&E services or has used qualifications-based procedures when not appropriate.

> DEFICIENCY CODE 349: Qualifications-based procurement deficiencies
>
> SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office procedures for following qualifications-based procedures when using FTA assistance to contract for A&E services. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

49 U.S.C. 5325 (b) ARCHITECTURAL, ENGINEERING, AND DESIGN CONTRACTS

"(1) Procedures for awarding contract. A contract or requirement for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services for a project for which Federal assistance is provided under this chapter shall be awarded in the same way as a contract for architectural and engineering services is negotiated under chapter 11 of title 40 [aka "Brooks Act"] or an equivalent qualifications-based requirement of a State adopted before August 10, 2005."

40 U.S.C. §§ 1101- 1104 ("Brooks Act")

§1101: "The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices."

§1104(b): "Order of Negotiation. The agency head shall attempt to negotiate a contract, as provided in subsection (a), with the most highly qualified firm selected under section 1103 of this title. If the agency head is unable to negotiate a satisfactory contract with the firm, the agency head shall formally terminate negotiations and then undertake negotiations with the next most qualified of the selected firms, continuing the process until an agreement is reached. If the agency head is unable to negotiate a satisfactory contract with any of the selected firms, the agency head shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached."

2 CFR § 200.320(d)(5)

"The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort."

FTA Circular 4220.1F Chapter IV 2. h. (2) (a)

"FTA has long administered the requirement for using qualifications-based procurement procedures for selection of contractors that perform A&E services, generally associated with the construction, alteration, or repair of real property. FTA interprets 49 U.S.C. Section 5325(b) to authorize the use of qualifications- based procurement procedures only for those services that directly support or are directly connected or related to construction, alteration, or repair of real property. FTA's interpretation of 49 U.S.C. Section 5325(b) is consistent with typical Federal policies implementing the "Brooks Act," 40 U.S.C. Section 1102, which limits qualifications-based procurement procedures to research, planning, development, design, construction, alteration, or repair of real property. Thus, if services, such as program management, feasibility studies, or mapping, are not directly in support of, directly connected to, or directly related to, or lead to construction, alteration, or repair of real property, then the recipient may not use qualifications- based procurement procedures to select the contractor that will perform those services."

Third Party Contracting FAQs

Q. Can a transit authority make multiple awards to A&E firms for a discipline such as surveying, when no specific tasks have been identified, and then select the best firm for the specific task to negotiate with? We have several surveying projects that may materialize, but none are certain. We would like to advertise for "Surveying Services" and make multiple awards for on-call services. Then, when a project or task for surveying is identified we would select the best A&E firm for a specific task and negotiate with them. If an agreement could not be made we would proceed to negotiate with the next most qualified firm. The idea
is to identify qualified firms for surveying and avoid having to advertise and rank each firm for each task or project.

A. You may make multiple awards to cover your needs for various disciplines, as you described them; e.g., geothermal, railroad, surveying, etc. However, your solicitation needs to describe how the work will actually be assigned, and not leave the process undefined. For example, if you evaluate company A initially as being the best for geothermal work, then all such work should be given to that company as tasks are defined, assuming the company can perform within the timeframes required for the task. You should not leave it to someone's judgment later to withhold work from company A and give it to company B based on a subjective judgment that B would be better than A for this job even though A was evaluated first initially. We would also not let the selected companies update their qualifications during the term of the contract and so be rated higher that they were initially. There should be a finite period for these contract awards, after which a new round of qualifications-based awards would be made.

BASIC REQUIREMENT
Recipients must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold. As a starting point, the recipient must make independent estimates before receiving bids or proposals.

11. *Does the recipient develop cost estimates and conduct cost and/or price analysis for each procurement action above the Simplified Acquisition Threshold?*

APPLICABILITY
Non-State recipients

INDICATORS OF COMPLIANCE

a. *Did the recipient develop independent cost estimates (ICE) prior to the receipt of bids and proposals for procurements above the Simplified Acquisition Threshold?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures. Onsite, review selected procurements to determine if the recipient developed an independent estimate prior to receipt of bids or proposals for procurements above the Simplified Acquisition Threshold.

b. *Did the recipient conduct a cost analysis or price analysis for every procurement action above the Simplified Acquisition Threshold?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures. Onsite, review selected procurements to determine if the recipient documented a cost analysis or price analysis as required.

Determine if a cost analysis was performed for: (1) procurements which require that offerors submit detailed elements of direct and indirect costs; (2) procurements where adequate price competition is lacking; and/or (3) sole-source procurements.

Determine if the recipient documented a price analysis when a cost analysis was not required.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if it has not conducted independent cost estimates for procurements above the Simplified Acquisition Threshold.

DEFICIENCY CODE 340: Lacking independent cost estimate

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include development of independent cost estimates prior to receipt of bids or proposals. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it did not conduct a cost analysis or price analysis, as applicable, for procurements above the Simplified Acquisition Threshold.

DEFICIENCY CODE 271: Lacking required cost/price analysis

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include performing applicable cost or price analysis procurements above the Simplified Acquisition Threshold. For the next applicable procurement, submit to FTA documentation that the required analysis was implemented.

GOVERNING DIRECTIVES
2 CFR § 200.323

"(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a

starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used."

FTA Circular 4220.1F Chapter VI 6. a. Cost Analysis.

"The recipient must obtain a cost analysis when a price analysis will not provide sufficient information to determine the reasonableness of the contract cost. The recipient must obtain a cost analysis when the offeror submits elements (that is, labor hours, overhead, materials, and so forth) of the estimated cost, (such as professional consulting and A&E contracts, and so forth). The recipient is also expected to obtain a cost analysis when price competition is inadequate, when only a sole source is available, even if the procurement is a contract modification, or in the event of a change order. The recipient, however, need not obtain a cost analysis if it can justify price reasonableness of the proposed contract based on a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation."

FTA Circular 4220.1F Chapter VI 6. b. Price Analysis.

"If the recipient determines that competition was adequate, a price analysis, rather than a cost analysis, is required to determine the reasonableness of the proposed contract price. As discussed previously in subsection 3.a of this Chapter, the price analysis for micro-purchases may be limited. Similarly, the recipient may use an abbreviated price analysis for small purchases in most cases. One method to record this price analysis is through the use of a preprinted form on which a contracting officer (or other responsible person) can annotate a finding of fair and reasonable pricing and check off the most common reasons why this would be so, such as catalog or market prices offered in substantial quantities to the general public, regulated prices (for example, for many utilities purchases), or a comparison with recent prices for similar goods and services."

BASIC REQUIREMENT
Recipients must include and implement required clauses and certifications in its procurements.

12. *Did the recipient include applicable federal clauses in FTA-funded procurements exceeding the micro-purchase limit and construction contracts over $2,000?*

APPLICABILITY
All recipients

INDICATOR OF COMPLIANCE

a. *Did the recipient include applicable required clauses in FTA-funded procurements?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures. During the site visit, examine procurement files for inclusion of required clauses as detailed in the Exhibit at the end of this section.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if did not include all applicable required clauses in FTA-funded procurements reviewed.

DEFICIENCY CODE 129: Missing FTA clauses

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that address inclusion of all FTA-required third party contract clauses through use of a clause checklist or other mechanism. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES:

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS.

"In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(A) Contracts for more than the simplified acquisition threshold currently set at $150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

(B) All contracts in excess of $10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.

(C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

(D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of $2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the

wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

(E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of $100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The
requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

(F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of "funding agreement" under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

(G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of $150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401- 7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

(H) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension." SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

(I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award exceeding $100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in

connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

(J) See §200.322 Procurement of recovered materials."

13. *Did the recipient include required certifications in solicitations and receive signed certifications from bidders as part of their bid or proposal, as applicable?*

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *For FTA-funded vehicle procurements including procurements of remanufactured vehicles, did the recipient include the required DBE transit vehicle manufacturer (TVM) certifications in solicitations and receive and verify signed certifications as part of bid responsiveness?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures. During the site visit, examine procurement files for inclusion of required DBE TVM certifications in solicitations and receipt of signed certifications from bidders.

For transit vehicle manufacturer purchases determine if, prior to award, the recipient documented that it verified TVM certifications received by either consulting FTA's Office of Civil Rights TVM website or contact the Office of Civil Rights directly. If the bidder is not listed on the website, confirm that recipient contacted FTA's Office of Civil Rights to verify bidder's or proposer's eligibility to bid at the time the bid or proposal was submitted. TVM status cannot be cured after bid or proposal submittal, but before contract award.

b. *Did the recipient include required lobbying certifications in solicitations and receive signed certifications from contractors as part of bid responsiveness in procurements over $100,000?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures. During the site visit, examine procurement files for inclusion of required certifications in solicitations and receipt of signed certifications from bidders at the time of submitting bids or proposals.

c. *Did the recipient include required Buy America certifications in solicitations and receive signed certifications from contractors as part of bid responsiveness in applicable procurements over $150,000 that included iron, steel or manufactured products?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures. During the site visit, examine procurement files for inclusion of required Buy America certifications in solicitations and receipt of signed certifications from bidders for:

- all purchases of steel, iron, and manufactured products greater than $150,000, regardless of whether they involve capital, operating, or planning funds
- contractors and subcontractors if the contract or subcontract is more than $150,000, including labor and options
- purchases made using an intergovernmental agreement and jointly purchased manufactured products
- purchases of used items

If a bidder or offeror cannot certify compliance with Buy America requirements, document if the recipient received a waiver of the Buy America statute before it awarded the contract to the bidder or offeror.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not include, where applicable, a provision in its bid specifications requiring TVM certifications, if the files do not contain TVM certifications from successful bidders, or if the TVM certification is out of date (References Part 23 instead of Part 26). The recipient is deficient if it cannot provide evidence that it ensured that the manufacturer was an eligible TVM at the time it submitted its bid or proposal.

DEFICIENCY CODE 272: No TVM certification

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO procedures for obtaining signed TVM certifications and for ensuring that manufacturers are eligible TVMs at the time of bid or proposal submission. The recipient must submit to the RCRO an updated TVM certification template to be used in future transit vehicle procurements. The recipient must submit to the FTA regional office a copy of the signed form with the next revenue rolling stock procurement.

The recipient is deficient if it has not included the lobbying certification in its agreements and procurement solicitations that exceed $100,000 or if it has not obtained the proper certifications from contractors and subrecipients awarded contracts or agreements that exceed $100,000.

DEFICIENCY CODE 12: Lobbying certifications not included in agreements/procurement solicitations

DEFICIENCY CODE 40: Lobbying certifications not signed by subrecipients, contractors, or subcontractors

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for obtaining signed lobbying certifications. The recipient must submit to the FTA regional office a copy of the signed lobbying certification with the next applicable procurement.

The recipient is deficient if it did not include applicable Buy America provision in its solicitation documents. The recipient also is deficient if it did not obtain signed Buy America certifications from vendors as part of the vendor's bid or proposal. The recipient is deficient if it awarded the contract to a contractor who certified non-compliance with Buy America and did not obtain a waiver from FTA or it awarded the contract to a contractor who certified both compliance and non-compliance.

DEFICIENCY CODE 138: Buy America provision not in solicitation and/or contract

DEFICIENCY CODE 156: Contract files lacking Buy America certifications DEFICIENCY

CODE 790: Contract awarded without Buy America waiver

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that require the recipient to include Buy America provisions in solicitation documents and to obtain signed certifications from vendors when procuring steel, iron, or manufactured products not subject to a general waiver. For the next procurement, submit to
the FTA regional office documentation that the required process was implemented.

For procurements for which a Buy America certification was not obtained, the recipient must provide the FTA regional office information documenting that the procurement complies with the Buy America provisions.

For procurements in progress for which bids have not been received, the recipient must submit to the FTA regional office documentation that it included, via an addendum, Buy America requirements in the solicitation.

The recipient must submit to the FTA regional office a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

GOVERNING DIRECTIVES
49 CFR 26.49 (a)

"If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section."

FTA Circular 9030.1E Chapter V 11. h.

"The recipient is obligated to determine, by checking the TVM listing on FTA's website or by checking with FTA's Office of Civil Rights at the time of bid opening, that the manufacturer likely to receive the contract is in compliance with part 26."

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL
AWARDS. (I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)

"Contractors that apply or bid for an award exceeding $100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award."

49 CFR 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."

49 CFR 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."

BASIC REQUIREMENT: If recipients include liquidated damages in procurements, the rate must be stated and it must be based on a calculation. Any recovered damages should be credited back to the project account.

14. Did the recipient appropriately include and account for liquidated damages in its procurements?

APPLICABILITY
Non-state recipients

INDICATORS OF COMPLIANCE

a. *If the recipient included liquidated damages in its procurements, did it specify the rate in the contract, based on a calculation and rationale?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient determines if it will use liquidated damages in contracts. During the site visits, examine selected contract files, in accordance with records sampling procedures, for liquidated damages clause(s). Determine if the rationale for and calculation of the dollar value of liquidated damages was documented in the procurement file and presented in the solicitation documents as a specific rate.

b. *If the recipient recovered liquidated damages in its FTA-funded procurements, did it appropriately account for those damages with FTA?*

DETERMINING COMPLIANCE
During the site visit, examine selected contract files and correspondence in TrAMS to determine if any liquidated damages recovered were credited to the project account involved or if FTA allowed the recipient to handle the recovered damages in a different manner.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if a liquidated damages rate is not specified in the solicitation documents but is included in a resulting contract. The recipient is deficient if it cannot provide a reasonable explanation regarding expected damages as a result of late completion and an appropriate mathematical basis for the dollar value of the liquidated damages.

DEFICIENCY CODE 315: Improper use of liquidated damage clause

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office written procedure for the correct use of liquidated damages clauses. If clauses are in existing contracts improperly, direct the recipient to modify the contract to eliminate the clause or provide a justification for the use and level of liquidated damages. Direct the recipient to obtain prior FTA regional office approval before awarding the next contract with a liquidated damage clause.

The recipient is deficient if it assessed liquidated damages, but did not credit these funds back to the project account or account for them as directed by FTA.

DEFICIENCY CODE XXX: Improper accounting for recovered liquidated damages SUGGESTED

CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for appropriately accounting for recovered liquidated damages.

GOVERNING DIRECTIVE
Master Agreement, section 39(c)

"Federal Interest in Recovery. The Federal Government retains the right to a proportionate share of any proceeds recovered from any third party, based on the percentage of the federal share for the Underlying Agreement. Notwithstanding the preceding sentence, the Recipient may return all liquidated damages it receives to its Award Budget for its Underlying Agreement rather than return the federal share of those liquidated damages to the Federal Government, provided that the Recipient receives FTA's prior written concurrence."

FTA Circular 4220.1F Chapter IV 2. b. (6) (b)1

"Liquidated Damages. FTA has determined that a recipient may use liquidated damages if the recipient reasonably expects to suffer damages through delayed contract completion, or if weight requirements are exceeded, and the extent or amount of such damages are uncertain and would be difficult or impossible to determine. The rate and measurement standards must be calculated to reasonably reflect the recipient's costs should the standards not be met, and must be specified in the solicitation and contract. The assessment for damages is often established at a specific rate per day for each day beyond the contract's delivery date or performance period. A measurement other than a day or another period of time, however, may be established if that measurement is appropriate, such as weight requirements in a rolling stock purchase. The procurement file should include a record of the calculation and rationale for the amount of damages established. Any liquidated damages recovered must be credited to the project account involved unless FTA permits otherwise."

BASIC REQUIREMENT: The recipient is responsible for issuing, evaluating, and making necessary decisions involving any change to its third party contracts, and any change orders, or modifications it may issue.

15. Did the recipient approve, evaluate, and document change orders to procurements?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. Did the recipient ensure that executed change orders were within the scope of the original contract?

DETERMINING COMPLIANCE
Prior to the site visit, receive and review the recipient's policies and procedures to determine how the recipient describes management of change orders. During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that had significant change orders issued. Determine if selected change orders were within the scope of the recipient's grant and reasonable for the completion of project's scope. A change to a contract that is beyond the scope of that contract, is a new non-competitive or sole source award that must be justified under the provisions for non-competitive procurements.

b. Did the recipient evaluate and document change orders?

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes evaluations of change orders and any thresholds and responsibilities for change order approvals. During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that had significant change orders issued. Determine if documentation for selected change orders included:

- Cost justification
- Approval by an authorized official

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if it executed change orders to contracts that were not within the scope of the contract, did not evaluate the cost of the change, and/or did not document authorized official approval in accordance with its procurement procedures.

DEFICIENCY CODE 277: Insufficient documentation to support change orders

SUGGESTED CORRECTIVE ACTION: The recipient must submit compliant change order procedures to the FTA regional office. For the next change order, submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES
FTA Circular 4220.1F Chapter VII 2. a. The Recipient's Role and Responsibilities.

"The recipient is responsible for issuing, evaluating, and making necessary decisions involving any change to its third party contracts, and any change orders, or modifications it may issue. The recipient is also responsible for evaluating and making the necessary decisions involving any claim of a constructive change. In general, FTA expects each recipient to comply with the following procedures: (1) Approval Requirements. FTA expects the recipient to have cost justifications supporting each change order it may issue. FTA also expects the recipient's authorized official to approve any proposed change order before it is issued. (2) Cost Restrictions. To be eligible for FTA assistance under the recipient's grant or cooperative agreement, the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its grant or cooperative agreement, and reasonable for the completion of project scope."

FTA Circular 4220.1F Chapter VI 3. i. (1) (b)

*"*When the recipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the recipient has made a sole source award that must be justified."

BASIC REQUIREMENT: Recipients that include options in FTA-funded contracts must ensure that options reflect their reasonably foreseeable need and are evaluated prior to contract award. Options for the procurement of buses or replacement parts must not extend for more than 5 years after the date of the original contract or 7 years for rail rolling stock.

15. If the recipient included options in an FTA-funded procurement, did it base the amount on its reasonably foreseeable need and evaluate the option price prior to awarding the contract?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. Did the recipient base the quantity or amount of options on its reasonably foreseeable need?

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient describes the use options. During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that included options. Determine if the recipient documented that the inclusion of options in the solicitation represented its foreseeable need. If the documentation does not appear to be sufficient, provide this information to the FTA regional office for their further review and action.

b. Did the recipient evaluate option prices included in solicitations prior to contract award?

DETERMINING COMPLIANCE
During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that included options. Determine if the recipient documented its evaluation of the option prices prior to contract award if it intended to exercise the option(s) at a later date.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if the contact quantities were not based on the recipient's foreseeable needs.

DEFICIENCY CODE 302: Improper use of options

SUGGESTED CORRECTIVE ACTION: The recipient must develop procedures for complying with FTA requirements when including options in solicitations.

The recipient is deficient if it exercised options that were not evaluated with the initial bid.

DEFICIENCY CODE 302: Improper use of options

SUGGESTED CORRECTIVE ACTION: The recipient must develop procedures for complying with FTA requirements when evaluating contracts which included options. For the next applicable procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient must provide to the FTA regional office a written assurance that it will not exercise the options unless FTA approval is granted for instances where options that may violate the requirements have not been exercised. The recipient may not assign the options to any other FTA recipients.

GOVERNING DIRECTIVES
2 CFR 200.318(d)

"The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach."

FTA Circular 4220.1F Chapter IV. 1.b. Necessity.

"…. requires the recipient to establish procedures to avoid the purchase of unnecessary property and services (including duplicative items and quantities or options it does not intend to use or whose use is unlikely)."

FTA Circular 4220.1F Chapter VI 7. b. (1). Evaluation Required.

"In general, FTA expects the recipient to evaluate bids or offers for any option quantities or periods contained in a solicitation if it intends to exercise those options after the contract is awarded."

16. *If the recipient procured bus or rail rolling stock or replacement parts with FTA funds, did it adhere to the time limitations on placing orders against the contracts?*

APPLICABILITY
All recipients

INDICATOR OF COMPLIANCE

a. *If the recipient procured bus or rail rolling stock or replacement parts did it ensure that the contracts met the five- and seven-year contract term restriction?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient describes management of options for rolling stock purchases. During the site visit, examine

selected rolling stock and replacement part contracts to ensure that these met the five- and seven-year contract term restriction. The five- and seven-year rules do not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. The recipient may not exercise the option to acquire buses or replacement parts later than five years (bus) or seven years (rail) after the date of its original contract.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it exercised rolling stock options outside of the five- or seven-year period.

> DEFICIENCY CODE 240: Contract(s) period of performance exceeds limitation SUGGESTED
>
> CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that include the five- and seven-year restriction on the period of performance for rolling stock and replacement part contracts supported with FTA funds. The recipient must provide the FTA regional office with an assurance that unexecuted options will not be executed on an existing contract that exceeds the five- or seven-year restriction. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVE

49 USC § 5325(e)

"(e) Multiyear rolling stock.

(1) Contracts. A recipient procuring rolling stock with Government financial assistance under this chapter may make a multiyear contract to buy the rolling stock and replacement parts under which the recipient has an option to buy additional rolling stock or replacement parts for:

(A) not more than 5 years after the date of the original contract for bus procurements; and

(B) not more than 7 years after the date of the original contract for rail procurements, provided that such option does not allow for significant changes or alterations to the rolling stock."

FTA Circular 4220.1F Chapter IV 2. e. (10) Time Limits for Options on Rolling Stock Contracts.

"MAP-21 amended 49 U.S.C. Section 5325(e)(1) by adding subsections (A) and (B), retaining the five (5) year option for the procurement of buses, while extending the option for rail procurements to seven (7) years. Consequently: (a) Buses. A recipient: 1 May enter into a multi-year contract to acquire buses or replacement parts, with an option not exceeding five (5) years to buy additional buses or replacement parts, 49 U.S.C. Section 5325(e)(1)(A), but 2 May not exercise the option to acquire buses or replacement parts later than five (5) years after the date of its original contract. (b) Rail. A recipient: May enter into a multi-year contract to acquire railcars or replacement parts, with an option not exceeding five
(5) years to buy additional railcars or replacement parts, 49 U.S.C. Section 5325(e)(1)(B), but 2 May not exercise the option to acquire railcars or replacement parts later than seven (7) years after the date of its original contract.

FTA interprets these five and seven-year periods as covering the recipient's "material requirements" for rolling stock and replacement needs from the first day when the contract becomes effective to its "material requirements" at the end of the fifth or seventh year, as applicable. In the case of rolling stock, which frequently cannot be delivered expeditiously, FTA recognizes that a recipient's "material requirements" for rolling stock will necessarily precede its actual need to put that rolling stock to use in public transportation service. This means that the contract may not have options for more rolling stock and replacement parts than a recipient's material requirements for the applicable five or seven-year period. This does not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. Instead it means

only that FTA limits a contract to purchasing no more than the recipient's material requirements for rolling stock or replacement parts for five or seven years based on the effective date of the contract."

BASIC REQUIREMENT: Recipients may use another recipient's contract rights if the original contract contained required Federal provisions, included an assignability provision, does not contain excessive options, the optioned vehicles do not include cardinal changes to the original vehicles, and the contract price is fair and reasonable.

17. *If the recipient purchased FTA-funded assets through a "piggyback" procurement method, did it comply with applicable requirements regarding inclusion of Federal requirements, assignability, price, and no cardinal changes?*

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *For "piggyback" procurements, did the recipient ensure that the underlying contract was solicited and awarded in accordance with Federal and FTA requirements?*

DETERMINING COMPLIANCE
For reasons of economy, FTA permits the assignment of unneeded contract rights, sometimes called "piggybacking." FTA discourages the assignment of another recipient's contract rights as a substitute for a stand-alone procurement. Piggybacking is different from joint procurements. A joint procurement is a method of contracting in which two or more recipients agree from the
outset to use a single solicitation document and enter into a single contract with a vendor. FTA encourages the use of joint procurements when combining requirements into a larger order can result in a more advantageous contract for the participating recipients.

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with "piggybacking" purchases. During the site visit, examine selected "piggyback" procurement files to ensure that the recipient files include sufficient documentation that the underlying contract was solicited and awarded in compliance with Federal and FTA requirements and included required contract provisions.

b. *For "piggyback" procurements, did the recipient ensure that original contract contained an assignability clause and that the quantities it used were available?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with "piggybacking" purchases. During the site visit, examine selected "piggyback" procurement files to determine if the recipient verified that:

- the original contract contained an assignability provision, and
- the quantities acquired, coupled with the quantities already assigned, did not exceed the amounts available under the assigning recipient's contract

c. *For "piggyback" procurements, did the recipient document that the price of assignments acquired was fair and reasonable?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with "piggybacking" purchases. During the site visit, examine selected "piggyback" procurement files to ensure that the recipient files include sufficient documentation that the original contract price remained fair and reasonable.

d. *For "piggyback" procurements, did the recipient make cardinal changes to the vehicle ordered under the option (e.g., ordered a different size vehicle, fuel option, etc.)?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with "piggybacking" purchases. During the site visit, examine selected "piggyback" procurement files to ensure that the recipient files include sufficient documentation that the vehicle ordered under the option is substantially the same as the original vehicle in the contract.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it cannot document that:

- the original award met Federal requirements,
- the contract contained an assignability clause, and that assigned quantities did not exceed contract allowable amounts,
- the price was determined to be fair and reasonable, and/or
- the option vehicle did not contain a cardinal change to the original vehicle.

DEFICIENCY CODE 231: Improper piggyback purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office piggybacking procedures that comply with FTA requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient may be required by FTA to terminate the agreement for convenience if an improper piggyback procurement is in process.

18. *If the recipient exercised an assigned option on a contract that was entered into before December 4, 2015, confirm that the assignment was incompliance with FTA's September 1, 2016 Policy Guidance on the implementation of the phased increase in domestic content contained in 49 USC §5323(j)?*

APPLICABILITY

All recipients

INDICATOR OF COMPLIANCE

a. *If the assigned option is exercised for delivery of vehicles in FY2018 or FY2019, did the original contract include a provision for domestic content of more than 65 percent? If the assigned option is exercised for delivery of vehicles in FY2020 and beyond, did the original contract include a provision for domestic content of more than 70 percent?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's listing of procurements to identify any piggybacking procurements entered into subsequent to December 4, 2015. Onsite, review the date of the underlying contract on which the recipient is piggybacking. Determine if that contract was awarded subsequent to December 4, 2015.

A manufacturer may not agree to amend the contract to provide for a higher domestic content in order to permit a recipient to piggyback on an existing contract. Such an amendment is considered a cardinal change to the original contract.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if, subsequent to December 4, 2015, it acquired options through piggybacking on a contract that was awarded prior to October 1, 2015 in violation of FTA's September 1, 2016 Policy Statement.

DEFICIENCY CODE 231: Improper piggyback purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office piggybacking procedures that comply with FTA requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient may be required by FTA to terminate the agreement for convenience if an improper piggyback procurement is in process.

GOVERNING DIRECTIVES

Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances IV, 81 Federal Register 60278 (September 1, 2016)

FTA Circular 4220.1F Chapter V (7)(2) Assignment of Contract Rights

"…The recipient may assign those contract rights to other recipients if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions. Some refer to this process as "piggybacking…" "…A recipient that obtains contractual rights through assignment may use them after first determining that the original contract price remains fair and reasonable, and the original contract provisions are adequate for compliance with all Federal requirements. The recipient need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the recipient to determine whether the contract price or prices originally established are still fair and reasonable before using those rights."

FTA Circular 4220.1F Chapter V 7. a. (1) (b). Exercise of Options.

"A recipient may use contract options held by another recipient with the following limitations:… The recipient may not exercise an option unless it has determined that the option price is better than prices available in the market, or that when it intends to exercise the option, the option is more advantageous."

FTA Circular 4220.1F Chapter V, Section 7. b. (2) (d)

"In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change would, at this time, include a change from a high-floor to a low-floor vehicle. Changing an engine might result in a cardinal change depending on the circumstances surrounding the project and whether a compatible replacement could be obtained through competition. FTA, however,

considers changes to seating, fabrics, and colors, exterior paint schemes, signage, and floor covering, and other similar changes to be permissible changes."

BASIC REQUIREMENT: The recipient must receive FTA approval for advance payments and protect FTA's interest on progress payments.

19. *Did the recipient ensure that appropriate FTA approval was acquired for advance payments and that adequate protection was exercised for progress payments?*

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *If the recipient used FTA funds for advance payments to contractors, is prior FTA approval documented in procurement files?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes management of payments to contractors. During the site visit, examine selected contract files, in accordance with records sampling procedures, for payments that may be categorized as payment to a contractor before the contractor incurred contract costs. Progress payments that do not reflect contractor incurred costs could be determined to be advance payments. If such payments are evident, determine if the recipient documented that it received prior FTA approval in advance of the payments.

b. *If the recipient used FTA funds for progress payments to contractors, did it adequately protect FTA's interest and substantiate the work for which payment was made?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes administration and management of progress payments. During the site visit, examine selected contract files, in accordance with records sampling procedures, for description of how and when progress payments will be made. Determine if the recipient documented appropriate measures it took to protect FTA's interest before making any progress payments and that it has written documentation to substantiate the work for which payment was made.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if it has used advance payments without prior FTA approval.

DEFICIENCY CODE 309: Improper advance/progress payments

SUGGESTED CORRECTIVE ACTION: The recipient must report immediately to the FTA regional office any improper advance payments with an explanation of the circumstances surrounding the payments. The recipient must submit to the FTA regional office procedures for obtaining prior FTA approval for advance payments. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has made progress payments but has not obtained adequate security for those payments and does not have written documentation to substantiate the work for which payment was made.

DEFICIENCY CODE 309*:* Improper advance/progress payments

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for obtaining adequate security and or sufficient written documentation to substantiate the work for progress payments. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES
2 CFR 200.305

2 CFR part 205

FTA C. 5010.1E, page IV-15

Provisions in 2 CFR § 200.305 and 31 CFR part 205 govern payments to recipients for financing operations under federal assistance and other programs. These regulations require that advance payment to a recipient be limited to the minimum amounts needed and timed to be in accord with only the actual, immediate cash requirements of the recipient in carrying out the purpose of the Award. The timing and amount of advance payments must be as close as is administratively feasible to the actual disbursements by the recipient for direct program or costs of the Award and the proportionate share of any allowable indirect costs. The recipient must make timely payment to third-party contractors in accordance with the third-party contract provisions.

FTA C. 4220.1F, Ch. IV, Sections 2. b. (5)(b) Advance Payments.

"Advance payments are payments made to a contractor before the contractor incurs contract costs. The recipient may use its local share funds for advance payments. However, if there is no automatic preaward authority for its project, then advance payments made with local share funds before FTA assistance has been awarded, or before a letter of no prejudice has been issued or other preaward authority has been provided, or before FTA approval for the specific advance payment has been obtained, are ineligible for reimbursement. The following principles and restrictions apply: 1 Use of FTA Assistance Prohibited. The recipient may not use FTA assistance to make payments to a third party contractor before the contractor has incurred the costs for which the payments would be attributable. 2 Exceptions for Sound Business Reasons. Apart from advance payments that are customary, as discussed further, FTA does occasionally make exceptions to its advance payment prohibitions, if the recipient can provide sound business reasons for doing so and has obtained FTA's advance written concurrence. A recipient that seeks to use FTA assistance to support advance payments should contact the regional office administering its project to obtain FTA concurrence. a Adequate Security for Advance Payments. FTA recognizes that advance payments may be needed for certain costs supported by sound business judgment. Adequate security for the advance payment is an essential pre-condition to FTA's concurrence in the use of FTA or local share funds. b Customary Advance Payments. FTA recognizes that advance payments are typically required
for, but are not limited to, public utility connections and services, rent, tuition, insurance premiums, subscriptions to publications, software licenses, construction mobilization costs, transportation, hotel reservations, and conference and convention registrations. Accordingly, the recipient may use FTA assistance to support or reimburse the costs of such acquisitions. FTA concurrence is required only when such advance payment or payments customarily required in the marketplace exceed $100,000."

FTA C. 4220.1F, Ch. IV, Sections 2. b. (5)(c) Progress Payments.

"Progress payments are payments for contract work that has not been completed. The recipient may use FTA assistance to support progress payments provided the recipient obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested. 1. Adequate Security for Progress Payments. Adequate security for progress payments may include taking title or obtaining a letter of credit or taking equivalent measures to protect the recipient's financial interest in the progress payment. Adequate security should reflect the practical realities of different procurement scenarios and factual circumstances. FTA acknowledges the practical reality that taking title to work in progress may not be desirable in some circumstances. The recipient should always consider the costs associated with providing security (for example, the recipient may need to acquire
bonds or letters of credit in the commercial marketplace) and the impact of those costs on the contract price, as well as

the consequences of incomplete performance. 2. Adequate Documentation. Sufficient documentation is required to demonstrate completion of the amount of work for which progress payments are made."

BASIC REQUIREMENT: For bus procurements, the recipient must have in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle.

20. If the recipient procured buses with FTA funds, did it comply with requirements for bus testing reports?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *Were the bus models that the recipient purchased during the review period tested?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the make and models of all buses procured since the last Comprehensive Review. Review the Altoona Bus Research and Testing Center Database at http://altoonabustest.psu.edu/ to determine if a bus report has been issued for that model. For bus models tested subsequent to October 31, 2016, determine if the bus model received a passing score.

b. *Did the recipient obtain the bus testing report showing the bus model met FTA's bus testing requirements prior to acceptance of the first vehicle?*

DETERMINING COMPLIANCE
During the site visit, examine selected bus procurement files to ensure that the recipient had in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle and that, subsequent to October 31, 2016, any new bus model tested received a passing score.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if the bus model purchased with FTA funds was not tested or, for new bus models tested after October 31, 2016, the bus model did not receive a passing score.

DEFICIENCY CODE 317: Deficiency with bus model testing requirements

SUGGESTED CORRECTIVE ACTION: If any vehicles have not been tested and the recipient has accepted the vehicles, the recipient must notify the FTA regional office immediately. The recipient must provide procedures for only accepting vehicles that were tested and received a passing score for future bus purchases to the FTA regional office. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if a copy of the Altoona Bus Test Report is not in the recipient's procurement files.

DEFICIENCY CODE 317: Deficiency with bus model testing requirements

SUGGESTED CORRECTIVE ACTION: The recipient must obtain the Altoona Bus Test Report for the specific make/model purchased and provide a copy of it and procedures for obtaining the report for future bus purchases to the FTA regional office.

GOVERNING DIRECTIVE

49 CFR 665.7 Certification of compliance.

(a) In each application to FTA for the purchase or lease of any new bus model, or any bus model with a major change in configuration or components to be acquired or leased with funds obligated by the FTA, the recipient shall certify that the bus was tested at the Bus Testing Facility and that the bus received a passing test score as required in this part. The recipient shall receive the appropriate full Bus Testing Report and any applicable partial testing report(s) before final acceptance of the first vehicle.

BASIC REQUIREMENT: A recipient purchasing revenue service rolling stock with Federal funds must conduct pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser's requirements, and Federal Motor Vehicle Safety Standards (FMVSS).

21. *If the recipient procured rolling stock with FTA funds, did it comply with pre-award and post- delivery audit requirements?*

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *For rolling stock procurements, did the recipient include the appropriate Buy America domestic content requirements in its solicitation?*

DETERMINING COMPLIANCE
Prior to the site visit, review the recipient's list of rolling stock procurements to determine which Buy America domestic content percentage is required. Onsite, review contract documents to ensure that the appropriate domestic content requirements are included.

- For contracts entered into before October 1, 2015, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract must contain a domestic content of 60 percent or more.
- The FAST Act amendments below regarding increasing domestic content do not apply to contracts entered into before October 1, 2015, even if the contract provides for the delivery of the first production vehicle after FY2017.
- For rolling stock contracts entered into on or after October 1, 2015, the applicable domestic content percentage is based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding.
- If the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent.
- If the delivery date of the first production vehicle is delayed such that it will be delivered in a year with a higher domestic content, FTA will address those situations on a case- by-case basis.

b. *For rolling stock purchases, did the recipient conduct pre-award and post-delivery audits to ensure the manufacturer(s) complied with contract specifications and Buy America?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with pre-award and post-delivery audits for rolling stock purchases. During the site visit, examine

selected rolling stock procurement files to ensure that, for each group of vehicles purchased, the recipient conducted the following audits:

- Pre-award Buy America
- Pre-award Purchaser's Requirements
- Post-delivery Buy America
- Post-delivery Purchaser's Requirements
- Post-delivery Federal Motor Vehicle Safety Standards (FMVSS)

c. *Did the recipient document its pre-award and post-delivery audits by completing and maintaining written certifications?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with pre-award and post-delivery audit certifications for rolling stock purchases. During the site visit, examine selected rolling stock procurement files to ensure that, for each group of vehicles purchased, the recipient made and included in their files:

- Pre-award Buy America certifications
- Pre-award Purchaser's Requirements certifications
- Post-delivery Buy America certifications
- Post-delivery Purchaser's Requirements certifications
- Post-delivery Federal Motor Vehicle Safety Standards (FMVSS) certifications

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it did not include the appropriate Buy America domestic content requirements in its rolling stock procurements

DEFICIENCY CODE: XXX Buy America domestic content deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must confer with the FTA regional office for the appropriate remedy based on the stage of the procurement process.

The recipient is deficient if it did not conduct all of the required audits for revenue rolling stock procurements. The recipient is deficient if it ordered a group of vehicles from a multi-year procurement before the pre-award audit was conducted.

DEFICIENCY CODE 253: Pre-award and/or post-delivery audits not performed

SUGGESTED CORRECTIVE ACTION: The recipient must confer with the FTA regional office for the appropriate corrective action. The recipient must submit to the FTA regional office procedures for pre-award and post-delivery review and inspection. For the next

procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient must submit to the FTA regional office procedures for conducting pre-award audits for options and/or multi-year contracts so that future procurements will comply with this requirement. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it did not make pre-award and/or post delivery certifications for applicable rolling stock procurements.

DEFICIENCY CODE 265: Pre-award and/or post-delivery certifications lacking

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office the certifications for the procurement reviewed and procedures for completing the applicable pre- award and post-delivery audits certifications for future revenue rolling stock procurements. If the recipient cannot certify compliance, it must confer with the FTA regional office for the appropriate corrective action. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

For the next revenue rolling stock procurement, the recipient must submit to the FTA regional office pre-award audit information and certifications before awarding the contract and the post- delivery audit information and certifications before drawing FTA funds.

GOVERNING DIRECTIVES
49 U.S.C. §5323(j)

49 CFR 663 Pre-award and Post-delivery Audits of Rolling Stock Purchases "Subpart B—Pre-Award Audits

§663.21 Pre-award audit requirements.

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a pre-award audit under this part is complete before the recipient enters into a formal contract for the purchase of such rolling stock.

§663.23 Description of pre-award audit.

A pre-award audit under this part includes—(a) A Buy America certification as described in §663.25 of this part; (b) A purchaser's requirements certification as described in §663.27 of this part; and (c) Where appropriate, a manufacturer's Federal Motor Vehicle Safety certification information as described in §663.41 or §663.43 of this part.

§663.25 Pre-award Buy America certification.

For purposes of this part, a pre-award Buy America certification is a certification that the recipient keeps on file that—(a) There is a letter from FTA which grants a waiver to the rolling stock to be purchased from the Buy America requirements under section 165(b)(1), (b)(2), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or (b) The recipient is satisfied that the rolling stock to be purchased meets the requirements of section 165(a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or through an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—(1) Component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and (2) The location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.

§663.27 Pre-award purchaser's requirements certification.

For purposes of this part, a pre-award purchaser's requirements certification is a certification a recipient keeps on file that— (a) The rolling stock the recipient is contracting for is the same product described in the purchaser's solicitation

specification; and (b) The proposed manufacturer is a responsible manufacturer with the capability to produce a vehicle that meets the recipient's specification set forth in the recipient's solicitation. Subpart C—Post-Delivery Audits

§663.31 Post-delivery audit requirements.

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a post-delivery audit under this part is complete before title to the rolling stock is transferred to the recipient.

§663.33 Description of post-delivery audit.

A post-delivery audit under this part includes—(a) A post-delivery Buy America certification as described in §663.35 of this part; (b) A post-delivery purchaser's requirements certification as described in §663.37 of this part; and (c) When appropriate, a manufacturer's Federal Motor Vehicle Safety Standard self- certification information as described in §663.41 or §663.43 of this part.

§663.35 Post-delivery Buy America certification.

For purposes of this part, a post-delivery Buy America certification is a certification that the recipient keeps on file that—(a) There is a letter from FTA which grants a waiver to the rolling stock received from the Buy America requirements under sections 165 (b)(1), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or (b) The recipient is satisfied that the rolling stock received meets the requirements of section 165 (a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or by means of an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—(1) Components and subcomponent parts of the rolling stock identified by manufacturer of the parts, their country of origin and costs; and (2) The actual location of the final assembly point for the rolling stock including a description of the activities which took place at the final assembly point and the cost of the final assembly.

§663.37 Post-delivery purchaser's requirements certification.

For purposes of this part, a post-delivery purchaser's requirements certification is a certification that the recipient keeps on file that—(a) Except for procurements covered under paragraph (c) in this section, a resident inspector (other than an agent or employee of the manufacturer) was at the manufacturing site throughout the period of manufacture of the rolling stock to be purchased and monitored and completed a report on the manufacture of such rolling stock. Such a report, at a minimum, shall—(1) Provide accurate records of all vehicle construction activities; and (2) Address how the construction and operation of the vehicles fulfills the contract specifications. (b) After reviewing the report required under paragraph (a) of this section, and visually inspecting and road testing the delivered vehicles, the vehicles meet the contract specifications. (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.

§663.39 Post-delivery audit review.

(a) If a recipient cannot complete a post-delivery audit because the recipient or its agent cannot certify Buy America compliance or that the rolling stock meets the purchaser's requirements specified in the contract, the rolling stock may be rejected and final acceptance by the recipient will not be required. The recipient may exercise any legal rights it has under the contract or at law. (b) This provision does not preclude the recipient and manufacturer from agreeing to a conditional acceptance of rolling stock pending manufacturer's correction of deviations within a reasonable period of time. Subpart D— Certification of Compliance With or Inapplicability of Federal Motor Vehicle Safety Standards

§663.41 Certification of compliance with Federal motor vehicle safety standards.

If a vehicle purchased under this part is subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, a recipient shall keep on file its certification that it received, both at the pre-award and post-delivery stage, a copy of the manufacturer's self-certification information that the vehicle

complies with relevant Federal Motor Vehicle Safety Standards.

§663.43 Certification that Federal motor vehicle standards do not apply.

(a) Except for rolling stock subject to paragraph (b) of this section, if a vehicle purchased under this part is not subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, the recipient shall keep on file its certification that it received a statement to that effect from the manufacturer.
(b) This subpart shall not apply to rolling stock that is not
a motor vehicle."

Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances IV, 81 Federal Register 60278 (September 1, 2016)

For rolling stock contracts entered into on or after October 1, 2015, i.e., the effective date of the FAST Act, the applicable domestic content percentage under section 5323(j)(2)(C) will be based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding. Thus, if a recipient or group of recipients as part of a joint procurement enter into a contract for rolling stock on or after October 1, 2015, then the new FAST Act provisions applicable for the date of delivery of the first production vehicle shall apply. Accordingly, if the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65
percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent. These delivery provisions apply to contracts entered into on or after October 1, 2015, unless a waiver is granted. If the delivery date of the first production vehicle is delayed such that it will be delivered in a year with a higher domestic content, FTA will address those situations on a case-by- case basis. The FAST Act amendments do not apply to contracts entered into before October 1, 2015, even if the contract provides for the delivery of the first production vehicle after FY2017. For contracts entered into before October 1, 2015, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract may contain a domestic content of more than 60 percent, per the pre-FAST Act requirements."

FTA is issuing two general public interest waivers to address two categories of recipients and manufacturers: (1) Recipients who entered into contracts or placed purchase orders against State schedules between October 1, 2015 and December 4, 2015; and (2) recipients who have entered into contracts after December 4, 2015, as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015. In addition, FTA is issuing a third public interest waiver for recipients who solicited contracts on or after December 4, 2015, provided they enter into a contract within 60 days of publication of this Notice.

BASIC REQUIREMENT: The recipient is responsible for ensuring that subrecipients administer FTA-funded procurements in accordance with the requirements in 2 CFR Part 200 and FTA Circular 4220.1F.

22. Does the recipient perform oversight of its subrecipients' FTA-funded procurement activities?

APPLICABILITY
All recipients of FTA funds

INDICATORS OF COMPLIANCE

a. *Does the recipient implement oversight procedures of its subrecipients for FTA-funded procurements?*

DETERMINING COMPLIANCE
Request and review a listing of subrecipients. Request and review the recipient's oversight procedures, State Management Plans, and any procurement requirements that have been included in subrecipient agreements. Discuss with the recipient onsite and determine who monitors the subrecipients' procurement processes. Examine written reports or audit reports of the process to determine if the recipient is monitoring in accordance with its documented procedures.

b. *Do subrecipient procurement files reviewed demonstrate adequate oversight by the recipient?*

DETERMINING COMPLIANCE
Onsite, during subrecipient visits, select sample procurements for compliance with 2 CFR Part 200 and FTA Circular 4220.1F. Governmental subrecipients may use State procurement procedures and only procurement provisions that apply to the State apply to them. Private, non- profit subrecipients must follow 4220.1F.

Subrecipients of states that are public entities and contractors must comply with FTA requirements that apply to states. Subrecipients of states that are private nonprofit or for profit entities must comply with all the FTA requirements of FTA C. 4220.1F. FTA considers all metropolitan planning organizations (MPOs), even those incorporated as a nonprofit organization under state law, to be "local governments." Consequently, MPOs must comply with the FTA requirements that apply to states.

The following procurement requirements apply to states and their public entity subrecipients and contractors:

- Comply with its own procurement regulations
- Conduct all procurements in a manner providing full and open competition
- Exclude the use of statutorily or administratively imposed in-state or local geographical preferences in the evaluation of bids or proposals except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference
- Use competitive proposal procedures based on the Brooks Act when contracting for architectural and engineering services, if the State has not adopted a statute governing the procurement of such services before August 10, 2005
- Award to only responsible contractors possessing the ability, willingness and integrity to perform successfully under the terms and conditions of the contract
- Ensure that every purchase order and contract executed using Federal funds includes all clauses required by Federal statutes and executive orders and their implementing regulations
- Do not enter into any contract for rolling stock with a period of performance for ordering exceeding five years (seven years for rail) inclusive of options without prior FTA approval

- Comply with Buy America requirements, including pre-award and post-delivery requirements
- • Comply with debarment and suspension requirements
- Comply with lobbying requirements
- Comply with piggybacking requirements in addition to the requirements that apply to states,

FTA C. 4220.1F requirements that apply to private nonprofit or for-profit entities include, but are not limited to, the following:

- Maintain a written code of standards of conduct governing the performance of employees engaged in the award and administration of contracts
- Have written procurement policies and procedures
- Have written protest procedures to handle and resolve disputes relating to the award of contracts
- Have procedures for settlement of contract issues/disputes
- Analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest
- Review procurement requests to avoid duplicative or unnecessary purchases
- Incorporate a clear and accurate description of the material, product, or services being procured; identify all requirements that offerors must fulfill; and identify evaluation factors in solicitations
- Develop an ICE before receiving bids or proposals
- Conduct a contract cost or price analysis for every procurement Evaluate options at the time of bid award, exercise the options at the agreed upon terms, and determine that the option price is better than current market prices before exercising the options
- Maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions and specifications of their contracts or purchase orders
- Maintain a written record of procurement history FTA C. 4220.1F contains a complete list of third party contracting requirements

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it is not providing oversight of its subrecipients' procurement processes as described in its written documents or it does not monitor subrecipients or contractors making direct procurements with FTA assistance for compliance with the requirements.

DEFICIENCY CODE 278: Insufficient oversight of procurement

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office with documentation that it has implemented a procurement monitoring program.

The recipient is deficient if, during a review of subrecipient procurements, deficiencies are found.

DEFICIENCY CODE 278: Insufficient oversight of procurement

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has implemented a procurement monitoring program of its subrecipients.

GOVERNING DIRECTIVE
2 CFR §200.331 "Requirement for pass-through entities:

All pass-through entities must:...(d) Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved. Pass-through entity monitoring of the subrecipient must include: (1) Reviewing financial and performance reports required by the pass-through entity. (2) Following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and other means. (3) Issuing a management decision for audit findings pertaining to the Federal award provided to the subrecipient from the pass-through entity as required by §200.521 Management decision."

ATTACHMENT D/ EXHIBIT 6 APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)					
CLAUSE	**TYPE OF PROCUREMENT**				
	Professional Services/A&E	**Operations/ Management/ Subrecipients**	**Rolling Stock Purchase**	**Construction**	**Materials & Supplies**
No Federal government obligations to third parties by use of a disclaimer	All	All	All	All	All
Program fraud and false or fraudulent statements and related acts	All	All	All	All	All
Access to Records	All	All	All	All	All
Federal changes	All	All	All	All	All
Civil Rights (EEO, Title VI & ADA)	All	All	All	All	All
Incorporation of FTA Terms	All	All	All	All	All
Energy Conservation	All	All	All	All	All
Termination Provisions (not required of states)	>$10,000	>$10,000	>$10,000	>$10,000	>$10,000
Debarment and Suspension	>$25,000	>$25,000	>$25,000	>$25,000	>$25,000
Buy America			>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (for steel, iron, manufacture d products)
Provisions for resolution of disputes, breaches, or other litigation	>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (see Note)
Lobbying	>$100,000	>$100,000	>$100,000	>$100,000	>$100,000
Clean Air	>$100,000	>$100,000	>$100,000	>$100,000	>$100,000
Clean Water	>$100,000	>$100,000	>$100,000	>$100,000	>$100,000
Cargo Preference			Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel

ATTACHMENT D/ EXHIBIT 6
APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over $2,000)

CLAUSE	TYPE OF PROCUREMENT				
	Professional Services/A&E	**Operations/ Management/ Subrecipients**	**Rolling Stock Purchase**	**Construction**	**Materials & Supplies**
Fly America	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air
Davis Bacon Act				>$2,000 (including ferry vessels)	
Copeland Anti-Kickback Act Section 1 Section 2				All >$2,000 (including ferry vessels)	
Contract Work Hours & Safety Standards Act		>$100,000	>$100,000	>$100,000 (including ferry vessels)	
Bonding (not required of states)				>$100,000 (including ferry vessels)	
Seismic Safety	A&E for new buildings &additions			New buildings &additions	
Transit Employee Protective Arrangements		Transit operations funded with Section 5307, 5309, 5311 or 5316 funds			
Charter Service Operations		All			
School Bus Operations		All			

ATTACHMENT D/ EXHIBIT 6 APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)					
	TYPE OF PROCUREMENT				
CLAUSE	**Professional Services/A&E**	**Operations/ Management/ Subrecipients**	**Rolling Stock Purchase**	**Construction**	**Materials & Supplies**
Drug and Alcohol Testing		Transit operations funded with Section 5307, 5309 or 5311 funds			
Patent Rights	Research &development				
Rights in Data and Copyrights requirements	Research &development				
Special DOL EEO clause for construction projects				>$10,000	
Disadvantaged Business Enterprises (DBEs)	All	All	All	All	All
Prompt Payment	All if threshold for DBE program met	All if threshold for DBE program met	All if threshold for DBE program met	All if threshold for DBE program met	All if threshold for DBE program met
Recycled Products		Contracts for items designated by EPA, when procuring $10,000 or more per year		Contracts for items designated by EPA, when procuring $10,000 or more per year	Contracts for items designated by EPA, when procuring $10,000 or more per year
ADA Access	A&E	All	All	All	
Special Notification Requirements for States	Limited to states	Limited to states	Limited to states	Limited to states	Limited to states

ATTACHMENT D/ EXHIBIT 6.1 REQUIRED THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)		
REQUIREMENT	**COMMENTS**	**MASTER AGREEMENT REFERENCE*** **
All FTA-Assisted Third Party Contracts and Subcontracts		
No Federal government obligations to third parties by use of a disclaimer		§3.1
Program fraud and false or fraudulent statements and related acts		§4.3.f
Access to Records		§9.c
Federal changes		§3.1
Civil Rights (EEO, Title VI & ADA)		§12,c,e,and h
Incorporation of FTA Terms	Per FTA C. 4220.1F	
Energy Conservation		§26.j
Awards Exceeding $10,000		
Termination provisions	49 CFR Part 18 Not required of states	§16.d()12
Awards Exceeding $25,000		
Debarment and Suspension	2 CFR Parts 180 and 1200	§4.b
Awards Exceeding the Simplified Acquisition Threshold ($150,000 – see Note)		
Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.		
Buy America	When tangible property or construction will be acquired	§15.a
Provisions for resolution of disputes, breaches, or other litigation		§39
Awards Exceeding $100,000 by Statute		
Lobbying		§3.d
Clean Air		§16.d(7)7.n
Clean Water		§16.d(7)

ATTACHMENT D/ EXHIBIT 6.1 REQUIRED THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)		
REQUIREMENT	**COMMENTS**	**MASTER AGREEMENT REFERENCE*** **
Transport of Property or Persons		
Cargo Preference	When acquiring property suitable for shipment by ocean vessel	§15.b
Fly America	When property or persons transported by air between U.S. and foreign destinations, or between foreign locations	§15c
Construction Activities		
Davis Bacon Act	Except for contracts <$2,000 or third party contracts for supplies, materials, or articles ordinarily available on the open market	§16.d(4)
Copeland Anti-Kickback Act Section 1 Section 2	All Contracts >$2,000	§24.a(3)
Contract Work Hours & Safety Standards Act	Contracts >$100,000	§16.d(5)
Bonding for construction activities exceeding $100,000	5% bid guarantee; 100% performance bond; and Payment bond equal to: • 50% for contracts < $1 M • 40% for contracts > $1 M, but < $5 M • $2.5 M for contracts > $5 M Not required of states	§16.n(1)
Seismic Safety	Contracts for construction of new buildings or additions to existing buildings	§23.b
Special DOL Clause	Contracts >$10,000	§12.d(3)
Non-construction Activities		
Nonconstruction Employee Protection (Contract Work Hours and Safety Standards Act)	Applicable to all turnkey, rolling stock and operational contracts (excluding contracts for transportation services) > $100,000	§28.b

ATTACHMENT D/ EXHIBIT 6.1 REQUIRED THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)		
REQUIREMENT	**COMMENTS**	**MASTER AGREEMENT REFERENCE*** **
Transit Operations		
Transit Employee Protective Arrangements	Applies to Section 5307, 5309, 5311 and 5316 projects	§24.d28.d
Charter Service Operations		§2832
School Bus Operations		§29
Drug and Alcohol Testing	Safety sensitive functions. Applies to Section 5307, 5309 and 5311 projects	§40.b
Planning, Research, Development, and Documentation Projects		
Patent Rights		§17
Rights in Data and Copyrights		§1820
Miscellaneous Special Requirements		
Disadvantaged Business Enterprises (DBEs)	Contracts awarded on the basis of a bid or proposal offering to use DBEs	§12.e3.d
Prompt Payment and Return of Retainage	Per 49 CFR Part 26, if grantee meets the threshold for a DBE program	§12.e
Recycled Products	Contracts for items designated by EPA, when procuring $10,000 or more per year	§16.d(10)
ADA Access	Contracts for rolling stock or facilities construction/ renovation	§12.h3.g
Assignability Clause	Piggyback procurements	§16.a(3)
State Requirements		
Special Notification Requirements for Stares		§37

ATTACHMENT D/EXHIBIT 6.2
REQUIRED CERTIFICATIONS, REPORTS AND FORMS
(excluding micro-purchases, except for construction contracts over $2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE***
Bus Testing Certification and Report	Procurements of buses and modified mass produced vans	§16.m
Transit Vehicle Manufacturer Certification	Procurements of railcars or buses and modified mass produced vans	§12.d(4)
Buy America Certification	Projects >$150,000 that contain steel, iron or manufactured products (see note)	§15.a
Pre-Award Audit	Rolling stock procurements	§16.m
Pre-Award Buy America Certification	Rolling stock procurements>$100,000 (see note)	§16.m
Pre-Award Purchaser's Requirement Certification	Rolling stock procurements	§16.m
Post-Delivery Audit	Rolling stock procurements	§16.m
Post-Delivery Buy America Certification	Rolling stock procurements >$150,000 (see note)	§16.m
Post-Delivery Purchaser's Requirement Certification	Rolling stock procurements	§16.m7.p(3)
On-Site Inspector's Report	Rolling stock procurements for more than 10 vehicles for areas >200,000 in population and 20 for areas <200,000 in population	§16.m
Federal Motor Vehicles Safety Standards Pre-Award and Post-Delivery Certification	Non-rail rolling stock procurements	§16.m
Excluded Parties Listing System search	Procurements > $25,000	§4.b
Lobbying Certification	Procurements > $100,000	§4.d
Standard Form LLL and Quarterly Updates (when required)	Procurements > $100,000 where contractor engages in lobbying activities	§4.d

References

U.S. DOT FTA Circular 4220.1F - Third Party Contracting Requirements – November 1, 2008/Rev. April 14, 2009; as amended

U.S. DOT FTA Master Agreement FY 2011; as amended

U.S. DOT FTA Best Practices Procurement Manual, as amended

U.S. DOT FTA Triennial Review Workbook, 2012

U.S. DOT FTA Triennial Review Workbook, 2015

U.S. DOT FTA 49 C.F.R 18 - Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments

U.S. DOT FTA Circular 5010.1D - Grant Management Guidelines, November 1, 2008/Rev. 1 August 27, 2012

FTA C **4220.1F**. November 1, 2008. Rev. 1, April 14, 2009. Rev. 2, July 1, 2010. Rev. 3, February 15, 2011. Rev. 4, March 18, **2013**. Subject: THIRD PARTY ...

49 CFR Part 661, "Buy America Requirements"

2. 49 CFR Part 663, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases"

3. FTA "Dear Colleague" Letter, March 18, 1997

4. Federal Register Vol. 71, No. 54, pp. 14112-14118, Buy America Requirements; Amendments to Definitions

5. Federal Register Vol. 72, No. 182, pp. 53688-53698, Buy America Requirements; End Product Analysis and Waiver Procedures, Final Rule

6. Federal Register Vol. 72, No. 188, pp. 55103-55104, Buy America Requirements; End Product Analysis and Waiver Procedures, Final Rule correction

USEFUL WEB LINKS

FTA Buy America Home Page
Best Practices Procurement Manual
Conducting Pre-Award and Post-Delivery Audits for Bus Procurements, FTA T-90-7713-93-1, Rev. B
Conducting Pre-Award and Post-Delivery Audits for Rail Vehicle Procurements, FTA DC-90-7713-94-1, Rev. B
FTA Third Party Contracting FAQs

COMPLIANCE

If a grantee fails to comply with FTA Buy America requirements, FTA may decide to not participate in the procurement.

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Attachments/Appendices/Exhibits

A	PIGGYBACKING WORKSHEET
B	DOCUMENT CHECKLIST FOR FTA-FUNDED PIGGYBACK PROCUREMENT
C	CHECKLIST FOR GDOT/GSA
D	FTA TYPE OF PROCUREMENT CLAUSES
E	INDEPENDENT COST ESTIMATE FORM
F	PRICE ANALYSIS
G	SOLE SOURCE JUSTIFICATION AND APPROVAL FORM
H	COST ANALYSIS FORM and GUIDELINES
I	SOLICITATION FILE CHECKLIST
J	ROLLING STOCK
K	PRE-AWARD AND POST-DELIVERY REVIEW CHECKLIST – Rolling Stock
L	CERTIFICATE OF COMPLIANCE WITH BUS TESINTING REQUIREMENT
M	FEDERAL MOTOR VEHICLE SAFETY STANDARDS
N	FEDERAL CERTIFICATE BUY AMERICA CERTIFICATION
O	DEBARMENT AND SUSPENSION CERTIFICATION
P	DEBARMENT AND SUPSPENSION CERTIFICATION (Lower-Tier)
Q	NON-COLLUSION AFFIDAVIT
R	CERTIFICATION REGARDING LOBBYING
S	DBE APPROVAL CERTIFICATION
T	PROMPT PAYMENT AFFIDAVIT
U	CONTRACT/PURCHASE ORDER FILE INDES (SEALED BIDS)
V	CONTRACT/PURCHASE ORDER FILE INDEX (RFP)
W	RESPONSIBILITY DETERMINATION FORM
X	METHOD OF PROCUREMENT - DECISION MATRIX FORM
Y	BID CHECKLIT FORM
Z	BID COST FACTORS FORM
AA	NONCOMPETITIVE PROCUREMENT JUSTIFICATION FORM
BB	DISCLOSURE STATEMENT
CC	SOLE SORCE COST ANALYSIS FORM
DD	BID SUMMARY FORM
EE	AWARD RECOMMENDATION AND JUSTICATION FORM
FF	PRICE/RATE QUOTATION FORM
GG	LEASE vs PURCHASE ANALYSIS
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1	CONTRACT ADMINISTRATION PROCEDURES/PROCESS
2	EMPLOYMENT ELIGIBILITY VERIFICATION AND SYSTEMATIC ALIEN VERIFICATION FOR ENTITLEMENT (SAVE)
3	FTA TRAINING
4	GENERAL CONDITIONS
5	FTA CIRCULAR 4220.1F CHANGES -REVISION 4 CHANGES DATED MARCH15, 2013
6	FTA FISCAL YEAR 2014 AGREEMENTS COMPARED WITH FTA FISCAL YEAR 2013 AGREEMENTS
7	GA STATUE REGARDING A&E (QULIFICATIONS-BASED) PROCUREMEWNT
EXHIBIT	
6 THRU 6.2	FTA TYPE OF PROCUREMENT CLAUSES

ATTACHMENT A

PIGGYBACKING WORKSHEET

Definition: Piggybacking is the post-award use of a contractual document/process that allows someone who was not contemplated in the original procurement to purchase the same supplies/equipment through that original document/process

	WORKSHEET	YES	NO
1.	Have you obtained a copy of the contract and the solicitation document, including the specifications and any Buy America Pre-award or Post- Delivery audits?		
2.	Does the solicitation and contract contain an express "assignability" clause that provides for the assignment of all or part of the specified deliverables?		
3.	Did the Contractor submit the certifications for TVM, Lobbying Buy America, Bus Testing, FMVSS as may be required by Federal regulations?		
4.	Does the contract contain the clauses required by Federal regulations?		
5.	Were the piggybacking quantities included in the original solicitation; i.e., were they in the original bid and were they evaluated as part of the contract award decision?		
6.	If this is an indefinite quantity contract, did the original solicitation and resultant contract contain both a minimum and maximum quantity, and did these represent the reasonably foreseeable needs of the parties to the contract?		
7.	If this piggybacking action represents the exercise of an option in the contract, is the option provision still valid or has it expired?		
8.	Does your State law allow for the procedures used by the original contracting agency: e.g., negotiations vs. sealed bids?		
9.	Was a cost or price analysis performed by the original contracting agency documenting the reasonableness of the price? Obtain a copy for your files.		
10.	If the contract is for rolling stock or replacement parts, does the contract term comply with the five-year term limit established by FTA? See FTA Circular 4220.1F, Chapter IV, 2 (14) (i).		
11.	Was there a proper evaluation of the bids or proposals? Include a copy of the analysis in your files.		
12.	If you will require changes to the vehicles (deliverables), are they "within the scope" of the contract or are they "cardinal changes"? See BPPM Section 9.2.1.		

PIGGYBACKING WORKSHEET		
13. Independent Cost Estimate		
14. Detailed Project Budget		
15. Prior to award notification search vendor on EPLS/SAM and print report for records		
16. Contract with vendor		

ATTACHMENT B

Document Checklist for FTA-Funded Piggyback Procurements

1. **Documents ARCC Obtains from "Piggyback" Agency**:

    a. Copy of the competitively sought RFP with a 5-year contractual limit
    b. Assignability clause
    c. Listing of options
    d. Pricing structure
    e. FTA clauses
    f. Letter from Agency to Augusta assigning the option(s)
    g. Pre-award Buy America information from manufacturer (content, description of final assembly, location of final assembly)
    h. Altoona test report
    i. Signed clauses for Buy America and Lobbying
    j. Certification of compliance with the Federal Motor Vehicle Safety Standards (FMVSS)
    k. TVM certification

2. **Documents created by AUGUSTA, GEORGIA COMMISSISON (AGC)**:

    Pre-Award of AGC Contract to Bus Manufacturer:

    a. Independent Cost Estimate
    b. Determination that the options in the Agency's RFP were viable and available
    c. Written record of procurement history
    d. Determination that the contract prices originally established are still fair and reasonable before exercising those rights
    e. Written determination that manufacturer has not been suspended or debarred
    f. Pre-award Buy America Audit certification of compliance
    g. Pre-award purchaser's requirements certification

    Contract Award and Delivery:

    a. Contract between AGC and the bus manufacturer
    b. Change orders for minor changes and supporting justification
    c. Relevant correspondence
    d. Post Delivery Buy America content from bus manufacturer
    e. Post Delivery Audit certification by AGC
    f. Post Delivery Purchaser's certification by AGC
    g. FMVSS from manufacturer
    h. FMVSS certification by AGC
    i. Inspector reports (if required based upon purchase quantity)

ATTACHMENT C

Checklist for GDOT/GSA

No.	Element	Description	Included	Not Included	NA	Comments
1	**Independent Cost Estimate**	The grantee made and documented an independent cost estimate before receipt of quotes.				
2	**Reasonable Qualification Requirements**	The grantee created and issued a solicitation containing reasonable requirements placed on firms.				
3	**Written Procurement Selection Procedures**	The grantee completed and documented written selection procedures and the solicitation also identifies all requirements that offerors must fulfill and all other factors to be used in evaluating bids.				
4	**Award to Responsible Contractors**	The grantee documented the determination that it was awarding to a responsible contractor considering such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.				
5	**Sound and Complete Agreement**	A sound and complete agreement is included. In addition, the contract includes remedies for breach of contract and provisions covering termination for cause and convenience.				
6	**Complete Specifications**	A complete, adequate, and realistic specification or purchase description was available and included any specifications and pertinent attachments which define the items sought in order for the bidder to properly respond. These specifications are documented.				
7	**Competition**	Two or more sources submitted quotes. Successful and unsuccessful bids are documented.				
8	**Advertise/Publicized**	Proof that the RFQ was publicly advertised is documented.				
9	**Adequate Solicitation**	Bids were solicited from an adequate number of known suppliers. Proof is documented.				
10	**Sufficient Bid Time**	Proof that prospective bidder were provided sufficient time to prepare bids prior to the date set for opening the bids is documented.				
11	**Rejecting Quotes**	A quote (or quotes) was rejected for a sound documented business reason. Reasons are documented. If no bids were rejected, check NA.				
12	**Cost or Price Analysis**	Either a cost analysis, with associated profit negotiation, or a price analysis was performed and documented in the procurement file with respect to the initial contract award. Also cost analysis was performed when negotiating contract modifications unless price reasonableness was established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation.				

No.	Element	Description	Included	Not Included	NA	Comments
13	**Written Record of Procurement History**	The file contains records detailing the history of this procurement. At a minimum, these records include: (1) the rationale for the method of procurement, (2) selection of contract type, (3) reasons for contractor selection or rejection, and (4) the basis for the contract price.				
14	**Out of Scope Changes**	The grantee amended this contract outside the scope of the original contract. The amendment was treated as a sole source procurement (complying with the FTA requirements for a justification, cost analysis and profit negotiation). If the contract was not modified or if all modifications were within the scope of the contract, check NA.				
15	**Liquidated Damages Provisions**	This contract contains liquidated damages provisions and the assessment for damages is specified in the contract at a specific rate per day for each day of overrun in contract time. If this contract does not contain liquidated damages provisions, check NA.				
16	**Clauses**	This contract contains the appropriate FTA required clauses. The contract clauses located in the Master Agreement should be used to determine the applicability of the clauses to the procurement type. The Best Practices Procurement Manual can be used to determine the applicability of the specific language of a clause that a grantee may use.				

ATTACHMENT D/ EXHIBIT 6
APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over $2,000)

CLAUSE	TYPE OF PROCUREMENT				
	Professional Services/A&E	Operations/ Management/ Subrecipients	Rolling Stock Purchase	Construction	Materials & Supplies
No Federal government obligations to third parties by use of a disclaimer	All	All	All	All	All
Program fraud and false or fraudulent statements and related acts	All	All	All	All	All
Access to Records	All	All	All	All	All
Federal changes	All	All	All	All	All
Civil Rights (EEO, Title VI & ADA)	All	All	All	All	All
Incorporation of FTA Terms	All	All	All	All	All
Energy Conservation	All	All	All	All	All
Termination Provisions (not required of states)	>$10,000	>$10,000	>$10,000	>$10,000	>$10,000
Debarment and Suspension	>$25,000	>$25,000	>$25,000	>$25,000	>$25,000
Buy America			>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (for steel, iron, manufacture d products)
Provisions for resolution of disputes, breaches, or other litigation	>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (see Note)
Lobbying	>$100,000	>$100,000	>$100,000	>$100,000	>$100,000
Clean Air	>$100,000	>$100,000	>$100,000	>$100,000	>$100,000
Clean Water	>$100,000	>$100,000	>$100,000	>$100,000	>$100,000
Cargo Preference			Involving property that may be transported b by ocean vessel	Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel

ATTACHMENT D/ EXHIBIT 6
APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over $2,000)

CLAUSE	TYPE OF PROCUREMENT				
	Professional Services/A&E	**Operations/ Management/ Subrecipients**	**Rolling Stock Purchase**	**Construction**	**Materials & Supplies**
Fly America	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air
Davis Bacon Act				>$2,000 (including ferry vessels)	
Copeland Anti-Kickback Act Section 1 Section 2				All >$2,000 (including ferry vessels)	
Contract Work Hours & Safety Standards Act		>$100,000	>$100,000	>$100,000 (including ferry vessels)	
Bonding (not required of states)				>$100,000 (including ferry vessels)	
Seismic Safety	A&E for new buildings &additions			New buildings &additions	
Transit Employee Protective Arrangements		Transit operations funded with Section 5307, 5309, 5311 or 5316 funds			
Charter Service Operations		All			

School Bus Operations		All			

ATTACHMENT D/ EXHIBIT 6
APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over $2,000)
)

	TYPE OF PROCUREMENT				
CLAUSE	**Professional Services/A&E**	**Operations/ Management/ Subrecipients**	**Rolling Stock Purchase**	**Construction**	**Materials & Supplies**
Drug and Alcohol Testing		Transit operations funded with Section 5307, 5309 or 5311 funds			
Patent Rights	Research &development				
Rights in Data and Copyrights requirements	Research &development				
Special DOL EEO clause for construction projects				>$10,000	
Disadvantaged Business Enterprises (DBEs)	All	All	All	All	All
Prompt Payment	All if threshold for DBE program met	All if threshold for DBE program met	All if threshold for DBE program met	All if threshold forDBE program met	All if threshold for DBE program met
Recycled Products		Contracts for items designated by EPA, when procuring $10,000 or more per year		Contracts for items designated by EPA, when procuring $10,000 or more per year	Contracts for items designated by EPA, when procuring $10,000 or more per year
ADA Access	A&E	All	All	All	

Special Notification Requirements for States	Limited to states	Limited to states	Limited to states	Limited to states	Limited to states

ATTACHMENT D/ EXHIBIT 6.1 REQUIRED THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)		
REQUIREMENT	**COMMENTS**	**MASTER AGREEMENT REFERENCE*** **
All FTA-Assisted Third Party Contracts and Subcontracts		
No Federal government obligations to third parties by use of a disclaimer		§3.1
Program fraud and false or fraudulent statements and related acts		§4.3.f
Access to Records		§9.c
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Civil Rights (EEO, Title VI & ADA)		§12,c,e,and h
Incorporation of FTA Terms	Per FTA C. 4220.1F	
Energy Conservation		§26.j
Awards Exceeding $10,000		
Termination provisions	49 CFR Part 18 Not required of states	§16.d()12
Awards Exceeding $25,000		
Debarment and Suspension	2 CFR Parts 180 and 1200	§4.b
Awards Exceeding the Simplified Acquisition Threshold ($150,000 – see Note)		
Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.		
Buy America	When tangible property or construction will be acquired	§15.a
Provisions for resolution of disputes, breaches, or other litigation		§39
Awards Exceeding $100,000 by Statute		
Lobbying		§3.d
Clean Air		§16.d(7)7.n
Clean Water		§16.d(7)

ATTACHMENT D/ EXHIBIT 6.1 REQUIRED THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)		
REQUIREMENT	**COMMENTS**	**MASTER AGREEMENT REFERENCE*** **
Transport of Property or Persons		
Cargo Preference	When acquiring property suitable for shipment by ocean vessel	§15.b
Fly America	When property or persons transported by air between U.S. and foreign destinations, or between foreign locations	§15c
Construction Activities		
Davis Bacon Act	Except for contracts <$2,000 or third party contracts for supplies, materials, or articles ordinarily available on the open market	§16.d(4)
Copeland Anti-Kickback Act Section 1 Section 2	All Contracts >$2,000	§24.a(3)
Contract Work Hours & Safety Standards Act	Contracts >$100,000	§16.d(5)
Bonding for construction activities exceeding $100,000	5% bid guarantee; 100% performance bond; and Payment bond equal to: • 50% for contracts < $1 M • 40% for contracts > $1 M, but < $5 M • $2.5 M for contracts > $5 M Not required of states	§16.n(1)
Seismic Safety	Contracts for construction of new buildings or additions to existing buildings	§23.b
Special DOL, EEO Clause	Contracts >$10,000	§12.d(3)
Non-construction Activities		
Nonconstruction Employee Protection (Contract Work Hours and Safety Standards Act)	Applicable to all turnkey, rolling stock and operational contracts (excluding contracts for transportation services) > $100,000	§28.b

ATTACHMENT D/ EXHIBIT 6.1 REQUIRED THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)		
REQUIREMENT	**COMMENTS**	**MASTER AGREEMENT REFERENCE*** **
Transit Operations		
Transit Employee Protective Arrangements	Applies to Section 5307, 5309, 5311 and 5316 projects	§24.d28.d
Charter Service Operations		§2832
School Bus Operations		§29
Drug and Alcohol Testing	Safety sensitive functions. Applies to Section 5307, 5309 and 5311 projects	§40.b
Planning, Research, Development, and Documentation Projects		
Patent Rights		§17
Rights in Data and Copyrights		§1820
Miscellaneous Special Requirements		
Disadvantaged Business Enterprises (DBEs)	Contracts awarded on the basis of a bid or proposal offering to use DBEs	§12.e3.d
Prompt Payment and Return of Retainage	Per 49 CFR Part 26, if grantee meets the threshold for a DBE program	§12.e
Recycled Products	Contracts for items designated by EPA, when procuring $10,000 or more per year	§16.d(10)
ADA Access	Contracts for rolling stock or facilities construction/ renovation	§12.h3.g
Assignability Clause	Piggyback procurements	§16.a(3)
State Requirements		
Special Notification Requirements for Stares		§37

Note:On December 19, 2014, a joint interim final rule was published, implementing for all Federal award-making agencies the final guidance "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards" (commonly referred to as the "Super Circular"), which was published by the Office of Management and Budget (OMB) on December 26, 2013. The Super Circular consolidates eight existing grant-related circulars into one set of uniform regulations located in Title 2 of the CFR.
2 CFR Part 200 applies to the administration of all Federal grants, cooperative agreements, and amendments as

of December 26, 2014. Procurements under grants and cooperative agreements executed prior to December 26, 2014 continue to be subject to 49 CFR Parts 18 and 19 as in effect on the date of such grants or agreements. 2 CFR Part 200 contains certain notable changes to FTA grants management. The Super Circular increases the simplified acquisition threshold to $150,000 (per 2 CFR 200.88) to bring it in alignment with the FAR. This new threshold applies to procurements funded by grants issued on or after December 26, 2014. Procurements funded by grants issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of $100,000 (per 18 CFR 36(d)).

Similarly, the Buy America public interest waiver exempts "small purchases" from Buy America regulations, which incorporated by reference a provision from US DOT's Common Grant Rule (49 CFR 18.36(d)) that set that threshold at $100,000 or less. This threshold continues to apply for all grants obligated on or before December 25, 2014. On December 26, 2014, however, US DOT's Common Grant Rule in 49 CFR Part 18 was replaced with a new regulation, 2 CFR Part 1201, which incorporates by reference OMB's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Part 200), and contains a higher threshold for simplified acquisitions.

Therefore, for grants obligated on or after December 26, 2014, the threshold is raised to match the simplified acquisition threshold set by 2 CFR 200.88, which incorporates by reference the Federal Acquisition Regulation at 48 CFR 2.1 (definitions), and currently is set at $150,000. This amount will be adjusted periodically for inflation. FTA will continue to base the exemption on the total amount of the project and not on the individual price of items being purchased. For example, if a recipient purchases ten items costing $20,000 each under a single purchase order, the $200,000 contract would make the procurement subject to Buy America Requirements, 49 CFR 661.7.

ATTACHMENT D/EXHIBIT 6.2
REQUIRED CERTIFICATIONS, REPORTS AND FORMS
(excluding micro-purchases, except for construction contracts over $2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE***
Bus Testing Certification and Report	Procurements of buses and modified mass produced vans	§16.m
Transit Vehicle Manufacturer Certification	Procurements of railcars or buses and modified mass produced vans	§12.d(4)
Buy America Certification	Projects >$150,000 that contain steel, iron or manufactured products (see note)	§15.a
Pre-Award Audit	Rolling stock procurements	§16.m
Pre-Award Buy America Certification	Rolling stock procurements>$100,000 (see note)	§16.m
Pre-Award Purchaser's Requirement Certification	Rolling stock procurements	§16.m
Post-Delivery Audit	Rolling stock procurements	§16.m
Post-Delivery Buy America Certification	Rolling stock procurements >$150,000 (see note)	§16.m
Post-Delivery Purchaser's Requirement Certification	Rolling stock procurements	§16.m7.p(3)
On-Site Inspector's Report	Rolling stock procurements for more than 10 vehicles for areas >200,000 in population and 20 for areas <200,000 in population	§16.m
Federal Motor Vehicles Safety Standards Pre-Award and Post-Delivery Certification	Non-rail rolling stock procurements	§16.m
Excluded Parties Listing System search	Procurements > $25,000	§4.b
Lobbying Certification	Procurements > $100,000	§4.d
Standard Form LLL and Quarterly Updates (when required)	Procurements > $100,000 where contractor engages in lobbying activities	§4.d

ATTACHMENT E

Independent Cost Estimate	Solicitation # _____

Contract Type : _____

Date of Estimate: _____

Description of Goods/Services: See sheet attached

Method of Obtaining Estimate:

Published Price List / Past Pricing:
Engineering or technical Estimate:
Independent Third Party Estimate:
Other (Specify)

Cost Estimate Details:

Cost of Standard Items

Product	Delivered	Freight	Notes/Data Source

Cost of Services, Repairs, or Non-Standard Items

Materials	Other Direct Costs	Labor	Labor Class	Allocated Overhead	SG&A	Profit	Total

Signature of Preparer:

ATTACHMENT F

Price Analysis

PO/Contract: _____

The evidence compiled by a price analysis includes:

- Developing and examining data from multiple sources whenever possible that proves or strongly suggests the proposed price is fair.
- Determining when multiple data consistently indicate that a given price represents a good value for the money.
- Documenting data sufficiently to convince a third party that the analyst's conclusions are valid.

DATE: PREPARED BY:

The pricing quoted on the attached sheet(s) is deemed to be fair and reasonable based on the following type of analysis:

_____ Comparison with competing suppliers' prices or catalog pricing for the same item. (Complete comparison matrix and attach supporting quotes or catalog pages.)

_____ Comparison of proposed pricing with in-house estimate for the same item. (Attach signed in-house estimate and explain factors influencing any differences found. Complete summary matrix)

_____ Comparison of proposed pricing with historical pricing from previous purchases of the same item, coupled with market data such as Producer Price Index or Inflation Rate over the corresponding time period. (Attach data and historical price record).

_____ Analysis of price components against current published standards, such as labor rates, dollars per pound etc. to justify the price reasonableness of the whole. (Attach analysis to support conclusions drawn.)

SUMMARY MATRIX

Item	Proposed Pricing	Average Market Price	Competitor A	Competitor B	In-House Estimate	Other

Comments:

ATTACHMENT G

Sole Source Justification and Approval Form

Sole source purchases are not permitted except when clearly and thoroughly justified.

. Estimated contract amount: $

2. Grant Funded: Funding Source: FTA GDot: Other:

3. Recommended supplier name, address, and contact information:

4. Description of requested items or services and their purpose(s):
5. Reason(s) for requesting a sole source purchase:

☐ Original manufacturer or provider; no other local distributors exist.
☐ Only local distributor for the original manufacturer or provider.
☐ Parts or equipment not interchangeable with similar parts of another manufacturer.
☐ Only known item or service matching the requested needs or performing the intended task.
☐ Sole provider of a licensed or patented good or service.
☐ Sole provider of items compatible with existing equipment, inventory, systems, programs or services.
☐ Sole provider of goods or services established as standard (Please provide evidence of such a standard). Sole provider of factory-authorized warranty service.
☐ Used item representing good value and advantage.
☐ None of the above applies (Please attach a detailed explanation and justification for this sole source request).

6. Explain why the product or service requested is the only one that can satisfy your requirements, as well as why alternatives are unacceptable. Be specific with regard to specifications. Attach additional pages if necessary.

REQUESTED BY: DEPARTMENT:
PREPARED BY: DATE:

I hereby certify that, to the best of my knowledge, the above justification is accurate and request that a sole source be approved for the procurement of the above requested items or services.

USER HEAD SIGNTURE

RESERVED FOR PROCUREMENT ONLY

REASON FOR DENIAL:

REQUISTION NUMBER:
APPROVED: YES _____NO _____

ATTACHMENT H

Cost Analysis Form

COST ANALYSIS SUMMARY (For New Contracts Including Letter Contracts)						
SOLICITATION #			SUPPLIES AND/OR SERVICES TO BE FURNISHED			
PREPARER'S NAME, DEPARTMENT, TITLE, PHONE						
DIVISION(S) AND LOCATION(S) WHERE WORK IS TO BE PERFORMED			APPROVAL SIGNATURE			
DETAIL DESCRIPTION OF COST ELEMENTS						
1.DIRECT MATERIAL			VENDOR A PROPOSAL	VENDOR B PROPOSAL	INDEPENDENT ESTIMATE	ANALYSIS
PURCHASED PARTS						
SUBCONTRACTED ITEMS						
OTHER – RAW MATERIAL STANDARD COMMERCIAL ITEMS						
TOTAL DIRECT MATERIAL						
2. MATERIAL OVERHEAD (RATE % X $ BASE*)						
3. DIRECT LABOR	ESTIMATED HOURS	RATE/HOUR	VENDOR A ($)	VENDOR B ($)	INDEPENDENT ESTIMATE	VARIANCE
TOTAL DIRECT LABOR						

ATTACHMENT H - PAGE 2

4. LABOR OVERHEAD	ESTIMATED HOURS	RATE/HOUR	VENDOR A ($)	VENDOR B ($)	INDEPENDENT ESTIMATE	VARIANCE
OH RATE						
X BASE (LABOR TOTAL ABOVE)						
TOTAL LABOR OVERHEAD						

OTHER DIRECT COSTS	VENDOR A ($)	VENDOR B ($)	INDEPENDENT ESTIMATE	VARIANCE
SPECIAL TOOLING/EQUIPMENT TOTAL SPECIAL TOOLING/EQUIPMENT				
TRAVEL				
RANSPORTATION				
ER DIEM OR SUBSISTENCE				
TOTAL TRAVEL				

DETAIL DESCRIPTION OF COST ELEMENTS (CONTINUED)	VENDOR A ($)	VENDOR B ($)	INDEPENDENT ESTIMATE	VARIANCE
INDIVIDUAL CONSULTANTS SERVICES				
TOTAL INDIVIDUAL CONSULTANT SERVICES				
OTHER				
TOTAL OTHER				
SUBTOTAL DIRECT COST AND OVERHEAD				
GENERAL AND ADMINISTRATIVE RATE %				
X $ BASE (USE 5.E ABOVE)				
ROYALTIES (IF ANY)				
SUBTOTAL ESTIMATED COST				
CONTRACT FACILITIES CAPITAL&COST OF MONEY				
SUBTOTAL ESTIMATED COST				
FEE OR PROFIT				
TOTAL ESTIMATED COST AND FEE OR PROFIT				
DISCOUNTS				
OPTION COSTS (SPECIFY)				
ADJUSTED COST				

ANALYSIS GUIDELINES

1. DIRECT MATERIAL

A. Analyze Purchased Parts: Provide a consolidated price analysis of material quantities included in the various tasks, orders, or contract line items being proposed and the basis for pricing (vendor quotes, invoice prices, etc.)

B. Subcontracted Items: Analyze the total cost of subcontract effort and supporting written quotations from the prospective subcontractors

C. Other:

1. Raw Material: Review any materials in a form or state that requires further processing. Analyze priced quantities of items required for the proposal. Consider alternatives and total cost impact.
2. Standard Commercial Items: Analyze proposed items that the offeror will provide, in whole or in part, and review the basis for pricing. Consider whether these could be provided at lower cost from another source.

2. MATERIAL OVERHEAD

Verify that this cost is not computed as part of labor overhead (item 4) or General and Administrative (G&A) (Item 6)

3. DIRECT LABOR

Analyze the hourly rate and the total hours for each individual (if known) and discipline of direct labor proposed. Determine whether actual rates or escalated rates are used. If escalation is included, analyze the degree (percent) and rationale used. Compare percentage of total that labor represents for each bid.

4. LABOR OVERHEAD

Analyze comparative rates and ensure these costs are not computed as part of G&A. Determine if Government Audited rates are available.

5. OTHER DIRECT COSTS

A. Special Tooling/Equipment. Analyze price and necessity of specific equipment and unit prices.

B. Travel. Analyze each trip proposed and the persons (or disciplines) designated to make each trip. Compare and check costs.

C. Individual Consultant Services. Analyze the proposed contemplated consulting.
Compare to independent estimate of the amount of services estimated to be required and match the consultants' quoted daily or hourly rate to known benchmarks.

D. Other Costs. Review all other direct charge costs not otherwise included in the categories described above (e.g., services of specialized trades, computer services, preservation, packaging and packing, leasing of equipment and provide bases for pricing. Scan for duplication or omissions.

6. GENERAL AND ADMINISTRATIVE EXPENSE

See notes on labor overhead above and check whether the base has been approved by a Government audit agency for use in proposals.

7. ROYALTIES

If more than $250, analyze the following information for each separate royalty or license fee; name and address of licenser; date of license agreement; patent numbers, patent application serial numbers, or other basis on which the royalty is payable; brief description (including any part of model numbers or each contract item or component on which the royalty is payable); percentage or dollar rate of royalty per unit; unit price of contract item; number of units; and total dollar amount of royalties

8. SUBTOTAL ESTIMATED COST

Compare the total of all direct and indirect costs excluding Cost of Money and Fee or Profit. Note reasons for differences.

9. CONTRACT FACILITIES CAPITAL AND COST OF MONEY

Analyze the offerors' supporting calculations and compare to known standards.

10. SUBTOTAL ESTIMATED COST

This is the total of all proposed costs excluding Fee or Profit. Determine the competitive range.

11. FEE OR PROFIT

Review the total of all proposed Fees or Profit. Remember that the FTA prohibits cost plus percentage of cost contracting, and caps A&E profits at 10%.

12. TOTAL ESTIMATED COST AND FEE OR PROFIT

Analyze the range of total estimated costs including Fee or Profit, and explain variance to independent estimate. Identify areas for negotiation or areas to be challenged. Explain your conclusions regarding fair and reasonable pricing.

13. DISCOUNTS

Review basis for Discounts and range between offers.

ATTACH NARRATIVE COST ANALYSIS MEMO ADDRESSING ITEMS AS INSTRUCTED ABOVE

ATTACHMENT I

SOLICITATION FILE CHECKLIST

SOLICITATION #		SOLICITATION DESCRIPTION:	
CONTRACT ADMINISTRATOR			

TAB	Included X	DOCUMENTATION	COMMENT
		Purchase Requisition PR No. _____ PO No. _____ Funding Source (check one): Federal Local __ Budgetary Sufficiency. Proper Approvals. Requirements Defined; Description, SOW, Specification, Drawing, Warranty Provisions and/or other Data/Documents. Delivery Due Date/Period of Performance	
		Independent Cost Estimate	
		Sole Source Justification, if applicable.	
		Schedule of Events	
		DBE Requirements / Documentation	
		Risk Management Requirements / Documentation	
		Required Third Party Clauses, if applicable	
		Approval Review	
		Original Solicitation and Original Amendments	
		Supplier Notification list	
		Affidavits of Advertising & Tearsheets	
		Internal Correspondence	
		Correspondence	
		Pre-Bid/Pre-Proposal Conference Summary Attendee List Record of Questions Record of Responses	
		Addendums	
		Bid Tab / Proposal Register	
		Bid Technical Evaluation Documentation	
		Bid Bonds, if applicable	(Construction Only)
		Evaluation Team Approval and No-Conflict Forms	(RFP Only)
		Evaluation Documentation/Scoresheets	(RFP Only)
		Oral Discussions	(RFP Only)
		Final Proposal Revision (FPR)/Price Proposal Evaluation Documentation	(RFP Only)
		Negotiation Memorandum and Documentation	(RFP Only)

ATTACHMENT I - PAGE 2

SOLICITATION FILE CHECKLIST

		Determination of Price Fair and Reasonable / Cost or Price Analysis Determination of Responsiveness Determination of Responsibility c) References d) Financial/Bank Reference e) Debarment, verification of EPLS.gov	
		Successful Bid(s) or Proposal(s), including any FPR(s)	
		DBE Commitment Forms, if applicable	
		Payments to DBE/SBE subcontractors	
		Unsuccessful Bidders/Offerors ▪ Debriefing Summaries ▪ Notices ▪ Bid or Proposal Copies ▪ Proof of Receipt	
		Findings and Determinations ▪ Reason(s) for F&D ▪ Supplemental Documentation ▪ Review & Approval ▪ Protests	
		Cancellation	
		Procurement Summary	

ATTACHMENT J

Rolling Stock Purchases

Contracting Officers shall assure compliance with FTA regulations at 49 CFR Part 663. These regulations apply to the purchase of rolling stock for carrying passengers in revenue services. Pre-award and post-delivery audits are required to assure compliance with the Authority's bid specifications, Buy America, and Federal Motor Vehicle Safety requirements. The Authority must certify compliance and must maintaining records of the certifications. Records are subject to FTA review.

Contract Term Limitation

Augusta shall not enter into any contract for rolling stock or replacement parts with a period of performance exceeding five (5) years inclusive of options. All other types of contracts (supply, service, leases of real property, revenue and construction, etc.) will be based on sound business judgment. Length of contracts shall be for not more than the amount of time required to accomplish the purpose of the contract, and will also include consideration for competition, pricing, fairness, and public perception. Once a contract has been awarded, an extension of the contract term length that amounts to an out of scope change, will require a sole source justification.

Buy America

As a condition of responsiveness to bidding for procurements of rolling stock, iron, steel, or manufactured products greater than $100,000 the bidder must submit with the bid or offer, a completed Buy America certificate in accordance with Part 661.6 for steel, iron, and manufactured products, or Part 661.12 for rolling stock (including train control, traction power, and communication equipment). Once submitted the bidder is bound by the certification provided. If the bidder does not submit a certification, the bid shall be considered nonresponsive. If the bidder executes certification that it cannot comply but may be eligible for an exception, then Augusta shall review the circumstances and determine if it should request a waiver form the FTA. There are specific instances included in the regulations for waiver of Buy America provisions including that it is in the public's best interest, that there are no U.S. products available, or there is a 25 percent price difference between the foreign and domestic products.

See FTA's Buy America web page
http://www.fta.dot.gov/legal/buy_america/14456_ENG_HTML.htm for additional information on requirements.

Please see the attached FTA Contract Clauses as a guide to ensure the proper clauses are included in the procurement process. These clauses are required to be included in all FTA contracts and purchase orders.

A full text of all Contract Clauses are available from FTA Best Practices Manual.

ATTACHMENT K

Pre-Award and Post-Delivery Review Checklist

Vendor: _____

Contract No: _____

Pre-Award Review
Compliant with FTA Pre-Award Requirements
(Before signing a contract with a supplier)

1. **Buy America Certification**

   a) _____ **Review and Verify 60 Percent Domestic Content**

   b) _____ **Review and Verify Proposed U.S. Final Assembly Location, Operations, and Total Cost**

   c) _____ **Complete a Pre-Award Buy America Compliance Certification**

2. **Purchaser's Requirements Certification**

   a) _____ **Check Bid Specification Compliance With Solicitation Specifications**

   b) _____ **Complete Manufacturer Capability Study**

   c) _____ **Complete a Pre-Award Purchaser's Requirements Certification**

3. **FMVSS – Compliant**

   a) _____ **Obtain FMVSS Self Certification sticker information from the manufacturer**

   b) _____ **Complete a Pre-Award FMVSS Compliance Certification**

   c) _____ **File FMVSS Certification for future FTA Reviews**

ATTACHMENT K – PAGE 2

Post-Delivery Review
Compliant with FTA Post-Delivery Requirements
(Before using the vehicles in transit service)

1. Buy America Certification

a) _____Review and Verify 60 Percent Domestic Content

b) _____Review and Verify Actual U.S. Final Assembly Location, Operations, and Total Cost

c) _____Complete a Post-Delivery Buy America Compliance Certification

2. Purchaser's Requirements Certification

a) _____Complete Resident Inspector's Report; if applicable (10 or more buses/vans)

b) _____Complete Visual Inspections and Performance Tests

c) _____Complete a Post-Delivery Purchaser's Requirements Certification

d) _____Verify the manufacturer's FMVSS sticker is affixed to each bus. Complete an FMVSS Certification and file in procurement file

ATTACHMENT L

Request for Proposal

[insert date of solicitation]

[insert Proposal number]

Certificate of Compliance with Bus Testing Requirement

The undersigned certifies that the vehicle offered in this procurement complies and will, when delivered, comply with 49 USC § 5323(c) and FTA's implementing regulation at 49 CFR Part 665 according to the indicated one of the following three alternatives.

Mark one and only one of the three blank spaces with an "X."

a) _____ The buses offered herewith have been tested in accordance with 49 CFR Part 665 on _____(date). If multiple buses are being proposed, provide additional bus testing information below or on attached sheet. The vehicles being sold should have the identical configuration and major components as the vehicle in the test report, which must be submitted with this Proposal. If the configuration or components are not identical, then the manufacturer shall provide with its Proposal a description of the change and the manufacturer's basis for concluding that it is not a major change requiring additional testing. If multiple buses are being proposed, testing data on additional buses shall be listed on the bottom of this page.

b) _____ The manufacturer represents that the vehicle is "grandfathered" (has been used in mass transit service in the United States before October 1, 1988, and is currently being produced without a major change in configuration or components), and submits with this Proposal the name and address of the recipient of such a vehicle and the details of that vehicle's configuration and major components.

c) _____ The vehicle is a new model and will be tested and the results will be submitted to the Agency prior to acceptance of the first bus.

The undersigned understands that misrepresenting the testing status of a vehicle acquired with federal financial assistance may subject the undersigned to civil penalties as outlined in the Department of Transportation's regulation on Program Fraud Civil Remedies, 49 CFR Part 31. In addition, the undersigned understands that FTA may suspend or debar a manufacturer under the procedures in 49 CFR Part 29.

Company name:

Name and title of the Proposer's authorized official:

_____

Authorized signature Date

ATTACHMENT M

Request for Proposal

[insert date of solicitation] [insert Proposal number]

Federal Motor Vehicle Safety Standards

The Proposer and (if selected) Contractor shall submit (1) manufacturer's FMVSS self-certification sticker information that the vehicle complies with relevant FMVSS or (2) manufacturer's certified statement that the contracted buses will not be subject to FMVSS regulations.

Company name:

Name of signer:

Title:

_____

Authorized signature Date

ATTACHMENT N

Request for Proposal
[insert date of solicitation]
[insert Proposal number]

Federal Certifications

Buy America Certification

This form is to be submitted with an offer exceeding the small purchase threshold for federal assistance programs, currently set at $150,000 and micro-purchases $3,500.

Certificate of Compliance

The Proposer hereby certifies that it will comply with the requirements of 49 USC Section 5323U)(2)(C), Section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, and the regulations of 49 CFR 661.11:

Name and title:

Company:

_____

Authorized D

Certificate of Non-Compliance

The Proposer hereby certifies that it cannot comply with the requirements of 49 USC Section 5323U)(2)(C) and Section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, but may qualify for an exception to the requirements consistent with 49 USC Sections 53230)(2)(8) or U)(2)(D), Sections 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act, as amended, and regulations in 49 CFR 661.7.

Name and title:

Company:

_____

Authorized D

ATTACHMENT O

Request for Proposal
[insert date of solicitation]
[insertProposal number]

Debarment and Suspension Certification for Prospective Contractor

Primary covered transactions must be completed by Proposer for contract value over $25,000.

Choose one alternative:

☐ – The Proposer, [insert name], certifies to the best of its knowledge and belief that it and its principals:

1. Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or agency;
2. Have not within a three-year period preceding this Proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state or local) transaction or Contract under a public transaction; violation of federal or state antitrust statutes or commission or embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
3. Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state, or local) with commission of any of the offenses enumerated in Paragraph 2 of this certification; and
4. Have not within a three-year period preceding this Proposal had one or more public transactions (federal, state or local) terminated for cause or default.

OR

☐ – The Proposer is unable to certify to all of the statements in this certification, and attaches its explanation to this certification. (In explanation, certify to those statements that can be certified to and explain those that cannot.)

The Proposer certifies or affirms the truthfulness and accuracy of the contents of the statements submitted on or with this certification and understands that the provisions of Title 31 USC § Sections 3801 are applicable thereto.

– **Executed in** [insert city and state].

Name:

Authorized signature Date

ATTACHMENT P

Request for Proposal
[insert date of solicitation] [insert Proposal number]

Debarment and Suspension Certification (Lower-Tier Covered Transaction)

This form is to be submitted by each Subcontractor receiving an amount exceeding $25,000.

The prospective lower-tier participant (Proposer) certifies, by submission of this Proposal, that neither it nor its "principals" as defined at 49 CFR § 29.105(p) is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any federal department or agency.

If the prospective Proposer is unable to certify to the statement above, it shall attach an explanation, and indicate that it has done so by placing an "X" in the following space: _____

THE PROPOSER, , CERTIFIES OR AFFIRMS THE TRUTHFULNESS AND ACCURACY OF EACH STATEMENT OF ITS CERTIFICATION AND EXPLANATION, IF ANY. IN ADDITION, THE PROPOSER UNDERSTANDS AND AGREES THAT THE PROVISIONS OF 31 USC §§3801 *ET SEQ.* APPLY TO THIS CERTIFICATION AND EXPLANATION, IF ANY.

Name and title of the Proposer's authorized official:

Authorized signature Date

_____

ATTACHMENT Q

Request for Proposal
[insert date of solicitation]
[insert Proposal number]

Non-Collusion Affidavit

This affidavit is to be filled out and executed by the Proposer; if a corporation makes the bid, then by its properly executed agent. The name of the individual swearing to the affidavit should appear on the line marked "Name of Affiant." The affiant's capacity, when a partner or officer of a corporation, should be inserted on the line marked "Capacity." The representative of the Proposer should sign his or her individual name at the end, not a partnership or corporation name, and swear to this affidavit before a notary public, who must attach his or her seal.

State of _____ County of _____

I, _____, being first duly sworn, do hereby state that
(Name of Affiant)

I am _____ of _____
(Capacity) (Name of Firm, Partnership or Corporation)

whose business is

_____

and who resides at

_____

and that

_____
(Give names of all persons, firms, or corporations interested in the bid)

is/are the only person(s) with me in the profits of the herein contained Contract; that the Contract is made without any connection or interest in the profits thereof with any persons making any bid or Proposal for said Work; that the said Contract is on my part, in all respects, fair and without collusion or fraud, and also that no members of the Board of Trustees, head of any department or bureau, or employee therein, or any employee of the Authority, is directly or indirectly interested therein.

_____
Signature of Affiant Date

Sworn to before me this _____ day of _____, 20 _____.

_____
Notary public

My commission expires

- Seal

ATTACHMENT R

CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, ``Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly. This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ``Disclosure Form to Report Lobbying," in accordance with its instructions. Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

_____

Signature

_____

Title

_____

Organization

ATTACHMENT S

Request for Proposal [insert date of solicitation] [insert Proposal number]

DBE Approval Certification

I hereby certify that the Proposer has complied with the requirements of 49 CFR 26, Participation by Disadvantaged Business Enterprises in DOT Programs, and that its goals have not been disapproved by the Federal Transit Administration.

Name and title of the Proposer's authorized official:

_____

Authorized Signature Date

ATTACHMENT T

PROMPT PAYMENT AFFIDAVIT

Contractor will place a check in the appropriate box below that applies to this payment request.

Re: Payment Request No. _____

I, _____ (Name), the _____ (Title - e.g., ADMINISTRATOR, Vice ADMINISTRATOR, etc.) of _____ ("Company"), do state the following with regard to payments made under Contract No. _____ ("Contract"):

1. ____Subcontractors, at the first tier, both DBE and non-DBE, who completed work and were listed for payment on the prior Payment Request No. _____, were paid no later than five (5) business days after Company received payment from Augusta, Georgia.
2. ____Copies of invoices and cancelled checks for subcontractors at the first tier who were paid under the prior payment request have been delivered or mailed to the DBE Department. In addition, Company has attached to the current Payment Request all lien waivers for prior subcontractor payments and any other documentation required by Augusta, Georgia. (Failure to attach all required documentation to the Payment Request or forward cancelled checks and invoices to The Augusta, Georgia DBE Department may cause the Payment Request to be rejected by Augusta, Georgia.)
3. ____All retainage amounts withheld from any subcontractor who satisfactorily completed its portion of the contract work, including punch list items, were paid to the subcontractor(s) no later than fourteen (14) business days after it satisfactorily completed its work, whether or not Augusta, Georgia has paid said retainage amounts to Company. Attach a copy of the cancelled check evidencing payment of each retainage amount.
4. ____There was no delay in or postponement of any payment owed to a subcontractor, whether periodic payment or retainage amount, except for good cause and after receipt of prior written approval from the Augusta, Georgia Purchasing Agent.

   Attach a copy of the written approval from the Augusta, Georgia Procurement Director.

_____
Company Name

_____
Signature

_____
Print Name

Date: _____

Subscribed and sworn to before me this _____day of _____ 20__.

_____

Notary Public

ATTACHMENT U (PAGE 1)

Contract/Purchase Order File Index
(For Sealed Bids Only)

INSTRUCTIONS: Applicable items should be entered in chronological order by tab number. Documents maintained in the file will be numbered and filed consecutively in each section with the highest number on top. When an item is not applicable, it will be designated with "NA" in the Tab Column.

Section A - Solicitation Documents		
Tab #	**Document(s)**	**Audit**
1	Purchase Request	
2	Specifications & DBE Goals	
3	Requirement Justification	
4	Independent Cost Estimate	
5	Bidder's List	
6	Contractor Information Form	
7	Justification of Procurement Method	
8	Copy of IFB	
9	Proof of publication	
10	IFB Attachments / Modifications	
11	Pre-Bid Minutes & List of Attendees	
12	Correspondence with Bidders	
13	Protests Prior to Bid Opening	
14	Interoffice Correspondence	
15	Review of Responsiveness	

Sealed Bid No._____ Contract Administrator: _____

Date:_____

Contract/Purchase Order File Index (For Sealed Bids Only)

INSTRUCTIONS: Applicable items should be entered in chronological order by tab number. Documents maintained in the file will be numbered and filed consecutively in each section with the highest number on top. When an item is not applicable, it will be designated with "NA" in the Tab Column.

Section B – Award Documents		
Tab #	**Document(s)**	**Audit**
1	Rationale for Method of Procurement Copy of Each Bid	
2	Late Bid – Bid Errors	
3	Bid Analysis / Tabulation Sheet	
4	Technical Evaluation & Pre-Award Survey	
5	Affirmative Action Evaluation / DBE Plan	
6	Bidder's Responsibility Determination	
7	Price Analysis	
8	Record of Negotiation for Single Bid	
9	Justification of Contract Type	
10	Award Recommendation Memo	
11	Board Resolution	
12	Notice of Award	
13	Notice to Unsuccessful Bidders (Bond, Check Returns)	
14	FTA Approval	
15	Legal Review of Contract Documents	
16	Contract Document	
17	Bond & Certificate of Insurance	
18	Notice to Proceed	
19	Purchase Order	

Contract / Purchase Order File Index
(For Sealed Bids Only)

INSTRUCTIONS: Applicable items should be entered in chronological order by tab number. Documents maintained in the file will be numbered and filed consecutively in each section with the highest number on top. When an item is not applicable, it will be designated with "NA" in the Tab Column.

Section C – Contract Administration Documents		
Tab #	**Document(s)**	**Audit**
1	Post Award Conference	
2	Status Reports	
3	Change Notices / Modifications / Change Orders	
4	Site Visit Reports	
5	Progress Meeting Minutes	
6	Quality Assurance Records	
7	Termination / Stop Work Notices or Resolution Plan	
8	Invoices and Check Requests	
9	Records of Payments	
10	Notice of Substantial Acceptance	
11	Notice of Claims	
12	Release of Claims / Bonds	
13	Assignments	
14	Notice of Final Payment	
15	Audit Reports	
16	Liquidated Damages	
17	Close Out Documentation	

ATTACHMENT V (PAGE 1)

Contract / Purchase Order File Index (For RFP Only)

INSTRUCTIONS: Applicable items should be entered in chronological order by tab number. Documents maintained in the file will be numbered and filed consecutively in each section with the highest number on top. When an item is not applicable, it will be designated with "NA" in the Tab Column.

Section A - Solicitation Documents		
Tab #	**Document(s)**	**Audit**
1	Purchase Request Rationale for Method of Procurement	
2	Specifications / Statement of Work	
3	Justification for Procurement	
4	Cost Estimate	
5	Set Aside Decision / DBE Goal	
6	Contractor Information Form	
7	Justification of Procurement Method	
8	List of Prospective Proposers	
9	Proof of publication	
10	Copy of RFP	
11	Addenda	
12	Pre-Proposal Minutes & List of Attendees	
13	Correspondence with Bidders	
14	Interoffice Correspondence	
15	Review of Responsiveness	

RFP No. _____

Contract Administrator: _____

Date: _____

Page 1 of 3

ATTACHMENT V (PAGE 2)

Contract / Purchase Order File Index (For RFP Only)

INSTRUCTIONS: Applicable items should be entered in chronological order by tab number. Documents maintained in the file will be numbered and filed consecutively in each section with the highest number on top. When an item is not applicable, it will be designated with "NA" in the Tab Column.

Section B – Award Documents		
Tab #	**Document(s)**	**Audit**
1	Copy of Each Proposal	
2	Proposal Tabulation Sheet	
3	Evaluation Team Notification	
4	Evaluation Sheet / Matrix	
5	Pre-Award Survey	
6	Determination of Zone of Consideration	
7	Late Proposers	
8	Invitations for Oral Interviews	
9	Notice of Rejection	
10	Minutes of Meetings	
11	Correspondence with Proposers	
12	Cost or Price Analysis	
13	Justification of Contract Type	
14	Negotiation Memorandum	
15	Copy of Each Best & Final Offer	
16	Award Recommendation Memo	
17	Board Resolution	
18	Legal Review of Contract Documents	
19	Notice of Award	
20	Notice to Unsuccessful Bidders	
21	Procurement Summary	
22	Determination and Findings	
23	Bonds & Certificates of Insurance	
24	Contract Document	
25	Notice to Proceed	
26	Purchase Order	

ATTACHMENT V (PAGE 3)

Contract / Purchase Order File Index (For RFP Only)

INSTRUCTIONS: Applicable items should be entered in chronological order by tab number. Documents maintained in the file will be numbered and filed consecutively in each section with the highest number on top. When an item is not applicable, it will be designated with "NA" in the Tab Column.

Section C – Contract Administration Documents		
Tab #	**Document(s)**	**Audit**
1	Post Award Conference	
2	Quality Assurance Records	
3	Change Notices / Modifications / Change Orders	
4	Periodic Status Reports	
5	Contractor Evaluation Form	
6	Site Visit Reports	
7	Termination / Stop Work Notices or Resolution Plan	
8	Invoices and Check Requests	
9	Records of Payments & Receipts	
10	Advance or Progress Payment Documents	
11	Notice of Substantial Acceptance	
12	Punch List Discrepancies	
13	Notice of Final Acceptance	
14	Notice of Claims	
15	Release of Claims / Bonds	
16	Assignments	
17	Notice of Final Payment	
18	Audit Reports	
19	Liquidated Damages	
20	Close Out Documentation	

ATTACHMENT W

Responsibility Determination Form

BID/RFP No: _____

Supplier: _____

Date: _____

For each of the areas described below, check that the appropriate research has been accomplished and provide a short description of the research and the results.

	Acceptable		Comment
1. Appropriate financial, equipment, facility, and personnel.	Yes	No	
2. Ability to meet the delivery schedule.	Yes	No	
3. Satisfactory period of performance.	Yes	No	
4. Satisfactory record of integrity, not on declined or suspended listing.	Yes	No	
5. Receipt of all necessary data from supplier.	Yes	No	
6. Debarred and Suspended List been checked (supplier not listed)	Yes	No	

ATTACHMENT X

Method of Procurement
Decision Matrix Form

To best determine which method of procurement is suitable, classify your situation by checking off the appropriate boxes below. All elements must apply to use that method.

Micro-purchase

- ☐ Amount <$3000
- ☐ Multiple sources

Competitive Procurement

- ☐ Amount >$3000
- ☐ Multiple sources available
- ☐ Not an Emergency

Small Purchase

- ☐ Amount < $100,000
- ☐ Complete and Adequate Specification or Description
- ☐ Two or more quotes available

Sealed Bid (IFBs)>$100,000

- ☐ Complete and Adequate Specifications or Description
- ☐ Two or more responsible Bidders willing to compete
- ☐ Selection can be made on basis of price alone
- ☐ Firm Fixed Price
- ☐ No Discussion with Bidders required after receipt of bids

Sole Source

- ☐ Approved by FTA
- ☐ OEM, or custom item OR
- ☐ Only one source available OR
- ☐ Competition is inadequate after Solicitation OR
- ☐ Emergency / Public exigency
  - There is a health or safety issue that prohibits delays

Competitive Proposal (RFPs) > $100,000

- ☐ Complete specifications not feasible
- ☐ Bidder input needed for specification
- ☐ Two or more responsible bidders willing to compete
- ☐ Discussion needed with bidders after proposals
- ☐ Fixed price can be set after discussions OR
- or a cost reimbursement contract is determined

Selection of Contract Type

- ☐ Fixed Price
- ☐ Firm fixed unit prices
- ☐ Cost plus fixed fee
- ☐ Time and material (T&M)
- ☐ Blanket purchase order
- ☐ Indefinite Delivery Indefinite Quantity

Time and Material (T&M)

- ☐ Fixed price cannot be set for work
- ☐ Complete extent of work unknown
- whether time, or material use or both

Best Value

- ☐ Price and qualitative consideration
- Greatest value to Augusta

Section 200.320 found below describes the five methods of procurements:

1) Micro-purchase (less than to $3,000),
2) Small purchase (less than $150,000),
3) Sealed bids purchases (more than $150,000),
4) Competitive proposal purchases (more than $150,000), and
5) Noncompetitive purchases (special circumstances which are applicable for all purchase levels).

All five procurement types must comply with the Procurement Standards in section 200.318, also found below, which can be summarized generally as follows:

- the purchase complies with the organization's documented procedures in place,
- purchases are necessary,
- open competition (to the extent required by each method),
- a conflict of interest policy and
- proper documentation for the purchases.

ATTACHMENT Y

Bid Checklist Form

		YES	NO
1.	Price is firm, fixed and definite		
2.	Bid is responsive to requirements of the solicitation		
3.	Exceptions taken to any material term or condition of the solicitation		
4.	Bid is ambiguous		
5.	All amendments to solicitation acknowledge		
6.	Bid signed		
7.	All material representations, bonds, guarantees and certifications completed		
8.	Required information submitted		
9.	Bid is not defective		

ATTACHMENT Z

Bid Cost Factors Form

Solicitation/Bid No: _____

Supplier Price Evaluation Factors:

1. Purchase price: $_____
2. Payment discount terms _____
3. Transportation costs _____
4. Warranty _____
5. Installation _____
6. Training _____
7. Technical assistance _____

Total Bid $_____

Evaluation _____

ATTACHMENT AA

NONCOMPETITIVE PROCUREMENT JUSTIFICATION FORM

Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies:

Check one:

_____ The item is available only from a single source (sole source justification is attached).

_____ The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (documented emergency condition is attached).

_____ FTA authorizes noncompetitive negotiations (letter of authorization is attached).

_____ After solicitation of a number of sources, competition is determined inadequate (record of source contacts is attached).

_____ The item is an associated capital maintenance item as defined in 49 U.S.C. §5307(a)(1) that is procured directly from the original manufacturer or supplier of the time to be replaced (price certification attached).

Comments:

_____

_____

_____

_____

_____ Cost Analysis is attached

_____ _____

Procurement Agent Procurement Director

_____ _____

Date Date

Disclosure Statement

The U.S. Department of Transportation Federal Transit Administration Master Agreement, Section 3a(1) prohibits the recipient's employees, officers, board members or agents from participating in the selection, award, or administration of a third party contract or subagreement supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when any of the following parties has a financial or other interest in the entity selected for award:

a) an employee, officer, board member or agent;
b) any member of his or her immediate family;
c) his or her partner;
d) an organization that employs or intends to employ any of the above.

It is the responsibility of the officers and employees of Augusta, Georgia upon acquiring interests which conflict or might appear to conflict with the interests of the Federal Transit Administration and/or Augusta, Georgia to bring them forth immediately for resolution.

I, the undersigned Augusta, Georgia employee, acknowledge receipt, understanding and acceptance of the Augusta, Georgia Code and this Disclosure Statement, and certify that (1) I have not solicited or received any kickbacks or gratuities, and (2) I have no financial interest in any supplier with whom Augusta, Georgia does business. If any real or perceived conflict should arise in the discharge of my duties, I will report such conflict immediately to the Director of Human Resources in writing.

Name: _____ Title: _____

Date: _____

This statement will be renewed on an annual basis

ATTACHMENT CC

Sole Source Cost Analysis Form

Prior to proceeding with sole source procurements, including contract modifications, the requesting department must perform a cost analysis in order to demonstrate the proposed price is fair and reasonable. The cost analysis should examine the elements of cost (labor hours, material, overhead, and profit) for professional consulting and architectural and engineering type contracts.

Please note: It is not sufficient to list the last price paid and the percentage change of the newly quoted price. Actual analysis of the figures should be evident to explain why any increase or decrease in quoted costs is reasonable. All of the following elements must be completed for each proposed sole source procurement.

1. Verification of cost or pricing data and evaluation of cost elements:

_____
_____
_____
_____
_____
_____

2. Comparison of cost proposed with independent or previous cost estimate, market indices, and other factors:

_____
_____
_____
_____
_____
_____

3. Evaluation of suppliers' costs first hand and assessment for completeness and reasonableness, including evidence and rationale for determination.

_____
_____
_____
_____
_____

ATTACHMENT DD

Bid Summary Form

Bid Opening:_____

Bid #: _____ Description: _____ Department: _____

Name of Bidder	Bid Deposit	Total Bid	Unit Price	Unit Price	Unit Price	Unit Price	Unit Price	Responsive Bid (Y/N)	Bid Rejected (Reason)

This Bid was opened at the time stated in the advertisement:_____
Initials

Person opening Bids: _____
Signature: _____
Date/Time: _____

ATTACHMENT EE

Award Recommendation & Justification Form

Department: _____

Procurement Number: _____
(RFP/BID #)

Subject: _____

Report Date:_____ Number Bids / RFP'S Mailed:_____ Number of Bids / RFP'S Received: _____

Recommendation:

_____
_____
_____
_____
_____
_____
_____
_____
_____
_____
_____

Justification:

_____
_____
_____
_____
_____
_____
_____
_____

Approvals:

_____ _____
PROCURING AGENT DIRECTOR OF PROCUREMENT

ATTACHMENT FF

Price/Rate Quotation Form

Department: _____

Subject: _____

Report Date: _____ Number of Quotes Received: _____

Qty.	Qty/Ctn	Item	Vendor	Price	Amount

Recommendation:

_____

_____

_____

_____

_____

_____

Approvals:

_____ _____

PROCURING AGENT

DIRECTOR OF PROCUREMENT

ATTACHMENT GG

Lease vs. Purchase Analysis

For Federal Transit Administration (FTA) Funded Procurements

FTA Background:

Since equipment leases are considered "third party contracts" within the meaning of FTA Circular 4220.1E, the requirements of that Circular apply to such procurements. FTA Circular 4220.1E requires a lease versus purchase analysis to determine the most economical approach to any given procurement.

Lease vs. purchase alternatives - It is usually less economical to lease equipment than to purchase it. However, there are some instances where this is not true. For example, short-term leases of equipment which is required for a short time or for a unique task may be reasonable and economically sound. It may also be advisable to lease equipment tath undergoes rapid technological change such as personal computers and other IT related equipment. In some cases, it is easier to have equipment maintained if it is leased. But long term leases and leases for items that should be purchased and capitalized but cannot be because of budget constraints are not economically prudent. If a decision is made to lease equipment, a lease vs. purchase analysis should be made. The analysis should be appropriate to the size and complexity of the procurement. In determining whether the lease of equipment is feasible**, the following factors must be considered**:

1. Estimated length of the period the equipment is required and the amount of time of actual equipment usage;

- Technological obsolescence of the equipment;

- Financial and operating advantages of alternative types and makes of equipment;

- Total rental cost for the estimated period of use;

2. Net purchase price, if acquired by purchase;

- Transportation and installation costs;

ATTACHMENT GG (Page 2)

Lease vs. Purchase Analysis
(Continued)

- Maintenance, storage and other service costs;

- Trade-in or salvage value;

- Imputed interest costs;

- Availability of a servicing facility especially for highly complex equipment (can the Agency service the equipment if it is purchased).

Based on this review, it is recommended to:

Purchase ☐ Lease ☐

Requisition Title:	
Submitted by: (Print Name)	
Signature:	
Date:	

FTA Lease vs. Purchase Analysis Form
Page 2 of 2

ATTACHMENT HH

Compliance Matrix by Department

Compliance Area	Transit	Finance	Procurement	Planning	Legal Counsel	Administrator's Office	Mayor's Office	Commissioners	Engineering	Fleet Management	Parks and Rec	Risk Management	DBE	EEO	Comments
Key: **O = Owner of Requirement** **A = Dept. Responsible for Compliance Action** **S = Dept Providing Support**															
Legal															
Authorizing Resolution	O S				A	S	A	A							
Delegation of Authority	O S				A										
Annual Certification & Assurances	O A				A S		A								
Lobbying (LLL Form)	O S				A										
Financial Capacity															
Multi-year Op & Capital fin plan	OA	S	S	S					S	S		S			
Budgets	A	O							S	S		S			
Local Share	O	A		S											
Financial Management															
Protocol for cost accounting		O A													
Financial Procedures		O A													
Tracking Grant Drawdowns by ALI	OA	A													
Eligible Costs	S	O A	S												
ECHO process	S	O A	S												
Audits		O A													
Reporting A-133 to FTA	S	OA													
Accounts Payable	S	O A	S												
Technical															
Grant administration procedures	O A	S													
Grant planning	O A		S	S						S		S	S		
Grant reporting Milestones	O A														
Grant reporting Financial	O	A													
Capital leasing	OA		S												
Project Management	O A								A S						
Budget and scope changes	OA								A S						
Grant close-out	O A	S													

ATTACHMENT HH (Page 2)

FTA liaison	O A																	
Cross departmental requirements	O					A												
Oversight of Contractor:																		
Drug and Alcohol	O											A						
Bus Maintenance	O								A									
Maintenance																		
Equipment	O																	
Facility	O									A								
Civil Rights Programs/Plans/Reporting																		
Title VI Program	O A			S														
DBE Program	O A		S									A						
EEO Program	O A												A					
Satisfactorily Continuing Control																		
Equipment records	O	A	S															
Inventory and Reconciliation	O	A																
Ensuring Useful Life Reqts Met	O	S							A	A								
Disposals	OA	A							A									
Insurance proceeds	O	A																
FTA interest addressed	OA	S																
Fleet management plan	OA	S		S					A									
Procurement																		
Policy	S		S		S	OA												
Procedures																		
Scope of Work	O A		A															
Method Used to Procure	A		OA															
Procurement Process: Solicititation to Contract Award	S		OA															
DBE Reqts	A		A									OA						
Buy America Clause & Cert	O A		S									A						
Rolling Stock: Pre Award Audit; Purchasers Certs, VMSS	O A		S															
Rolling Stock: Post Delivery Audit; Purchasers Certs, VMSS	O A		S						A									
Debarment and Suspension (SAMS)	S		OA															
Lobbying Cert	S		OA															
FTA Clauses	A		O															
Contract Administration	A		O		S	S			A			S						

Attachment HH (page 3)

ADA														
Fixed route services	O A				S									
Paratransit services	O A				S									
Facility Design/Renovation	O A				S					A				
Drug and Alcohol Program	OS				S						A			

ATTACHMENT II

Article 2 Code of Ethics

Sec. 1-1-20. Code of ethics for government service—A statement of ethical principles.
Sec. 1-1-21. Purpose.
Sec. 1-1-22. Persons subject to this article; definitions.
Sec. 1-1-23. Rules of conduct for employees and public officials of Augusta.
Sec. 1-1-24. Violations; sanctions—Employees.
Sec. 1-1-25. Violations; complaints—Public officials.
Sec. 1-1-26. Disciplinary action against public official.

Sec. 1-1-20. Code of ethics for government service—A statement of ethical principles.
Any person in government service should:
(a Put loyalty to the highest moral principles and to country above loyalty to person, party, or government department.
(b) Uphold the Constitution, laws, and legal regulations of the United States and the State of Georgia and of all governments therein and never be a party to their evasion.
(c) Give a full day's labor for a full day's pay and give to the performance of his duties his earnest effort and best thought.
(d) Seek to find and employ more efficient and economical ways of accomplishing tasks.
(e) Never discriminate unfairly by the dispensing of special favors or privileges to anyone, whether for remuneration or not, and never accept, for himself/herself or his/her family, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of his governmental duties.

(f) Make no private promises of any kind binding upon the duties of office, since a government employee has no private word which can be binding on public duty.

(g) Engage in no business with the government, either directly or indirectly, which is inconsistent with the conscientious performance of his governmental duties.

(h) Never use any information coming to him confidentially in the performance of governmental duties as a means for making private profit.

(i) Expose corruption wherever discovered.

(j) Uphold these principles, ever conscious that public office is a public trust.
(Ord. No. 6239, § 1, 1-18-00)

Sec. 1-1-21. Purpose.

An ethics in government policy for elected and appointed officials and employees of Augusta is hereby established to encourage a commitment of fidelity to the public interest for the people of Augusta.
(Ord. No. 6239, § 1, 1-18-00)

Sec. 1-1-22. Persons subject to this article; definitions.

The following persons are subject to this article:

(a) All employees of Augusta and in any agency created by the Augusta-Richmond County Commission, whether elected or appointed, including the Mayor and members of the Augusta-Richmond County Commission.

(b) Agency heads who are appointed by the Augusta-Richmond County Commission, Mayor or Administrator.

(c) As used in this article the term:

(1) Agency means any agency, authority, department, board, bureau, commission, council, corporation, entities or instrumentality of Augusta, except those headed by an elected official other than the Mayor and any citizens committee, or citizens advisory committee, appointed by the Mayor or the Commission.

(2) Agency head means the director or executive head of an agency.

(3) Commission means the Augusta-Richmond County Commission.

(4) Employee means any agency head, and all individuals employed by the Augusta-Richmond County Commission, Augusta, Georgia, or any agency of Augusta.

(5) Gift means food, lodging, transportation, personal services, a gratuity, subscription, membership, trip, loan, extension of credit on behalf of an employee or public official, forgiveness of debt of an employee or public official, advance or deposit of money for the benefit of an employee or public official, or anything of value, exceeding the value of one hundred dollars ($100.00). A "gift" shall not include:

(A) Food or beverage consumed at a single meal or event; or food, beverages, and registration at group events to which all members of an agency are invited or food, beverage, or expenses afforded employees, public officials, relatives, or others that are associated with normal and customary business or social functions or activities;
(B) Legitimate salary, benefits, fees, commissions, or expenses associated with a recipient's nonpublic business, employment, trade, or profession;
(C) An award, plaque, certificate, memento, or similar item given in recognition of the recipient's civic, charitable, political, pro-fissional, private or public service, or achievement;
(D) Actual and reasonable expenses for food, beverages, travel, lodging, and registration provided to permit participation in a meeting related to official or professional duties, if participation has been approved in writing by the agency head;
(E) Promotional items generally distributed to the general public;

(F) A gift from a relative or personal friend of the employee or public official who is neither a lobbyist nor a vendor; or
(G) Lawful campaign contributions to any elected official or candidate for elected office; and
(H) Courtesy tickets or free admission extended to an elected official for an event as a courtesy or for ceremonial purposes;
(I) a commercially reasonable loan made in the ordinary course of business.

(6) Lobbyist shall have the meaning de-fined in O.C.G.A. § 21-5-70(6).

(7) Person means an individual, partner-ship, committee, association, corps-ration, labor organization, or any other organization or group of individuals.

(8) Public official means the Mayor and members of the Augusta-Richmond County Commission and all appointed members of any agency.

(9) Relative means members of the family or household or relatives (including a person for whom the employee or public official has legal responsibility, a parent, stepparent, child, Step-child, son-in-law, daughter-in- law, brother, sister, spouse, aunt, uncle, niece, nephew, grandparent, grandchild, brother-in-law, sister-in-law, or persons living in the employee's or public officials household).

(10) Value means the actual retail price or cost attributable to a gift, less applicable taxes and gratuities, or a reasonable estimate based upon customary charges for like goods or services in the locality, prorated among all recipients of each single gift, whether or not all recipients are employees. Gifts shall be valued as a single gift. Specific types of gifts shall be valued on the following basis:
(A) Transportation, by air or rail, shall be based on the ticket cost or coach-class equivalent value.
(B) Ground transportation shall be valued on cost or the mileage rate reimbursed by Augusta.
(C) Entrance fees, admission fees, or other tickets shall be valued at the face value of the ticket or fee, excluding any portion at-attributable to a charitable contribution, if provided by the charitable organization.

(11) Vendor means any person who solicits to sell to or to contract, or who sells or contracts, with Augusta or any department, board, bureau, agency, or commission created by the
Augusta-Richmond County Commission for the provision of any goods or services.
(12) Charitable organization shall have the meaning defined in O.C.G.A. § 45-20-51.
(Ord. No. 6239, § 1, 1-18-00)

Sec. 1-1-23. Rules of conduct for employees and public officials of Augusta.

Employees and public officials of Augusta shall perform their official duties in such a manner as to promote the best interest of the public. To help ensure the proper performance of their duties, the following Rules of Conduct are adopted.

(a) Receipt of gifts by employees and public officials prohibited; reporting; disposition.

(1) An employee or public official, or any other person on his or her behalf, is prohibited from knowingly accepting and retaining, directly or indirectly, a gift from a lobbyist, vendor, or any other person seeking to influence official action. If a gift has been accepted, it must be either returned to the donor or transferred to a charitable organization. However, an employee or public official on behalf of Augusta may accept a gift, the agency, or the Mayor and Commission. If the gift is accepted,

the person receiving the gift shall not maintain custody of the gift for any period beyond that reasonably necessary to arrange for the transfer of custody and ownership of the gift.

(2) An employee who accepts a gift for an agency or for the Mayor and Commission must file a report, no later than the last day of each quarter in which a reportable gift is made. The report shall be filed with the employee's agency head and in the case of the Mayor and Commission with the Clerk of the Commission. The report must contain a description of each gift, the name and ad-dress of the recipient of the gift, and the date such gift is given. The donor shall be notified that the gift will be reported, but a single gift need not be reported by more than one employee.

(3) A public official who accepts a gift for an agency or for the Mayor and Commission must file a report with the Clerk of the Commission not later than February 1, 2001, and not later than February 1 of each year there after, and shall cover the preceding calendar year. The report must contain a description of each gift, the name and address of the donor of the gift, and the date such gift is given. The donor shall be notified that the gift will be reported, but a single gift need not be reported by more than one (1) employee.

(b) Conflict of interest prohibited.

(1) An employee or public official shall not knowingly use his or her position in any manner which will result in the receipt of a financial benefit or gift, direct or indirect, to the employee, the employee's relatives, the public official, the public official's relatives, or an individual with whom the employee or public official has a financial interest or a business with which the employee or public official has a financial interest.

A) These rules shall not be applicable to financial and other benefits derived by an employee or public official that he or she would enjoy to an extent no greater than that which other citizens of Georgia would or could enjoy.

(B) These rules shall not be applicable to financial and other benefits rightfully gained by an employee or public official pursuant to the proper performance of his or her official responsibilities.

(C) These rules shall not be applicable to the exceptions to prohibited transactions set forth in O.C.G.A. §§ 45-10-23 and 45-10-25.

(D) These rules shall not be applicable to such further exceptions as may be made on a case-by-case basis upon application to the Augusta-Richmond County Commission.

(2) An employee or public official shall not directly or knowingly ask, accept, demand, extract, solicit, seek, or assign or receive a financial benefit or gift for himself or herself or for another person in return for being influenced in the discharge of his or her official responsibilities.

(3) An employee or public official shall not solicit or receive a financial benefit, or a gift other than a financial benefit received by the employee or public official for acting in his or her official capacity, for advice or assistance given in the course of carrying out the employee's official responsibilities.

(4) An employee or public official shall not use or disclose information gained in the course of, or by reason of, his or her official responsibilities in a way that would affect a personal financial interest of the employee, an employee's relative, the public official, a public official's relative, or a person with whom, or business with which, the employee or public official shares a financial interest.

(5) An employee shall not cause the employment, appointment, promotion, transfer, or advancement of a relative to an employment position which the employee directly supervises or manages. An employee or public official shall not participate in an action relating to the disciplining of a relative. Nothing herein shall be construed to affect Augusta's nepotism policy as contained in its Personnel Policies and Procedures.

(c) Appearance of conflict.

(1) An employee or public official shall make every reasonable effort to avoid even the appearance of a conflict of interest. An appearance of conflict exists when a reasonable person would conclude from the circumstances that the employee's or public official's ability to protect the public interest, or perform public duties, is compromised by personal interests. An appearance of conflict could exist even in the absence of a legal conflict of interest.

(2) An employee or public official shall recuse himself or herself from participation in any official proceeding in which the employee's or public official's impartiality might reason-ably be questioned due to the employee's or public official's personal or financial relationship with any participant in the proceeding, including an owner, shareholder, partner, employee, or agent of a business entity involved in the proceeding. If the employee or public official is uncertain whether the relationship justifies recusal, then the employee or public official shall disclose the relationship to the person presiding over the proceeding. The presiding officer shall determine the extent to which, if any, the employee or public official will be permitted to participate. If the presiding officer is the affected employee or public official, he or she shall relinquish the chair to a substitute who shall made the determination.

(d) Other rules of conduct.

(1) The agency head shall make a due and diligent effort to determine whether he or she has a conflict of interest or appearance of conflict before taking any action.

(2) The agency head shall continually monitor, evaluate, and manage his or her personal, financial, and professional affairs to ensure the absence of conflicts of interests and appearance of conflicts.

(e) Augusta shall not pay lodging costs, meal costs, transportation costs, entrance fees, admission fees, or for other tickets for anyone other than the employee unless such person has specific approval from the City Administrator or agency head, as applicable, for such person to accompany the employee on such trip, nor shall Augusta pay for such expenses for anyone representing the Mayor or members of the Commission, without specific approval of the Augusta-Richmond County Commission. (Ord. No. 6239, § 1, 1-18-00)

Sec. 1-1-24. Violations; sanctions—Employees.

Each agency shall make a copy of this article available to all employees and public officials and shall institute procedures for its enforcement consistent with all applicable Georgia laws. Violation of this Article may subject an employee to disciplinary action, including termination of employment pursuant to the applicable policies and procedures. The agency head of each agency shall be responsible to the Augusta-Richmond County Commission for the faithful enforcement of this article, and shall report all alleged violations and their disposition to the Augusta-Richmond County Commission.

(Ord. No. 6239, § 1, 1-18-00)

Sec. 1-1-25. Violations; complaints—Public officials.

The Augusta-Richmond County Commission shall be responsible for hearing and deciding any complaints filed against a public official regarding alleged violation of articles 2 and 3 of this Chapter.

(Ord. No. 6239, § 1, 1-18-00)

Sec. 1-1-26. Disciplinary action against public official.

In addition to any other remedy provided by law, a public official who is subject to the provisions of this article and who is found by the Augusta-Richmond County Commission to have violated its provisions may be subject to censure or reprimand. (Ord. No. 6239, § 1, 1-18-00)

ATTACHMENT JJ

Article 3 Ethics in Public Procurement

Sec. 1-1-27. Employee or public official conflict of interest.
Sec. 1-1-28. Gifts, rebates and kickbacks.
Sec. 1-1-29. Prohibition against contingent fees.
Sec. 1-1-30. Contemporaneous employment prohibited.
Sec. 1-1-31. Waiver from contemporaneous employment prohibition and other conflicts of interest.
Sec. 1-1-32. Use of confidential information.
Sec. 1-1-33. Inside information.
Sec. 1-1-34. Use of position for gain.
Sec. 1-1-35. Unauthorized purchases.
Sec. 1-1-36. Agreement of candidates involving work or appointments.
Sec. 1-1-37. Penalties and sanctions.
Sec. 1-1-38. Recovery of value transferred or received in breach of ethical standards.
Sec. 1-1-39. Political contributions.
Sec. 1-1-40. Registration of vendors making gifts

Sec. 1-1-27. Employee or public official conflict of interest.

It shall be unethical for any Augusta-Richmond County employee or public official, as defined in the Augusta-Richmond County Code section 1-1-22(c)(8), to transact any business or participate directly or indirectly in a procurement contract when the employee or public official knows that:

(a) The employee or public official or any member of the employee's or public official's immediate family has a substantial interest or financial interest pertaining to the procurement contract, except that the purchase of goods and services from businesses which a member of the Commission or other Augusta-Richmond County employee has a financial interest is authorized as per O.C.G.A. § 36-1-14, or the procurement contract is awarded pursuant to O.C.G.A. § 45-10-22 and § 45-10-24, or the transaction is excepted from said restrictions by O.C.G.A. § 45-10-25;

(b) Any other person, business, or organization with whom the employee or public official or any member of an employee's or public official's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement contract.

An employee or public official or any member of an employee's or public official's immediate family who holds a substantial interest or financial interest in a disclosed blind trust shall not be deemed to have a conflict of interest with regard to matters pertaining to that substantial interest or financial interest. (Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-28. Gifts, rebates and kickbacks.

(a) Gifts. It shall be unethical for any person to offer, give, or agree to give any Augusta-Richmond County employee or public official, or for any Augusta-Richmond County employee or official to solicit, demand, accept, or agree to accept from another person, a gift or gratuity except as provided in Augusta-Richmond County Code § 1- 1-23, or any rebate or an offer of employment in connection with any decision, approval, disapproval, recommendation, or preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation,

auditing, or in any other advisory capacity in any proceeding or application request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefor.

(1) Kickbacks and rebates. It shall be unethical for any payment, gifts, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor, or any person associated therewith, as an inducement for the award of a subcontract or order.

(2) Contract clause. The prohibition against gratuities, rebates and kickbacks prescribed in this Section shall be conspicuously set forth in every contract and solicitation therefor.

(3) Courtesies. Employees may accept for them-selves and members of their families common courtesies usually associated with customary business practices so long as they do not violate the provision of the Rules of Conduct set forth in Augusta- Richmond County Code § 1-1-23.

(4) Cash. It is never permissible for an Augusta-Richmond County official or employee to accept a gift in cash or cash equivalent (e.g. stocks or other forms of marketable securities) of any amount.

(Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-29. Prohibition against contingent fees.

It shall be unethical for a person to be retained, or to retain a person, to solicit or secure an Augusta-Richmond County contract upon any agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business. (Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-30. Contemporaneous employment prohibited.

It shall be unethical for any Augusta-Richmond County employee or official who is participating directly or indirectly in the procurement process to become, or to be while such an employee or public official, the employee of any person contracting with Augusta-Richmond County. (Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-31. Waiver from contemporaneous employment prohibition and other conflicts of interest.

The Augusta-Richmond County Commission may grant a waiver from the employee conflict of interest provision or the contemporaneous employment provision upon making a written determination that:

(a) The contemporaneous employment or financial interest of the employee has been publicly disclosed;

(b) The employee will be able to perform his/her procurement functions without actual or apparent bias or favoritism; and

(c) The award will be in the best interests of Augusta-Richmond County. (Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-32. Use of confidential information.

It shall be unethical for any Augusta-Richmond County employee or public official knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person. (Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-33. Inside information.

No Augusta-Richmond County public official or employee shall:

(a) Give or release without proper authority to anyone not employed by Augusta-Richmond County or to another employee or public official who has no need for the information, data or information of a confidential or proprietary nature, such as a tax sale obtained while in Augusta-Richmond County's employment or service.

(b) Use non-public information obtained while in Augusta-Richmond County's employment or service, including information about customers or suppliers, for the personal profit of that employee or public official or anyone else. This includes, but is not limited to, taking advantage of such information by:

(1) Trading or providing information for others to trade in securities;

(2) Acquiring a real property interest of any kind, including but not limited to plant or office sites or adjacent properties; or

(3) Acquiring options to obtain interest in royalties, minerals, or real property for the purpose of obtaining mineral or royalty interest. (Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-34. Use of position for gain.

No Augusta-Richmond County public official or employee shall use his official position or office to obtain financial gain for himself.(Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-35. Unauthorized purchases.

No purchases of materials, supplies, equipment and services shall be made in the name of Augusta-Richmond County or one (1) of its departments, or through its procurement department, except such as are required for official use by Augusta-Richmond County or one (1) of its departments. Purchases in the name of Augusta-Richmond County or a department for personal use by an individual or for other than official use are prohibited, and no Augusta-Richmond County funds will be expended or advanced therefor.(Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-36. Agreement of candidates involving work or appointments.

It shall be unethical for any candidate for the office of mayor or commissioner to enter into any agreement or understanding with any person as to the disposal of any work or appointment which is or shall be under the control of the Commission.

(Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-37. Penalties and sanctions.

(a) Legal or disciplinary action by Commission. The Commission may take appropriate legal and/or disciplinary actions against any Augusta-Richmond County public official, vendor, contractor, organization, or person in violation of these ethical standards or the Rules of Conduct set forth in Augusta-Richmond County Code § 1-1-23.

(b) Legal or disciplinary action by Augusta Richmond County Administrator. The Augusta Richmond County Administrator may take appropriate legal and/or disciplinary actions against any Augusta-Richmond County employee subject to the Administrator's supervision and control as defined in the Augusta-Richmond County Code, subject to the appropriate appeals process of Augusta-Richmond County.

(c) Legal or disciplinary action by Elected/Constitutional Officers of Augusta-Richmond County. The Constitutional Officers and other Elected Officers of Augusta-Richmond County may take the appropriate legal and/or disciplinary actions against any employee under their super- vision and control subject to the appropriate appeals process of Augusta-Richmond County.

(d) Administrative penalties for employees. The Augusta-Richmond County Administrator or Constitutional/Elected Officer may impose any one (1) or more of the following penalties or sanctions on an Augusta-Richmond County employee for violations of the ethical standards in this Section as appropriate to the situation, subject to the Personnel Manual or other appropriate appeals procedures:

(1) Oral or written warnings or reprimands;

(2) Suspensions with or without pay for specified periods of time; or

(3) Termination of employment.

(e) Administrative penalties for outside contractors/vendors. The Augusta-Richmond County Commission may impose any one (1) or more of the following penalties or sanctions on a vendor/contractor or other person or organization for violations of these ethical standards:

(1) Written warnings or reprimands;
(2) Termination of contracts; or
(3) Debarment or suspension as provided in section 1-10-65 (Authority to Debar or Suspend). (Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-38. Recovery of value transferred or received in breach of ethical standards.

(a) General provisions. The value of anything transferred or received in breach of the ethical standards of this chapter or the Rules of Conduct set forth in Augusta-Richmond County Code section 1-1-23 by an Augusta-Richmond County employee, public official, or a vendor/contractor or other person may be recovered from either party.

(b) Recovery of kickbacks by Augusta-Richmond County. Upon showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by Augusta-Richmond County and will be recoverable hereunder from the recipient. In addition, that amount may also be recovered from the subcontractor making such kickbacks. Recovery from one (1) offending party shall not preclude recovery from other offending parties. (Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-39. Political contributions.

(a) No employee or public official shall make any contribution of Augusta-Richmond County funds, property, or services to any political party or committee, or to any candidate for or holder of any office of the government—National, state, local, or foreign.

(b) Nothing herein shall be construed as prohibiting the making of political contributions by any vendor/contractor or other person or organization to any candidate for public office, so long as the contribution is made without any agreement or understanding with regard to future or pending contracts or purchase orders. (Ord. No. 6239, § 2, 1-18-00)

Sec. 1-1-40. Registration of vendors making gifts

(a) Any vendor who, either directly or through another person, makes a gift or gifts to one (1) or more employees or public officials exceeding in the aggregate one hundred dollars ($100.00) in value during any calendar year shall file a disclosure report with the Clerk of the Augusta-Richmond County Commission in the form specified by the Augusta-Richmond County Commission listing the amount and date of receipt, the name and mailing address of any vendor making the gift, and the name, address, and position of each public employee or public official receiving such a gift.

(b) Each disclosure report required by subsection (a) of this section shall be filed with the Clerk of the Commission not later than February 1, 2001, and not later than February 1 of each year thereafter, and shall cover the preceding calendar year.

(c) A report required by this section shall be verified by the oath or affirmation of the person filing such report or statement taken before an officer authorized to administer oaths. Each report required in a calendar year shall contain cumulative totals of all gifts which have been made or received and which are required to be reported.

(d) In addition to other penalties provided under this Article, a filing fee of fifty dollars ($50.00) shall be imposed for each report that is filed late. In addition, a filing fee of twenty-five dollars

($25.00) shall be imposed on the fifteenth day after the due date if the report has still not been filed. (Ord. No. 6239, § 2, 1-18-00)

ATTACHMENT KK

Code of Conduct and the Richmond County
Removal Procedure

Article 1 General Provisions

Sec. 1-4-1. Appointment; qualifications; prohibition against appointment to more than one board or authority.
Sec. 1-4-1.1 Attendance at meetings; removal.
Sec. 1-4-2. Code of ethics.
Sec. 1-4-3. Appeals.
§ 1-4-4. Removal; procedure.
Sec. 1-4-5. Reserved.

BOARDS AND AUTHORITIES
ARTICLE 1 GENERAL PROVISIONS

Sec. 1-4-1. Appointment; qualifications; prohibition against appointment to more than one board or authority.

(a) The Augusta-Richmond County Commission has the responsibility under the Augusta-Richmond County Code and its Ordinances, and certain Acts of the General Assembly, to appoint members to certain boards, commissions, committees, panels, and authorities. The Augusta-Richmond County Commission deems it to be in the best interest of the citizens of Richmond County to prohibit any one individual from being appointed to more than one permanent board, commission, committee, panel, or authority for which said Commission has the authority of appointment or ratifying appointments and to provide qualifications for members on same.

(b) No person who is serving on a permanent board, commission, committee, panel, authority, or other entity appointed by the former Board of Commissioners of Richmond County, the former City Council of Augusta, or the Augusta-Richmond County Commission, shall, while serving as such a member, be qualified to be appointed to any other such permanent board, commission, committee, panel, authority, or other entity.

(c) No individual shall be eligible to be appointed to, or serve upon, any board, commission, authority, or other agency for which the Augusta-Richmond County Commission has the power of appointment, or the responsibility of approving appointments, who:

(1) Has been convicted of a felony or a crime of moral turpitude, unless such individual has had his civil rights restored as provided by law;
(2) Is under indictment for a felony or a crime of moral turpitude; or
(3) Is not a resident of Richmond County, or fails to maintain his residency in Rich-

mond County, except where otherwise permitted by law.

(d) It shall be the duty of any prospective appointee to any such permanent the Augusta-Richmond County Commission to indicate to the Augusta board, commission, committee, panel, authority, or other entity appointed by Richmond County Commission, in advance of his appointment, his membership on any other such permanent board, commission, committee, panel, authority, or other such entity and his qualification to serve as provided herein.

(e) The Clerk shall notify any such appointee of his duty to notify theAugusta-Richmond County Commission of his membership on any other board, commission, committee, panel, authority,or other such entity by appointment by the former Board of Commissioners of Richmond County, the former City Council of Augusta, or the Augusta-Richmond County Commission and of his not being disqualified to serve for failing to meet the qualifications set forth in subparagraph (g) hereof. (Ord. No. 6244, § 1, 1-18-00)

Sec. 1-4-1.1 Attendance at meetings; removal.

(a) Faithful and prompt attendance at all meetings of boards, committees, commissions, panels, or authorities, and conscientious performance of the duties required of members shall be a prerequisite to continuing membership on such board, committee, commission, panel or authority.

(b) Except as hereinafter provided, should a member fail to attend three (3) consecutive regular meetings of such board, committee, commission, panel or authority, and should there be no adequate excuse for such absences as determined by such board, committee, commission, panel or authority, same shall recommend to the Augusta-Richmond County Commission that such member be removed as provided in § 1-4-1. Nothing herein shall be deemed to apply to any member of the Augusta-Richmond County Commission who may be a member of any such board, committee, commission, panel or authority.(Ord. No. 6201, § 2, 9-21-99; Ord. No. 6244, § 2, 1-18-00)

Sec. 1-4-2. Code of ethics.

(a) Notwithstanding any provision of law to the contrary, each member of any board, commission, committee, panel, authority, or other entity appointed by theAugusta-Richmond County Commission, shall, upon appointment to such entity,whether directly or upon ratification of the appointment recommended or nominated by another body or entity, be subject to the Code of Ethics and Rules of Conduct set forth in Title 1, Chapter 1, Articles 2 and 3 of this Code.

I,_____ shall:

(1) Uphold the Constitution, laws, and regulations of the United States, the State of Georgia, and all governments therein and never be a party to their evasion;

(2) Never discriminate by the dispensing of special favors or privileges to anyone, whether or not for remuneration;

(3) Not engage in any business with the government, either directly or indirectly,which is inconsistent with the conscientious peformance of my governmental duties;

(4) Never use any information coming to me confidentially in the performance of governmental duties as a means for making private profit;

(5) Expose corruption wherever discovered;

(6) Never solicit, accept, or agree to accept gifts, loans, gratuities, discounts, favors, hospitality, or services from any person, association, or corporation under circumstances from which it could reasonably be inferred that a major purpose of the donor is to influence the performance of my official duties;

(7) Never accept any economic opportunity under circumstances where I know or should know that there is a substantial possibility that the opportunity is being afforded me with intent to influence my conduct in the performance of my official duties;

(8) Never engage in other conduct which is unbecoming to a member or which constitutes a breach of public trust; and

(9) Never take any official action with regard to any matter under circumstances in which I know or should know that I have a direct or indirect monetary interest in the subject matter of such matter or in the outcome of such official action.

(b) Upon formal charges being filed with the Mayor of the Augusta-Richmond County Commission relative to a violation of the Code of Ethics set forth in subsection (a) hereof on the part of a member of any such board, commission, committee, panel, authority, or other entity appointed by the Augusta-Richmond County Commission, the Augusta-Richmond Commission shall conduct a hearing for the purpose of receiving evidence relative to the merits of such charges. The member so charged shall be given at least thirty (30) days written notice prior to such hearing. If such charges are found to be true, the Augusta-Richmond County Commission shall forthwith remove such member from such board, commission, committee, panel, authority, or other entity appointed by said Commission, and the vacancy
shall be filled as provided by the Ordinance, Code, or special or general law providing for the membership of such entity. Any member removed from such entity shall have the right to judicial review of such decision by the Augusta-Richmond County Commission by the filing of a petition within thirty (30) days after the service of the final decision of the Commission, or if a rehearing is requested, within thirty (30) days after the decision thereon. The petition shall be filed in the Superior Court of Richmond County, Georgia. Copies of the petition shall be served upon the Mayor of the Augusta-Richmond County Commission. The petition shall state the nature of petitioner's interest, the facts showing that the
petitioner is aggrieved by the decision, and the ground as specified herein upon which the petitioner contends that the decision shall be reversed or modified. The petition may be amended by leave of court.

(c) The filing of the petition does not itself stay enforcement of the decision of the Commission. Except as otherwise provided, the Commission may grant, or the reviewing Court may order, a stay upon ppropriate terms for good cause shown.

(d) Within thirty (30) days after the service of the petition or within further time allowed by the Court, the Commission shall transmit to the reviewing Court the original or a certified copy of the entire record of the

proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the Court for the additional costs. The Court may require or permit subsequent corrections or additions to the record.

(e) If, before the date set for hearing, application is made to the Court for leave to present additional evidence and it is shown to the satisfaction of the Court that the additional evidence is material and there were good reasons for failure to present it in the proceedings before the Commission, the Court may order that the additional evidence be taken upon conditions determined by the Court. The Commission may modify its findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the reviewing Court.

(f) The review shall be conducted by the Court without a jury and shall be confined to the record. In case of alleged irregularities in procedure before the Commission, not shown in the record, proof thereon may be taken in the Court. The Court, upon request, shall hear oral argument and receive written briefs.

(g) The Court shall not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact. The Court may affirm the decision of the Commission. The Court may reverse or modify the decision if substantial rights of the petitioner have been prejudiced because the findi ngs, inferences, conclusions, or decisions of the Commission are:

(1) in violation of constitutional or statutory provisions;
(2) in excess of the statutory authority of the Commission;
(3) made upon unlawful procedures;
(4) affected by other error of law;
(5) clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
(6) arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(Ord. No. 6244, § 2, 1-18-00) **State law reference—**(Ga. Laws 1976, p. 344, § 1.)

Sec. 1-4-3. Appeals.

In any appeal or contested case:

(a) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in the trial of civil nonjury cases in the superior courts shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under such rules, evidence not admissible thereunder may be admitted, except where precluded by statute, if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs or it consists of a report of medical, psychiatric, or psychological evaluation of a type routinely submitted to and relied upon by an agency in the normal course of its business. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interest of the parties will not be prejudiced substantially, any part of the evidence may be received in written form;

(b) Documentary evidence may be received in the form of copies or excerpts if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original or have it established as documentary evidence according to the rules of evidence applicable to the superior

courts of this state;

(c) A party may conduct such cross-examination as shall be required for a full and true disclosure of the facts; and

(d) Official notice may be taken of judicially cognizable facts.

§ 1-4-4. Removal; procedure.

Upon good cause shown, including without limitation, a violation of the Code of Ethics and Code of Conduct set forth in Title 1, Chapter 1, Articles 2 and 3 or a failure to meet the qualifications set forth in § 1-4-1 hereof, the Augusta-Richmond County Commission may remove from the membership of any board or authority any member which it has appointed to that board or authority. The procedure for such removal shall be as set forth in § 1-4-2 (b) through (g) and § 1-4-3-above. (Ord. No. 6244, § 3, 1-18-00)

Sec. 1-4-5. Reserved.

APPENDIX 1

Contract Administration Procedures

Contract administration is the coordination of all actions that take place to obtain compliance with all contract requirements, which may include delivery, installation, acceptance, payment and closing of the contract.

Contract administration includes monitoring progress of contractors regarding requirements such as delivery/performance schedules in accordance with terms of the contract and evaluating performance. It also includes determining whether the contractor is complying with applicable contract clauses. Further, it includes administering the progress payments provisions.

Before the procurement is released, a Project Manager from the user department is assigned the responsibility to monitor the contract through performance, completion and close-out. Generally, the scope of work/specifications defines the specific task, schedules and other performance requirements of the contract. As a consequence, the contract administration procedures will vary depending on the specific project. The Project Manager may provide scope of work/specification interpretation and technical direction to the contract and respond to contractor correspondence on technical matters. A copy of all correspondence shall be provided to Procurement. The Project Manager shall review the progress of the work on a periodic basis and initiate contract review as required.

The Project Manager shall review the contractor's documentation and invoices in relation to the schedule, cost expended to date and budgeting information. The Project Manager shall also review invoices for accuracy and content and recommend, if appropriate, the approval for payment in accordance with contract terms and conditions.

If, during the course of the contract, it becomes apparent that a change in the scope of work/specifications is required, the Project Manager shall initiate a request for a change order by providing the recommended change and other required documentation to the Procurement Manager or designee. The change in the scope of work/specifications, change in schedule, and cost provided by the contractor is needed before the change order is processed. Any changes must not be a major deviation from the original purpose of the work. **Below is and excerpt from the FTA Grant Program Compliance Matrix for Contract Administration**.- (ATTACHMENT HH)

Augusta has identified the following as Compliance Areas by Departments.

Compliance Area Finance Department is responsible for all fiscal requirements for FTA Grants	**Transit**	**Procurement**	**Legal Counsel**	**Engineering**	**DBE**
Key: **O = Owner of Requirement** **A = Dept. Responsible for Compliance Action** **S = Dept. Providing Support**					
Procurement					
Contract Administration	A	O	S	A	S

The Procurement Department AS OWNER will ensure that the following information as required by FTA C 4220.1F is in each FTA Third Party Contract

Transit is Responsible for Compliance Action

Engineering is Responsible for Compliance Action (Optional)

DBE is a supporting department for DBE

APPENDIX 1

U.S. Department of Transportation

Federal Transit Administration

Required Procurement Elements and Suggested Best Practices

1) Written Standards of Conduct

(1) "The Common Grant Rules require each recipient to maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts."

a. "…no employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those previously listed has a financial or other interest in the firm selected for award."

b. "The recipient's officers, employees, agents, or board members may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value."

c. "To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the recipient's officers, employees, agents, board members, or by contractors or subrecipients or their agents." [FTA C 4220.1F (MS Word), III, 1.a, b, c.]

2) Contract Administration System

"The Common Grant Rules require the recipient to maintain a contract administration system to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State and local responsibilities." [FTA C 4220.1F (MS Word), III, 3.]

3) Written Protest Procedures

(1) "FTA expects each recipient to have appropriate written protest procedures, as part of its requirement to maintain or acquire adequate technical capacity to implement the project.

a. Recipients are required "to notify FTA when they receive a third party contract protest to which this circular applies, and to keep FTA informed about the status of the protest.

b. The protester must exhaust its administrative remedies by pursuing the recipient's protest procedures to completion before appealing the recipient's decision to FTA.

c. The protestor must be an "interested party," that is, "a party that is an actual or prospective bidder whose direct economic interest would be affected by the award or failure to award the third party contract at issue.

d. FTA will limit its review of third party contract protests as follows:

    1. The recipient does not have protest procedures, or
    2. Has not complied with its protest procedures, or
    3. Has not reviewed the protest when presented an opportunity to do so.

4. When a Federal law or regulation is involved…"FTA will exercise discretionary jurisdiction over those appeals involving issues important to FTA's overall public transportation program.

e. The protestor must deliver its appeal to the FTA Regional Administrator…within five (5) working days of the date when the protestor has received actual or constructive notice of the recipient's final decision," or …"when the protestor has identified other grounds for appeal to FTA," such as "the recipient's failure to have or failure to comply with its protest procedures or failure to review the protest." [FTA C 4220.1F (MS Word), VII, 1.a. b.

4) Prequalification System

"A recipient may prequalify people, firms, or products for participation in its procurements provided that:

a. …lists used in acquiring property and services are current.

b. …lists include enough qualified sources to ensure maximum full and open competition.

c. The recipient permits potential bidders or proposers to qualify during the solicitation period (from the issuance of the solicitation to its closing date), as set forth in the Common Grant Rule for governmental recipients. Evaluations for prequalification, however, need not be accelerated or truncated. FTA does not require a recipient to hold a particular solicitation open to accommodate a potential bidder or proposer that submits a person, firm, or product for approval before or during that solicitation." [FTA C 4220.1F (MS Word), VI, 1.c]

[Note: Grantees are not required, or encouraged, to have a prequalification system. Prequalification systems are difficult and costly to maintain in a way that does not inhibit competition. The intent of this element is to ensure that, if a grantee maintains a prequalification list for one or more products or services, or a qualified manufacturers list, such lists are current and provide full and open competition.]

5) Procedures for Ensuring Most Efficient and Economic Purchase

"Proposed procurements should be reviewed to avoid the purchase of property and services the recipient does not need (including duplicative items and unnecessary options). Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. To obtain the best value, lease versus purchase alternatives for acquiring property should be reviewed and, if necessary, an analysis should be obtained to determine the more economical alternative." FTA requires the recipient to make a written determination of the cost of leasing the asset compared with the cost of purchasing or constructing it." [FTA C 4220.1F (MS Word), IV, 1.b. c. e.]

6) Procurement Policies and Procedures

"Each recipient and subrecipient may use its own procurement procedures, provided that its procurements conform to applicable Federal law and regulations." [FTA C 4220.1F (MS Word), III, 3.a.] "…the guidance within this circular applies to each Federal Transit Administration (FTA) recipient of Federal assistance…." [FTA C 4220.1F (MS Word), II, 1.]

II.2. INDIVIDUAL PROCUREMENT ELEMENTS

7) Independent Cost Estimate

"The Common Grant Rules require the recipient to perform a cost or price analysis in connection with every procurement action ...as a starting point, the recipient must make independent estimates before receiving bids or proposals" [FTA C 4220.1F (MS Word), VI, 6.; BPPM § 2.3.2]

8) A&E Geographic Preference

"Geographic location may be a selection criterion [in procurements for architectural and engineering (A&E) services] provided an appropriate number of qualified firms are eligible to compete for the contract, given the nature and size of the project." [FTA C 4220.1F (MS Word), VI, 2.a. (4) (g); BPPM § 6.5]

9) Unreasonable Qualification Requirements

Example of situation restrictive of competition: "Unreasonable requirements placed on bidders or offerors in order for them to qualify to do business" [FTA C 4220.1F (MS Word), VI, 2.a. (4) (a); BPPM § 2.4.2.1]

10) Unnecessary Experience and Excessive Bonding

Example of situation restrictive of competition: "Unnecessary experience" and "excessive bonding requirements… FTA does not require any bonding for rolling stock, services, maintenance operations, or any contracts other than construction…." [FTA C 4220.1F (MS Word), IV, 2.b.h. (1); BPPM § 2.4.2.1.]

11) Organizational Conflict of Interest

Example of situation restrictive of competition: "Organizational Conflict of Interest. An organizational conflict of interest occurs when any of the following circumstances arise:

a. **Lack of Impartiality**. When the contractor is unable, or potentially unable, to render impartial assistance or advice to the recipient due to other activities, relationships, contracts, or other circumstances.

b. **Impaired Objectivity**. When the contractor's objectivity in performing the contract work is or might be otherwise be impaired due to other activities, relationships, contracts, or other circumstances.

c. **Unfair Competitive Advantage**. The contractor has an unfair competitive advantage." [FTA C 4220.1F (MS Word), VI, 2.a. (4) (h); BPPM § 2.4.2.2.2]

12) Arbitrary Action

Example of situation restrictive of competition: "Taking any arbitrary action in the procurement process" [FTA C 4220.1F (MS Word), VI, 2.a. (4) (j); BPPM § 2.4.2.1]

13) Brand Name Restrictions

Example of situation restrictive of competition: "Specifying only a 'brand name' product instead of allowing an 'or equal' product to be offered or failing to specify the brand name product's salient characteristics" [FTA C 4220.1F (MS Word), VI, 2.a. (4) (f); BPPM § 2.4.2.1 and 2.4.2.2.1]

a. "Detailed product specifications should be avoided if at all possible in favor of performance specifications." " [FTA C 4220.1F (MS Word), VI, 2.a. (1)]

b. "When it is impractical or uneconomical to make a clear and accurate description of the technical requirements of the property… a 'brand name or equal' description may be used as a means to define the performance or other salient characteristics of a specific type of property. The recipient, however, must state the salient characteristics of the named brand that offerors must provide." [FTA C 4220.1F (MS Word), VI, 2a. (3); BPPM § 4.3.2, 4.4.1. 4.5.1 and 4.5.2]

c. If brand names are used they should have a "brand name or equal" description and the specific features or other salient characteristics must be clearly stated (2 CFR 200.319(a))

14) Geographic Preferences

Example of situation restrictive of competition: "Specifying statutorily or administratively imposed in-State or local geographical preferences or evaluating bids and proposals in light of such in-State or local geographical preferences. Specifically, an FTA recipient is prohibited from limiting their bus purchases to in-State dealers." [FTA C 4220.1F (MS Word), VI, 2. a. (4) (g)]

15) Contract Term Limitation

a. "To comply with 49 U.S.C 5325 (e)(1), a multi - year third party contract to purchase additional rolling stock and replacement parts may not have options that extend more than five years after the date of the original contract."

b. "FTA interprets this five-year period as covering the recipient's rolling stock and replacement needs from the first day when the contract becomes effective to those at the end of the fifth year. This means that the contract may not encompass more rolling stock and replacement parts than the recipient needs within five years. The five-year rule does not mean delivery, acceptance, or even fabrication must be completed in five years – only that a contract is limited to purchasing no more than the recipient's rolling stock or replacement parts needs for five years based on the effective date of the contract." [FTA C 4220.1F (MS Word), IV, 2.e.(10)]

16) Written Procurement Selection Procedures

a. "The Common Grant Rule…requires the recipient to have written procurement procedures." [FTA C 4220.1F (MS Word), III, 3. a.; BPPM § 4.3.2, 4.4.1, 4.5.1, and 4.5.2]

b. "The Common Grant Rules require that each solicitation provide for the following…Identify all factors to be used in evaluating bids or proposals." FTA C 4220.1F (MS Word), VI, 2.e.; BPPM § 4.3.2, 4.4.1, 4.5.1, and 4.5.2]

17) Solicitation Prequalification Criteria

A recipient may prequalify people, firms, or products for participation in its procurements provided that:

a. "**Lists**. The recipient ensures that all its prequalification lists used in acquiring property and services are current. [FTA C 4220.1F (MS Word), VI, 1.c.(1)]

b. "**Sources**. The recipient ensures that all its prequalification lists include enough qualified sources to ensure maximum full and open competition." [FTA C 4220.1F (MS Word), VI, 1.c.(2)]

c. "**Qualification Periods**. The recipient permits potential bidders or proposers to qualify during the solicitation period) from the issuance of the solicitation to its closing date)." [FTA C 4220.1F (MS Word), VI, 1.c.(3)]

18) Award to Responsible Contractors

"A recipient may award a contract …only to a 'responsible' contractor capable of successfully performing under the terms and conditions of the contract. To determine responsibility, the recipient must consider the following criteria before awarding the contract:

a. **Integrity**. The contractor's integrity;

b. **Public Policy**. The contractor's compliance with public policy;

c. **Past Performance**. The contractor's past performance;

d. **Financial and Technical Resources**. The contractor's financial and technical resources, and;

e. **Debarment/Suspension**. Contractor's status with respect to DOT regulations, 'Government-wide Debarment and Suspension (Non-procurement),' 49 CFR Part 29." [FTA C 4220.1F (MS Word), VI, 8.b.]

19) Sound and Complete Agreement

a. "The Common Grant Rules require that all third party contracts include provisions adequate to form a sound and complete agreement." [FTA C 4220.1F (MS Word), III, 3.b.]

b. "Third party contracts exceeding $100,000 must include administrative, contractual, or legal remedies for violations or breach of the contract by the third party contractor." [FTA C 4220.1F (MS Word), IV, 2.b. (6) 2]

c. "For contracts exceeding $10,000, there must be termination for cause and termination for convenience provisions." [FTA C 4220.1F (MS Word), IV, 2.b. (6) 4]

20) No Splitting [Micro-purchase]

"…there should be … no splitting of procurements to avoid competition." [FTA C 4220.1F (MS Word), VI, 3.a.; BPPM § 4.1]

21) Fair and Reasonable Price Determination [Micro-purchase]

"FTA's only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made this determination." [FTA C 4220.1F (MS Word), VI, 3.a. (2) (c); BPPM § 4.1]

22) Micro-Purchase Davis Bacon

"Davis - Bacon prevailing wage and hour restrictions apply to construction contracts exceeding $2,000." [FTA C 4220.1F (MS Word), VI, 3.a.; BPPM § 4.1]

23) Price Quotations [Small Purchase]

"Price or rate quotations shall be obtained from an adequate number of qualified sources" [FTA C 4220.1F (MS Word), VI, 3.b.; BPPM § 4.2]

24) Clear, Accurate, and Complete Specification

a. "Each solicitation must provide a clear and accurate description of the technical requirements for the property or services to be procured." [FTA C 4220.1F (MS Word), VI, 2.a.; BPPM § 3]

b. "In competitive procurements, the description may not contain features that unduly restrict competition." [FTA C 4220.1F (MS Word), III, 3.a.(1) (b)]

c. "The Common Grant Rule … advises the recipient to describe technical requirements in terms of 'functions to be performed or performance required, including the range

d. of acceptable characteristics or minimum acceptable standards.'" [FTA C 4220.1F (MS Word), III, 3.a.(1) (d)]

e. "In order for sealed bidding to be feasible, the following conditions should be present: A complete, adequate, and realistic specification or purchase description is available." [FTA C 4220.1F (MS Word), VI, 3.c. (1) (a)]

f. "If this procurement method is used . . . the invitation for bids will include any specifications and pertinent attachments…in order for the bidder to properly respond." [FTA C 4220.1F (MS Word), VI, 3.c. (2) (c)]

25) Adequate Competition - Two or More Competitors

a. "In order for sealed bidding to be feasible, the following conditions should be present: . . . Two or more responsible bidders are willing and able to compete effectively for the business." [FTA C 4220.1F (MS Word), VI, 3.c. (b)]

b. "Competitive proposals is a procurement method normally conducted with more than one source submitting an offer or proposal." [FTA C 4220.1F (MS Word), VI, 3.d.(2)(c)] ". . .the procurement lends itself to a firm fixed price contract." [FTA C 4220.1F (MS Word), VI, 3.c. (1) (c)]

26) Firm Fixed Price [Sealed Bid]

". . .the procurement lends itself to a firm fixed price contract." [FTA C 4220.1F (MS Word), VI, 3.c. (1) (c)]

27) Selection on Price [Sealed Bid]

". . .the selection of the successful bidder can be made on the basis of price and those price-related factors included in the solicitation." [FTA C 4220.1F (MS Word), VI, 3.c. (1) (d)]

28) Discussions Unnecessary [Sealed Bid]

"No discussion with bidders is needed" [FTA C 4220.1F (MS Word), VI, 3.c. (1) (e)]

29) Advertised/Publicized [Sealed Bid] [RFP]

a. "…sealed bidding (is) a procurement method in which bids are publicly solicited." [FTA C 4220.1F (MS Word), VI, 3.c.]
b. "The invitation for bids will be publicly advertised." [FTA C 4220.1F, VI, 3.c. (2) (a)]
c. "Procurement Procedures. The following procedures apply to procurements by competitive proposals: (a) Publicity. The request for proposals is publicly advertised." [FTA C 4220.1F (MS Word), VI, 3.d. (2) (a)]

30) Adequate Number of Sources Solicited [Sealed Bid] [RFP]

a. "Bids shall be solicited from an adequate number of known suppliers…." [FTA C 4220.1F (MS Word), VI, 3.c. (2) (b)]
b. "Procurement Procedures. The following procedures apply to procurements by competitive proposals: (c) Adequate Sources. Proposals are solicited from an adequate number of qualified sources." [FTA C 4220.1F (MS Word), VI, 3.d. (2) (c)]

31) Sufficient Bid Time [Sealed Bid]

"Bids shall be solicited from an adequate number of known suppliers, providing time to prepare bids prior to the date set for opening the bids." [FTA C 4220.1F (MS Word), VI, 3.c. (2) (d)]

32) Bid Opening [Sealed Bid]

"All bids will be publicly opened at the time and place prescribed in the invitation for bids" [FTA C 4220.1F (MS Word), VI, 3.c. (2) (e)]

33) Responsiveness [Sealed Bid]

"A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder."

a. "When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest;"
b. "Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of." [FTA C 4220.1F (MS Word), VI, 3.c. (2) (f)]

34) Lowest Price [Sealed Bid]

"A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder." [FTA C 4220.1F (MS Word), VI, 3.c. (2) (f)]

35) Rejecting Bids [Sealed Bid]

"Any or all bids may be rejected if there is a sound, documented business reason" [FTA C 4220.1F (MS Word), VI, 3.c. (2) (g)]

36) Evaluation [RFP]

"If this procurement method is used the following requirements apply: …

a. All evaluation factors will be identified in the procurement documents along with their relative importance; numerical or percentage ratings or weights, however, need not be disclosed… [FTA C 4220.1F (MS Word), VI, 3.d. (2) (b)]

b. The recipient will have a method in place for conducting technical evaluations of the proposals received and for selecting awardees." [FTA C 4220.1F (MS Word), VI, 3.d. (2) (d)]

37) Price and Other Factors [RFP]

"If this procurement method is used the following requirements apply: . . . Award will be made to the responsible firm whose proposal is most advantageous to the recipient's program with price and other factors considered." [FTA C 4220.1F (MS Word), VI, 3.d. (2) (e)]

38) Sole Source if Other Award is Infeasible

"Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies:" [FTA C 4220.1F (MS Word), VI, 3.i.(1)]

a. "When the supplies or services are available from only one responsible source, and no other type of supplies or services will satisfy the recipient's requirements; or" [FTA C 4220.1F (MS Word), VI, 3.i.(b)]

b. "When the recipient's need for the supplies or services is of such unusual and compelling urgency that the recipient would be seriously injured unless the recipient is permitted to limit the number of sources from which it solicits bids or proposals, or when the public exigency or emergency for the requirement will not permit a delay resulting from a competitive solicitation;" or [FTA C 4220.1F (MS Word), VI, 3.i.2(c)]

c. "FTA authorizes noncompetitive negotiations;" or [FTA C 4220.1F (MS Word), VI, 3.i.2(e)]

d. "After solicitation of a number of sources, competition is determined inadequate" [FTA C 4220.1F (MS Word), VI, 3.i.2]

39) Cost Analysis Required [Sole Source]

"A cost analysis will be necessary when adequate price competition is lacking and for sole source procurements, including contract modifications or change orders…." [FTA C 4220.1F (MS Word), VI, 6.a.]

40) Evaluation of Options

"Options may be included in contracts to assure the future availability of property or services. An option is a unilateral right in a contract by which, for a specified time, a recipient may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract." [FTA C 4220.1F (MS Word), IV, 1.d.]

a. "In awarding the basic contract … the recipient shall evaluate offers for any option quantities or periods contained in a solicitation when it has been determined prior to soliciting offers that the recipient is likely to exercise the options." [FTA C 4220.1F (MS Word), VI, 7.b.]

b. "When options have not been evaluated as part of the award, the exercise of such options will be considered a sole source procurement." [FTA C 4220.1F (MS Word), V, 7.a. (1) (c) 1]

41) Cost or Price Analysis

a. Cost analysis

i. "The Common Grant Rules require the recipient to perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation . . . . " [FTA C 4220.1F (MS Word), VI, 6.]

ii. "A cost analysis must be performed when the offeror is required to submit the elements (i.e., labor hours, overhead, materials, etc.) of the estimated cost, (e.g., under professional consulting and architectural and engineering services contracts, etc.)" [FTA C 4220.1F (MS Word), VI, 6.a.]

iii. "A cost analysis will be necessary when adequate price competition is lacking . . . unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public . . . " [FTA C 4220.1F (MS Word), VI, 6.a.]

iv. "A cost analysis will be necessary when adequate price competition is lacking . . . unless price reasonableness can be established on the basis of . . . prices set by law or regulation". [FTA C 4220.1F (MS Word), VI, 6.a.]

v. "A cost analysis will be necessary . . . for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public . . . " [FTA C 4220.1F (MS Word), VI, 6.a.]

vi. "A cost analysis will be necessary . . . for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of . . . prices set by law or regulation." [FTA C 4220.1F (MS Word), VI, 6.a.]

b. "A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price." [FTA C 4220.1F (MS Word), VI, 6.b.]

c. Profit

i. "The recipient will negotiate profit as a separate element of the price for each contract in which there is no price competition . . . ." [FTA C 4220.1F (MS Word), VI, 6.a.(3)]

ii. "The recipient will negotiate profit as a separate element of the price for each contract …in all cases where cost analysis is performed." [FTA C 4220.1F (MS Word), VI, 6.a.(3)]

iii. "To establish a fair and reasonable profit, consideration will be given to:

a. the complexity of the work to be performed,

b. the risk being borne by the contractor,

c. the contractor's investment,

d. the amount of subcontracting,

e. the quality of its record of past performance, and

f. industry profit rates in the surrounding geographical area for similar work." [FTA C 4220.1F (MS Word), VI, 6.a.(3)]

42) Written Record of Procurement History

"The Common Grant Rules require the recipient to maintain…written records detailing the history of each procurement, as follows:

a. **Procurement Method**. …the rationale for the method of procurement, including a sole source justification for any acquisition that does not qualify as competitive;

b. **Contract Type**. …state the reasons for selecting the contract type (fixed price, cost reimbursement, etc.);

c. **Contractor Selection**. …state the reasons for contractor selection or rejection…include a written responsibility determination for the successful contractor.

d. **Cost or Price**. Each recipient must evaluate and state its justification for the contract cost or price." [FTA C 4220.1F (MS Word), III, 3. d. (1)]

43) Exercise of Options

"Options may be included in contracts to assure the future availability of property or services. An option is a unilateral right in a contract by which, for a specified time, a recipient may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract." [FTA C 4220.1F (MS Word), IV, 1. d.]

a. "**Consistency with the Contract**. A recipient must ensure that the exercise of an option is in accordance with the terms and conditions of the option stated in the initial contract awarded." [FTA C 4220.1F (MS Word), V, 7. a. (1) (a)]

b. "**Price**. An option may not be exercised unless the recipient has determined that the option price is better than prices available in the market or that the option is the more advantageous offer at the time the option is exercised." [FTA C 4220.1F (MS Word), V, 7. a. (1) (b)]

c. "**Negotiating a Lower Option Price**. Exercising an option after a lower price has been negotiated constitutes a sole source procurement." [FTA C 4220.1F (MS Word), V, 7. a. (1) (c) 2]

44) Out of Scope Changes

"A contract change that is not within the scope of the original contract is considered a sole source procurement…." [FTA C 4220.1F (MS Word), VI, 3.i.(1)(b)]

45) Advance Payments

"Advance payments are payments made to a contractor before the contractor incurs costs in the performance of the contract. The following principles and restrictions apply:

a. **Use of FTA Funds Prohibited**. FTA does not authorize the use of Federal assistance to make payments to a third party contractor before the contractor has incurred the costs for which the payments would be attributable….A recipient that seeks to use FTA or local share funds to support advance payments should contact its Regional Office to obtain FTA concurrence." [FTA C 4220.1F (MS Word), IV, 2.b.(5)(b).1, 2]

b. **Customary Advance Payments**. FTA concurrence is required only when advance payment or payments customarily required in the market place exceed $100,000." [The circular notes that advance payments falling into this category would include such things as utility services, and subscriptions to newspapers and magazines.] [FTA C 4220.1F (MS Word), IV, 2.b.(5)(b)2 b]

46) Progress Payments

"Progress payments are payments for costs incurred by the contractor in the performance of the contract before the contract work has been completed. FTA assistance may be used to support progress payments provided:

a. the recipient obtains adequate security for those payments, and
b. has sufficient documentation to substantiate the work performed for which payment is requested.
c. Progress payments for construction contracts may be made on a percentage of completion basis (as described in the Common Grant Rules). This payment method may not be used in non-construction contracts." [FTA C 4220.1F (MS Word), IV, 2.b.(5)(c)]

47) Time and Materials Contracts

"The Common Grant Rule …permits the use of time and material type contracts only:

a. **Restricted Use**. After a determination that no other type of contract is suitable; and
b. **Firm Ceiling Price**. If the contract specifies a ceiling price that the contractor shall not exceed except at its own risk." [FTA C 4220.1F (MS Word), VI, 2.c.(2)(b)]

48) Cost Plus Percentage of Cost

"The Common Grant Rules expressly prohibit the use of the cost plus a percentage of cost and percentage of construction cost methods of contracting." [FTA C 4220.1F (MS Word), VI, 2.c.(2)(a)]

49) Liquidated Damages Provisions

"**Delay**. FTA has determined that a recipient may use liquidated damages if the recipient reasonably expects to suffer damages through delayed contract completion and the extent or amount of such damages would be difficult or impossible to determine. The rate and measurement period must be specified in the third party contract and may not be excessive. The assessment for damages is usually established at a specific rate per day for each day beyond the contract's delivery date or performance period, but a measurement period other than a day may be established if appropriate. Any liquidated damages recovered shall be credited to the project account involved unless the FTA permits otherwise." [FTA C 4220.1F (MS Word), IV, 2.b.(6)(b)1]

50) Piggybacking

"**Assignment of Rights**. Although FTA does not encourage the practice, a recipient may assign its contractual rights to purchase property and services to other recipients if the original contract contains an appropriate assignability clause that provides for the assignment of all or a portion of the specified deliverables as originally advertised, competed, evaluated, and awarded, or other appropriate assignment provisions. Some refer to this process as "piggybacking."

a. "If the supplies or services were solicited, competed and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, then both the solicitation and contract award must contain both a minimum and maximum
b. quantity that represent the reasonably foreseeable needs of the party(s) to the solicitation and contract."
c. "An FTA recipient that obtains these contractual rights through assignment may exercise them after first determining the contract price remains fair and reasonable, and all Federal requirements have been addressed in the contract's clauses. The recipient is not required to perform a second price analysis if a price analysis was originally performed. However, the recipient must determine the contract price or prices originally established are still fair and reasonable."

d. The recipient is responsible for Buy America compliance with the transaction and assuring that they execute all of the required pre-award and post-delivery Buy America audit certifications." [FTA C 4220.1F (MS Word), V, 7. a. (2); BPPM Appendix B.16]

51) Qualifications Exclude Price [A&E]

A&E service procurements must use a qualifications based method (Brooks Act). Price is negotiated with the most qualified firm. If an agreement cannot be reached then the recipient may negotiate with the next most qualified firm (U.S.C 5325 (b), FTA Circular 4220.1F Chapter IV 2.h. (2))

"**When Required**. Qualifications-based proposal procedures are required for projects related to or leading to a construction project. These procedures must be used not only when contracting for architectural and engineering services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services. Grantees shall use qualifications-based competitive proposal procedures [i.e. Brooks Act Procedures when contracting for A&E services as defined in 40 U.S.C. Sections 1101 - 1104 and 49 U.S.C. Section 5325(b)(1)]. When this procurement method is used, the following requirements apply: [FTA C 4220.1F (MS Word), VI, 3.f.(3)]

a. **Qualifications**.– An offeror's qualifications muse be evaluated.
b. **Price**. Price is excluded as an evaluation factor. ." [FTA C 4220.1F (MS Word), VI, 3.f.(3)(b)]
c. "**Design-Build**. An FTA recipient must procure design-build services through means of qualifications-based competitive proposal procedures based on the Brooks Act…when the preponderance of the work to be performed is considered to be for architectural and engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related A&E services. (A&E) services…qualifications-based competitive proposal procedures may not be used to procure design-build services when the preponderance of the work to be performed are services other than those listed in the previous sentence, unless required by State law." [FTA C 4220.1F (MS Word, VI, 3.h.]

52) Serial Price Negotiations [A&E]

When this procurement method is used, the following requirements apply:

a. **Most Qualified**. Negotiations are conducted with only the most qualified offeror; and
b. **Next Most Qualified**. Failing agreement on price, negotiations with the next most qualified offeror and, if necessary, negotiations with successive offerors in descending order must be conducted until a contract award can be made to the offeror whose price the recipient believes is fair and reasonable." [FTA C 4220.1F (MS Word), VI, 3.f.(3)]

53) Bid Security [Construction Over $100,000]

"**Bonding**. The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. FTA's bonding policies are as follows:

1. **Bid Guarantee**. Both FTA and the Common Grant Rules require a bid guarantee from each bidder equivalent 5 percent of the bid price. The 'bid guarantee' shall consist of a firm

commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will honor its bid upon acceptance of his bid [FTA C 4220.1F (MS Word), IV, 2.h.(1)(a)]

54) Performance Security [Construction Over $100,000]

"**Bonding**. The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. FTA's bonding policies are as follows:

1. **Performance Bond**. Both FTA and the Common Grant Rules require a performance bond on the part of the contractor for 100 percent of the contract price. A 'performance bond' is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract" [FTA C 4220.1F (MS Word), IV, 2.h.(1)(b)]

55) Payment Security [Construction Over $100,000]

"**Bonding**. The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. FTA's bonding policies are as follows:

1. **Payment Bond**. A 'payment bond' is one executed in connection with a contract to assure payment as required by law of all people supplying labor and material in the execution of the work provided for in the contract. FTA has determined the following payment bond amounts are adequate to protect FTA's interest and will accept a local bonding policy that meets the following minimums:
    1. **Less Than $1 Million**. Fifty percent of the contract price if the contract price is not more than $1 million;
    2. **More Than $1 Million but Less Than $5 Million**. Forty percent of the contract price if the contract price is more than $1 million but not more than $5 million; or
    3. **More Than $5 Million**. Two and a half million dollars if the contract price is more than $5 million." [FTA C 4220.1F (MS Word), IV, 2.h.(1)(c)]

A recipient that wishes to adopt less stringent bonding requirements, for a specific class of projects, or for a particular project, may submit its policy and rationale to its FTA Regional Office for approval." [FTA C 4220.1F (MS Word), IV, 2.h.(1)(e)]

56) Clauses

"FEDERAL REQUIREMENTS THAT MAY AFFECT A RECIPIENT'S ACQUISITIONS. Before FTA assistance may be used to support an acquisition of property or services, all applicable Federal requirements, whether or not addressed in the Common Grant Rules, must be fulfilled." [FTA C 4220.1F (MS Word), IV, 2.]

[FTA Circular 4220.1F, Appendix D, contains a matrix of Federally required clauses and contractor certifications for various dollar values and types of procurements, such as construction, A&E. rolling stock, materials, etc. Instructions for these clauses and suggested clause language may be found in the FTA "Best Practices Procurement Manual," Appendix A.1]

PROCUREMENT

Procurement has the overall responsibility for administering contracts. These responsibilities consist of the following:

a) Acts as a focal point for correspondence and provides direction to the contractor regarding contractual matters.
b) Coordinates proposed changes with contractors, obtains cost information, assesses cost and schedule impact, and obtains necessary approval to process contract changes.

c) Negotiates change order pricing if necessary, completes required cost analysis for change orders, negotiates and prepares all change orders with technical assistance from the Project Manager, with supporting backup, reflecting these changes.
d) Monitors requests for payment to ensure that payments are processed in a timely manner.
e) Assures contractor maintains required insurance coverage during the term of the contract.
f) Reviews proposed changes in subcontracts submitted by the contractor to ensure compliance with the contract requirements. Obtains the technical review from the Project Manager to assure proper scope, level of effort and subcontract price. Prepares and transmits appropriate written responses to the contractor either granting approval or requiring appropriate changes.
g) Prepares contractual memoranda with cooperation from the Project Manager for presentation to APT staff and Board of Commissioners.
h) Maintains master contract files.
i) Attends, as required, project progress meetings between contractor and APT staff.
j) Performs contract close-out in accordance with established procedures.

PROJECT MANAGER

a) Assures that contractor performs in accordance with the scope of work/specification contained in APT's contract.
b) Assures that the contractor is making timely progress in meeting established performance schedules. (Informs Procurement in a timely manner, by means of a written report, on the status of each contract).
c) Establishes and maintains a process that routinely and periodically monitors the quality of a contractor's performance. Informs senior management and Procurement of any significant deviations, as they occur, and corrective action proposed.
d) Reviews invoices for compliance with contract including for accuracy and allowable costs. Notifies contractor if invoice is incorrect, approves for payment if correct, processes blanket release for payment and forwards to Accounts Payable.
e) Reviews all contract amendments, change orders, etc. and concurs in such actions prior to execution by Procurement.

DBE LIAISON OFFICER

The Chief Executive Officer concerning DBE Program matters for Augusta, Georgia shall be the Mayor of Augusta, Georgia. Augusta shall have a DBE Liaison Officer who shall have direct, independent access to the Mayor concerning DBE Program matters. The DBE Liaison Officer shall have the following duties and responsibilities:

(a) Gathering and reporting statistical data and other information as required by DOT, FTA, FAA and other contracts covered by this program.

(b) Reviewing third party contracts and purchase requisitions for compliance with this program.

(c) Working with all departments to set overall annual goals or as required by federal law.

(d) Ensuring that bid notices and requests for proposals are available to DBEs in a timely manner.

(e) Identifying contracts and procurements so that DBE goals are included in solicitations covered by this DBE Program.

(f) Analyzing Augusta, Georgia's progress toward attainment and identifying ways to improve progress.

(g) Participating in pre-bid meetings.

(h) Advising the Commission on DBE matters and achievement.

(i) Providing DBEs with information and assistance in preparing bids, obtaining bonding and insurance.

(j) Planning and participating in DBE training seminars.

(k) Certifying DBEs according to the criteria set by DOT and FTA and acting as liaison to the Uniform Certification Process in Georgia.

(l) Providing outreach to DBEs and community organizations to advise them of opportunities.

(m) Maintaining the DBE bidder's list for DOT, FTA and other contracts covered by this program as provided in § 1-10-117.

(n) Ensuring that all aspects of this DBE Program are complied with by participants and using agencies.

See ATTACHMENT HH for the FTA Grant Program Compliance Matrix. This matrix identifies by Department it's responsibility for each area of compliance.

CONTRACT ADMINISTRATION PLANNING PROCESS

Tasks	Related Standards
1. Determine the required level of contract surveillance	Consider key factors that may affect the need for contract surveillance, including: • The criticality (i.e., importance to the Government) of the supplies or services. Generally, contracts are designated as: A. Critical contracts, including: - Contracts negotiated under unusual and compelling urgency; and - Contracts for major systems B. Other contracts for items needed to: - Maintain a Government or contractor production or repair line; - Preclude out-of-stock conditions; or — Meet user needs for non-stock items C. All other contracts - Contract requirements for reporting production progress and performance - The contract performance schedule - The contractor's production plan - The contractor's history of contract performance - The contractor's experience with the contract supplies or services - The contractor's financial capability - Any special circumstances identified by the contracting office Contracts at or below the simplified acquisition threshold should not normally require production surveillance
2. Determine what contract administration functions (if any) will be delegated	Consider: • Agency and contracting activity policy on the delegation of contract administration • Any additional delegations authorized by prior agreement with the contract administration office (CAO), provided that: - The required CAO resources are available - The head of the contracting activity or designee has approved the delegation of any authority to issue orders under provisioning procedures in existing contracts or under basic ordering agreements for items and services identified in the schedule; and - The delegation does not require the CAO to undertake new or follow-on acquisitions • Prior coordination with the contract administration office (when required) • The need for special surveillance of a major system acquisition • The need for specialized support services at a contractor or subcontractor facility; and • The resources available at the contract administration office (CAO)

Tasks	Related Standards
3. Delegate contract administration as applicable	As provided in agency procedures, delegate contract administration or specialized support services. The delegation should include: • The name and address of the CAO designated to perform the administration (this information also must be entered in the contract) • Copies of all contracting agency regulations or directives - Referenced in the contract; or - Otherwise necessary for contract administration (unless previously provided) A CAO or a contracting office retaining contract administration, may request support from the CAO cognizant of the contractor location where performance of specific contract administration functions is required. The request must: • Be in writing • Clearly state the specific functions to be performed; and • Be accompanied by a copy of pertinent contractual and other necessary documents Subcontract administration support may be requested as long as the request conforms to FAR requirements and good business practice
4. Develop a contract administration plan	The plan should be designed to facilitate effective and efficient contract administration considering: • The required level of contract surveillance • Contract terms and conditions related to administration • Contractor performance milestones • Government performance milestones (e.g., for providing Government furnished property or responding to contractor plans and other required submissions) • Contractor reporting procedures • Contract quality requirements • Name, position, and authority of contract administration team members; and • Milestones for any reports required from contract administration team members Documentation of the plan should meet the requirements of the agency, activity, and good business practice

Tasks	Related Standards
5. Identify qualified personnel (as authorized and necessary) to represent the Contracting Officer in administering contract requirements	Contracting and contract administration offices typically include a wide variety of fulltime specialists who represent the Contracting Officer in contractor system reviews and other contract administration activities. These specialists may include: • Quality Assurance Representatives (QARs) • Software specialists • Property specialists; and • Others When authorized by the contract and necessary for effective and efficient contract administration, the Contracting Officer may also appoint technical representatives for specific contracts. The representatives may be known by a variety of names, including: • Contracting Officer Representative (COR) • Contracting Officer's Representative (COR) • Contracting Officer Technical Representative (COR); or • Technical Representative of the Contracting Officer (TRCO) Technical representative designations must follow agency and activity guidelines. Generally: • The cognizant Contracting Officer must assure that each representative possesses the necessary technical qualifications • Technical representatives must undergo training on their responsibilities and authority as a representative of the Contracting Officer • The delegation must include a copy of the applicable portions of the contract and other necessary guidance • The delegation remains in effect throughout the life of the contract unless canceled or modified by the cognizant Contracting Officer

APPENDIX 2

Employment Eligibility Verification and Systematic Alien Verification for Entitlements (SAVE):

Employment Eligibility Verification (E-Verify)

All contractors and subcontractors entering into contracts with Augusta, Georgia for the physical performance of services shall be required to execute an Affidavit verifying its compliance with O.C.G.A. § 13-10-91, stating affirmatively that the individual, firm, or corporation which is contracting with Augusta, Georgia has registered with and is participating in a federal work authorization program. All contractors and subcontractors must provide their *E-Verify number* and must be in compliance with the electronic verification of work authorized programs operated by the United States Department of Homeland Security or any equivalent federal work authorization program operated by the United States Department of Homeland Security to verify information of newly hired employees, pursuant to the Immigration Reform and Control Act of 1986 (IRCA), P.L. 99-603, in accordance with the applicability provisions and deadlines established in O.C.G.A. § 13-10-91 and shall continue to use the federal authorization program throughout the contract term. All contractors shall further agree that, should it employ or contract with any subcontractor(s) in connection with the physical performance of services pursuant to its contract with Augusta, Georgia the contractor will secure from such subcontractor(s) each subcontractor's *E-Verify number* as evidence of verification of compliance with O.C.G.A. § 13-10-91 on the subcontractor affidavit provided in Rule 300-10-01-.08 or a substantially similar form. All contractors shall further agree to maintain records of such compliance and provide a copy of each such verification to Augusta, Georgia at the time the subcontractor(s) is retained to perform such physical services.

Systematic Alien Verification for Entitlements (SAVE) Program

O.C.G.A. § 50-36-1, requires Georgia's cities to comply with the federal **Systematic Alien Verification for Entitlements (SAVE) Program**. SAVE is a federal program used to verify that applicants for certain "public benefits" are legally present in the United States. Contracts with Augusta, Georgia are considered "public benefits." Therefore, the successful bidder will be required to provide the Affidavit Verifying Status for Augusta, Georgia Benefit Application with their submittal.

APPENDIX 3

Objective:
To schedule future FTA training for Procurement Staff to address deficiencies discovered in the Transit Review and to foster the use of industry best practices to be able to assess compliance with Federal procurement requirements.
Solution:

1. Transit Department is to notify Procurement of all FTA training sessions;
2. Procurement will be responsible for expenditures;
3. Positions identified to attend FTA Workshop(s) are
    a. Compliance Officer
    b. Quality Assurance Analyst and/or
    c. Procurement Director and/or
    d. Bid Management Assistant and/or
    e. Administrative Assistant

Immediately after a FTA workshop is attended Procurement will adopt a "Train the Trainer" method for all personnel involved in the FTA process. Training will be conducted in the Procurement Training room no later than three (3) weeks after attending FTA workshop(s). The training will be conducted by the Compliance Officer and the Quality Assurance Analyst. It will be mandatory for the following personnel to attend any scheduled FTA training as deemed necessary.

a. Bid and Contract Team
b. Bid Management Assistant
c. Acquisition Team Leader
d. Procurement Director
e. Administrative Assistant

Attached is a copy of the training sessions that was attended prior to and after the 2012 FTA Review.

FTA Training

Date	Title of Training	Location	Objective of Training	Attendees
Prior to the 2012 Triennial Review the following training Seminar(s) took place				
4/10/10 - 4/22/10	**Third Party Contracting Guidance**	Atlanta, GA	Provide grantees in third party contracting guidance and compliance with FTA Circular 4220.1F	Geri Sams, Nancy Williams, Lonnie Sutton
7/10 10 - 7/11/10	**In-house FTA Training**	Augusta, GA	Develop in-house procedures for FTA projects	Geri Sams, Heyward Johnson, Phyllis Johnson, Lonnie Sutton, Valerie Taylor, Sharon Dottery, Frank Hutto
2/16/11-2/17/11	**Financial Management Oversight**	Miami, FL	Review the criteria for establishing and maintain financial management systems that meet the requirements of 49 CFR	Heyward Johnson Geri Sams Susan Kain Sharon Dottery, Juriah Lewis
2013 - 2014 Trainings				
4/3/13 - 4/4/13	**Bus Procurement Workshop**	Charlotte, NC	Assist FTA Grantees to comply with FTA bus procurement requirement	Phyllis Johnson Sheila Paulk Nancy Williams
10/29/13 - 10/31/13	**Disadvantaged Business Enterprise**	Charlotte, NC	Provide grantees an understanding of the application and administration of the Disadvantaged Business Enterprise	Geri Sams Phyllis Johnson Yvonne Gentry Sharon Dottery, Nancy Williams
12/2/13 - 12/4/13	**FTA 2014 Procurement System Review Workshop**	Atlanta, GA	Clarify FTA procurement requirements, review of procedures to comply with Circular	Phyllis Johnson, Nancy Williams
05/04/14	**Subcontracting and Data Collection Procedures – Contract Management**	Augusta, GA	Develop system for subcontracting tracking and utilization	Geri Sams, Yvonne Gentry, Connie Kelly-Crisler, Sheila Paulk, Nancy Williams
6/1/14 - 6/7/14	**One Solution Training - Contract Management**	Anaheim, CA	Review accounting module for contract management, subcontracting tracking and utilization.	Geri Sams, Yvonne Gentry, Sheila Paulk Nancy Williams
1/26/16 – 1/29/16	**FTA Training Series I:**	San Bernardino, CA	Orientation to Transit Procurement	Geri Sams, Phyllis Johnson, Nancy Williams

FTA TRANING				
Date	**Title of Training**	**Location**	**Objective of Training**	**Attendees**
5/14/17 -5/20/17	**FTA Training Series II:**	San Diego, CA	Risk Assessment & Basic Cost or Price Analysis	Geri Sams, Phyllis Johnson, Nancy Williams
5/16/17 -5/21/17	**FTA Training Series III**	San Jose, CA	RFPs and Competitive Contract Negotiations	Geri Sams, Phyllis Johnson, Nancy Williams
11/27/18 – 12/1/17	**FTA Training**	Atlanta, GA	Triennial Review	Geri Sams, Phyllis Johnson, Nancy Williams, Patrick Stephens, Sharon Dottery, Kellie Irving, Rachel Mack Burshunda Harden, Portia Stith
PROPOSED 3/5/18 – 3/9/18	**FTA Training Series IV**	Richmond, VA	Contract Administration	Geri Sams, Phyllis Johnson, Nancy Williams

GENERAL CONDITIONS

ARTICLE I-DEFINITIONS

Wherever used in these General Conditions or in the other Contract Documents the following terms have the meanings indicated, which are applicable to both the singular and plural thereof:

Addenda-Any changes, revisions or clarifications of the Contract Documents which have been duly issued by OWNER to prospective Bidders prior to the time of opening of Bids.

Agreement-The written agreement between OWNER and CONTRACTOR covering the Work to be performed; other Contract Documents are attached to the Agreement and made a part thereof as provided therein.

Application for Payment-The form accepted by PROFESSIONAL which is to be used by CONTRACTOR in requesting progress or final payments and which is to include such supporting documentation as is required by the Contract Documents.

Bid-The offer or proposal of the bidder submitted on the prescribed form setting forth the price(s) for the Work to be performed.

Bonds-Bid, performance and payment bonds and other instruments of security furnished by CONTRACTOR and its Surety in accordance with the Contract Documents.

Change Order-- *A* document recommended by PROFESSIONAL, which is signed by CONTRACTOR and OWNER, and authorizes an addition, deletion or revision in the Work, or an adjustment in the Contract Price or the Contract Time, issued on or after the Effective Date of the Agreement.

Contract Documents-The Agreement: Addenda (which pertain to the Contract Documents); CONTRACTOR's Bid (including documentation accompanying the Bid and any post-Bid documentation submitted prior to the Notice of Award) when attached as an exhibit to the Agreement; the Bonds; these General Conditions; the Supplementary Conditions; the Plans, Specifications and the Drawings as the same are more specifically identified in the Agreement; Certificates of Insurance; Notice of Award; and Change Order duly delivered after execution of Contract together with all amendments, modifications and supplements issued pursuant to paragraphs 3.3 and 3.5 or after the Effective Date of the Agreement.

Contract Price-The moneys payable by OWNER to CONTRACTOR under the Contract Documents as stated in the Agreement (subject to the provisions of paragraph 11.9.1 in the case of Unit Price Work).

Contract Time-The number of days (computed as provided in paragraph 17.2.1) or the date stated in the Agreement for the completion of the Work.

CONTRACTOR-The person, firm or corporation with whom OWNER has entered into the Agreement.

COUNTY-Richmond County, Georgia, or Augusta, Georgia, political subdivisions of the State of Georgia, the Augusta, Georgia Commission, and its authorized designees, agents, or employees.

Day-Either a working day or calendar day as specified in the bid documents. If a calendar day shall fall on a legal holiday, that day will be omitted from the computation. Legal Holidays: New Year's Day, Martin Luther King Day, Memorial Day, 4th of July, Labor Day, Veterans Day, Thanksgiving Day and the following Friday, and Christmas Day.

Defective-An adjective which, when modifying the word Work, refers to Work that is unsatisfactory, faulty or deficient, does not conform to the Contract Documents, or does not meet the requirements of any inspection, reference standard, test or

approval referred to in the Contract Documents, or has been damaged prior to PROFESSIONAL's recommendation of final payment, unless responsibility for the protection thereof has been assumed by OWNER at Substantial Completion (in accordance with paragraph 14.8 or 14.10).

Drawings-The drawings which show the character and scope of the Work to be performed and which have been prepared or approved by PROFESSIONAL and are referred to in the Contract Documents.

Effective Date of the Agreement-The date indicated in the Agreement on which it becomes effective, but if no such date is indicated it means the date on which the Agreement is signed by the Mayor of Augusta, Georgia.

Field Order-A written order issued by PROFESSIONAL that modifies Drawings and Specifications, but which does not involve a change in the Contract Price or the Contract Time.

General Requirements-Sections of Division I of the Specifications.

Laws or Regulations-Laws, rules, regulations, ordinances, codes and/or orders.

Notice of Award-The written notice by OWNER to the apparent successful bidder stating that upon compliance by the apparent successful bidder with the conditions precedent enumerated therein, within the time specified, OWNER will sign and deliver the Agreement.

Notice to Proceed-A written notice given by OWNER to CONTRACTOR (with a copy to PROFESSIONAL) fixing the date on which the Contract Time will commence to run and on which CONTRACTOR shall start to perform CONTRACTOR'S obligations under the Contract Documents.

OWNER- Augusta, Georgia, and the Augusta, Georgia Commission.

Partial Utilization-Placing a portion of the Work in service for the purpose for which it is intended or for a related purpose) before reaching Substantial Completion for all the Work.

PROFESSIONAL-The Architectural/Engineering firm or individual or in-house licensed person designated to perform the design and/or resident engineer services for the Work.

PROGRAM MANAGER – The professional firm or individual designated as the representative or the OWNER who shall act as liaison between OWNER and both the PROFESSIONAL and CONTRACTOR when project is part of an OWNER designated program.

Project-The total construction of which the Work to be provided under the Contract Documents may be the whole, or a part, as indicated elsewhere in the Contract Documents.

Project Area-The area within which are the specified Contract Limits of the improvements contemplated to be constructed in whole or in part under this Contract.

Project Manager-The professional in charge, serving OWNER with architectural or engineering services, his successor, or any other person or persons, employed by said OWNER, for the purpose of directing or having in charge the work embraced in this Contract.

Resident Project Representative-The authorized representative of PROFESSIONAL as PROGRAM MANAGER who is assigned to the site or any part thereof.

Shop Drawings-All drawings, diagrams, illustrations, schedules and other data which are specifically prepared by or for CONTRACTOR to illustrate some portion of the Work and all illustrations, brochures, standard schedules, performance charts, instructions, diagrams and other information prepared by a Supplier and submitted by CONTRACTOR to illustrate material or equipment for some portion of the Work.

Specifications-Those portions of the Contract Documents consisting of written technical descriptions of materials, equipment, construction systems, standards and workmanship as applied to the Work and certain administrative details applicable thereto.

Subcontractor-An individual, firm or corporation having a direct contract with CONTRACTOR or with any other SUBCONTRACTOR for the performance of a part of the Work at the site.

Substantial Completion-The Work (or a specified part thereof) has progressed to the point where, in the opinion of PROFESSIONAL as evidenced by PROFESSIONAL's definitive certificate of Substantial Completion, it is sufficiently complete, in accordance with the Contract Documents, so that the Work (or specified part) can be used for the purposes for which it is intended, or if there be no such certificate issued, when final payment is due in accordance with paragraph 14.13. The terms "substantially complete" and "substantially completed" as applied to any Work refer to Substantial Completion thereof.

Supplementary Conditions-The part of the Contract Documents which amends or supplements these General Conditions.

Supplier-A manufacturer, fabricator, supplier, distributor, materialman or vendor.

Underground Facilities-All pipelines, conduits, ducts, cables, wires, manholes, vaults, tanks, tunnels or other such facilities or attachments, and any encasement containing such facilities which have been installed underground to furnish any of the following services or materials: electricity, gases, steam, liquid petroleum products, telephone or other communications, cable television, sewage and drainage removal, traffic or other control systems, or water.

Unit Price Work-Work to be paid for on the basis of unit prices.

Work-The entire completed construction or the various separately identifiable parts thereof required to be furnished under the Contract Documents. Work is the result of performing services, furnishing labor and furnishing and incorporating materials and equipment into the construction, and furnishing documents, all as required by the Contract Documents.

Work Change Directive-A written directive to CONTRACTOR, issued on or after the Effective Date of the Agreement and signed by OWNER and recommended by PROFESSIONAL, ordering an addition, deletion or revision in the Work, or responding to differing or unforeseen physical conditions under which the Work is to be performed as provided in paragraph 4.2 or 4.3 or to emergencies under paragraph 6.22. A *Work Change Directive* may not change the Contract Price or the Contract Time but is evidence that the parties expect that the change directed or documented by a *Work Change Directive* will be incorporated in a subsequently issued Change Order following negotiations by the parties as to its effect, if any, on the Contract Price or Contract Time as provided in Article 10.

Written Amendment-A written amendment of the Contract Documents, signed by OWNER and CONTRACTOR on or after the Effective Date of the Agreement and normally dealing with the non-engineering or non-technical rather than strictly Work-related aspects of the Contract Documents.

ARTICLE 2-PRELIMINARY MATTERS

Delivery of Bonds:

2.1. When CONTRACTOR delivers the executed Agreements to OWNER, CONTRACTOR shall also deliver to OWNER such Bonds as CONTRACTOR may be required to furnish in accordance with these Contract Documents.

Copies of Documents:

2.2. After the award of the Contract, OWNER shall furnish CONTRACTOR, at no cost, one (1) complete set of the Contract Documents for execution of the work. Additional sets of the project manual and drawings and/or individual pages or sheets of the project manual or drawings will be furnished by COUNTY upon CONTRACTOR's request and at CONTRACTOR's expense, which will be OWNER'S standard charges for printing and reproduction.

Commencement of Contract Time, Notice to Proceed:

2.3. The Contract Time shall commence as established in the Notice to Proceed. A Notice to Proceed may be given at any time after the Effective Date of the Contract.

Starting the Project:

2.4. CONTRACTOR shall begin the Work on the date the Contract Time commences. No Work shall be done prior to the date on which the Contract Time commences. Any Work performed by CONTRACTOR prior to date on which Contract Time commences shall be at the sole risk of CONTRACTOR.

Before Starting Construction:

2.5. Before undertaking each part of the Work, CONTRACTOR shall carefully study and compare the Contract Documents and check and verify pertinent figures shown thereon and all applicable field measurements. CONTRACTOR shall promptly report in writing to PROFESSIONAL any conflict, error, ambiguity, or discrepancy which CONTRACTOR may discover and shall obtain a written interpretation or clarification from PROFESSIONAL before proceeding with any Work affected thereby. CONTRACTOR shall be liable to OWNER for failure to report any conflict, error, ambiguity or discrepancy in the Contract Documents, if CONTRACTOR knew or reasonably should have known thereof.

2.6. Within ten days after the Effective Date of the Agreement (unless otherwise specified in the General Requirements), CONTRACTOR shall submit to PROFESSIONAL and OWNER for review:

2.6.1. an estimated progress schedule indicating the starting and completion dates of the various stages of the Work:

2.6.2. a preliminary schedule of Shop Drawing and Sample submissions, and

2.6.3. a preliminary schedule of values for all of the Work which will include quantities and prices of items aggregating the Contract Price and will subdivide the Work into component parts in sufficient detail to serve as the basis for progress payments during construction. Such prices will include an appropriate amount of overhead and profit applicable to each item of Work which will be confirmed in writing by CONTRACTOR at the time of submission.

2.7. Before any Work at the site is started, CONTRACTOR shall deliver to OWNER, with copies to each additional insured identified in the Supplementary Conditions, an original policy or certified copies of each insurance policy (and other evidence of insurance which OWNER may reasonably request) which CONTRACTOR is required to purchase and maintain

in accordance with Article 5.

Pre-construction Conference:

2.8. Before any Work at the site is started, a conference attended by CONTRACTOR, OWNER, PROFESSIONAL and others as appropriate will be held to establish a working understanding among the parties as to the Work and to discuss the schedules referred to in 2.6 as well as procedures for handling Shop Drawings and other submittals, processing applications for payment and maintaining required records.

Finalizing Schedules:

2.9. At least ten days before submission of the first Application for Payment, a conference attended by CONTRACTOR, PROFESSIONAL and OWNER and others as appropriate will be held to finalize the schedules submitted in accordance with paragraph 2.6. CONTRACTOR shall have an additional ten (10) calendar days to make corrections and adjustments and to complete and resubmit the schedules. No progress payment shall be made to CONTRACTOR until the schedules are submitted and acceptable to OWNER and PROFESSIONAL as provided below. The finalized progress schedule will be acceptable to OWNER and PROFESSIONAL as providing an orderly progression of the Work to completion within any specified Milestones and the Contract Time, but such acceptance will neither impose on PROFESSIONAL responsibility for the sequencing, scheduling or progress of the Work nor interfere with or relieve CONTRACTOR from full responsibility therefore. The finalized schedule of Shop Drawing submissions and Sample submissions will be acceptable to PROFESSIONAL as providing a workable arrangement for reviewing and processing the submissions. CONTRACTOR's schedule of values shall be approved by PROFESSIONAL as to form and substance.

CONTRACTOR, in addition to preparing an initially acceptable schedule, shall be responsible for maintaining the schedule, including updating schedule. Schedule updates shall include progression of work as compared to scheduled progress on work. Schedule updates shall accompany each pay request.

ARTICLE 3-CONTRACT DOCUMENTS; INTENT, AMENDING, REUSE

Intent:

3.1. The Contract Documents comprise the entire agreement between OWNER and CONTRACTOR concerning the Work. The Contract Documents are complementary: what is called for by one is as binding as if called for by all. The Contract Documents will be construed in accordance with the law of the State of Georgia.

3.2. It is the intent of the Contract Documents to describe a functionally complete Project (or part thereof) to be constructed in accordance with the Contract Documents. Any Work, materials or equipment that may reasonably be inferred from the Contract Documents or from prevailing custom or trade usage as being required to produce the intended result will be supplied whether or not specifically called for. When words or phrases which have a well-known technical or construction industry or trade meaning are used to describe Work, materials or equipment, such words shall be interpreted in accordance with that meaning.

3.3. Except as otherwise specifically stated in the Contract Documents or as may be provided by amendment or supplement thereto issued by one of the methods indicated in 3.6 or 3.7, the provisions of the Contract Documents shall take precedence in resolving any conflict, error, ambiguity or discrepancy between the provisions of the Contract Documents and the provisions of any such standard, specification, manual, code or instruction (whether or not specifically incorporated by reference in the Contract Documents) and the provisions of any such Laws or Regulations applicable to the performance of the Work (unless such an interpretation of the provisions of the Contract Documents would result in violation of such Law or Regulation). Clarifications and interpretations of the Contract Documents shall be issued by PROFESSIONAL as provided in paragraph 9.4.

3.4. Reference to standards, specifications, manuals or codes of any technical society, organization or association, or to the Laws or Regulations of any governmental authority, whether such reference be specific or by implication, shall mean the latest standard, specification, manual, code or Laws or Regulations in effect at the time of opening of Bids (or on the Effective Date of the Agreement if there were no Bids), except as may be otherwise specifically stated in the Contract Documents.

3.5. If, during the performance of the Work, CONTRACTOR discovers any conflict, error, ambiguity or discrepancy within the Contract Documents or between the Contract Documents and any provision of any such Law or Regulation applicable to the performance of the Work or of any such standard, specification, manual or code or of any instruction of any Supplier referred to in 6.7,

CONTRACTOR shall so report to PROFESSIONAL in writing at once and before proceeding with the Work affected thereby and shall obtain a written interpretation or clarification from PROFESSIONAL; however, CONTRACTOR shall not be liable to OWNER or PROFESSIONAL for failure to report any conflict, error, ambiguity or discrepancy in the Contract Documents unless CONTRACTOR had actual knowledge thereof or should reasonably have known thereof.

Amending and Supplementing Contract Documents:

3.6. The Contract Documents may be amended to provide for additions, deletions and revisions in the Work or to modify the terms and conditions thereof in one or more of the following ways:

3.6.1. a formal Written Amendment,

3.6.2. a Change Order (pursuant to paragraph 10.3), or

3.6.3. a Work Change Directive (pursuant to paragraph 10.4).

As indicated in paragraphs 11.2 and 12.1, Contract Price and Contract Time may only be changed by a Change Order or a Written Amendment.

3.7. In addition, the requirements of the Contract Documents may be supplemented, and minor variations and deviations in the Work may be authorized in one or more of the following ways:

3.7.1. a Field Order (pursuant to paragraph 9.5).

3.7.2. PROFESSIONAL's approval of a Shop Drawing or sample (pursuant to paragraphs 6.24 and 6.26), or

3.7.3. PROFESSIONAL's written interpretation or clarification (pursuant to paragraph 9.4).

Reuse of documents:

3.8. Neither CONTRACTOR nor any Subcontractor or Supplier or other person or organization performing or furnishing any of the Work under a direct or indirect contract with OWNER shall have or acquire any title to or OWNERSHIP rights in any of the Drawings, Specifications or other documents (or copies of any thereof) prepared by or bearing the seal of PROFESSIONAL or PROFESSIONAL's consultant; and they shall not reuse such Drawings, Specifications or other documents (or copies of any thereof) on extensions of the Project or any other project without written consent of OWNER and PROFESSIONAL and specific written verification or adaptation by PROFESSIONAL.

ARTICLE 4-AVAILABILITY OF LANDS, PHYSICAL CONDITIONS; REFERENCE POINTS

Availability of Lands:

4.1. OWNER shall furnish, as indicated in the Contract Documents, the lands upon which the Work is to be performed, rights-of-way and easements for access thereto, and such other lands which are designated for the use of CONTRACTOR. Necessary easements or rights-of-way will be obtained and expenses will be borne by OWNER. If CONTRACTOR and OWNER are unable to agree on entitlement to or the amount or extent of any adjustments in the Contract Price or the Contract Times as a result of any delay in OWNER's furnishing these lands, rights-of-way or easements, the CONTRACTOR may make a claim therefor as provided in Articles 11 and 12. The CONTRACTOR shall provide for all additional lands and access thereto that may be required for temporary construction facilities or storage of materials and equipment.

Physical Conditions:

4.2.1. Explorations and Reports: Reference is made to the Supplementary Conditions for identification of those reports of explorations and tests of subsurface conditions at or contiguous to the site that have been utilized in preparing the Contract Documents

and those drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the site (except Underground Facilities) that have been utilized in preparing the Contract Documents.

4.2.2. CONTRACTOR may rely upon the general accuracy of the "technical data" contained in such reports and drawings. Such "technical data" is identified in the Supplementary Conditions. Except for such reliance on such "technical data," CONTRACTOR may not rely upon or make any claim against OWNER, PROFESSIONAL, or any of PROFESSIONAL's Consultants with respect to:

4.2.2.1. the completeness of such reports and drawings for CONTRACTOR's purposes, including but not limited to, any aspects of the means, methods, techniques, sequences and procedures of construction to be employed by CONTRACTOR and safety precautions and programs incident thereto, or

4.2.2.2. other data, interpretations, opinions and information contained in such reports or shown or indicated in such drawings, or

4.2.2.3. any CONTRACTOR interpretation of or conclusion drawn from any "technical data" or any such data, interpretations, opinions or information.

4.2.3. If conditions are encountered, excluding existing utilities, at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then CONTRACTOR shall give OWNER notice thereof promptly before conditions are disturbed and in no event later than 48 hours after first observance of the conditions.

4.2.4. The OWNER and PROFESSIONAL shall promptly investigate such conditions, and, if they differ materially and cause an increase or decrease in CONTRACTOR's cost of, or time required for, performance of any part of the Work, the OWNER and PROFESSIONAL shall recommend an equitable adjustment in the Contract Price or Contract Time, or both. If the OWNER and PROFESSIONAL determine that the conditions at the Site are not materially different from those indicated in the Contract Documents or are not materially different from those ordinarily found and that no change in the terms of the Contract is justified, the PROFESSIONAL shall notify CONTRACTOR of the determination in writing. The Work shall be performed after direction is provided by the PROFESSIONAL. ***Physical Conditions-Underground Facilities:***

4.3.1. Shown or Indicated: The information and data shown or indicated in the Contract Documents with respect to existing Underground Facilities at or contiguous to the site is based on information and data furnished to OWNER or PROFESSIONAL by OWNER'S of such Underground Facilities or by others. Unless it is otherwise expressly provided in the Supplementary Conditions:

4.3.1.1. OWNER and PROFESSIONAL shall not be responsible for the accuracy or completeness of any such information or data; and

4.3.1.2. The cost of all of the following will be included in the Contract Price and CONTRACTOR shall have full responsibility for reviewing and checking all such information and data for locating all Underground Facilities shown or indicated in the Contract Documents, for coordination of the Work with the OWNER'S of such Underground Facilities during construction, for the safety and protection thereof as provided in paragraph 6.20 and repairing any damage thereto resulting from the Work, the cost of all of which will be considered as having been included in the Contract Price.

4.3.2. Not Shown or Indicated. If an Underground Facility is uncovered or revealed at or contiguous to the site which was not shown or indicated in the Contract Documents and which CONTRACTOR could not reasonably have been expected

to be aware of, CONTRACTOR shall, promptly after becoming aware thereof and before performing any Work affected thereby except in an emergency as permitted by paragraph 6.22, identify the OWNER of such Underground Facility and give written notice thereof to that OWNER and to OWNER and PROFESSIONAL. PROFESSIONAL will promptly review the Underground Facility to determine the extent to which the Contract Documents should be modified to reflect and document the consequences of the existence of the Underground Facility, and the Contract Documents will be amended or supplemented to the extent necessary. During such time, CONTRACTOR shall be responsible for the safety and protection of such Underground Facility as provided in paragraph 6.20. CONTRACTOR shall be allowed an increase in the Contract Price or an extension of the Contract Time, or both, to the extent that they are attributable to the existence of any Underground Facility that was not shown or indicated in the Contract Documents and which CONTRACTOR could not reasonably have

been expected to be aware of. If the parties are unable to agree as to the amount or length thereof, CONTRACTOR may make a claim therefor as provided in Articles 11 and 12.

Reference Points:

4.4. OWNER shall provide Engineering surveys to establish reference points for construction which in PROFESSIONAL's judgment are necessary to enable CONTRACTOR to proceed with the Work. CONTRACTOR shall be responsible for laying out the Work (unless otherwise specified in the General Requirements), shall protect and preserve the established reference points and shall make no changes or relocations without the prior written approval of OWNER. CONTRACTOR shall report to PROFESSIONAL whenever any reference point is lost or destroyed or requires relocation because of necessary changes in grades or locations, and shall be responsible for the accurate replacement or relocation of such reference points by professionally qualified personnel.

Asbestos, PCBs, Petroleum, Hazardous Waste or Radioactive Material:

4.5 OWNER shall be responsible for any Asbestos, PCBs, Petroleum, Hazardous Waste or Radioactive Material uncovered or revealed at the site which was not shown or indicated in Drawings or Specifications or identified in the Contract Documents to be within the scope of the Work and which may present a substantial danger to persons or property exposed thereto in connection with the Work at the site. OWNER shall not be responsible for any such materials brought to the site by CONTRACTOR, Subcontractor, Suppliers or anyone else for whom CONTRACTOR is responsible.

4.6 CONTRACTOR shall immediately: (i) stop all work in connection with such hazardous condition and in any area affected thereby (except in an emergency as required by 6.22), and (ii) notify OWNER and PROFESSIONAL (and thereafter confirm such notice in writing). OWNER shall promptly consult with PROFESSIONAL concerning the necessity for OWNER to retain a qualified expert to evaluate such hazardous condition or take corrective action, if any. CONTRACTOR shall not be required to resume Work in connection with such hazardous condition or in any such affected area until after OWNER has obtained any required permits related thereto and delivered to CONTRACTOR special written notice (i) specifying that such condition and any affected area is or has been rendered safe for the resumption of Work, or (ii) specifying any special conditions under which such Work may be resumed safely. If OWNER and CONTRACTOR cannot agree as to entitlement to or the amount or extent of an adjustment, if any, in Contract Price or Contract Times as a result of such Work stoppage or such special conditions under which Work is agreed by CONTRACTOR to be resumed, either party may make a claim therefor as provided in Articles 11 and 12.

4.7 If after receipt of such special written notice, CONTRACTOR does not agree to resume such Work based on a reasonable belief it is unsafe, or does not agree to resume such Work under such special conditions, then CONTRACTOR may order such portion of the Work that is in connection with such hazardous conditions or in such affected area to be deleted from the Work. If OWNER and CONTRACTOR cannot agree as to entitlement to or the amount or extent of an adjustment, if any, in Contract Price or Contract Times as a result of deleting such portion of the Work, then either party may make a claim therefor as provided in Articles 11 and 12. OWNER may have deleted such portion of the Work performed by OWNER's own forces or others in accordance with Article 7.

4.7.1 The provisions of 4.2 and 4.3 are not intended to apply to Asbestos, PCBs, Petroleum, Hazardous Waste or Radioactive Material uncovered or revealed at the site.

ARTICLE 5-BONDS AND INSURANCE

Performance and Other Bonds:

5.1. CONTRACTOR shall furnish performance and payment Bonds, each in an amount at least equal to the Contract

Price as Security for the faithful performance and payment of all CONTRACTOR's obligations under the Contract Documents. These Bonds shall remain in effect at least until one year after the date when final payment becomes due, except as otherwise provided by Law or Regulation or by the Contract Documents. CONTRACTOR shall also furnish such other Bonds as are required by the Supplementary Conditions. All Bonds shall be in the forms prescribed by Law or Regulation or by the Contract Documents and be executed by such sureties as are named in the current list of "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds, and as Acceptable Reinsuring Companies" as published in Circular 570 (amended) by the Audit Staff Bureau of Accounts, U.S. Treasury Department. All Bonds signed by an agent must be accompanied by a certified copy of the authority to act.

APPENDIX 4

Licensed Sureties and Insurers; Certificates of Insurance

5.2.1 All bonds and insurance required by the Contract Documents to be purchased and maintained by CONTRACTOR shall be obtained from surety or insurance companies that are duly licensed or authorized in the State of Georgia to issue bonds or insurance policies for the limits and coverages so required. All bonds signed by an agent must be accompanied by a certified copy of authority to act. Such surety and insurance companies shall also meet such additional requirements and qualifications as may be provided in the Supplementary Conditions.

5.2.2. CONTRACTOR shall deliver to OWNER, with copies to each additional insured identified in 5.3, an original or a certified copy of the complete insurance policy for each policy required, certificates of insurance (and other evidence of insurance requested by OWNER or any other additional insured) which CONTRACTOR is required to purchase and maintain in accordance with 5.3.

5.2.3. If the surety on any Bond furnished by CONTRACTOR is declared bankrupt or becomes insolvent or its right to do business is terminated in an state where any part of the Project is located or it ceases to meet the requirements of paragraph 5.1, CONTRACTOR shall within five days thereafter substitute another Bond and Surety, both of which must be acceptable to OWNER.

CONTRACTOR's Liability Insurance:

5.3. CONTRACTOR shall purchase and maintain such comprehensive general liability and other insurance as is appropriate for the Work being performed and furnished and as will provide protection from claims set forth below which may arise out of or result from CONTRACTOR's performance and furnishing of the Work and CONTRACTOR's other obligations under the Contract Documents, whether it is to be performed or furnished by CONTRACTOR, by any Subcontractor, by anyone directly or indirectly employed by any of them to perform or furnish any of the Work, or by anyone for whose acts any of them may be liable:

5.3.1. Claims under workers' or workmen's compensation, disability benefits and other similar employee benefit acts;

5.3.2. Claims for damages because of bodily injury, occupational sickness or disease, or death of CONTRACTOR's employees;

5.3.3. Claims for damages because of bodily injury, sickness or disease, or death of any person other than CONTRACTOR's employees;

5.3.4. Claims for damages insured by personal injury liability coverage which are sustained (a) by any person as a result of an offense directly or indirectly related to the employment of such person by CONTRACTOR, or (b) by any other person for any other reason;

5.3.5. Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property

wherever located, including loss of use resulting therefrom;

5.3.6. Claims arising out of operation of Laws or Regulations for damages because of bodily injury or death of any person or for damage to property; and

5.3.7. Claims for damages because of bodily injury or death of any person or property damage arising out of the OWNERSHIP, maintenance or use of any motor vehicle.

The insurance required by this paragraph 5.3 shall include the specific coverage's and be written for not less than the limits of liability and coverage's provided in the Supplementary Conditions, or required by law, whichever is greater. The comprehensive general liability insurance shall include completed operations insurance. All of the policies of insurance so required to be purchased and maintained (or the certificates or other evidence thereof) shall contain a provision or endorsement that the coverage afforded will not be canceled, materially changed or renewal refused until at least thirty days prior written notice has been given to OWNER, PROGRAM MANAGER, and PROFESSIONAL by certified mail. All such insurance shall remain in effect until final payment and at all times thereafter when CONTRACTOR may be correcting, removing or replacing defective Work in accordance with paragraph 13.12. In addition,

CONTRACTOR shall maintain such completed operations insurance for at least two years after final payment and furnish OWNER with evidence of continuation of such insurance at final payment and one year thereafter.

Contractual Liability Insurance:

5.4. The comprehensive general liability insurance required by paragraph 5.3 will include contractual liability insurance applicable to CONTRACTOR's obligations under paragraphs 6.32 and 6.33.

OWNER's Liability Insurance:

5.5. OWNER shall be responsible for purchasing and maintaining OWNER's own liability insurance, and/or Risk Retention Program, and, at OWNER's option, may purchase and maintain such insurance as will protect OWNER against claims which may arise from operations under the Contract Documents.

Property Insurance:

5.6. Unless otherwise provided in the Supplementary Conditions, OWNER shall purchase and maintain property insurance upon the Work at the site to the full insurable value thereof (subject to such deductible amounts as may be provided in the Supplementary Conditions or required by Laws and Regulations). This insurance shall include the interests of OWNER, CONTRACTOR, Subcontractors, PROGRAM MANAGER, PROFESSIONAL and PROFESSIONAL's consultants in the Work, all of whom shall be listed as insureds or additional insured parties, shall insure against the perils of fire and extended coverage and shall include "all risk" insurance for physical loss and damage including theft, vandalism and malicious mischief, collapse and water damage, and such other perils as may be provided in the Supplementary Conditions, and shall include damages, losses and expenses arising out of or resulting from any insured loss or incurred in the repair or replacement of any insured property (including but not limited to fees and charges of PROFESSIONALs, architects, attorneys and other PROFESSIONALs). If not covered under the "all risk" insurance or otherwise provided in the Supplementary Conditions, CONTRACTOR shall purchase and maintain similar property insurance on portions of the Work stored on and off the site or in transit when such portions of the Work are to be included in an Application for Payment.

5.7. OWNER shall purchase and maintain such boiler and machinery insurance or additional property insurance as may be required by the Supplementary Conditions or Laws and Regulations which will include the interests of OWNER, CONTRACTOR, Subcontractors, PROFESSIONAL AND PROFESSIONAL's consultants in the Work, all of whom shall be listed as insured or additional insured parties.

5.8. All the policies of insurance (or the certificates or other evidence thereof) required to be purchased and maintained by OWNER in accordance with paragraphs 5.6 and 5.7 will contain a provision or endorsement that the coverage afforded will not be canceled or materially changed or renewal refused until at least thirty days prior written notice has been given to CONTRACTOR by certified mail and will contain waiver provisions in accordance with paragraph of 5.11.2.

5.9. OWNER shall not be responsible for purchasing and maintaining any property insurance to protect the Interests of CONTRACTOR, Subcontractors or others in the Work to the extent of any deductible amounts that are provided in the Supplementary Conditions. The risk of loss within the deductible amount will be borne by CONTRACTOR,

Subcontractor or others suffering any such loss, and if any of them wishes property insurance coverage within the limits of such amounts, each may purchase and maintain it at the purchaser's own expense.

5.10. If CONTRACTOR requests in writing that other special insurance be included in the property insurance policy, OWNER shall, if possible, include such insurance, and the cost thereof will be charged to CONTRACTOR by appropriate Change Order or Written Amendment. Prior to commencement of the Work at the site, OWNER shall in writing advise

CONTRACTOR whether or not such other insurance has been procured by OWNER.

Waiver of Rights:

5.11.1. OWNER and CONTRACTOR waive all rights against each other for all losses and damages caused by any of the perils covered by the policies of insurance provided in response to paragraphs 5.6 and 5.7 and other property insurance applicable to the

Work, and also waive all such rights against the Subcontractors, PROFESSIONAL, PROFESSIONAL's consultants and all other parties named as insureds in such policies for losses and damages so caused. As required by paragraph 6.11, each subcontract between CONTRACTOR and a Subcontractor will contain

similar waiver provisions by the Subcontractor in favor of OWNER, CONTRACTOR, PROFESSIONAL, PROFESSIONAL's consultants and all other parties named as insureds. None of the above waivers shall extend to the rights that any of the insured parties may have to the proceeds of insurance held by OWNER as trustee or otherwise payable under any policy so issued.

5.11.2. OWNER and CONTRACTOR intend that policies provided in response to paragraphs 5.6 and 5.7 shall protect all of the parties insured and provide primary coverage for all losses and damages caused by the perils covered thereby. Accordingly, all such policies shall contain provisions to the effect that in the event of payment of any loss or damage the insurer will have no rights of recovery against any of the parties named as insureds or additional insureds, and if the insurers require separate waiver forms to be signed by PROFESSIONAL or PROFESSIONAL's consultant, OWNER will obtain the same, and if such waiver forms are required of any Subcontractor, CONTRACTOR will obtain the same.

Receipt and Application of Proceeds:

5.12. Any insured loss under the policies of insurance required by paragraphs 5.6 and 5.7 will be adjusted with OWNER and made payable to OWNER as trustee for the insureds, as their interests may appear, subject to the requirements of any applicable mortgage clause and of paragraph 5.13. OWNER shall deposit in a separate account any money so received and shall distribute it in accordance with such agreement as the parties in interest may reach. If no other special agreement is reached, the damaged Work shall be repaired or replaced, the moneys so received applied on account thereof, and the Work and the cost thereof covered by an appropriate Change Order or Written Amendment.

Receipt and Application of Insurance Proceeds

5.13. OWNER, as trustee, shall have power to adjust and settle any loss with the insurers unless one of the parties in interest shall object in writing within fifteen days after the occurrence of loss to OWNER's exercise of this power. If such objection be made, OWNER, as trustee, shall make settlement with the insurers in accordance with such agreement as the parties in interest may reach. If required in writing by any party in interest, OWNER as trustee shall, upon the occurrence of an insured loss, give bond for the proper performance of such duties.

Acceptance of Insurance:

5.14. If OWNER has any objection to the coverage afforded by or other provisions of the insurance required to be purchased and maintained by CONTRACTOR in accordance with paragraphs 5.3 and 5.4 on the basis of its not complying with the Contract Documents, OWNER shall notify CONTRACTOR in writing thereof within ten days of the date of delivery of such certificates to OWNER in accordance with paragraph 2.7. If CONTRACTOR has any objection to the coverage afforded by or other provisions of the policies of insurance required to be purchased and maintained by OWNER in accordance with paragraphs 5.6 and 5.7 on the basis of their not complying with the Contract Documents, CONTRACTOR shall notify OWNER in writing thereof within ten days of the date of delivery, of such certificates to CONTRACTOR in accordance with paragraph 2.7. OWNER and CONTRACTOR shall each provide to the other such additional information in respect of insurance provided by each as the other may reasonably request. Failure by OWNER or CONTRACTOR to give
any such notice of objection within the time provided shall constitute acceptance of such insurance purchased by the other as complying with the Contract Documents.

Partial Utilization-Property Insurance:

5.15. If OWNER finds it necessary to occupy or use a portion or portions of the Work prior to Substantial Completion of all the Work, such use or occupancy may be accomplished in accordance with paragraph 14.10 provided that no such use or occupancy shall commence before the insurers providing the property insurance have acknowledged

notice thereof and in writing effected the changes in coverage necessitated thereby. The insurers providing the property insurance shall consent by endorsement on the policy or policies, but the property insurance shall not be canceled or lapse on account of any such partial use or occupancy.

Indemnification

5.16.1. CONTRACTOR shall indemnify and hold harmless OWNER, PROGRAM MANAGER, and its employees and agents from and against all liabilities, claims, suits, demands, damages, losses, and expenses, including attorneys' fees, arising out of or resulting from the performance of its Work, provided that any such liability, claim, suit, demand, damage, loss, or expense (a) is attributable to bodily injury, sickness, disease or death, or injury to or destruction of tangible property, including the loss of use resulting therefrom and (b) is caused in whole or in part by an act or omission of CONTRACTOR, any Subcontractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, whether or not it is caused in whole or in part by the negligence or other fault of a party indemnified hereunder.

5.16.2. In any and all claims against OWNER or any of its agents or employees by any employee of CONTRACTOR, any SUBCONTRACTOR, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable, the indemnification obligation under the previous paragraph shall not be limited in any way as to the amount or type of damages, compensation or benefits payable by or for CONTRACTOR or any SUBCONTRACTOR under workmen's compensation acts, disability benefit acts, or other employee benefit acts.

5.16.3. CONTRACTOR shall indemnify and hold harmless OWNER and anyone directly or indirectly employed by it from and against all claims, suits, demands, damages, losses expenses (including attorneys' fees) arising out of any infringement on patent or copyrights held by others and shall defend all such claims in connection with any alleged infringement of such rights.

ARTICLE 6--CONTRACTOR'S RESPONSIBILITIES

6.1. CONTRACTOR shall supervise and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with the Contract Documents. CONTRACTOR shall be solely responsible for the means, methods, techniques, sequences and procedures of construction, but CONTRACTOR shall not be responsible for the negligence of others in the design or specification of a specific means, method, technique, sequence or procedure of construction which is shown or indicated in and expressly required by the Contract Documents. CONTRACTOR shall be responsible to see that the finished Work complies accurately with the Contract Documents.

6.2. CONTRACTOR shall keep on the Work, at all times during its progress, a competent resident superintendent, who shall not be replaced without written notice to OWNER and PROFESSIONAL except under extraordinary circumstances. The superintendent will be CONTRACTOR's representative at the site and shall have authority to act on behalf of CONTRACTOR. All communications to the superintendent shall be as binding as if given to CONTRACTOR.

Labor, Materials and Equipment:

6.3. CONTRACTOR shall provide competent, suitably qualified personnel to survey and lay out the Work and perform construction as required by the Contract Documents. CONTRACTOR shall at all times maintain good discipline and order at the site. Except in connection with the safety or protection of persons or the Work or property at the site or

adjacent thereto, and except as otherwise indicated in the Contract Documents, all Work at the site shall be performed during regular working hours, and CONTRACTOR will not permit evening work or the performance of Work on Saturday, Sunday or any legal holiday without OWNER's written consent given after prior written notice to PROFESSIONAL.

6.4. Unless otherwise specified in the General Requirements, CONTRACTOR shall furnish and assume full responsibility for all materials, equipment, labor, transportation, construction equipment and machinery, tools, appliances, fuel, power, light, heat, telephone, water, sanitary facilities, temporary facilities and all other facilities and incidentals whether temporary or permanent necessary for the execution, testing, initial operation, and completion of the Work as required by the Contract Documents.

6.5. All materials and equipment shall be of good quality and new, except as otherwise provided in the Contract Documents. If required by PROFESSIONAL, CONTRACTOR shall furnish satisfactory evidence (including reports of required tests) as to the kind and quality of materials and equipment. All materials and equipment shall be applied, installed, connected, erected, used, cleaned and conditioned in accordance with the instructions of the applicable Supplier except as otherwise provided in the Contract Documents; but no provision of any such instructions will be effective to assign to PROFESSIONAL, or any of PROFESSIONAL's consultants, agents or employees, any duty or authority to supervise or direct the furnishing or performance of the Work or any duty or authority to undertake responsibility contrary to the provisions of paragraph 9.14 or 9.15.

Adjusting Progress Schedule:

6.6. CONTRACTOR shall submit to PROFESSIONAL for acceptance to the extent indicated in paragraph 2.9 adjustments in the progress schedule to reflect the impact thereon of new developments; these will conform generally to the progress schedule then in effect and additionally will comply with any provisions of the General Requirements applicable thereto.

Substitutes or "Or-Equal" Items:

6.7.1. Whenever materials or equipment are specified or described in the Contract Documents by using the name of a proprietary item or the name of a particular Supplier, the naming of the item is intended to establish the type, function and quality required. Unless the name is followed by words indicating that no substitution is permitted, materials or equipment of other Suppliers may be accepted by PROFESSIONAL if sufficient information is submitted by CONTRACTOR to allow PROFESSIONAL to determine that the material or equipment proposed is equivalent or equal to that named. The procedure for review by PROFESSIONAL will include the following as supplemented in the General Requirements. Requests for review of substitute items of material and equipment will not be accepted by PROFESSIONAL from anyone other than CONTRACTOR. If CONTRACTOR wishes to furnish or use a substitute item of material or equipment, CONTRACTOR shall make written application to PROFESSIONAL for acceptance thereof, certifying that the proposed substitute will perform adequately the functions and achieve the results called for by the general design, be similar and of equal substance to that specified and be suited to the same use as that specified. The application will state that the evaluation and acceptance of the proposed substitute will not prejudice CONTRACTOR's achievement of Substantial Completion on time, whether or not acceptance of the substitute for use in the Work will require a change in any of the Contract Documents (or in the provisions of any other direct contract with OWNER for work on the Project) to adapt the design to the proposed substitute and whether or not incorporation or use of the substitute in connection with the Work is subject to payment of any license fee or royalty.

All variations of the proposed substitute from that specified will be identified in the application and available maintenance, repair and replacement service will be indicated. The application will also contain an itemized estimate of all costs that will result directly or indirectly from acceptance of such substitute, including costs of redesign and claims of other contractors affected by the resulting change, all of which shall be considered by PROFESSIONAL. In evaluating the proposed substitute, PROFESSIONAL may require CONTRACTOR to furnish, at CONTRACTOR's expense, additional data about the proposed

substitute.

6.7.2. If a specific means, method, technique, sequence or procedure of construction is indicated in or required by the Contract Documents, CONTRACTOR may furnish or utilize a substitute means, method, sequence, technique or procedure of construction acceptable to PROFESSIONAL, if CONTRACTOR submits sufficient information to allow PROFESSIONAL to determine that the substitute proposed is equivalent to that indicated or required by the Contract Documents. The procedure for review by PROFESSIONAL will be similar to that provided in paragraph 6.7.1 as applied by PROFESSIONAL and as may be supplemented in the General Requirements.

6.7.3. PROFESSIONAL will be allowed a reasonable time within which to evaluate each proposed substitute. PROFESSIONAL will be the sole judge of acceptability and no substitute will be ordered, installed or utilized without PROFESSIONAL's prior written acceptance which will be evidenced by either a Change Order or an approved Shop Drawing. OWNER may require CONTRACTOR to furnish, at CONTRACTOR's expense, a special performance guarantee or other surety with respect to any substitute. PROFESSIONAL will record time required by PROFESSIONAL and PROFESSIONAL's consultants in evaluating substitutions proposed by CONTRACTOR and in making changes in the Contract Documents occasioned thereby. Whether or not PROFESSIONAL accepts a proposed substitute, CONTRACTOR shall reimburse OWNER for the charges of PROFESSIONAL and PROFESSIONAL's consultants for evaluating each proposed substitute.

Concerning Subcontractors, Suppliers and Others:

6.8.1. CONTRACTOR shall not employ any Subcontractor, Supplier or other person or organization (including those acceptable to OWNER and PROFESSIONAL as indicated in paragraph 6.8.2) whether initially or as a substitute, against whom OWNER or PROFESSIONAL may have reasonable objection. CONTRACTOR shall not be required to employ any Subcontractor, Supplier or other person or organization to furnish or perform any of the Work against whom CONTRACTOR has reasonable objection.

6.8.2. If the Supplementary Conditions require the identity of certain Subcontractors, Suppliers or other persons or organizations including those who are to furnish the principal items of materials and equipment to be submitted to OWNER prior to the Effective Date of the Agreement for acceptance by OWNER and PROFESSIONAL and if CONTRACTOR has submitted a list thereof in accordance with the Supplementary Conditions, OWNER's or PROFESSIONAL's acceptance (either in writing or by failing to make written objection thereto by the date indicated for acceptance or objection in the bidding documents or the Contract Documents) of any such Subcontractor, Supplier or other person or organization so identified may be revoked on the basis of reasonable objection after due investigation, in which case CONTRACTOR shall submit an acceptable substitute, the Contract Price will be increased by the difference, and the cost occasioned by such substitution and an appropriate Change Order will be issued or Written Amendment signed. No acceptance by OWNER or PROFESSIONAL of any such Subcontractor, Supplier or other person or organization shall constitute a waiver of any right of OWNER or PROFESSIONAL to reject defective Work.

6.9. CONTRACTOR shall be fully responsible to OWNER and PROFESSIONAL for all acts and omissions of the Subcontractors, Suppliers and other persons and organizations performing or furnishing any of the Work under a direct or indirect contract with CONTRACTOR just as CONTRACTOR is responsible for CONTRACTOR's own acts and omissions. Nothing in the Contract Documents shall create any contractual relationship between OWNER or PROFESSIONAL and any such Subcontractor, Supplier or other person or organization, nor shall it create any obligation on the part of OWNER or PROFESSIONAL to pay or to see to the payment of any moneys due any such Subcontractor, Supplier or other person or organization except as may otherwise be required by Laws and Regulations.

6.10. The divisions and sections of the Specifications and the identifications of any Drawings shall not control CONTRACTOR in dividing the Work among Subcontractors or Suppliers or delineating the Work to be performed by any specific trade.

6.11. All Work performed for CONTRACTOR by a Subcontractor will be pursuant to an appropriate agreement between CONTRACTOR and the Subcontractor which specifically binds the Subcontractor to the applicable terms and conditions of the Contract Documents for the benefit of OWNER and PROFESSIONAL and contains waiver provisions as required by paragraph 5.11. CONTRACTOR shall pay each Subcontractor a just share of any insurance moneys received by CONTRACTOR on account of losses under policies issued pursuant to paragraphs 5.6 and 5.7.

Patent Fees and Royalties:

6.12. CONTRACTOR shall pay all license fees and royalties and assume all costs incident to the use in the performance of the Work or the incorporation in the Work of any invention, design, process, product or device which is the subject of patent rights or copyrights held by others. CONTRACTOR shall indemnify and hold harmless OWNER and PROFESSIONAL and anyone directly or indirectly employed by either of them from and against all claims, damages, losses and expenses including attorneys' fees and court and arbitration costs arising out of any infringement on patent rights or copyrights incident to the use in the performance of the Work or resulting from the incorporation in the Work of any invention, design, process, product or device not specified in the Contract Documents, and shall defend all such claims in connection with any alleged infringement of such rights.

Permits:

6.13. CONTRACTOR shall obtain and pay for all construction permits, licenses, governmental charges and inspection fees, and all public utility charges which are applicable and necessary for the execution of the Work. All permit costs shall be included in the base bid. Permits, if any that are provided and paid for by OWNER are listed in the Supplementary Conditions. Any delays associated with the permitting process will be considered for time extensions only and no damages or additional compensation for delay will be allowed.

Laws and Regulations:

6.14.1. CONTRACTOR shall give all notices and comply with all Laws and Regulations applicable to furnishing and performance of the Work. Except where otherwise expressly required by applicable Laws and Regulations, neither OWNER nor PROFESSIONAL shall be responsible for monitoring CONTRACTOR's compliance with any Laws or Regulations.

6.14.2. If CONTRACTOR observes that any of the Contract Documents are contradictory to such laws, rules, and regulations, it will notify the Project Manager promptly in writing. Any necessary changes shall then be adjusted by an appropriate Change Order. If CONTRACTOR performs any Work that it knows or should have known to be contrary to such laws, ordinances, rules, and regulations and without such notice to the Project Manager, it shall bear all related costs.

Taxes:

6.15. CONTRACTOR shall pay all sales, consumer, use and other similar taxes required to be paid in accordance with the Laws and Regulations of the place of the Project which are applicable during the performance of the Work.

Use of Premises:

6.16. CONTRACTOR shall confine construction equipment, the storage of materials and equipment and the operations of workers to the Project site and land and areas identified in and permitted by the Contract Documents and other land and areas permitted by Laws and Regulations, rights-of-way, permits and easements. CONTRACTOR shall not unreasonably encumber the premises with construction equipment or other materials or equipment. Any loss or damage to CONTRACTOR's or any Subcontractor's equipment is solely at the risk of CONTRACTOR. CONTRACTOR shall assume full responsibility for any damage to any such land or area, or to the OWNER or occupant thereof or of any land or areas

contiguous thereto, resulting from the performance of the Work. Should any claim be made against OWNER or PROFESSIONAL by any such OWNER or occupant because of the performance of the Work, CONTRACTOR shall promptly attempt to settle with such other party by agreement or otherwise resolve the claim by arbitration or at law. CONTRACTOR shall, to the fullest extent permitted by Laws and Regulations, indemnify and hold OWNER harmless from and against all claims, damages, losses and expenses (including, but not limited to, fees of PROFESSIONALs, architects, attorneys and other professionals and court and arbitration costs) arising directly, indirectly or consequentially out of any action, legal or equitable, brought by any such other party against OWNER to the extent based on a claim arising out of CONTRACTOR's performance of the Work.

6.17. During the progress of the Work, CONTRACTOR shall keep the premises free from accumulations of waste materials, rubbish and other debris or contaminants resulting from the Work. At the completion of the Work, CONTRACTOR shall remove all waste materials, rubbish and debris from and about the premises as well as all tools, appliances, construction equipment and machinery, and surplus materials, and shall leave the site clean and ready for occupancy by OWNER. CONTRACTOR shall restore to original condition all property not designated for alteration by the Contract Documents.

6.18. CONTRACTOR shall not load nor permit any part of any structure to be loaded in any manner that will endanger the structure, nor shall CONTRACTOR subject any part of the Work or adjacent property to stresses or pressures that will endanger them.

Record Documents:

6.19. Contractor shall keep at the site and in good order one record copy of the Contract Documents and all Drawings and Specifications. These documents shall be annotated on a continuing basis to show all changes made during the construction process. These shall be available to PROFESSIONAL and the Project Manager and shall be submitted with the Application for Final Payment.

Safety and Protection:

6.20. CONTRACTOR shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the Work. CONTRACTOR shall assume all risk of loss for stored equipment or materials, irrespective of whether CONTRACTOR has transferred the title of the stored equipment or materials to OWNER. CONTRACTOR shall take all necessary precautions for the safety of, and shall provide the necessary protection to prevent damage, injury or loss to:

6.20.1. all employees on the Work and other persons and organizations who may be affected thereby;

6.20.2. all the Work and materials and equipment to be incorporated therein, whether in storage on or off the site; and

6.20.3. other property at the site or adjacent thereto, including trees, shrubs, lawns, walks, pavements, roadways, structures, utilities and Underground Facilities not designated for removal, relocation or replacement in the course of construction.

CONTRACTOR shall comply with all applicable Laws and Regulations of any public body having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss; and shall erect and maintain all necessary safeguards for such safety and protection. CONTRACTOR shall notify OWNERs of adjacent property and of Underground Facilities and utility OWNERs when prosecution of the Work may affect them, and shall cooperate with them in the protection, removal, relocation and replacement of their property. All damage, injury or loss to any property referred to in paragraph 6.20.2 or 6.20.3 caused, directly or indirectly, in whole or in part, by CONTRACTOR, any Subcontractor, Supplier or any other person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, shall be remedied by CONTRACTOR (except damage or loss attributable to the fault of Drawings

or Specifications or to the acts or omissions of OWNER or PROFESSIONAL or anyone employed by either of them or anyone for whose acts either of them may be liable, and not attributable, directly or indirectly, in whole or in part, to the fault or negligence of CONTRACTOR). CONTRACTOR's duties and responsibilities for the safety and protection of the Work shall continue until such time as all the Work is completed and PROFESSIONAL has issued a notice to OWNER and CONTRACTOR in accordance, with paragraph 14.13 that the Work is acceptable (except as otherwise expressly provided in connection with Substantial Completion).

6.21. CONTRACTOR shall designate a responsible member of its organization whose duty shall be the prevention of accidents at the site. This person shall be CONTRACTOR's superintendent unless otherwise designated in writing by CONTRACTOR to the Project Manager.

Emergencies:

6.22. In emergencies affecting the safety or protection of persons or the Work or property at the site or adjacent thereto, CONTRACTOR, without special instruction or authorization from PROFESSIONAL or OWNER, is obligated to act to

prevent threatened damage, injury or loss. CONTRACTOR shall give PROFESSIONAL prompt written notice if CONTRACTOR believes that any significant changes in the Work or variations from the Contract Documents have been caused thereby. If PROFESSIONAL determines that a change in the Contract Documents is required because of the action taken in response to an emergency, a Work Change Directive or Change Order be issued to document the consequences of the changes or variations.

6.22.1. CONTRACTOR shall immediately notify PROFESSIONAL of all events involving injuries to any person on the Site, whether or not such person was engaged in the construction of the Project, and shall file a written report on such person(s) and any other event resulting in property damage of any amount within five (5) days of the occurrence.

6.22.2. If PROFESSIONAL determines that a change in the Contract Documents is required because of the action taken by CONTRACTOR in response to such an emergency, a Change Order will be issued to document the consequences of such action.

Shop Drawings and Samples:

6.23. After checking and verifying all field measurements, CONTRACTOR shall promptly submit to PROFESSIONAL for approval, in accordance with the accepted schedule of submittals, all submittals and samples required by the Contract Documents. All submittals and samples shall have been checked by and stamped with the approval of CONTRACTOR and identified as PROFESSIONAL may require. The data shown on or with the submittals will be complete with respect to dimensions, design criteria, materials and any other information necessary to enable PROFESSIONAL to review the submittal as required. At the time of each submission, CONTRACTOR shall give notice to PROFESSIONAL of all deviations that the submittal or sample may have from the requirements of the Contract Documents.

6.24. PROFESSIONAL shall review and approve submittals and samples. Professional's review and approval shall be only for conformance with the design concept of the Project and compliance with the information given in the Contract Documents. The approval of a separate item as such will not indicate approval of the assembly in which the item functions. CONTRACTOR will make any corrections required by PROFESSIONAL and resubmit the required number of corrected copies until approved. CONTRACTOR's stamp of approval on any submittal or sample shall constitute its representation to PROFESSIONAL and OWNER that CONTRACTOR has determined and verified all quantities, dimensions, field construction criteria, materials, catalog numbers, and similar data, and that each submittal or sample has been reviewed or coordinated with the requirements of the Work and the Contract Documents.

6.24.1. No Work requiring a submittal or sample submission shall commence until the submission has been approved by PROFESSIONAL. A copy of each approved submittal and each approved sample shall be kept in good order by CONTRACTOR at the site and shall be available to PROFESSIONAL and OWNER. Any delays associated with the submittal process will be considered for time extensions only, and no damages or additional compensation for delay will be allowed.

6.24.2. Before submission of each Shop Drawing or sample, CONTRACTOR shall have determined and verified all quantities, dimensions, specified performance criteria, installation requirements, materials, catalog numbers and similar data with respect thereto and reviewed or coordinated each Shop Drawing or sample with other Shop Drawings and samples and with the requirements of the Work and the Contract Documents.

6.24.3. At the time of each submission, CONTRACTOR shall give PROFESSIONAL specific written notice of each variation that the Shop Drawings or samples may have from the requirements of the Contract Documents, and, in addition, shall cause a specific notation to be made on each Shop Drawing submitted to PROFESSIONAL for review and approval of each such variation.

6.26. PROFESSIONAL will review and approve with reasonable promptness Shop Drawings and samples, but PROFESSIONAL's review and approval will be only for conformance with the design concept of the Project and for compliance with the information given in the Contract Documents and shall not extend to means, methods, techniques, sequences or procedures of construction (except where a specific means, method, technique, sequence or procedure of construction is indicated in or required by the Contract Documents) or to safety precautions or programs incident thereto. The review and approval of a separate item as such will not indicate approval of the assembly in which the item functions.

6.27. PROFESSIONAL's approval of submittals or samples shall not relieve CONTRACTOR from responsibility for any variation from the requirements of the Contract Documents unless CONTRACTOR has, in writing, called PROFESSIONAL's attention to each such variation at the time of submission and the OWNER has given written approval to the specific deviation; any such approval by PROFESSIONAL shall not relieve CONTRACTOR from responsibility for errors

or omissions in the submittals.

6.28. Where a shop drawing or sample is required by the Contract Documents or the schedule of shop drawings and sample submissions accepted by PROFESSIONAL as required, any related work performed prior to PROFESSIONAL's review and approval of the pertinent submittal will be at the sole expense and responsibility of CONTRACTOR.

APPENDIX 4

Continuing the Work:

6.30. CONTRACTOR shall carry on the Work and adhere to the progress schedule during all disputes or disagreements with OWNER. No Work shall be delayed or postponed pending resolution of any disputes or disagreements, except as permitted by paragraph 15.6 or as CONTRACTOR and OWNER may otherwise agree in writing.

Cleaning Up:

6.31. CONTRACTOR shall maintain the site free from accumulations of waste materials, rubbish, and other debris or contaminants resulting from the work on a daily basis or as required. At the completion of the work, CONTRACTOR shall remove all waste materials, rubbish, and debris from the site as well as all tools, construction equipment and machinery, and surplus materials and will leave the Site clean and ready for occupancy by OWNER. All disposal shall be in accordance with applicable Laws and Regulations. In addition to any other rights available to OWNER under the Contract Documents, CONTRACTOR's failure to maintain the site may result in withholding of any amounts due CONTRACTOR. CONTRACTOR will restore to original condition those portions of the site not designated for alteration by the Contract Documents.

Indemnification:

6.32. To the fullest extent permitted by Laws and Regulations, CONTRACTOR shall indemnify and hold harmless OWNER, PROGRAM MANAGER and PROFESSIONAL and their consultants, agents and employees from and against all claims, damages, losses and expenses, direct, indirect or consequential (including but not limited to fees and charges of PROGRAM MANAGER, PROFESSIONALs, architects, attorneys and other PROFESSIONALs and court and arbitration costs) arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom and (b) is caused in whole or in part by any negligent act or omission of CONTRACTOR, any Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder or arises by or is imposed by Law and Regulations regardless of the negligence of any such party.

6.33. In any and all claims against OWNER, PROGRAM MANAGER or PROFESSIONAL or any of their consultants, agents or employees by any employee of CONTRACTOR, any Subcontractor, any person or organization directly or indirectly employed by any of them to perform or furnish any of the Work or anyone for whose acts any of them may be liable, the indemnification obligation under paragraph 6.32 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for CONTRACTOR or any such Subcontractor or other person or organization under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

6.34. The obligations of CONTRACTOR under paragraph 6.32 shall not extend to the liability of PROFESSIONAL, PROFESSIONAL's consultants, agents or employees arising out of the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications.

ARTICLE 7---OTHER WORK

Related Work at Site:

7.1. OWNER may perform other work related to the Project at the site by OWNER's own forces, have other work performed by aided OWNERs or let other direct contracts therefor which shall contain General Conditions similar to these. If the fact that such other work is to be performed was not noted in the Contract Documents, written notice thereof will be given to CONTRACTOR prior to starting any such other work, and, if CONTRACTOR believes that such

performance will involve additional expense to CONTRACTOR or requires additional time and the parties are unable to agree as to the extent thereof, CONTRACTOR may make a claim therefor as provided in Articles 11 and 12.

7.1.2. CONTRACTOR shall afford each utility OWNER and other contractor who is a party to such a direct contract for OWNER, if OWNER is performing the additional work with OWNER's employees, proper and safe access to the site and a reasonable opportunity for the introduction and storage of materials and equipment and the execution of such work, and shall properly connect and

coordinate the Work with theirs. CONTRACTOR shall do all cutting, fitting and patching of the Work that may be required to make its several parts come together properly and integrate with such other work. CONTRACTOR shall not endanger any work of others by cutting, excavating or otherwise altering their work and will only cut or alter their work with the written consent of PROFESSIONAL and the others whose work will be affected. The duties and responsibilities of CONTRACTOR under this paragraph are for the benefit of such utility OWNERs and other contractors to the extent that there are comparable provisions for the benefit of CONTRACTOR in said direct contracts between OWNER and such utility OWNERs and other contractors.

7.2. If any part of CONTRACTOR's Work depends for proper execution or results upon the work of any such other contractor or utility OWNER (or OWNER), CONTRACTOR shall inspect and promptly report to PROFESSIONAL in writing any delays, defects or deficiencies in such work that render it unavailable or unsuitable for such proper execution and results. CONTRACTOR's failure so to report will constitute an acceptance of the other work as fit and proper for integration with CONTRACTOR's Work except for latent or nonapparent defects and deficiencies in the other work.

Coordination:

7.4. If OWNER contracts with others for the performance of other work on the Project at the site, the person or organization who will have authority and responsibility for coordination of the activities among the various prime contractors will be identified in the Supplementary Conditions, and the specific matters to be covered by such authority and responsibility will be itemized, and the extent of such authority and responsibilities will be provided in the Supplementary Conditions. Unless otherwise provided in the Supplementary Conditions, neither OWNER nor PROFESSIONAL shall have any authority or responsibility in respect of such coordination.

ARTICLE 8---OWNER'S RESPONSIBILITIES

8.1. Except as otherwise provided in these General Conditions, OWNER shall issue all communications to CONTRACTOR through the PROGRAM MANAGER or PROFESSIONAL.

8.2. In case of termination of the employment of PROFESSIONAL, OWNER shall appoint a PROFESSIONAL against whom CONTRACTOR makes no reasonable objection, whose status under the Contract Documents shall be that of the former PROFESSIONAL. Any dispute in connection with such appointment shall be subject to arbitration.

8.3. OWNER shall furnish the data required of OWNER under the Contract Documents promptly and shall make payments to CONTRACTOR promptly after they are due as provided in paragraphs 14.4 and 14.13.

8.4. OWNER's duties in respect of providing lands and easements and providing Engineering surveys to establish reference points are set forth in paragraphs 4.1 and 4.4. Paragraph 4.2 refers to OWNER's identifying and making available to CONTRACTOR copies of reports of explorations and tests of subsurface conditions at the site and in existing structures which have been utilized by PROFESSIONAL in preparing the Drawings and Specifications.

8.5. OWNER's responsibilities in respect of purchasing and maintaining liability and property insurance are set forth in paragraphs 5.5 through 5.8.

8.6. OWNER is obligated to execute Change Orders as indicated in paragraph 10.3.

8.7. OWNER's responsibility in respect of certain inspections, tests and approvals is set forth in paragraph 13.4.

8.8. In connection with OWNER's right to stop Work or suspend Work, see paragraphs 13.10 and 15.1. Paragraph

15.2 deals with OWNER's right to terminate services of CONTRACTOR under certain circumstances.

ARTICLE 9---PROFESSIONAL'S STATUS DURING CONSTRUCTION

OWNER's Representative:

9.1. PROFESSIONAL will be OWNER's representative during the construction period. The duties and responsibilities and the limitations of authority of PROFESSIONAL as OWNER's representative during construction are set forth in the Contract Documents and shall not be extended without written consent of OWNER and PROFESSIONAL.

Visits to Site:

9.2. PROFESSIONAL will make visits to the site at intervals appropriate to the various stages of construction to observe the premises and quality of the executed Work and to determine, in general, if the Work is proceeding in accordance with the Contract Documents. PROFESSIONAL will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. PROFESSIONAL's efforts will be directed toward providing for OWNER a greater degree of confidence that the completed Work will conform to the Contract Documents. On the basis of such visits and on-site observations as an experienced and qualified design PROFESSIONAL, PROFESSIONAL will keep OWNER informed of the progress of the Work and will endeavor to guard OWNER against defects and deficiencies in the Work.

Project Representation:

9.3. If OWNER and PROFESSIONAL agree, PROFESSIONAL will furnish a Resident Project Representative to assist PROFESSIONAL in observing the performance of the Work. The duties, responsibilities and limitations of authority of any such Resident Project Representative and assistants will be as provided in the Supplementary Conditions. If OWNER designates another agent to represent OWNER at the site who is not PROFESSIONAL's agent or employee, the duties, responsibilities and limitations of authority of such other person will be as provided in the Supplementary Conditions.

Clarifications and Interpretations:

9.4. PROFESSIONAL shall issue such written clarifications or interpretations of the Contract Documents (in the form of Drawings or otherwise) as may be determined necessary, or as reasonably requested by CONTRACTOR, which shall be consistent with or reasonably inferable from the overall intent of the Contract Documents. If CONTRACTOR believes that a written clarification and interpretation entitles it to an increase in the Contract Price and/or Contract Time, CONTRACTOR may make a claim as provided for in Articles 11 or 12.

Authorized Variations in Work:

9.5. PROFESSIONAL may authorize minor variations in the Work from the requirements of the Contract Documents which do not involve an adjustment in the Contract Price or the Contract Time and are consistent with the overall intent of the Contract Documents. These may be accomplished by a Field Order and will be binding on OWNER and also on CONTRACTOR who shall perform the Work involved promptly. If CONTRACTOR believes that a Field Order justifies an increase in the Contract Price or an extension of the Contract Time and the parties are unable to agree as to the amount or extent thereof, CONTRACTOR may make a claim therefor as provided in Article 11 or 12.

Rejecting Defective Work:

9.6. PROFESSIONAL will have authority to disapprove or reject Work which PROFESSIONAL believes to be defective and will also have authority to require special inspection or testing of the Work as provided in paragraph 13.9, whether or not the Work is fabricated, installed or completed.

Shop Drawings, Change Orders and Payments:

9.7. In connection with PROFESSIONAL's responsibility for Shop Drawings and samples, see paragraphs 6.23 through 6.29 inclusive.

9.8. In connection with PROFESSIONAL's responsibilities as to Change Orders, see Articles 10, 11 and 12.

9.9. In connection with PROFESSIONAL's responsibilities in respect of Applications for Payment, etc., see Article 14.

Determinations for Unit Prices:

9.10. PROFESSIONAL will determine the actual quantities and classifications of Unit Price Work performed by CONTRACTOR. PROFESSIONAL will review with CONTRACTOR PROFESSIONAL's preliminary determinations on such matters before rendering a written decision thereon (by recommendation of an Application for Payment or otherwise). PROFESSIONAL's written decisions thereon will be final and binding upon OWNER and CONTRACTOR, unless, within ten days after the date of any such decision, either OWNER or CONTRACTOR delivers to the other party to the Agreement and to PROFESSIONAL written notice of intention to appeal from such a decision.

Decisions on Disputes:

9.11. PROFESSIONAL will be the initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the Work thereunder. Claims, disputes and other matters relating to the acceptability of the Work or the interpretation of the requirements of the Contract Documents pertaining to the performance and furnishing of the Work and claims under Articles 11 and 12 in respect of changes to the Contract Price or Contract Time will be referred initially to PROFESSIONAL in writing with a request for a formal decision in accordance with this paragraph, which PROFESSIONAL will render in writing within a reasonable time. Written notice of each such claim, dispute and other matter will be delivered by the claimant to PROFESSIONAL and the other party to the Agreement promptly (but in no event later than thirty days after the occurrence of the event giving rise thereto) and written supporting data will be submitted to PROFESSIONAL and the other party within sixty days after such occurrence unless PROFESSIONAL allows an additional period of time to ascertain more accurate data in support of the claim.

9.12. When functioning as interpreter and judge under paragraphs 9.10 and 9.11, PROFESSIONAL will not show partiality to OWNER or CONTRACTOR and will not be liable in connection with any interpretation or decision rendered in good faith in such capacity. The rendering of a decision by PROFESSIONAL pursuant to paragraphs 9.10 and 9.11 with respect to any such claim, dispute or other matter (except any which have been waived by the making or acceptance of final payment as provided in paragraph 14.16) will be a condition precedent to any exercise by OWNER or CONTRACTOR of such rights or remedies as either may otherwise have under the Contract Documents or by Laws or Regulations in respect of any such claim, dispute or other matter.

Limitations on PROFESSIONAL's Responsibilities:

9.13. Neither PROFESSIONAL's authority to act under this Article or elsewhere in the Contract Documents nor any decision made in good faith to exercise such authority shall give rise to any duty or responsibility of PROFESSIONAL to CONTRACTOR, any Subcontractor, any of their agents or employees.

9.14. PROFESSIONAL shall not be responsible for the construction means, methods, techniques, sequences, or procedures or the safety precautions and programs used. PROFESSIONAL shall not be responsible for CONTRACTOR's

failure to perform the Work in accordance with the Contract Documents.

9.15. PROFESSIONAL shall not be responsible for the acts or omissions of CONTRACTOR, any Subcontractors, any agents or employees, or any other persons performing any of the Work.

ARTICLE 10--CHANGES IN THE WORK

10.1. Without invalidating the Contract, OWNER may at any time or from time to time order additions, deletions, or revisions in the Work. The OWNER shall provide CONTRACTOR with a proposal request, identifying the Work to be added, deleted or revised. Upon receipt, CONTRACTOR shall promptly submit a written proposal for the changed work prepared in accordance with Articles 11 and 12. If the proposal request calls only for the deletion of Work, the OWNER may order the partial suspension of any Work related to the

proposed deletion, in which case CONTRACTOR must cease performance as directed; CONTRACTOR shall not be entitled to claim lost profits on deleted work. All changed Work shall be executed under the applicable conditions of the Contract Documents.

10.2. Additional Work performed by CONTRACTOR without authorization of a Change Order will not entitle CONTRACTOR to an increase in the Contract Price or an extension of the Contract Time, except in the case of an emergency as provided in Article 6. The effect of this paragraph shall remain paramount and shall prevail irrespective of any conflicting provisions contained in these Contract Documents.

10.3. Upon agreement as to changes in the Work to be performed, Work performed in an emergency as provided in Article 6, and any other claim of CONTRACTOR for a change in the Contract Time or the Contract Price, PROFESSIONAL will prepare a written Change Order to be signed by PROFESSIONAL and CONTRACTOR and submitted to OWNER for approval.

10.4. In the absence of an agreement as provided in 10.3, OWNER may, at its sole discretion, issue a Work Change Directive to CONTRACTOR. Pricing of the Work Change Directive will be in accordance with Section 11.3. The Work Change Directive will specify a price, and if applicable a time extension, determined to be reasonable by OWNER. If CONTRACTOR fails to sign such Work Change Directive, CONTRACTOR may submit a claim in accordance with Articles 11 and 12, but CONTRACTOR shall nevertheless be obligated to fully perform the work as directed by the Work Change Directive.

10.5. CONTRACTOR shall proceed diligently with performance of the Work as directed by OWNER, regardless of pending claim actions, unless otherwise agreed to in writing.

10.6. If notice of any change affecting the general scope of the Work or the provisions of the Contract Documents (including, but not limited to, Contract Price or Contract Time) is required by the provisions of any Bond to be given to a surety, the giving of any such notice will be CONTRACTOR's responsibility, and the amount of each applicable Bond will be adjusted accordingly.

ARTICLE 11-CHANGE OF CONTRACT PRICE

11.1. The Contract Price constitutes the total compensation (subject to written authorized adjustments) payable to CONTRACTOR for performing the Work. All duties, responsibilities and obligations assigned to or undertaken by CONTRACTOR shall be at CONTRACTOR’s expense without change in the Contract Price.

11.2. The Contract Price may only be changed by a Change Order or by a Written Amendment. Any claim for an increase or decrease in the Contract Price shall be based on written notice delivered by the party making the claim to the other party and to PROFESSIONAL promptly (but in no event later than thirty days) after the occurrence of the event giving rise to the claim and stating the general nature of the claim. Notice of the amount of the claim with supporting data shall be delivered within sixty days after such occurrence (unless PROFESSIONAL allows an additional period of time to ascertain more accurate data in support of the claim) and shall be accompanied by claimant's written statement that the amount claimed covers all known amounts (direct, indirect and consequential) to which the claimant is entitled as a result of the occurrence of said event. All claims for adjustment in the Contract Price shall be determined by PROFESSIONAL in accordance with paragraph 9.11 if OWNER and CONTRACTOR cannot otherwise agree on the amount involved. No claim for an adjustment in the Contract Price will be valid if not submitted in accordance with this paragraph 11.2.

11.3. The value of any Work covered by a Change Order or of any claim for an adjustment in the Contract Price will be determined by the following procedures:

11.3.1. Designated Unit Price (Field Measure). CONTRACTOR and OWNER recognize and acknowledge that the quantities shown for those items designated in the Bid Proposal as unit price items are approximations prepared by OWNER for bid purposes and that the actual compensation payable to CONTRACTOR for the utilization of such items is based upon the application of unit prices to the actual quantities of items involved as measured in the field and required to complete the Work as originally defined in the Contract Documents.

11.3.2. When it is determined by OWNER that an addition, deletion, or revision to the Work, as defined in these Contract Documents, is required and affects the quantities required for items designed in the Bid Proposal as unit price items, CONTRACTOR

and OWNER agree that the compensation payable to CONTRACTOR for such unit price items shall be adjusted accordingly by a Change Order based upon the application of the appropriate unit prices shown in the Bid Proposal to the quantity of the unit price item required to complete the Work as defined in the Contract Documents.

11.3.3. Other Unit Prices. For items not designated in the bid proposal as unit prices, OWNER and CONTRACTOR may establish unit prices as agreed on by Change Order.

11.3.4. Lump Sum. When it is determined by OWNER that an addition, deletion or revision to the Work is required which results in a change in Work designated in the Bid Proposal as a lump sum item, the amount of increase or decrease in the lump sum price shall be established by mutual agreement of the parties.

11.3.5. If the pricing methods specified in 11.3 are inapplicable, or if the parties are unable to agree on a price for the changed work, a reasonable price for the same shall be established by OWNER in accordance with 11.4 and 11.5. OWNER shall then process a unilateral Change Order, specifying the said reasonable price, in accordance with 11.4 through 11.6. CONTRACTOR shall perform the Work as directed in the Change Order.

11.3.6. Failure on the part of CONTRACTOR to construct any item to plan or authorized dimensions within the specification tolerances shall result in: reconstruction to acceptable tolerances at no additional costs to OWNER; acceptance at no pay; or acceptance at reduced final pay quantity or reduced unit price, all at the discretion of OWNER. Determinations of aggregate monetary change for items identified as lump sum quantities shall be made by OWNER based upon an analysis of the scope of CONTRACTOR's failure to construct to plan or authorized dimensions.

Cost of the Work:

11.4. The term Cost of the Work means the sum of all costs necessarily incurred and paid by CONTRACTOR in the proper performance of the Work. Except as otherwise may be agreed to in writing by OWNER, such costs shall be in amounts no higher than those prevailing in the locality of the Project, shall include only the following items and shall not include any of the costs itemized in paragraph 11.5:

11.4.1. Payroll costs for employees in the direct employ of CONTRACTOR in the performance of the Work under schedules of job classifications agreed upon by OWNER and CONTRACTOR. Payroll costs for employees not employed full time on the Work shall be apportioned on the basis of their time spent on the Work. Payroll costs shall include, but not be limited to, salaries and wages plus the cost of fringe benefits which shall include social security contributions, unemployment, excise and payroll taxes, workers' or workmen's compensation, health and retirement benefits, bonuses, sick leave, vacation and holiday pay applicable thereto. Such employees shall include superintendents and foremen at the site. The expenses of performing Work after regular working hours, on Saturday, Sunday or legal holidays, shall be included in the above to the extent authorized by OWNER.

11.4.2. Cost of all materials and equipment furnished and incorporated in the Work, including costs of transportation and storage thereof, and Suppliers' field services required in connection therewith. All cash discounts shall accrue to CONTRACTOR unless OWNER deposits funds with CONTRACTOR with which to make payments, in which case the cash discounts shall accrue to OWNER. Trade discounts, rebates and refunds and all returns from sale of surplus materials and equipment shall accrue to OWNER, and CONTRACTOR shall make provisions so that they may be obtained.

11.4.3. Payments made by CONTRACTOR to the Subcontractors for Work performed by Subcontractors. If required by OWNER, CONTRACTOR shall obtain competitive bids from Subcontractors acceptable to CONTRACTOR and shall deliver such bids to OWNER who then determines, with the advice of PROFESSIONAL, which bids will be accepted. If a subcontract provides that the Subcontractor is to be paid on the basis of Cost of the Work Plus a Fee, the Subcontractor's Cost of the

Work shall be determined in the same manner as CONTRACTOR's Cost of the Work. All subcontracts shall be subject to the other provisions of the Contract Documents insofar as applicable.

11.4.4. Costs of special consultants (including but not limited to engineers, architects, testing laboratories, surveyors, attorneys and accountants) employed for services specifically related to the Work.

11.4.5. Supplemental costs including the following:

11.4.5.1. The proportion of necessary transportation, travel and subsistence expenses of CONTRACTOR's employees incurred in discharge of duties connected with the Work.

11.4.5.2. Cost, including transportation and maintenance, of all materials, supplies, equipment, machinery, appliances, office and temporary facilities at the site and hand tools not owned by the workers, which are consumed in the performance of the Work, and cost less market value of such items used but not consumed which remain the property of CONTRACTOR.

11.4.5.3. Rentals of all construction equipment and machinery and the parts thereof whether rented from CONTRACTOR or others in accordance with rental agreements approved by OWNER with the advice of PROFESSIONAL, and the costs of transportation, loading, unloading, installation, dismantling and removal thereof-all in accordance with terms of said rental agreements. The rental of any such equipment, machinery or parts shall cease when the use thereof is no longer necessary for the Work.

11.4.5.4. Sales, consumer, use or similar taxes related to the Work, and for which CONTRACTOR is liable, imposed by Laws and Regulations.

11.4.5.5. Deposits lost for causes other than negligence of CONTRACTOR, any Subcontractor or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable, and royalty payments and fees for permits and licenses.

11.4.5.6. Losses and damages (and related expenses), not compensated by insurance or otherwise, to the Work or otherwise sustained by CONTRACTOR in connection with the performance and furnishing of the Work (except losses and damages within the deductible amounts of property insurance established by OWNER in accordance with paragraph 5.6) provided they have resulted from causes other than the negligence of CONTRACTOR, any Subcontractor, or anyone directly or indirectly employed by any of them or for whose acts any of them may be liable. Such losses shall include settlements made with the written consent and approval of OWNER. No such losses, damages and expenses shall be included in the Cost of the Work for the purpose of determining CONTRACTOR's Fee. If, however, any such loss or damage requires reconstruction and CONTRACTOR is placed in charge thereof, CONTRACTOR shall be paid for services a fee proportionate to that stated in paragraph 11.6.2.

11.4.5.7. The cost of utilities, fuel and sanitary facilities at the site.

11.4.5.8. Minor expenses such as telegrams, long distance telephone calls, telephone service at the site, expressage and similar petty cash items in connection with the Work.

11.4.5.9. Cost of premiums for additional Bonds and insurance required because of changes in the Work and premiums of property insurance coverage within the limits of the deductible amounts established by OWNER in accordance with paragraph 5.6.

11.5. The term Cost of the Work shall not include any of the following:

11.5.1. Payroll costs and other compensation of CONTRACTOR's officers, executives, principals (of partnership and sole proprietorships), general managers, engineers, architects, estimators, attorneys, auditors, accountants, purchasing and contracting agents, expeditors, timekeepers, clerks and other personnel employed by CONTRACTOR whether at the site or in CONTRACTOR's principal or a branch office for general administration of the Work and not specifically included in the agreed upon schedule of job classifications referred to in paragraph 11.4.1 or specifically covered by paragraph 11.4.4-all of which are to be considered administrative costs covered by CONTRACTOR's Fee.

11.5.2. Expenses of CONTRACTOR's principal area branch offices other than CONTRACTOR's office at the site.

11.5.3. Any part of CONTRACTOR's capital expenses, including interest on CONTRACTOR'S capital used for the Change Order Work and charges against CONTRACTOR for delinquent payments.

11.5.4. Cost of premiums for all Bonds and for all insurance whether or not CONTRACTOR is required by the Contract Documents to purchase and maintain the same (except for the cost of premiums covered by subparagraph 11.4.5.9 above).

11.5.5. Costs due to the negligence of CONTRACTOR, any Subcontractor, or anyone directly or indirectly, employed by any of them or for whose acts any of them may be liable, including but not limited to, the correction of defective Work, disposal of materials or equipment wrongly supplied and making good any damage to property.

11.5.6. Other overhead or general expense costs of any kind and the costs of any item not specifically and expressly included in paragraph 11.4.

CONTRACTOR's Fee:

11.6. CONTRACTOR's Fee allowed to CONTRACTOR for overhead and profit shall be determined as follows:

11.6.1. a mutually acceptable fixed fee, or if none can be agreed upon;

11.6.2. a fee based on the following percentages of the various portions of the Cost of the Work:

11.6.2.1. for costs incurred under paragraphs 11.4.1 and 11.4.2, CONTRACTOR's Fee shall be fifteen percent,

11.6.2.2. for costs incurred under paragraph 11.4.3, CONTRACTOR's Fee shall five percent; and if a subcontract is on the basis of Cost of the Work Plus a Fee, the maximum allowable to CONTRACTOR on account of overhead and profit of all Subcontractors shall be fifteen percent,

11.6.2.3. no fee shall be payable on the basis of costs itemized under paragraphs 11.4.4, 11.4.5 and 11.3,

11.6.2.4. the amount of credit to be allowed by CONTRACTOR to OWNER for any such change which results in a net decrease in cost will be the amount of the actual net decrease plus a deduction in CONTRACTOR's Fee by an amount equal to ten percent of the net decrease, and

11.6.2.5. when both additions and credits are involved in any one change, the adjustment in CONTRACTOR's Fee shall be computed on the basis of the net change in accordance with paragraphs 11.6.2.1 through 11.6.2.4, inclusive.

11.7. For all changes, CONTRACTOR shall submit an itemized cost breakdown, together with supporting data in such detail and form as prescribed by the Project Manager. When a credit is due, the amount of credit to be allowed by CONTRACTOR to OWNER for any such change which results in a net decrease in cost will be the amount of the actual net decrease in direct cost as determined by the Project Manager, plus the applicable reduction in overhead and profit. When both additions and credits are involved in any change, the combined overhead and profit shall be calculated on the basis of the net change, whether an increase or decrease. In any event, the minimum detail shall be an itemization of all man-hours required by discipline/trade with the unit cost per man-hour and total labor price, labor burden, equipment hours and rate for each piece of equipment, material by units of measure and price per unit, other costs specifically itemized, plus the overhead and profit markup.

Cash Allowances:

11.8. It is understood that CONTRACTOR has included in the Contract Price all allowances so named in the Contract Documents and shall cause the Work so covered to be done by such Subcontractors or Suppliers and for such sums within the limit of the allowances as may be acceptable to PROFESSIONAL CONTRACTOR agrees that:

11.8.1. The allowances include the cost to CONTRACTOR (less any applicable trade discounts) of materials and equipment required by the allowances to be delivered at the site and all applicable taxes; and

11.8.2. CONTRACTOR's costs for unloading and handling on the site, labor, installation costs, overhead, profit and other expenses contemplated for the allowances have been included in the Contract Price and not in the allowances. No demand for additional payment on account of any thereof will be valid.

Prior to final payment, an appropriate Change Order will be issued as recommended by PROFESSIONAL to reflect actual amounts due CONTRACTOR on account of Work covered by allowances, and the Contract Price shall be correspondingly adjusted.

Unit Price Work:

11.9.1. Where the Contract Documents provide that all or part of the Work is to be Unit Price Work, initially the Contract Price will be deemed to include for all Unit Price Work an amount equal to the sum of the established unit prices for each separately identified item of Unit Price Work times the estimated quantity of each item as indicated in the Agreement. The estimated quantities of items of Unit Price Work are not guaranteed and are solely for the purpose of comparison of Bids and determining an initial Contract Price. Determinations of the actual quantities and classifications of Unit Price Work performed by CONTRACTOR will be made by PROFESSIONAL in accordance with Paragraph 9.10.

11.9.2. Each unit price will be deemed to include an amount considered by CONTRACTOR to be adequate to cover CONTRACTOR's overhead and profit for each separately identified item.

11.9.3. Where the quantity of any item of Unit Price Work performed by CONTRACTOR differs materially and significantly from the estimated quantity of such item indicated in the Agreement and there is no corresponding adjustment with respect to any other item of Work and if CONTRACTOR believes that CONTRACTOR has incurred additional expense as a result thereof, CONTRACTOR may make a claim for an increase in the Contract Price in accordance with Article 11 if the parties are unable to agree as to the amount of any such increase.

ARTICLE 12--CHANGE OF CONTRACT TIME

12.1. The Contract Time may only be changed by a Change Order. Any request for an extension in the Contract Time shall be made in writing and delivered to PROFESSIONAL and OWNER within seven (7) calendar days of the occurrence first happening and resulting in the claim. Written supporting data will be submitted to PROFESSIONAL and OWNER within fifteen (15) calendar days after such occurrence unless the OWNER allows additional time. All claims submitted by CONTRACTOR for adjustments to the Contract Time must set forth in detail the reasons for and causes of the delay and clearly indicate why the subject delay was beyond CONTRACTOR’s control or fault.

12.2. If CONTRACTOR is delayed at any time in the performance, progress, commencement, or completion of the Work by any act or neglect of OWNER or PROFESSIONAL, or by an employee of either, or by any separate CONTRACTOR employed by OWNER, or by changes ordered in the Work, or by labor disputes, fire, unavoidable casualties, utility conflicts which could not have been identified or foreseen by CONTRACTOR using reasonable diligence, or any causes beyond CONTRACTOR’s control or fault, then the Contract Time shall be extended by Change Order for such reasonable time as OWNER may determine. CONTRACTOR shall be entitled to an extension of time for such causes only for the number of days of delay which OWNER may determine to be due solely to such causes and only to the extent such occurrences actually delay the completion of the Work and then only if CONTRACTOR shall have strictly complied with all the requirements of the Contract Documents. Provided, however, notwithstanding anything in the Contract Documents to the contrary, no interruption, interference, inefficiency, suspension or delay in the performance, progress, commencement or completion of the Work for any cause whatsoever, including those for which OWNER or PROFESSIONAL may be responsible in whole or in part, shall relieve CONTRACTOR of its duty to perform or give rise to any right to damages or additional compensation from OWNER. CONTRACTOR’s sole and exclusive remedy against OWNER for interruption, interference, inefficiency, suspension or delay

of any aspect of the Work shall be the right to seek an extension to the Contract Time in accordance with the procedures set forth herein.

ARTICLE 13--WARRANTY AND GUARANTEE; TESTS AND INSPECTIONS: CORRECTION, REMOVAL OR ACCEPTANCE OF DEFECTIVE WORK

Warranty and Guarantee:

13.1. CONTRACTOR warrants and guarantees to OWNER that all materials and equipment will be new unless otherwise specified and that all work will be of good quality, performed in a workmanlike manner, free from faults or defects, and in accordance with the requirements of the Contract Documents and any inspections, tests, or approvals referred to in this Article. All unsatisfactory Work, all faulty Work and all Work not conforming to the requirements of the Contract Documents or such inspections, tests, approvals, or all applicable building, construction and safety requirements shall be considered defective. Notice of all defects shall be given to CONTRACTOR by PROFESSIONAL. All defective work, whether or not in place, may be rejected, corrected, or accepted as provided in this Article.

Access to Work:

13.2. For the duration of the Work, PROFESSIONAL and its representatives, other designated representatives of OWNER, and authorized representatives of any regulatory agency shall at all times be given access to the Work. CONTRACTOR shall provide proper facilities for such access and observation of the Work and also for any inspection or testing by others.

Tests and Inspections:

13.3. If the Contract Documents, laws, ordinances, rules, regulations or orders of any public authority having jurisdiction require any Work to specifically be inspected, tested, or approved by someone other than CONTRACTOR, CONTRACTOR shall give PROFESSIONAL timely notice of readiness therefore.

13.4. The testing firm(s) (if assigned by OWNER to this Work) and all such inspections, tests, or approvals provided for by OWNER shall be identified in writing by PROFESSIONAL to CONTRACTOR. All other inspections, tests or approvals shall be at CONTRACTOR's expense including additional expenses for inspection and tests required as a result of delays by CONTRACTOR or hours worked in excess of 40 hours per week. For all required inspections, tests, and approvals on any Work prepared, performed, or assembled away from the site, CONTRACTOR will furnish PROFESSIONAL with the required Certificates of Inspection, testing, or approval. All such tests will be in accordance with the methods prescribed by the American Society for Testing and Materials or such other applicable organizations as may be required by law or the Contract Documents. Materials or Work in place that fail to pass acceptability tests shall be retested at the direction of PROFESSIONAL and at CONTRACTOR's expense.

13.5. All inspections, tests or approvals other than those required by Laws or Regulations of any public body having jurisdiction shall be performed by organizations acceptable to OWNER and CONTRACTOR (or by PROFESSIONAL if so specified).

13.6. If any Work (including the work of others) that is to be inspected, tested or approved is covered without written concurrence of PROFESSIONAL, it must, if requested by PROFESSIONAL, be uncovered for observation. Such uncovering shall be at CONTRACTOR's expense unless CONTRACTOR has given PROFESSIONAL timely notice of CONTRACTOR's intention to cover the same and PROFESSIONAL has not acted with reasonable promptness in response to such notice.

13.7. Neither observations by PROFESSIONAL or Project Manager nor inspections, tests, or approvals by persons other than CONTRACTOR shall relieve CONTRACTOR of its obligations to perform the Work in accordance with the requirements of the Contract Documents.

Uncovering Work:

13.8. If any Work required to be inspected, tested or approved is covered prior thereto without the prior written approval of PROFESSIONAL, or if any Work is covered contrary to the request of PROFESSIONAL, the Work shall, if requested by PROFESSIONAL, be uncovered for observation, inspection, testing or approval and replaced at CONTRACTOR's expense.

13.9. If PROFESSIONAL considers it necessary or advisable that covered Work be observed by PROFESSIONAL or inspected or tested by others, CONTRACTOR, at PROFESSIONAL's request, shall uncover, expose or otherwise make available for observation, inspection or testing as PROFESSIONAL may require, that portion of the Work in question, furnishing all necessary labor, material and equipment. If it is found that such Work is defective, CONTRACTOR shall bear all direct and consequential costs of such uncovering, exposure, observation, inspection and testing and of satisfactory reconstruction (including but not limited to fees and charges of PROFESSIONALs, architects, attorneys and other PROFESSIONALs), and OWNER shall be entitled to an appropriate decrease in the Contract Price and, if the parties are unable to agree as to the amount thereof, OWNER may make a claim therefor as provided in Article 11. If, however, such Work is not found to be defective, CONTRACTOR shall be allowed an increase in the Contract Price or an extension of the Contract Time, or both, directly attributable to such uncovering, exposure, observation, inspection, testing and reconstruction, and, if the parties are unable to agree as to the amount or extent thereof, CONTRACTOR may make a claim therefor as provided in Articles 11 and 12.

OWNER May Stop the Work:

13.10. When Work is defective or when CONTRACTOR fails to supply sufficient skilled workmen or suitable materials or equipment or make prompt payments to Subcontractors for labor, materials, or equipment or if CONTRACTOR violates any provisions of these Contract Documents, OWNER may order CONTRACTOR to stop the Work until the cause for such order has been eliminated. However, this right of OWNER to stop the Work shall not give rise to any duty on the part of OWNER to exercise this right for the benefit of CONTRACTOR or any other party. CONTRACTOR shall have no right to claim an increase in the Contract Price or Contract Time or other damages for a stop work order under this paragraph.

Correction or Removal of Defective Work:

13.11. When directed by PROFESSIONAL, CONTRACTOR shall promptly, without cost to OWNER and as specified by PROFESSIONAL, either correct the defective Work whether fabricated, installed, or completed, or remove it from the site and replace it with non-defective Work. If CONTRACTOR does not correct such defective Work or remove and replace such defective Work within a reasonable time, as specified in a written notice from PROFESSIONAL, OWNER may have the deficiency corrected. All direct and indirect costs of such correction shall be paid by CONTRACTOR or deducted from payment to CONTRACTOR. CONTRACTOR will also bear the expense of correcting or removing and replacing all Work of others destroyed or damaged by the correction, removal, or replacement of the defective Work.

One Year Correction Period:

13.12. If, after approval of final payment and prior to the expiration of one year after the date of substantial completion or such longer period of time as may be prescribed by law or by the terms of any applicable special guarantee required by the Contract Documents, any Work or materials are found to be defective, incomplete, or otherwise not in accordance with the Contract Documents, CONTRACTOR shall promptly, without cost to OWNER and in accordance with OWNER's written instructions, either correct such defective Work or if it has been rejected by OWNER, remove it from the Site and replace it with non-defective Work. If CONTRACTOR does not promptly comply with the terms of such instructions, OWNER may have the defective Work corrected, removed, or replaced. All direct, indirect and consequential costs of such removal and replacement (including but not limited to fees and charges of engineers, architects, attorneys and other professionals) will be paid by CONTRACTOR.

Acceptance of Defective Work:

13.13. If, instead of requiring correction or removal and replacement of defective Work, OWNER (and, prior to PROFESSIONAL's recommendation of final payment, PROFESSIONAL) prefers to accept it, OWNER may do so. CONTRACTOR shall bear all direct,

indirect and consequential costs attributable to OWNER's evaluation of and determination to accept such defective Work (such costs to be approved by PROFESSIONAL as to reasonableness and to include but not be limited to fees and charges of engineers, architects, attorneys and other professionals). If any such acceptance occurs prior to PROFESSIONAL's recommendation of final payment, a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work, and OWNER shall be entitled to an appropriate decrease in the Contract Price, and, if the parties are unable to agree as to the amount thereof, OWNER may make a claim therefor as provided in Article 11. If the acceptance occurs after such recommendation, an appropriate amount will be paid by CONTRACTOR to OWNER.

APPENDIX 4

OWNER May Correct Defective Work:

13.14. If CONTRACTOR fails within a reasonable time after written notice of PROFESSIONAL to proceed to correct defective Work or to remove and replace rejected Work as required by PROFESSIONAL in accordance with paragraph 13.11, or if CONTRACTOR fails to perform the Work in accordance with the Contract Documents, or if CONTRACTOR falls to comply with any other provision of the Contract Documents, OWNER may, after seven days' written notice to CONTRACTOR, correct and remedy any such deficiency. In exercising the rights and remedies under this paragraph, OWNER shall proceed expeditiously, to the extent necessary to complete corrective and remedial action. OWNER may exclude CONTRACTOR from all or part of the site, take possession of all or part of the Work, and suspend CONTRACTOR's services related thereto, take possession of CONTRACTOR's tools, appliances, construction equipment and machinery at the site and incorporate in the Work all materials and equipment stored at the site or for which OWNER has paid CONTRACTOR but which are stored elsewhere. CONTRACTOR shall allow OWNER, OWNER's representatives, agents and employees such access to the site as may be necessary to enable OWNER to exercise the rights and remedies under this paragraph. All direct, indirect and consequential costs of OWNER in exercising such rights and remedies will be charged against CONTRACTOR in an amount approved as to reasonableness by PROFESSIONAL, and a Change Order will be issued incorporating the necessary revisions in the Contract Documents with respect to the Work, and OWNER shall be entitled to an appropriate decrease in the Contract Price, and, if the parties are unable to agree as to the amount thereof, OWNER may make a claim therefor as provided in Article 11. Such direct, indirect and consequential costs will include, but not be limited to, fees and charges of engineers, architects, attorneys and other professionals, all court costs and all costs of
repair and replacement of work of others destroyed or damaged by correction, removal or replacement of CONTRACTOR's defective Work. CONTRACTOR shall not be allowed an extension of the Contract Time because of any delay in performance of the Work attributable to the exercise by OWNER of OWNER's rights and remedies hereunder.

Neglected Work by CONTRACTOR

13.15. If CONTRACTOR neglects to execute the Work in accordance with the Contract Documents, including any requirements of the progress schedule, PROFESSIONAL may direct CONTRACTOR to submit a recovery plan and take specific corrective actions including, but not limited to, employing additional workmen and/or equipment, and working extended hours and additional days, all at no cost to OWNER in order to put the Work back on schedule. If CONTRACTOR fails to correct the deficiency or take appropriate corrective action, OWNER may terminate the contract or CONTRACTOR's right to proceed with that portion of Work and have the Work done by others. The cost of completion under such procedure shall be charged against CONTRACTOR. A Change Order shall be issued incorporating the necessary revisions in the Contract Documents, including an appropriate reduction in the Contract Price. If the payments due CONTRACTOR are not sufficient to cover such amount, CONTRACTOR shall pay the difference to OWNER.

13.16. Should CONTRACTOR work overtime, weekends or holidays to regain the schedule, all costs to OWNER of associated inspection, construction management and resident engineers shall be identified to CONTRACTOR and the Contract Price reduced by a like amount via Change Order.

ARTICLE 14-PAYMENTS TO CONTRACTOR AND COMPLETION

Schedule of Values:

14.1. The schedule of values established as provided in 2.9 will serve as the basis for progress payments and will be incorporated into a form of application for Payment acceptable to Project Manager. Progress payments on account of Unit Price Work will be based on the number of units completed.

Application for Progress Payment:

14.2. At least twenty (20) calendar days before the date established for each progress payment (but not more often than once a month), CONTRACTOR shall submit to PROFESSIONAL for review an application for Payment filled out and signed by CONTRACTOR covering the work completed as of the date of the application and accompanied by such supporting documentation as is required by the Contract Documents. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at the site or at another location agreed to in writing, the Application for Payment shall also be

accompanied by a bill of sale, invoice or other documentation warranting that OWNER has received the materials and equipment free and clear of all liens and evidence that the materials and equipment are covered by appropriate property insurance and other arrangements to protect OWNER's interest therein, all of which will be satisfactory to OWNER. Payment is subject to a ten percent (10%) retainage that will be held until the final payment or acceptance by OWNER. The amount of retainage with respect to progress payments will be as stipulated in the Agreement.

CONTRACTOR's Warranty of Title:

14.3. CONTRACTOR warrants and guarantees that title to all Work, materials and equipment covered by any Application for Payment, whether incorporated in the Project or not, will pass to OWNER no later than the time of payment free and clear of all Liens.

Review of Applications for Progress Payment:

14.4. PROFESSIONAL will, within ten (10) calendar days after receipt of each Application for Payment, either indicate in writing a recommendation of payment and present the application to OWNER, or return the application to CONTRACTOR indicating in writing PROFESSIONAL's reasons for refusing to recommend payment. In the latter case, CONTRACTOR may make the necessary corrections and resubmit the application. OWNER shall, within thirty-one calendar days of presentation to him of the application for payment with PROFESSIONAL's recommendation of the amount for payment, pay CONTRACTOR amount recommended.

14.5. PROFESSIONAL's recommendation of any payment requested in an Application for Payment will constitute a representation by PROFESSIONAL to OWNER, based on PROFESSIONAL's on-site observations of the Work in progress as an experienced and qualified design PROFESSIONAL and on PROFESSIONAL's review of the Application for Payment and the accompanying data and schedules, that the Work has progressed to the point indicated; that, to the best of PROFESSIONAL's knowledge, information and belief, the quality of the Work is in accordance with the Contract Documents subject to an evaluation of the Work as a functioning whole prior to or upon Substantial Completion, to the results of any subsequent tests called for in the Contract Documents, to a final determination of quantities and classifications for Unit Price Work under paragraph 9.10, and to any other qualifications stated in the recommendation; and that CONTRACTOR is entitled to payment of the amount recommended. However, by recommending any such payment, PROFESSIONAL will not thereby be deemed to have represented that exhaustive or continuous on-site inspections have been made to check the quality or the quantity of the Work beyond the responsibilities specifically assigned to PROFESSIONAL in the Contract Documents or that there may not be other matters or issues between the parties that might entitle CONTRACTOR to be paid additionally by OWNER or OWNER to withhold payment to CONTRACTOR.

14.6. PROFESSIONAL's recommendation of final payment will constitute an additional representation by PROFESSIONAL to OWNER that the conditions precedent to CONTRACTOR's being entitled to final payment as set forth in paragraph 14.13 have been fulfilled.

14.7. PROFESSIONAL may refuse to recommend the whole or any part of any payment if, in PROFESSIONAL's opinion, it would be incorrect to make such representations to OWNER. PROFESSIONAL may also refuse to recommend any such payment, or, because of subsequently discovered evidence or the results of subsequent inspections or tests, nullify any such payment previously recommended, to such extent as may be necessary in PROFESSIONAL's opinion to protect OWNER from loss because:

14.7.1. the Work is defective, or completed Work has been damaged requiring correction or replacement.

14.7.2. the Contract Price has been reduced by Written Amendment or Change Order.

14.7.3. OWNER has been required to correct defective Work or complete Work in accordance with paragraph 13.14. or

14.7.4. of PROFESSIONAL's actual knowledge of the occurrence of any of the events enumerated in paragraphs 15.2.1 through 15.2.9 inclusive.

OWNER may refuse to make payment of the full amount recommended by PROFESSIONAL because claims have been made against OWNER on account of CONTRACTOR's performance or furnishing of the Work or Liens have been filed in connection with the Work or

there are other items entitling OWNER to a off-set against the amount recommended, but OWNER must give CONTRACTOR immediate written notice (with a copy to PROFESSIONAL) stating the reasons for such action.

Substantial Completion:

14.8. When CONTRACTOR considers the entire Work ready for its intended use, CONTRACTOR shall notify OWNER and PROFESSIONAL in writing that the entire Work is substantially complete (except for items specifically listed by CONTRACTOR as incomplete) and request that PROFESSIONAL issue a certificate of Substantial Completion. Within a reasonable time thereafter, OWNER, CONTRACTOR and PROFESSIONAL shall make an inspection of the Work to determine the status of completion. If PROFESSIONAL does not consider the Work substantially complete, PROFESSIONAL will notify CONTRACTOR in writing giving the reasons therefor. If PROFESSIONAL considers the Work substantially complete, PROFESSIONAL will prepare and deliver to OWNER a tentative certificate of Substantial

Completion which shall fix the date of Substantial Completion. There shall be attached to the certificate a tentative list of items to be completed or corrected before final payment. OWNER shall have seven days after receipt of the tentative certificate during which to make written objection to PROFESSIONAL as to any provisions of the certificate or attached list. If, after considering such objections, PROFESSIONAL concludes that the Work is not substantially complete, PROFESSIONAL will, within fourteen days after submission of the tentative certificate to OWNER notify CONTRACTOR in writing stating the reasons therefore. If, after consideration of OWNER's, objections, PROFESSIONAL considers the Work substantially complete, PROFESSIONAL will within said fourteen days execute and deliver to OWNER and CONTRACTOR a definitive certificate of Substantial Completion (with a revised tentative list of items to be completed or corrected) reflecting such changes from the tentative certificate as PROFESSIONAL believes justified after consideration of any objections from OWNER. At the time of delivery of the tentative certificate of Substantial Completion, PROFESSIONAL will deliver to OWNER and CONTRACTOR a written recommendation as to division of responsibilities pending final payment between OWNER and CONTRACTOR with respect to security, operation, safety, maintenance, heat, utilities, insurance and warranties. Unless OWNER and CONTRACTOR agree otherwise in writing and so inform PROFESSIONAL prior to PROFESSIONAL's issuing the definitive certificate of Substantial Completion, PROFESSIONAL's aforesaid recommendation will be binding on OWNER and CONTRACTOR until final payment.

14.9. OWNER shall have the right to exclude CONTRACTOR from the Work after the date of Substantial Completion, but OWNER shall allow CONTRACTOR reasonable access to complete or correct items on the tentative list.

Partial Utilization:

14.10. Use by OWNER at OWNER's option of any substantially completed part of the Work which (i) has specifically been identified in the Contract Documents, or (ii) OWNER, PROFESSIONAL, and CONTRACTOR agree constitutes a separately functioning and usable part of the Work that can be used by OWNER for its intended purpose without significant interference with CONTRACTOR's performance of the remainder of the Work, may be accomplished prior to Substantial Completion of all the Work subject to the following:

14.10.1. OWNER at any time may request CONTRACTOR in writing to permit OWNER to use any such part of the Work which OWNER believes to be ready for its intended use and substantially complete. If CONTRACTOR agrees, CONTRACTOR will certify to OWNER and PROFESSIONAL that said part of the Work is substantially complete and request PROFESSIONAL to issue a certificate of Substantial Completion for that part of the Work. CONTRACTOR at any time may notify OWNER and PROFESSIONAL in writing that CONTRACTOR considers any such part of the Work ready for its intended use and substantially complete and request PROFESSIONAL to issue a certificate of Substantial Completion for that part of the Work. Within a reasonable time after either such request, OWNER, CONTRACTOR and PROFESSIONAL shall make an inspection of that part of the Work to determine its status of completion. If PROFESSIONAL does not consider that part of the

Work to be substantially complete, PROFESSIONAL will notify OWNER and CONTRACTOR, in writing, giving the reasons therefore. If PROFESSIONAL considers that part of the Work to be substantially complete, the provisions of paragraphs 14.8 and 14.9 will apply with respect to certification of Substantial Completion of that part of the Work and the division of responsibility in respect thereof and access thereto.

14.10.2. OWNER may at any time request CONTRACTOR, in writing, to permit OWNER to take over operation of any such part of the Work although it is not substantially complete. A copy of such request will be sent to PROFESSIONAL and, within a reasonable time thereafter, OWNER, CONTRACTOR and PROFESSIONAL shall make an inspection of that part of the Work to

determine its status of completion, and PROFESSIONAL will prepare a list of the items remaining to be completed or corrected thereon before final payment. If CONTRACTOR does not object in writing to OWNER and PROFESSIONAL that such part of the Work is not ready for separate operation by OWNER, PROFESSIONAL will finalize the list of items to be completed or corrected and will deliver such list to OWNER and CONTRACTOR together with a written recommendation as to the division of responsibilities pending final payment between OWNER and CONTRACTOR with respect to security, operation, safety, maintenance, utilities, insurance, warranties and guarantees for that part of the Work which will become binding upon OWNER and CONTRACTOR at the

time when OWNER takes over such operation (unless they shall have otherwise agreed in writing and so informed PROFESSIONAL). During such operation and prior to Substantial Completion of such part of the Work, OWNER shall allow CONTRACTOR reasonable access to complete or correct items on said list and to complete other related Work.

14.10.3. No occupancy or separate operation of part of the Work will be accomplished prior to compliance with the requirements of paragraph 5.15 in respect of property insurance.

14.10.4. OWNER, may at its discretion, reduce the amount of retainage subject to Beneficial Occupancy.

Final Inspection:

14.11. Upon written notice from CONTRACTOR that the entire Work or an agreed upon portion thereof is complete, PROFESSIONAL will make a final inspection with OWNER and CONTRACTOR and will notify CONTRACTOR in writing of all particulars in which this inspection reveals that the Work is incomplete or defective. CONTRACTOR shall immediately take such measures as are necessary to remedy such deficiencies.

Final Application for Payment:

14.12. After CONTRACTOR has completed all such corrections to the satisfaction of PROFESSIONAL and OWNER and delivered in accordance with the Contract Documents all maintenance and operating instructions, schedules, guarantees, bonds, certificates or other evidence of insurance required by 5.2, certificates of inspection, marked-up record documents and other documents, CONTRACTOR may make application for final payment following the procedure for progress payments. The final Application for Payment shall be accompanied (except as previously delivered) by: (i) all documentation called for in the Contract Documents, including but not limited to the evidence of insurance required, (ii) consent of the surety, if any, to final payment, and (iii) complete and legally effective releases or waivers (satisfactory to OWNER) of all liens arising out of or filed in connection with the Work. In lieu of such releases or waivers of liens and as approved by OWNER, CONTRACTOR may furnish receipts or release in full and an affidavit of CONTRACTOR that (i) the releases and receipts include all labor, services, material and equipment for which a lien could be filed, and (ii) all payrolls, material and equipment bills and other indebtedness connected with the Work for which OWNER or OWNER's property might in any way be responsible have been paid or otherwise satisfied. If any Subcontractor or supplier fails to furnish such a release or receipt in full, CONTRACTOR may furnish a bond or other collateral satisfactory to OWNER to indemnify OWNER against any lien.

14.12.1. No application for final payment will be accepted by OWNER until approved as-built documents by CONTRACTOR are accepted and approved by PROFESSIONAL.

14.12.2. Notwithstanding any other provision of these contract documents to the contrary, OWNER and PROFESSIONAL are under no duty or obligation whatsoever to any vendor, materials provider, Subcontractor, laborer or other party to ensure that payments due and owing by CONTRACTOR to any of them are or will be made. Such parties shall rely only on CONTRACTOR's surety bonds for remedy of nonpayment by him. CONTRACTOR agrees to defend and resolve all claims made by Subcontractors, indemnifying OWNER and PROFESSIONAL for all claims arising from or resulting from Subcontractor or supplier or material men or laborer services in connection with this project.

14.12.3. General Indemnity: CONTRACTOR shall indemnify OWNER and PROFESSIONAL for any damages sustained, including lost profits, resulting from CONTRACTOR's failure or refusal to perform the work required by these contract documents.

Final Payment and Acceptance:

14.13. If, on the basis of PROFESSIONAL's observation of the Work during construction and final inspection and PROFESSIONAL's review of the final Application for Payment and accompanying documentation as required by the

Contract Documents, PROFESSIONAL is satisfied that the Work has been completed and CONTRACTOR's other obligations under the Contract Documents have been fulfilled, PROFESSIONAL will, within ten (10) working days after receipt of the final Application for Payment, indicate in writing PROFESSIONAL's recommendation of payment and present the Application to OWNER for payment. At the same time PROFESSIONAL will also give written notice to OWNER and CONTRACTOR that the Work is acceptable subject to the provisions of 14.6. Otherwise, PROFESSIONAL will return the application to CONTRACTOR, indicating in writing the reasons for refusing to recommend final payment, in which case CONTRACTOR shall make the necessary corrections and resubmit the Application. After the presentation to OWNER of the application and accompanying documentation, in appropriate form and substance and with PROFESSIONAL's recommendation and notice of acceptability, the amount recommended by PROFESSIONAL will become due and will be paid by OWNER to CONTRACTOR.

14.14. If, through no fault of CONTRACTOR, final completion of the Work is significantly delayed and if PROFESSIONAL so confirms, OWNER shall, upon receipt of CONTRACTOR's final Application for Payment and recommendation of PROFESSIONAL and without terminating the Agreement, make payment of the balance due for that portion of the Work fully completed and accepted. If the remaining balance to be held by OWNER for Work not fully completed or corrected is less than the retainage stipulated in the Contract and if bonds have been furnished as required in Article 5, the written consent of the surety to the payment of the balance due for that portion of the Work fully completed and accepted shall be submitted by CONTRACTOR to PROFESSIONAL with the application for such payment. Such payment shall be made under the terms and conditions governing final payment, except that it shall not constitute a waiver of claims.

CONTRACTOR's Continuing Obligation:

14.15. CONTRACTOR's obligation to perform and complete the Work in accordance with the Contract Documents shall be absolute. Neither recommendation of any progress or final payment by PROFESSIONAL, nor the issuance of a certificate of Substantial Completion, nor any payment by OWNER to CONTRACTOR under the Contract Documents, nor any use or occupancy of the Work or any part thereof by OWNER, nor any act of acceptance by OWNER nor any failure to do so, nor any review and approval of a Shop Drawing or sample submission, nor the issuance of a notice of acceptability by PROFESSIONAL pursuant to paragraph 14.13, nor any correction of defective Work by OWNER will constitute an acceptance of Work not in accordance with the Contract Documents or a release of CONTRACTOR's obligation to perform the Work in accordance with the Contract Documents (except as provided in paragraph 14.16).

Waiver of Claims:

14.16. The making and acceptance of final payment will constitute:

14.16.1. A waiver of all claims by OWNER against CONTRACTOR, except claims arising from unsettled liens, from defective Work appearing after final inspection pursuant to 14.11, from failure to comply with the Contract Documents or the terms of any special guarantees specified therein, or from CONTRACTOR's continuing obligations under the Contract Documents; and

14.16.2. A waiver of all claims by CONTRACTOR against OWNER other than those previously made in writing and still unsettled.

ARTICLE 15--SUSPENSION OF WORK AND TERMINATION

OWNER May Suspend Work:

15.1. OWNER may, at any time and without cause, suspend the Work or any portion thereof for a period of not more than ninety days by notice in writing to CONTRACTOR and PROFESSIONAL which will fix the date on which Work will be resumed. CONTRACTOR shall resume the Work on the date so fixed. CONTRACTOR shall be allowed an adjustment in the

Contract Price or an extension of the Contract Time, or both, directly attributable to any suspension if CONTRACTOR makes an approved claim therefor as provided in Articles 11 and 12.

Termination For Cause:

15.2. Upon the occurrence of any one or more of the following events:

15.2. 1. if CONTRACTOR commences a voluntary case under any chapter of the Bankruptcy Code (Title 11, United States Code), as now or hereafter in effect, or if CONTRACTOR takes any equivalent or similar action by filing a petition or otherwise under any other federal or state law in effect at such time relating to the bankruptcy or insolvency;

15.2.2. if a petition is filed against CONTRACTOR under any chapter of the Bankruptcy Code as now or hereafter in effect at the time of filing, or if a petition is filed seeking any such equivalent or similar relief against CONTRACTOR under any other federal or state law in effect at the time relating to bankruptcy or insolvency;

15.2.3. if CONTRACTOR makes a general assignment for the benefit of creditors;

15.2.4. if a trustee, receiver, custodian or agent of CONTRACTOR is appointed under applicable law or under contract, whose appointment or authority to take charge of property of CONTRACTOR is for the purpose of enforcing a Lien against such property or for the purpose of general administration of such property for the benefit of CONTRACTOR's creditors;

15.2.5. if CONTRACTOR admits in writing an inability to pay its debts generally, as they become due;

15.2.6. if CONTRACTOR fails to perform the Work in accordance with the Contract Documents (including, but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment or failure to adhere to the progress schedule established under paragraph 2.9 as revised from time to time);

15.2.7. if CONTRACTOR disregards Laws or Regulations of any public body having jurisdiction;

15.2.8. if CONTRACTOR disregards the authority of PROFESSIONAL; or

15.2.9. if CONTRACTOR otherwise violates in any substantial way any provisions of the Contract Documents,

OWNER may, after giving CONTRACTOR (and the surety, if there be one) seven days' written notice and to the extent permitted by Laws and Regulations, terminate the services of CONTRACTOR, exclude CONTRACTOR from the site and take possession of the Work and of all CONTRACTOR's tools, appliances, construction equipment and machinery at the site and use the same to the full extent they could be used by CONTRACTOR (without liability to CONTRACTOR for trespass or conversion), incorporate in the Work all materials and equipment stored at the site or for which OWNER has paid CONTRACTOR but which are stored elsewhere, and finish the Work as OWNER may deem expedient. In such case CONTRACTOR shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Price exceeds the direct, indirect and consequential costs of completing the Work (including but not limited to fees and charges of PROFESSIONALs, architects, attorneys and other PROFESSIONALs and court and arbitration costs) such excess will be paid to CONTRACTOR. If such costs exceed such unpaid balance, CONTRACTOR shall pay the difference to OWNER. Such costs incurred by OWNER will be approved as to reasonableness by PROFESSIONAL and incorporated in a Change Order, but when exercising any rights or remedies under this paragraph, OWNER shall not be required to obtain the lowest price for the Work performed.

15.3. In the event OWNER terminates the contract for cause and it is subsequently judicially determined that there was no cause for termination, the termination for convenience provision will be the means for disposition of the balance of the contract obligations.

Termination for Convenience

15.4. Upon seven working days' written notice to CONTRACTOR and PROFESSIONAL, OWNER may, without cause and without prejudice to any other right or remedy of OWNER, elect to terminate the Contract. In such case, CONTRACTOR shall be paid (without duplication of any items):

15.4.1. For completed and acceptable Work executed in accordance with the Contract Documents prior to the effective date of termination, including fair and reasonable sums for overhead and profit on such Work;

15.4.2. For expenses sustained prior to the effective date of termination in performing services and furnishing labor, materials or equipment as required by the Contract Documents in connection with uncompleted Work, plus fair and reasonable sums for overhead and profit on such expenses;

15.4.3. For all claims, costs, losses and damages incurred in settlement of terminated contracts with Subcontractors, suppliers and others; and

15.4.4. For reasonable expenses directly attributable to termination.

CONTRACTOR shall not be paid on account of loss of anticipated profits or revenue or other economic loss arising out of or resulting from such termination.

15.5. Where CONTRACTOR's services have been so terminated by OWNER, the termination will not affect any rights or remedies of OWNER against CONTRACTOR then existing or which may thereafter accrue. Any retention or payment of moneys due CONTRACTOR by OWNER will not release CONTRACTOR from liability.

CONTRACTOR May Stop Work or Terminate:

15.6. If through no act or fault of CONTRACTOR, the Work is suspended for a period of more than ninety calendar days by OWNER or under an order of court or other public authority, or PROFESSIONAL fails to act on any Application for Payment within thirty days after it is submitted or OWNER fails for thirty-one days to pay CONTRACTOR any sum finally determined to be due, then CONTRACTOR may upon seven working days' written notice to OWNER and PROFESSIONAL and provided OWNER or PROFESSIONAL did not remedy such suspension or failure within that time, terminate the Agreement and recover from OWNER payment on the same terms as provided in 15.2. In lieu of terminating the Agreement and without prejudice to any other right or remedy, if PROFESSIONAL has failed to act on an Application for Payment within thirty days after it is submitted or OWNER has failed for thirty-one calendar days after it is submitted to pay CONTRACTOR any sum finally determined to be due, CONTRACTOR may upon seven days' written notice to OWNER and PROFESSIONAL stop the Work until receipt of payment of all such amounts due CONTRACTOR, including interest thereon. The provisions of this paragraph are not intended to preclude CONTRACTOR from making claim under Articles 11 and 12 for an increase in Contract Price or Contract Time or otherwise for expenses or damage directly attributable to CONTRACTOR's stopping Work as permitted by this paragraph. The provisions of this paragraph shall not relieve CONTRACTOR of the obligations under paragraph 6.30 to carry on the Work in accordance with the progress schedule and without delay during disputes and disagreements with OWNER.

ARTICLE 16--DISPUTE RESOLUTION

16.1. All disputes arising under this Contract or its interpretation whether involving law or fact or both, or extra work, and all claims for alleged breach of contract shall within ten (10) working days of the commencement of the dispute be presented by CONTRACTOR to OWNER for decision. All papers pertaining to claims shall be filed in quadruplicate. Such notice need not detail the amount of the claim but shall state the facts surrounding the claim in sufficient detail to identify the claim, together with its character and scope. In the meantime, CONTRACTOR shall proceed with the Work as directed. Any claim not presented within the time limit specified in this paragraph shall be deemed to have been waived, except that if the claim is of a continuing character and notice of the claim is not given within ten (10) working days of its commencement, the claim will be considered only for a period commencing ten (10) working days prior to the receipt by OWNER of notice thereof. Each decision by OWNER will be in writing and will be mailed to CONTRACTOR by registered or certified mail, return receipt requested, directed to his last known address.

16.2 All claims, disputes and other matters in question between OWNER and CONTRACTOR arising out of, or relating to, the Contract Documents or the breach thereof shall be decided under Georgia Law in the Superior Court of Richmond County, Georgia. CONTRACTOR by execution of the Contract consents to jurisdiction and venue in the Superior Court of Richmond County, Georgia, and waives any right to contest same.

ARTICLE 17-MISCELLANEOUS

Giving Notice:

17.1. Whenever any provision of the Contract Documents requires the giving of written notice, it will be deemed to have been validly given if delivered in person to the individual or to a member of the firm or to an officer of the corporation for whom it is

intended, or if delivered at or sent by registered or certified mail, postage prepaid, to the last business address known to the giver of the notice.

Computation of Time:

17.2.1. When any period of time is referred to in the Contract Documents by days, it will be computed to exclude the first and include the last day of such period. If the last day of any such period falls on a Saturday or Sunday or on a day made a legal holiday by the law of the applicable jurisdiction, such day will be omitted from the computation.

17.2.2. A calendar day of twenty-four hours measured from midnight to the next midnight shall constitute a day.

General:

17.3. Should OWNER or CONTRACTOR suffer injury or damage to person or property because of any error, omission or act of the other party or of any of the other party's employees or agents or others for whose acts the other party is legally liable, claim should be made in writing to the other party within a reasonable time of the first observance of such injury or damage. The provisions of this paragraph 17.3 shall not be construed as a substitute for or a waiver of the provisions of any applicable statute of limitations or repose.

17.4. The duties and obligations imposed by these General Conditions and the rights and remedies available hereunder to the parties hereto, and, in particular but without limitation, the warranties, guarantees and obligations imposed upon CONTRACTOR by paragraphs 6.32, 13.1, 13.12, 13.14, 14.3 and 15.2 and all of the rights and remedies available to OWNER and PROFESSIONAL thereunder, are in addition to, and are not to be construed in any way as a

limitation of, any rights and remedies available to any or all of them which are otherwise imposed or available by Laws or Regulations, by special warranty or guarantee or by other provisions of the Contract Documents, and the provisions of this paragraph will be as effective as if repeated specifically in the Contract Documents in connection with each particular duty, obligation, right and remedy to which they apply. All representations, warranties and guarantees made in the Contract Documents will survive final payment and termination or completion of the Agreement.

17.5. CONTRACTOR shall keep adequate records and supporting documentation applicable to this Work and Contract. Said records and documentation shall be retained by CONTRACTOR for a minimum of five (5) years from the date of final completion or termination of this Contract. OWNER shall have the right to audit, inspect, and copy all such records and documentation as often as OWNER deems necessary during the period of the Contract and for a period of five (5) years thereafter provided, however, such activity shall be conducted only during normal business hours. OWNER, during this

period of time, shall also have the right to obtain a copy of and otherwise inspect any audit made at the direction of CONTRACTOR as concerns the aforesaid records and supporting documentation.

17.6. The Contract Documents are intended by the Parties to, and do, supersede any and all provisions of the Georgia Prompt Pay Act, O.C.G.A. Section 13-11-1, et seq. In the event any provision of the Contract Documents are inconsistent with any provision of the Prompt Pay Act, this provision of the Contract Documents shall control.

17.7. Notwithstanding any provision of the law to the contrary, the parties agree that no interest shall be due Contractor on any sum held as retainage pursuant to the Contract Documents and CONTRACTOR specifically waives any claim to same.

Substitutions:

17.8. Notwithstanding any provision of these general conditions, there shall be no substitutions of materials that are not determined to be equivalent to those indicated or required in the contract documents without an amendment to the contract.

Sanitary Sewer Overflow Prevention:

17.9. Procedures to Prevent Overflows During Sanitary Sewer Construction:

APPENDIX 4

17.9.1 The CONTRACTOR is hereby notified that the discharge of any untreated wastewater to waters of the State is a violation of Georgia Water Quality Regulations and is prohibited.

17.9.2 The CONTRACTOR will submit an Emergency Response Plan prior to beginning work. This plan will include a list of key personnel with 24-hour contact information who will respond during an emergency situation. The ERP will include estimates of mobilization time for a response crew to arrive onsite. Any changes to the Emergency Response Plan will be submitted to the RESIDENT PROJECT REPRESENTATIVE prior to implementation.

17.9.3 In the event bypass pumping is required to facilitate new sewer construction, bypassing plans and supporting calculations must be submitted to the Augusta Utilities Department for review prior to establishment of the bypass. All bypass systems will include complete redundancy in pumping systems, if failure of the primary pumping system could result in a discharge of untreated wastewater to waters of the State.

17.9.4 Bypass pumping will be monitored continuously by a person knowledgeable in pump operation and maintenance if the failure of the bypass pump could result in the discharge of untreated wastewater to waters of the State.

17.9.5 In the event of a discharge of untreated wastewater, the CONTRACTOR will take the following actions:

1. Take immediate steps to eliminate or minimize the discharge of untreated wastewater.
2. Immediately notify the Utilities Department dispatcher (706.796.5000) and the RESIDENT PROJECT REPRESENTATIVE (contact information will be provided at the preconstruction conference).
3. Maintain a chronicle of relevant information regarding the incident including specific actions taken by the CONTRACTOR and estimates of the discharge volume.

17.9.6 The RESIDENT PROJECT REPRESENTATIVE will coordinate notification of the Georgia Environmental Protection Division (800.241.4113) and the Augusta Emergency Management Agency if appropriate.

17.9.7 If, in the opinion of the RESIDENT PROJECT REPRESENTATIVE and the OWNER, the CONTRACTOR is not responding to an emergency situation in an appropriate manner, the Utilities Department will undertake necessary actions to abate an overflow situation. The cost of these actions will be the responsibility of the CONTRACTOR.

17.9.8 Following a discharge of untreated wastewater, a downstream inspection will be conducted by the Utilities Department to assess potential mitigation measures that may be required of the CONTRACTOR.

PROGRAM MANAGER:

17.10 The PROGRAM MANAGER

The presence or duties of PROGRAM MANAGER's personnel at the construction site, whether as onsite representatives or otherwise, do not make PROGRAM MANAGER or PROGRAM MANAGER's personnel in any way responsible for those duties that belong to OWNER and/or the CONTRACTOR or other entities, and do not relieve the CONTRACTOR or any other entity of their obligations, duties, and responsibilities, including, but not limited to, all construction methods, means, techniques, sequences, and procedures necessary for coordinating and completing all portions of the construction work in accordance with the construction Contract

Documents and any health and safety precautions required by such construction work.

PROGRAM MANAGER and PROGRAM MANAGER's personnel have no authority to exercise any control over any construction contractor or other entity or their employees in connection with their work or any health or safety precautions and have no duty of inspecting, noting, observing, correcting, or reporting on health or safety deficiencies of the CONTRACTOR(s) or other entity or any other persons at the site except PROGRAM MANAGER's own personnel.

The presence of PROGRAM MANAGER's personnel at the construction site is for the purpose of providing to OWNER a greater degree of confidence that the completed construction work will conform generally to the construction documents and that the integrity of the design concept as reflected in the construction documents has been implemented and preserved by the construction contractor(s). PROGRAM MANAGER neither guarantees the performance of the construction contractor(s) nor assumes responsibility for construction contractor's failure to perform work in accordance with the construction documents.

For this AGREEMENT only, construction sites include places of manufacture for materials incorporated into the construction work, and construction contractors include manufacturers of materials incorporated into the construction work

FTA Circular 4220.1F Changes
Revision 4 Changes dated March15, 2013

PURPOSE. This circular provides contracting guidance for recipients of Federal assistance awarded by the Federal Transit Administration (FTA) when using that Federal assistance to finance its procurements (third party contracts). This revision incorporates the new procurement provisions of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, July 6, 2012, and includes the most current available guidance for the Federal public transportation program as of the date of publication.

1. Under authority of Chapter 53 of title 49, U.S.C. as amended by Moving Ahead for Progress in the 21st Century Act (MAP-21), Section 5325, Contract Requirements, Paragraph (k), make changes as indicated below:

CHAPTER I

INTRODUCTION AND ROLE OF THE FEDERAL TRANSIT ADMINISTRATION

Chapter I, Section 2 is changed to read as follows:

2. AUTHORIZING LEGISLATION. Most Federal transit laws are codified at 49 U.S.C. Chapter 53. Authorizing legislation is substantive legislation enacted by Congress that establishes or continues the legal operation of a Federal program or agency. Congress has generally amended FTA's authorizing legislation every four to six years. FTA's most recent authorizing legislation, in effect for two fiscal years, is the Moving Ahead for Progress in the 21st Century Act (MAP-21) Pub. L. 112-141, July 6, 2012, however, authorizes FTA programs for two years, from the beginning of Federal Fiscal Year 2013 through the end of Federal Fiscal Year 2014. Revisions to this edition of the circular encompass the MAP-21 changes to Federal transit law and changes required by other laws that have become effective since FTA last issued this circular in 2003.

CHAPTER II

APPLICABILITY

2. APPLICABILITY OF THE CIRCULAR. Project Types and Third Party Contracts.
   (2) Operations Contracts.(b) Operations Contracts Financed Entirely Without FTA Assistance. Line 15, insert the word "to" between "apply" and "a."

CHAPTER III

THE RECIPIENT'S RESPONSIBILITIES

3. THIRD PARTY CONTRACTING CAPACITY

   b. Adequate Third Party Contract Provisions.

Because bids and offers can at times be ambiguous, FTA recommends that your procedures include a second paragraph or provisions similar to the following:

> "Because bids and offers can at times be ambiguous, in its solicitation documents, the Recipient reserves the right to request additional information before making an award. The Recipient also reserves the right to seek clarification from any bidder or offeror about any statement in its bid or proposal that the Recipient finds ambiguous."

d. Record Keeping.

(2) Access to Records. Apart from the more limited record access provisions of the Common Grant Rules, 49 U.S.C. Section 5325(g) provides FTA and DOT officials, the U.S. Comptroller General, or any of their representatives, access to and the right to examine and inspect all records, documents, and papers, including contracts, related to any FTA project financed with Federal assistance authorized by 49 U.S.C. Chapter 53.

CHAPTER IV
THE RECIPIENT'S PROPERTY AND SERVICES NEEDS AND FEDERAL REQUIREMENTS AFFECTING THOSE NEEDS

2. FEDERAL REQUIREMENTS THAT AFFECT A RECIPIENT'S ACQUISITIONS.

a. Contractor Qualifications

(1) Responsibility Requirements. Remove last sentence in its entirety.

(2) Debarment and Suspension.

(b) General Services Administration (GSA) Excluded Parties List System. Even though the recipient may collect a debarment and suspension certification from the prospective third party contractor, or include a clause in the third party contract requiring disclosure, FTA strongly recommends that the recipient check the Excluded Parties List System (EPLS). Now a part of the System for Awards Management (SAM) the EPLS is an electronic, web-based system that identifies those parties excluded from receiving Federal contracts, certain subcontracts, and certain types of Federal financial and non-financial assistance and benefits. The EPLS keeps its user community aware of administrative and statutory exclusions across the entire government, and individuals barred from entering the United States. Go to www.sam.gov and the Extracts and Data Access area and click on the Public Data Access box to find the individual firm, individual or vessel you may be seeking.

(6) Socio-Economic Development.

(a) Disadvantaged Business Enterprises (DBEs). Section 1101(b) of MAP-21, 23 U.S.C. Section 101 note, extends the Federal statutory requirement that FTA make available at least 10 percent of its funding under that Act for contracts with small business concerns owned and controlled by socially and economically disadvantaged people. Each FTA recipient and subrecipient of FTA funding assists FTA in meeting this national goal. To receive FTA assistance, each FTA recipient and subrecipient of FTA funding must comply with applicable requirements of DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance

(b) Programs," 49 CFR Part 26. If the recipient is required to have a DBE program, the third party contracts that the recipient has included in its DBE program determine whether the recipient meets the DBE threshold for goal setting, and the goal if the threshold is met.

b. Administrative Restrictions on the Acquisition of Property and Services.

(3) Period of Performance.

(b) Federal Restrictions. Except for procurements of rolling stock and replacement part contracts, which are limited by law to five (5) or seven (7) years as discussed in subsection 2.e of this Chapter, the recipient's other third party contracts (such as property, services, leases, construction, revenue, and so forth) are not encumbered by Federal requirements restricting the maximum periods of performance. Nevertheless, the duration of the recipient's other contracts must be reasonable.

c. Socio-Economic Requirements for the Acquisition of Property and Services.

(1) Labor.

(c) Veterans Employment. – Recipients and subrecipients of Federal financial assistance under this chapter shall ensure that contractors working on a capital project funded using such assistance give a hiring preference, to the extent practicable, to veterans (as defined in section 2108 of title 5) who have the requisite skills and abilities to perform the construction work required under the contract. This subsection shall not be understood, construed or enforced in any manner that would require an employer to give a preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, an individual with a disability, or a former employee.

d. Technical Restrictions on the Acquisition of Property and Services.

(1) Intelligent Transportation Systems. Intelligent transportation system (ITS) property and services must comply with the National ITS Architecture and Standards to the extent required by 23 U.S.C. Section 517(d) and FTA Notice, "FTA National ITS Architecture Policy on Transit Projects," 66 FR 1455 et seq., January 8, 2001, and later published policies or implementing directives FTA may issue. Consequently, third party contracts involving ITS are likely to require provisions to ensure compliance with Federal requirements.

e. Rolling Stock – Special Requirements.

(7) Bus Testing. Each third party contract to acquire a new bus model or a bus with significant alterations to an existing model must include provisions to assure compliance with applicable requirements of 49 U.S.C. Section 5318, as amended by MAP-21, and FTA regulations, "Bus Testing," 49 CFR Part 665.

Please substitute the following for paragraph 2.e(10)

(10) Time Limits for Options on Rolling Stock Contracts. MAP-21 amended 49 U.S.C. Section 5325(e)(1) by adding subsections (A) and (B), retaining the five (5) year option for the procurement of buses, while extending the option for rail procurements to seven (7) years. Consequently:

(a) Buses. A recipient:

1 May enter into a multi-year contract to acquire buses or replacement parts, with an option not exceeding five(5) years to buy additional buses or replacement parts, 49 U.S.C. Section 5325(e)(1)(A), but

2 May not exercise the option to acquire buses or replacement parts later than five (5) years after the date of its original contract.

(b) Rail. A recipient:

1 May enter into a multi-year contract to acquire railcars or replacement parts, with an option not exceeding five(5) years to buy additional railcars or replacement parts, 49 U.S.C. Section 5325(e)(1)(B), but

2 May not exercise the option to acquire railcars or replacement parts later than seven (7) years after the date of its original contract.

FTA interprets these five and seven-year periods as covering the recipient's "material requirements" for rolling stock and replacement needs from the first day when the contract becomes effective to its "material requirements" at the end of the fifth or seventh year, as applicable. In the case of rolling stock, which frequently cannot be delivered expeditiously, FTA recognizes that a recipient's "material requirements" for rolling stock will necessarily precede its actual need to put that rolling stock to use in public transportation service. This means that the contract may not have options for more rolling stock and replacement parts than a recipient's material requirements for the applicable five or seven-year period. This does not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. Instead it means only that FTA limits a contract to purchasing no more than the recipient's material requirements for rolling stock or replacement parts for five or seven years based on the effective date of the contract.

CHAPTER V

SOURCES

4. STATE OR LOCAL GOVERNMENT PURCHASING SCHEDULES OR PURCHASING CONTRACTS. FTA uses the term "state or local government purchasing schedule" to mean an arrangement that a State or local government has established with several or many vendors in which those vendors agree to provide essentially an option to the State or local government, and its subordinate government entities, to acquire specific property or services in the future at established prices. These arrangements are somewhat similar to the General Services Administration's (GSA) Cooperative Purchasing Program available for Federal Government use. If the State or local government wishes to permit others to use its schedules, the State or local government might seek the agreement of the vendor to provide the listed property or services to others with access to the schedules, or it may permit the vendor to determine whether or not it wishes to do so. CAUTION: The term "state of local government purchasing schedule" does not include intergovernmental purchasing schedules to be the type of State or local intergovernmental agreement.

a. Use.

(1) Use Permitted. FTA's policies are as follows:

(a) General. The Common Grant Rule for governmental recipients encourages recipients and subrecipients to enter into State and local intergovernmental agreements for procurements of property or services, and

(b) State or Local Government Permission Required. If so permitted by State or local authorities, a non-governmental recipient may also use State and local sources of property and services. This is because 49 C.F.R. § 18.36(a) permits States to use their own policies and procedures they use for their own purchases, not because those schedules are "State intergovernmental agreements," and

b. Use Restricted. Although the Common Grant Rule for governmental recipients, 49 C.F.R. § 18.36(b)(5), provides that "grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurements of common goods and services":

(1) Prohibited. FTA does not authorize grantees to consider intergovernmental purchasing schedules to be the type of State or local intergovernmental agreement to which that Common Grant Rule is referring, but

(2) Permitted. FTA recognizes joint purchases to be the only type of intergovernmental agreement suitable for use by its grantees and subgrantees.

CHAPTER VI

PROCEDURAL GUIDANCE FOR OPEN MARKET PROCUREMENTS

3. METHODS OF PROCUREMENT.

i. Other Than Full and Open Competition. Normally, the recipient must provide for full and open competition when soliciting bids or proposals. The Common Grant Rule for governmental recipients, however, acknowledges that under certain circumstances, a recipient may conduct procurements without providing for full and open competition.

(1) When Appropriate. A recipient may use noncompetitive proposals only when the procurement is inappropriate for small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances are present:

* * * * *

(e) Authorized by FTA. The Common Grant Rules provide Federal agencies authority to permit a recipient to use noncompetitive proposals. Under this authority, FTA has made the following determinations:

1 Team, Consortium, Joint Venture, Partnership. With some exceptions, when FTA awards a grant agreement or enters into a cooperative agreement with a team, consortium, joint venture, or partnership, or provides FTA assistance for a research project in which FTA has approved the participation of a particular firm or combination of firms in the project work, the grant agreement or cooperative agreement constitutes approval of those arrangements. In such cases, FTA expects the recipient to use competition, as feasible, to select other participants in the project. It can sometimes be difficult to determine whether a bidder or offeror is submitting its bid or offer as a team or other group with committed parties. The Recipient should clarify with the bidder or offeror how other entities included in its bid or offer are to be treated.

5. ADJUSTMENTS TO PROJECT COSTS. MAP-21 amended 49 U.S.C. Section 5309(l) to permit FTA to approve an adjustment of the final net capital project cost of a new fixed guideway capital project or core capacity improvement project to include the cost of eligible activities not included in the original project if FTA determines that the original project has been completed at a cost that is significantly below the original estimate.

2. Moving Ahead for Progress in the 21st Century Act (MAP 21), Pub. L. 112-141, July 6, 2012,

b. Add the following references:

- Arms Export Control Act, as amended, 22 U.S.C. Sections 2751 *et seq*.
- Trading with the Enemy Act, 50 U.S.C. app. Sections 1 *et seq*.
- International Emergency Economic Powers Act, as amended, 50 U.S.C. Sections 1701 *et seq*.
- Export Administration Act of 1979, as amended, 50 U.S.C. app. Sections 2401 *et seq.*
- U.S. Department of Commerce, "Export Administration Regulations," 15 C.F.R. Parts 730 *et seq*.
- U.S. Department of State regulations, "International Traffic in Arms Regulations," (ITAR), 22 C.F.R. Subchapter M.
- U.S. Department of Treasury, regulations "Office of Foreign Assets Control," [OFAC] 31 C.F.R. Chapter V.
- FTA Circular 4220.1F, "Third Party Contracting Guidance," November 1, 2008, as revised.

Grant Agreement, Supplemental Agreement, and Cooperative Agreement

We made the following changes in our Federal Grant Agreements, Supplemental Agreements, and Cooperative Agreements:

1. The new document numbers and dates are as follows:

    a. Grant Agreement, FTA G-20, October 1, 2013,

    b. Supplemental Agreement, Attachment to FTA S-20, October 1, 2013, and

    c. Cooperative Agreement, FTA C-20, October 1, 2013, and

2. The Grant Agreement and the Cooperative Agreement display the website address of the new Master Agreement, http://www.fta.dot.

Master Agreement

Below are the important changes to the Fiscal Year 2014 Master Agreement. We have not identified editorial, text changes, or minor changes to formats, headings or provisions when their essential meaning is consistent with our previous requirements:

1. Cover Page. We made the following changes:

    a. Document Number and Date. The document number and date for the new Master Agreement is FTA MA(20), October 1, 2013, and

    b. FTA Website. The FTA website for the new Master Agreement is http://www.fta.dot.gov,

2. Table of Contents. We divided the Master Agreement into two parts: "Generally Applicable Provisions" and "Special Provisions for Specific Programs,"

3. Preface. We made the following changes:

    a. We are now using the Standard FTA Master Agreement for Grants under the Tribal Transit Program, 49 U.S.C. § 5311(c)(1). Therefore we will not be using a separate Master Agreement for the Tribal Transit Program, and

    b. We have stated that MAP-21 requirements will apply to all "recoveries" funds FTA awards, irrespective of the fiscal year for which those funds were appropriated,

4. Section 1, "Definitions." We made the following changes:

    a. New Section 1.k. We added a definition of "Federal Requirement" to the "Definitions" section of the Master Agreement,

b. Re-numbered Sections 1.l through 1.q. We re-numbered former sections 1.k through 1.p as sections 1.l through 1.q respectively,

c. New Section 1.r. We added a definition of "Indian Tribe" to the "Definitions" section of the Master Agreement,

d. Re-numbered 1.s. We re-numbered former Section 1.q as section 1.s,

e. New Section1.t. We added a definition of "Low-Income Individual,

f. New Section 1.u. We added a definition of "Non-Tribal Service Provider" to the "Definitions" section of the Master Agreement,

g. Re-numbered Sections 1.v through 1.x. We re-numbered former sections 1.r through 1.t as sections 1.v through 1.x, respectively,

h. New Section 1.y. We added a definition of "State Supply Schedule" to the "Definitions" section of the Master Agreement, and

i. Re-numbered Sections 1.z through 1.gg. We re-numbered former sections 1.u through 1.bb as sections 1.z through 1.gg respectively,

5. Section 2.c(1), "Federal Requirements." We amended the "Federal Requirements" provision of this section to reference the definition in section 1.k of the Master Agreement,

6. Section 2.c(2), "Federal Guidance." We amended the "Federal Guidance" provision of this section to reference the definition in section 1.j of the Master Agreement,

7. Section 2.g(2)(d). We added a new provision in Section 2.g(2)(d), which provides that a false claim under the False Claims Act, 31 U.S.C. 3729, *et seq.*, or similar misconduct made by a Principal, Official, Employee, Agent, or Third Party Participant of the Recipient, or other person involving Federal funding is considered an adverse action that can result in a change in Project performance, and renumbered former Section 2.g(2)(d) as Section 2.g(2)(e),

8. Section 2.g(2)(f). We added a new Section 2.g.(2)(f), which provides that a suspension, debarment, or similar action against a Third Party Participant by the Recipient is considered an adverse action that can result in a change in Project performance,

9. Section 3.b, "Debarment and Suspension." We made the following changes:

a. Section 3.b(1)(b). U.S. General Services Administration (U.S. GSA) has established the "System for Award Management" that now encompasses information that had been maintained in U.S. GSA's "Excluded Parties Listing System" as well as the Catalog of Federal Domestic Assistance and other Federal systems,

b. Sections 3.b(1)(b) and Section 3.b(1)(c)2. U.S. GSA's debarment and suspension information is now available at https://www.sam.gov,

c. Renumbered Sections 3.b(2) and 3.b(3). We re-numbered former Sections 3.b(2) and 3.b(3) as Sections 3.b(1)(b) and 3.b(1)(c), and

d. New Section 3.b(2). We added new Section 3.b(2) to include a provision whereby the Recipient agrees to provide immediate written notice to FTA if the Recipient suspends, debars, or takes a similar action against a Third Party Participant or individual,

10. Section 4, "Federal Share." In section 4.b(2)(b), we added a provision stating that in instances when FTA has discretion, FTA may determine the amount of Federal funding to provide for a specific Project,

11. Section 5, "Local Share." In Section 5, we made the following changes:

a. Section 5.a(3). We added a Special Provision discussing the local share for Tribal Transit projects,

b. Former Section 5.b(1). We removed the former broad prohibition against providing any receipts from the use of Project facilities and equipment as local share,

c. New Section 5.b.We added a new Section 5.b to list permissible sources of local share,

d. New Section 5.c. We added a provision setting forth permissible sources of local share that may need FTA written concurrence,

e. Transferred Section 5.d(1) and (2) [*former Section 5.b*]. We consolidated the provision concerning restricted local share with the provisions about in-kind local share and use of bond proceeds under that heading,

f. Transferred Section 5.e [*former Section 5.b(1)*]. We transferred the provisions about prohibited sources of local share to a separate subsection, and

g. Re-numbered Sections 5.f through 5.h. We re-numbered former sections 5.c through 5.e as sections 5.f through 5.h, respectively,

12. Section 7, "Payments to Recipients." We made several changes to this section:

a. Section 7.f(2) and 7.g. We moved former Section 7.f(2) to Sections 7.f(1)(b) and 7.4(1)(c) and amended the text of these sections as well as Section 7.g to clarify the provisions about using the Delphi eInvoicing system and other aspects of FTA's payment provisions, and

b. Section 7.g. We amended the text of this section to provide more flexibility about the use of Program Income,

13. New Section 8.c. We added a new section 8.c providing requirements for all 49 U.S.C. § 5307 and 49 U.S.C. § 5311 Recipients that must comply with the National Transit Database requirements,

14. Transferred Sections 8.d and 8.e. We transferred former sections 8.c and 8.d to sections 8.d to 8.e,

15. Section 13, "Civil Rights." We made the following changes to section 13:

a. Section 13.a(3)(a)1, "Nondiscrimination in Federal Public Transportation Programs." This provision acknowledges the new title of the latest FTA Circular 4702.1, "Title VI Requirements and Guidelines for Federal Transit Administration Recipients," issued October 1, 2012,

b. Section 13.b(3)(a), "Nondiscrimination – Title VI of the Civil Rights Act." This provision acknowledges the new title of the latest FTA Circular 4702.1, "Title VI Requirements and Guidelines for Federal Transit Administration Recipients," issued October 1, 2012,

c. Section 13.d, "Disadvantaged Business Enterprise." We made the following changes:

(1) New Section 13.d(2). We added a new paragraph (2), "DBE Program Requirement," to emphasize that Recipients receiving planning, capital and/or operating assistance that will award prime third party contracts exceeding $250,000 in a Federal fiscal year must:

(a) Have a DBE program meeting the requirements of 49 C.F.R. part 26,

(b) Implement a DBE program approved by FTA, and

(c) Establish an annual DBE participation goal,

(2) New Section 13.d(3). We added a new paragraph (3), "Special Requirements for a Transit Vehicle Manufacturer," to emphasize that, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, a transit vehicle manufacturer (TVM) must provide the Recipient a certification that the TVM has complied with the requirements of 49 C.F.R. part 26, and

(3) Re-numbered Section 13.d(4). We re-numbered former section 13.d(2) as section 13.d(4),

d. Former Section 13.j, "Environmental Justice." We made the following changes:

(1) Transferred Section 13.j. We transferred the environmental requirements provisions from section 13.j in the "Civil Rights" section to section 29.c, "Environmental Protections" because the section 29 addresses environmental requirements and guidance, and

(2) Re-numbered Section 13.j. We re-numbered former section 13.k as section 13.j, and

e. New Section 13.k. We added a new "Remedies" provision for violations of Civil Rights laws and regulations,

16. Section 17, "Procurement." We made the following changes:

a. Section 17.h. We changed the heading of section 17.h from "Federal Supply Schedules" to clarify that the subject matter of the subsection is "U.S. GSA Federal Supply Schedules,"

b. Section 17.h(1). We changed the text of section 17.h(1) from "Federal Supply Schedules" to clarify that the subject matter of the provision in section 17.h(1) is "U.S. GSA Federal Supply Schedules," and

c. New Section 17.i. We made the following changes:

(1) New Section 17.i. We added a new section 17.i to clarify the limitations on how Recipients may use State Supply Schedules, and

(2) Re-numbered Sections 17.j through 17.x. We re-numbered former section 17.i through section 17.was section 17.j through section 17.x, respectively,

17. Section 21, "Use of Real Property, Equipment, and Supplies." We made the following changes:

a. Section 21.j(2). We added a provision to the "Insurance" subsection reserving FTA the right to approve an alternative use of insurance proceeds, and

b. Section 21.l. We divided the "Disposition of Project Property" section into two parts:

(1) Dispositions under 49 U.S.C. § 5334(h), and

(2) Dispositions under 49 C.F.R. part 18 or part 19,

18. Section 22, "Transit Asset Management." We made the following changes:

a. Section 22.a(1)(b)1. We added a reference to the "Transit Asset Management" rulemaking process and noted that the Transit Asset Management final rule has not been issued as of October 1, 2014,

b. Former Sections 22.b and c. We streamlined section 22 by removing former subsections b and c pertaining to types of regulations and performance targets, and

c. Re-numbered Section 22.b. We re-numbered former section 22.d as section 22.b,

19. Section 26, "Construction." We made the following changes:

a. Transferred Section 26.b. We transferred the "Seismic Safety" provisions from former Section 26.e to Section 26.b,

b. Transferred Section 26.c. We transferred the "Supervision of Construction" provision from former Section 26.b to Section 26.c,

c. Transferred Section 26.d. We transferred the "Construction Reports" provisions from former Section 26.c to Section 26.d,

d. Section 26.e. For clarity, we changed the name of the heading from "Project Management for Major Capital Projects" to "Major Capital Investment Project Regulations and Guidance," and

e. New Section 26.e(2)(a). FTA guidance, "Notice of Availability of New Starts and Small Starts Policy Guidance," was published in 78 *Fed. Reg*. 49372 *et seq*., August 14, 2013,

20. Section 29, "Environmental Requirements." We made the following changes:

a. Section 29.b(1)(d). Amendments to Joint FHWA and FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. part 771 and 49 C.F.R. part 622, were published in the *Federal Register*, 78 *Fed. Reg*. 8963, February 7, 2013, and

b. Transferred Section 29.c *[former Section 29.j]*. We made the following changes:

(1) New Section 29.c. We transferred the environmental requirements provisions from section 13.j to section 29.c, because section 29 addresses environmental requirements and guidance, and

(2) Re-numbered Sections 29.d through 29.q. We re-numbered former section 29.c through section 29.p as section 29.d through section 29.q, respectively,

21. Section 33. "School Bus Operations." We amended section 33.d to state that, if the Recipient violates the School Bus prohibitions, FTA may require the Recipient to take such remedial measures as FTA considers appropriate, in addition to barring a Recipient from receiving further transit funds,

22. Section 38.b, "Motor Carrier Safety." We made the following changes:

a. Section 38.b. We added a reference to the safety requirements also in FMCSA Regulations, "Transportation of Hazardous Materials; Driving and Parking Rules," 49 C.F.R. part 397,

b. Section 38.c. We added a reference to the State driver's qualifications of FMCSA Regulations, "State Compliance with Commercial Driver's License Program," 49 C.F.R. part 384, and

c. Section 38.d. To determine which substance abuse regulations will apply to motor carriers not covered by FTA's alcohol and drug testing control regulations, FMCSA staff recommended that:

(1) The weight threshold be changed from 20,000 to 20,001 lbs, and

(2) An alert be added that a motor vehicle of any size used in the transportation of hazardous materials must be placarded under the Hazardous Materials Regulations, 49 C.F.R. part 172, subpart F,

23. Section 40, "Substance Abuse." We made the following changes:

a. New Section 40.b(1)(b). Amendments to FTA regulations, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations," 49 C.F.R. part 655, were published in the *Federal Register*, 78 *Fed. Reg*. 37991, June 25, 2013. These regulations implement the MAP-21 amendments to 49 U.S.C. § 5331,

b. Re-numbered Section 40.b(1)(c). We re-numbered former section 40.b(1)(b) as section 40.b(1)(c), and

c. Section 40.b(2). MAP-21 amended the remedy for non-compliance with FTA regulations, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations," 49 C.F.R. part 655, so that now the Federal Transit Administrator has more discretion to determine the amount of Federal transit funding to withhold from a Recipient or Third Party Participant that has not complied with those regulations,

24. Transferred Section 43, "Freedom of Information" [*Former Section 95*]. We transferred the "Freedom of Information" provisions from former section 95 to the new section 43 with no substantive change,

25. Transferred Section 44, "Disputes, Breaches, Defaults, or Other Litigation" [*Former Section 96*]. We made the following changes:

    a. New Section 44. We transferred the "Disputes, Breaches, Defaults, or Other Litigation" provisions from former section 96 to new section 44,

    b. New Section 44.b(2)(d). We added a new provision in Section 44.b(2)(d), which provides that a false claim under the False Claim Act, 31 U.S.C. 3729, *et seq.*, or similar misconduct made by a Principal, Official, Employee, Agent, or Third Party Participant of the Recipient, or other person involving Federal funding is considered a current or prospective legal matter that may affect the Federal Government and requires notification to FTA, and the U.S. DOT Inspector General,

    c. New Section 44.b(4). We added a new provision in Section 44.b(4), which provides that if a legal matter emerges under Section 44.b(2)(d) of the Master Agreement, then the Recipient must notify the U.S. DOT Inspector General, and

    d. New Section 44.c(2). We amended the former liquidated damages provision to require the Recipient to obtain FTA concurrence before it seeks to return liquidated damages it has received to its Project Account,

26. Transferred Section 45, "Amendments to the Project" [*Former Section 97*]. We transferred the "Amendments to the Project" provisions from former section 97 to new section 45 with no substantive change,

27. Transferred Section 46, "FTA's Electronic Award and Management System" [*Former Section 98*]. We transferred the "FTA's Electronic Award and Management System" provisions from former section 98 to new section 46 with no substantive change,

28. Transferred Section 47, "Information Obtained through Internet Links" [*Former Section 99*]. We transferred the "Information Obtained through Internet Links" provisions from former section 99 to new section 47 with no substantive change,

29. Transferred Section 48, "Severability" [*Former Section 100*]. We transferred the "Severability" provisions from former section 100 to new section 48 with no substantive change,

30. Transferred Section 49, "Applicability of MAP-21 and Previous Authorization Requirements" [*Former Section 43*]. We made the following changes:

    a. We transferred the "Applicability of MAP-21 and Previous Authorization Requirements" provisions from former section 43 to new section 49,

    b. In section 49.b(1)(c)1, we added statutory citations for the programs listed,

    c. In section 49.b(2)(a)3, we added statutory citations for the programs listed, and

d. In section 49.b(2)(a)3.b, we added a reference to the Clean Fuels Grant Program,

31. Transferred Section 50, "Special Provisions for the Metropolitan Planning Program" [*Former Section 44*]. We transferred the "Special Provisions for the Metropolitan Planning Program" from former section 44 to new section 50 with no substantive change,

32. Transferred Section 51, "Special Provisions for the Statewide Planning and Research Program" [*Former Section 45*]. We transferred the "Special Provisions for the Statewide Planning and Research Program" from former section 45 to new section 51 with no substantive change,

33. Transferred Section 52, "Special Provisions for the Transit-Oriented Development Planning Pilot Program" [*Former Section 46*]. We transferred the "Special Provisions for the Transit Oriented Development Pilot Program" from former section 46 to new section 52 with no substantive change,

34. Transferred Section 53, "Special Provisions for the Alternatives Analysis Program" [*Former Section 47*]. We transferred the "Special Provisions for the Alternatives Analysis Program" from former section 47 to new section 53 with no substantive change,

35. Transferred Section 54, "Special Provisions for the Urbanized Area Formula Grant Program Authorized by MAP-21 for Projects That Use Funds Appropriated or Made Available in Fiscal Year 2013 or a Subsequent Fiscal Year" [*Former Section 48*]. We made the following changes:

    a. New Section 54. We transferred the "Special Provisions for the Urbanized Area Formula Grant Program Authorized by MAP-21 for Projects That Use Funds Appropriated or Made Available in Fiscal Year 2013 or a Subsequent Fiscal Year" from former section 48 to new section 54,

    b. Section 54.d(6)(c). We added a new section 54.d(6)(c) stating that after FTA issues regulations under the Transit Asset Management Program authorized under 49 U.S.C. § 5326, as amended by MAP-21, the Recipient must report information relating to, and the condition of, its transit assets, as provided by the FTA regulations,

    c. New Section 54.d(7)(b). We added a new section 54.d(7)(b) to include FTA's new regulations, "Emergency Relief," 49 C.F.R. part 602, published in 78 *Fed. Reg*. 19144 *et seq*., and

    d. Re-numbered Section 54.d(7)(c). We re-numbered former section 54.d(7)(b) as section 54.d(7)(c),

36. Transferred Section 55, "Special Provisions for the Urbanized Area Formula Grant Program for Projects That Use Funds Appropriated or Made Available for Fiscal Year 2012 or a Previous Fiscal Year" [*Former Section 49*]. We made the following changes:

    a. New Section 55. We transferred the "Special Provisions for the Urbanized Area Formula Grant Program for Projects or Grants That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" from former section 49 to new section 55,

b. Section 55.d(6)(b). We added a new section 55.d(6)(c) stating that after FTA issues regulations under the Transit Asset Management Program authorized under 49 U.S.C. § 5326, as amended by MAP-21, the Recipient must report information relating to, and the condition of, its transit assets, as provided by the FTA regulations,

c. Re-numbered Section 55.d(6)(c). We re-numbered former section 55.d(6)(c) and (d) as sections 54.d(6)(d) and 54.d(6)(e), respectively,

d. New Section 55.d(7)(b). We added a new section 55.d(7)(b) to include FTA's new regulations, "Emergency Relief," 49 C.F.R. part 602, published in 78 *Fed. Reg.* 19144 *et seq*., and

e. Re-numbered Section 55.d(7)(c). We re-numbered former section 55.d(7)(b) as section 55.d(7)(c),

37. New Section 56, "Special provisions for the "Discretionary Passenger Ferry Grant Program" Authorized by MAP-21." We added a new section for the "Discretionary Passenger Ferry Grant Program" with appropriate provisions,

38. Transferred Section 57, "Special Provisions for the Job Access and Reverse Commute (JARC) Formula Grant Program" [*Former Section 50*]. We transferred the "Special Provisions for the Job Access and Reverse Commute (JARC) Formula Grant Program" from former section 50 to new section 57 with no substantive change,

39. Transferred Section 58, "Special Provisions for the Fixed Guideway Capital Investment Grants Program" [*Former Section 51*]. We made the following changes:

a. New Section 58. We transferred the "Special Provisions for the Fixed Guideway Capital Investment Grants Program" from former section 52 to new section 58,

b. New Section 58.c(1)(b). We added a reference to FTA regulations, "Major Capital Investment Projects," 49 C.F.R. part 611,

c. New Section 58.c(1)(c). We added a reference to FTA regulations, "Project Management Oversight," 49 C.F.R. part 633, and

d. Re-numbered Sections 58.c(1)(d) through (h). We re-numbered former Sections 58.c(1)(b) through 58.c(1)(f)f as sections 58.(1)(d) through 58.c(1)(h), respectively,

40. Transferred Section 59, "Special Provisions for the State of Good Repair Formula Program" [*Former Section 52*]. We made the following changes:

a. New Section 59. We transferred the "Special Provisions for the State of Good Repair Grants Program" from former section 52 to new section 59,

b. New Name. We re-named the new section the "Special Provisions for the State of Good Repair Formula Program," and

c. New Section 59b(2)(a). In addition to other applicable guidance, we added a specific reference to FTA Circular 5300.1, "State of Good Repair," when issued,

41. Transferred Section 60, "Special Provisions for the Fixed Guideway Modernization Grant Program" [*Former Section 53*]. We transferred the "Special Provisions for the Fixed Guideway Modernization Program" from former section 53 to new section 60 with no substantive change,

42. Transferred Section 61, "Special Provisions for the Bus and Bus Facilities Formula Program Authorized by MAP-21" [*Former Section 54*]. We made the following changes:

    a. New Section 61. We transferred the "Special Provisions for the Bus and Bus Facilities Formula Program Authorized by MAP-21" from former section 54 to new section 61, and

    b. New Section 61.b(2)(a). We added a reference to FTA Circular "Bus and Bus Facilities: Guidance and Application Instructions," to be issued,

43. Transferred Section 62, "Special Provisions for the Discretionary Bus and Bus Facility Grants Program for Projects or Grants That Use Funds Appropriated or Made Available for Fiscal Year 2012 or a Previous Fiscal Year" [*Former Section* 55]. We transferred the "Special Provisions for the Discretionary Bus and Bus Facility Grants Program That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" from former section 55 to new section 62 with no substantive change,

44. Transferred Section 63, "Special Provisions for the Enhanced Mobility of Seniors and Individuals with Disabilities Formula Program Authorized by MAP-21 For Projects That Use Funds Appropriated or Made Available in Fiscal Year 2013 or a Subsequent Fiscal Year" [*Former Section 56*]. We made the following changes:

    a. New Section 63. We transferred the "Special Provisions for the Enhanced Mobility of Seniors and Individuals with Disabilities Formula Program Authorized by MAP-21 For Projects That Use Funds Appropriated or Made Available in Fiscal Year 2013 or a Subsequent Fiscal Year" from former section 56 to new section 63,

    b. Federal Guidance. We added a reference to FTA Circular 9070.1 "Enhanced Mobility of Seniors and Individuals with Disabilities," when issued, and

    c. Transfer of Funds. We added a new section 63.c(2)(a) pertaining to transfers of funds apportioned to small urbanized areas and rural areas,

45. Transferred Section 64, "Special Provisions for the Formula Grants for the Special Needs of Elderly Individuals and Individuals with Disabilities Program for Projects or Grants That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" [*Former Section 57*]. We transferred the "Special Provisions for the Formula Grants for Special Needs of Elderly and Individuals with Disabilities Program" from former section 57 to new section 64 with no substantive change,

46. Transferred Section 65, "Special Provisions for the "New Freedom Program" [*Former Section 58*]. We transferred the "Special Provisions for the New Freedom Program" from former section 58 to new section 65 with no substantive change,

47. Transferred Section 66, "Special Provisions for the Formula Grants Program for Rural Areas Authorized by MAP-21 For Projects That Use Funding Appropriated or Made Available in Fiscal Year 2013 or a Subsequent Fiscal Year" [*Former Section* 59]. We made the following changes:

    a. New Section 66. We transferred the "Special Provisions for the Formula Grants Program for Rural Areas Authorized by MAP-21 For Projects That Use Funding Appropriated or Made Available in Fiscal Year 2013 or a Subsequent Fiscal Year" from former section 59 to new section 66,

    b. Section 66.c(1)(a). We added a reference to FTA Circular 9070.1 "Rural Areas Formula Program Guidance and Grant Application Instructions," when issued,

    c. Section 66.d(2)(b). We added provisions pertaining to the Emergency Relief Program,

    d. Section 66.d(7)(b). We added a new section 66.d(2)(b) stating that after FTA issues regulations under the Transit Asset Management Program authorized under 49 U.S.C. § 5326, as amended by MAP-21, the Recipient must report information relating to, and the condition of, its transit assets, as provided by the FTA regulations, and

    e. Section 66.d(7)(c)(1). We added Special Provisions for the Tribal Transit Program,

48. Transferred Section 67, "Special Provisions for the Formula Grants for Other Than Urbanized Areas Program for Projects or Grants That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" [*Former Section 60*]. We made the following changes:

    a. New Section 67. We transferred the "Special Provisions for the Formula Grants for Other Than Urbanized Areas Program for Projects or Grants for Projects or Grants That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" from former section 60 to new section 67, and

    b. Section 66.b. We added a reference to the preceding section 66 of the Master Agreement,

49. Transferred Section 69, "Special Provisions for Public Transportation on Indian Reservations Programs (also known as the "Tribal Transit Program") That Use Funds Made Available for MAP-21" [*Former Section 62*]. We made the following changes:

    a. New Section 69. We transferred former section 62 to new section 69, and

    b. New Section 69.b(1)(d). We added a comprehensive list of generally applicable provisions of this Master Agreement, see Appendix A to this Master Agreement,

50. Transferred Section 70, "Special Provisions for the Public Transportation on Indian Reservations Program (also known as the "Tribal Transit Program") That Use Funds Made Available for Fiscal Year 2012 or a Previous Fiscal Year" [*Former Section 63,*]. We made the following changes:

    a. New Section 70. We transferred former section 63 to new section 70, and

b. New Section 70.b(1)(d). We added a comprehensive list of generally applicable provisions of this Master Agreement, see Appendix A to this Master Agreement,

51. Transferred Section 71, "Special Provisions for the Appalachian Development Public Transportation Assistance Program Authorized by MAP-21" [*Former Section 64*]. We made the following changes:

    a. New Section 71. We transferred the "Special Provisions for the Appalachian Development Public Transportation Assistance Program Authorized by MAP-21" from former section 64 to new section 71, and

    b. New Guidance. We included additional requirements that the Recipient follow the most edition of FTA Circular 9040.1, "Rural Areas Formula Program Guidance and Grant Application Instructions," when issued,

52. Transferred Section 72, "Special Provisions for the Over-the-Road Bus Accessibility Program for Projects or Grants That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" [*Former Section 65*]. We transferred the "Special Provisions for the Over-the-Road Bus Accessibility Program" from former section 65 to new section 72 with no substantive change,

53. Transferred Section 73, "Special Provisions for the Paul S. Sarbanes Transit in Parks Program for Projects, Grants, or Cooperative Agreements That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" [*Former Section 66*].

    We transferred the "Special Provisions for the Clean Fuels Grant Program for Projects or Grants That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" from former section 66 to new section 73 with no substantive change,

54. Transferred Sections 74, "Special Provisions for the Clean Fuels Grant Program for Projects or Grants That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" [*Former Section 77*]. We made the following changes:

    a. New Section 74. We transferred the "Special Provisions for the Clean Fuels Grant Program That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" from former section 77 to new section 74,

    b. Former Section 74.b(1)(e). Because the "Clean Fuels Grant Program" is essentially a capital program, we removed the provision pertaining to compliance with research-type projects, and

    c. Re-numbered Section 74.b(1)(e). We re-numbered section 74.b(1)(f) as section 74.b(1)(3),

55. Transferred Section 75, "Special Provisions for All "Research-Type" Program" [*Former Section 67*]. We transferred "Special Provisions for All "Research-Type Programs" from former section 76 to new section 75 with no substantive change,

56. New Section 76, "Special Provisions for the Research, Development, Demonstration, and Deployment Program Authorized by MAP-21" [*Former Sections 68, 70, 72, and 74*]. Although the actual requirements for each program consolidated differ in some respects, the Master Agreement provisions remained substantially similar.
    Therefore, we consolidated requirements for MAP-21 in the following programs:

a. "Research, Development, Demonstration, and Deployment Program" authorized under 49 U.S.C. § 5312(a),

b. "Research Program" authorized under 49 U.S.C. § 5312(b),

c. "Innovation and Development Program" authorized under 49 U.S.C. § 5312(c), and

d. "Demonstration, Deployment, and Evaluation Program" authorized under 49 U.S.C. § 5312(d), except for Projects funded by the "Low or No Emission Vehicle Deployment Program" authorized under 49 U.S.C. § 5312(d)(5),

57. New Section 77, "Special Provisions for the Research, Development, Demonstration, and Deployment Program (also known as the National Research and Technology Program) and Other Research Programs or Special Studies for Projects That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" [*Former Sections 69, 71, 73, 75, 78, 79, 80, 84, 85, and 88*]. Although the actual requirements for each program consolidated differ in some respects, the Master Agreement provisions remained substantially similar. Therefore, we consolidated requirements for the following programs in effect in Fiscal Year 2012 or a previous fiscal year into this single section, new section 77:

    a. "Research, Development, Demonstration, and Deployment Projects" authorized under former 49 U.S.C. § 5312(a),

    b. "Joint Partnership Program for Deployment of Innovation Projects" authorized under former 49 U.S.C. § 5312(b),

    c. "International Program Projects" authorized under former 49 U.S.C. § 5312(c),

    d. "National Fuel Cell Bus Technology Development Program" authorized under Section 3045 of SAFETEA-LU,

    e. "Allocations for National Research and Technology Program Projects" authorized under Section 3046 of SAFETEA-LU, 49 U.S.C. § 5338 note,

    f. "Program to Facilitate Compliance with the Americans with Disabilities Act of 1990 Projects (Project ACTION)" authorized under former 49 U.S.C. § 5314(a)(2),

    g. "National Technical Assistance Center for Senior Transportation Program Projects" authorized under former 49 U.S.C. § 5314(c), and

    h. "Human Resources Fellowship Program Projects" authorized under former 49 U.S.C. § 5322(b),

58. Transferred Section 78, "Special Provisions for the Low or No Emission Vehicle Deployment Program" [*Former Section 76*]. We transferred "Special Provisions for the Low or No Emission Vehicle Deployment Program" from former section 76 to new section 78 with no substantive change,

59. Transferred Section 79, "Transit Cooperative Research Program" [*Former Section 81*]. We transferred "Special Provisions for the "Transit Cooperative Research Program" from former section 81 to new section 79 with no substantive change,

60. Transferred Section 80, "Special Provisions for Technical Assistance and Standards Development Program and Technical Assistance Program" [*Former Sections 82 and 83*]. We consolidated former sections 82 and 83 addressing technical assistance programs authorized under 49 U.S.C. § 5314 in new section 80 with no substantive change,

61. Transferred Section 81, "Special Provisions for the Human Resources and Training Program Authorized by MAP-21 and for the Human Resources Program for Projects, Grants, or Cooperative Agreements That Use Funds Appropriated for Fiscal Year 2012 or a Previous Fiscal Year" [*Former Section 86*]. We made the following changes:

    a. New Section 81. We transferred the "Special Provisions for the Human Resources and Training Program Authorized by MAP-21 and for the Human Resources Program in Effect in Fiscal Year 2012 or a Previous Fiscal Year" from former section 86 to new section 81, and

    b. New Section 81.a. We added a provision stating that eligibility projects under those programs did not change, but

    c. New Section 81.b. Local share requirements for projects using funding appropriated or made available for MAP-21 require a fifty (50) per cent local share,

62. Transferred Section 82, "Innovative Public Transportation Workforce Development Program" [*Former Section 87*]. We transferred the "Special Provisions for the Innovative Public Transportation Workforce Program" from former section 87 to new section 85 with no substantive change,

63. Transferred Section 83, "Special Provisions for the Public Transportation Emergency Relief (or Emergency Relief) Program" [*Former Section 89*]. We made the following changes:

    a. New Section 83. We transferred the "Special Provisions for the Public Transportation Emergency Relief (or Emergency Relief) Program" from former section 89 to new section 83,

    b. New Section 83.b(1)(b). We added a reference to new FTA regulations, "Emergency Relief," 49 C.F.R. part 602, published in 78 *Fed. Reg*. 19144 *et seq*.,

    c. New Section 83.b(1)(c). We added a reference to Joint FHWA/FTA regulations, "Environmental Impact and Related Procedures," 23 C.F.R. part 771 and
    49 C.F.R. part 622, including 23 C.F.R. § 771.118, which were amended in
    FY 2013 and were published in 78 Fed. Reg. 8963, February 7, 2013,

    d. Re-numbered Section 83.b(1)(d). We re-numbered former section 83.b(1)(b) as section 83.b(1)(d),

e. Re-numbered Section 83.b(1)(e). We re-numbered former section 83.b(1)(c) as section 83.b(1)(e),

f. New Section 83.b(1)(f). We added "Special Conditions, if any, to the list, and

g. Re-numbered Section 83.b(1)(g). We re-numbered former 83.b(1)(d) as section 83.b(1)(g),

64. Transferred Section 84, "Special Provisions for the State Safety Oversight Grant Program" [*Former Section 90*]. We made the following changes:

a. New Section 84. We transferred the "Special Provisions for the State Safety Oversight Grant Program" from former section 90 to new section 84,

b. New Section 84.b. We included additional requirements for the Recipient and its project, and

c. New Section 84.c. We included additional special provisions,

65. Transferred Section 85, "Special Provisions for State Infrastructure Bank Projects" [*Former Section 91*]. We transferred the "Special Provisions for State Infrastructure Bank Projects" from former section 91 to new section 85 with no substantive change,

66. Transferred Section 86, "Special Provisions for TIFIA Projects" [*Former Section 92*]. We transferred the "Special Provisions for TIFIA Projects" from former section 92 to new section 86 with no substantive change,

67. Transferred Section 87, "Special Provisions for Recovery Act Projects" [*Former Section 93*]. We transferred the "Special Provisions for Recovery Act Projects" from former Section 93 to new section 87 with no substantive change,

68. Transferred Section 88, "Special Provisions for Joint FTA-FRA Projects [*Former Section 94*]. We transferred the "Special Provisions for Joint FTA-FRA Projects" from former section 94 to new section 88 with no substantive change, and

69. New Appendix A – Tribal Transit Program – Applicable Provisions. We added a list of the Master Agreement provisions that apply to the Tribal Transit Program.

Georgia Statue regarding A&E (qualifications-based) procurement:

The Georgia statute is O.C.G.A. § 36-91-20(f):

> **(f) Any governmental entity may, in its discretion, adopt a process for mandatory prequalification of prospective bidders or offerors; provided, however, that:**
>
> **(1) Criteria for prequalification must be reasonably related to the project or the quality of work;**
>
> **(2) Criteria for prequalification must be available to any prospective bidder or offeror requesting such information for each project that requires prequalification;**
>
> **(3) Any prequalification process must include a method of notifying prospective bidders or offerors of the criteria for or limitations to prequalification; and**
>
> **(4) Any prequalification process must include a procedure for a disqualified bidder to respond to his or her disqualification to a representative of the governmental entity; provided, however, that such procedure shall not be construed to require the governmental entity to provide a formal appeals procedure. A prequalified bidder or offeror can not be later disqualified without cause.**

Ga. Code Ann., § 36-91-20

§ 36-91-20. Contracts to be in writing and available for public inspection; competitive bids or proposals; notice; addenda; prequalification of prospective bidders

Effective: July 1, 2007

(a) All public works construction contracts subject to this chapter entered into by a governmental entity with private persons or entities shall be in writing and on file and available for public inspection at a place designated by such governmental entity. Municipalities and consolidated governments shall execute and enter into contracts in the manner provided in applicable local legislation or by ordinance.

(b)(1) Prior to entering into a public works construction contract other than those exempted by Code Section 36-91-22, a governmental entity shall publicly advertise the contract opportunity. Such notice shall be posted conspicuously in the governing authority's office and shall be advertised in the legal organ of the county or by electronic means on an Internet website of the governmental entity or an Internet website identified by the governmental entity which may include the Georgia Procurement Registry as provided by Code Section 50-5-69.

(2) Contract opportunities that are advertised in the legal organ shall be advertised a minimum of two times, with the first advertisement occurring at least four weeks prior to the opening of the sealed bids or proposals. The second advertisement shall follow no earlier than two weeks from the first advertisement.

(3) Contract opportunities that are advertised solely on the Internet shall be posted continuously for at least four weeks prior to the opening of sealed bids or proposals. Inadvertent or unintentional loss of Internet service during the advertisement period shall not require the contract award or bid or proposal opening to be delayed.

(4) Contract opportunities that will be awarded by competitive sealed bids shall have plans and specifications available on the first day of the advertisement and shall be open to inspection by the public. The plans and specifications shall indicate if the project will be awarded by base bid or base bid plus selected alternates and:

(A) A statement listing whether all anticipated federal, state, or local permits required for the project have been obtained or an indication of the status of the application for each such permit including when it is expected to be obtained; and

(B) A statement listing whether all anticipated rights of way and easements required for the project have been obtained or an indication of the status as to when each such rights of way or easements are expected to be obtained.

(5) Contract opportunities that will be awarded by competitive sealed proposals shall be publicly advertised with a request for proposals which request shall include conceptual program information in the request for proposals describing the requested services in a level of detail appropriate to the project delivery method selected for the project.

(6) The advertisement shall include such details and specifications as will enable the public to know the extent and character of the work to be done.

(7) All required notices of advertisement shall also advise of any mandatory prequalification requirements or pre-bid conferences as well as any federal requirements pursuant to subsection (d) of Code Section 36-91-22. Any advertisement which provides notice of a mandatory pre-bid conference or prequalification shall provide reasonable advance notice of said conference or for the submittal of such prequalification information.

(c) Governmental entities are authorized to utilize any construction delivery method, provided that all public works construction contracts subject to the requirements of this chapter that:

(1) Place the bidder or offeror at risk for construction; and

(2) Require labor or building materials in the execution of the contract

shall be awarded on the basis of competitive sealed bidding or competitive sealed proposals. Governmental entities shall have the authority to reject all bids or proposals or any bid or proposal that is nonresponsive or not responsible and to waive technicalities and informalities.

(d) No governmental entity shall issue or cause to be issued any addenda modifying plans and specifications within a period of 72 hours prior to the advertised time for the opening bids or proposals, excluding Saturdays, Sundays, and legal holidays. However, if the necessity arises to issue an addendum modifying plans and specifications within the 72 hour period prior to the advertised time for the opening of bids or proposals, excluding Saturdays, Sundays, and legal holidays, then the opening of bids or proposals shall be extended at least 72 hours, excluding Saturdays, Sundays, and legal holidays, from the date of the original bid or proposal opening without need to readvertise as required by subsection (b) of this Code section.

(e) Bid and contract documents may contain provisions authorizing the issuance of change orders, without the necessity of additional requests for bids or proposals, within the scope of the project when appropriate or necessary in the performance of the contract. Change orders may not be used to evade the purposes of this article.

(f) Any governmental entity may, in its discretion, adopt a process for mandatory prequalification of prospective bidders or offerors; provided, however, that:

(1) Criteria for prequalification must be reasonably related to the project or the quality of work;

(2) Criteria for prequalification must be available to any prospective bidder or offeror requesting such information for each project that requires prequalification;

(3) Any prequalification process must include a method of notifying prospective bidders or offerors of the criteria for or limitations to prequalification; and

(4) Any prequalification process must include a procedure for a disqualified bidder to respond to his or her disqualification to a representative of the governmental entity; provided, however, that such procedure shall not be construed to require the governmental entity to provide a formal appeals procedure. A prequalified bidder or offeror can not be later disqualified without cause.

Credits

Laws 2000, p. 498, § 1; Laws 2001, p. 820, § 12; Laws 2007, Act 342, § 2, eff. July 1, 2007.

Notes of Decisions (5)

Ga. Code Ann., § 36-91-20, GA ST § 36-91-20
The statutes and Constitution are current with legislation passed during the 2017 Session of the Georgia General Assembly. The statutes are subject to changes by the Georgia Code Commission.

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PROCUREMENT QUESTIONS and ANSWERS

1. Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?

APPLICABILITY
State and Non-state recipients

INDICATORS OF COMPLIANCE
a. If the recipient is a state, does it have written procurement policies and procedures?
b. If the recipient is not a state, does it have written procurement policies and procedures that conform to 2 CFR §§200.318 (General Procurement Standards) through 200.326 (Contract Provisions)?

DETERMINING COMPLIANCE

Request and review the recipient's procurement policies and procedures.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements with its non-Federal funds. The state will comply with 2 CFR §200.322 (*Procurement of Recovered Materials*) and ensure that every purchase order or other contract includes any clauses required by 2 CFR §200.326 (*Contract Provisions*) (see Question 11).

All other non-Federal entities, including subrecipients of a state, will follow 2 CFR §§200.318 (*General Procurement Standards*) through 200.326 (*Contract Provisions*). These documented procurement procedures must reflect applicable State, local, and tribal laws and regulations, and conform to applicable Federal law and the standards identified in 2 CFR part 200.

For non-state recipients, determine if the procurement policies and procedures contain provisions addressing the following:

- All procurement transactions must be conducted in a manner that provides full and open competition. Some of the situations considered to be restrictive of competition include but are not limited to:
  - Placing unreasonable requirements on firms in order for them to qualify to do business;
  - Requiring unnecessary experience and excessive bonding;
  - Noncompetitive pricing practices between firms or between affiliated companies;
  - Noncompetitive contracts to consultants that are on retainer contracts;
  - Organizational conflicts of interest (In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements.);
  - Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the

procurement; and

- Any arbitrary action in the procurement process.

• Procedures to avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase.

• Where appropriate, an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

• Award of contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.

• Federal funds may not be used to support a procurement that uses an exclusionary or discriminatory specification.

• Compliance with Buy America requirements in 49 U.S.C §5323(j) and 49 CFR parts 661 and 663.

• Prohibition of the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

• A contract or requirement for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services for a project for which Federal assistance is provided shall be awarded in the same way as a contract for architectural and engineering services is negotiated under chapter 11 of title 40 or an equivalent qualificationsbased requirement of a State adopted before August 10, 2005 (i.e., the Brooks Act), including policies and procedures for conducting audits as required under 49 U.S.C. §5323(b)(2).

• Procedures for procurement transactions that ensure all solicitations:

Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.

Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

- Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals. See Appendix 7 – Georgia statute is O.C.G.A.

• Current prequalified lists of persons, firms, or products which are used in acquiring goods and services that include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

• Use of one of the following methods of procurement: (1) micro-purchases; (2) small purchase procedures; (3) sealed bid; (4) competitive proposals; or (4) non-competitive proposals.

Recipients are encouraged, but not required to address the following issues in their procurement policies and procedures:

• To foster greater economy and efficiency, and in accordance with efforts to promote cost effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

• The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

• The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

POTENTIAL DEFICIENCY DETERMINATIONS

The state or non-state recipient is deficient if it does not have written procurement policies and procedures.

DEFICIENCY CODE: 22: Procurement policies and procedures not evident

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office procurement policies that include all required provisions.

Non-state recipients are deficient if procurement policies and procedures contain provisions that are contrary to the provisions outlined above or those provisions are not addressed.

DEFICIENCY CODE 740: Procurement policies or procedures not current/complete

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office revised procurement policies that include all required provisions.

GOVERNING DIRECTIVE

2 CFR §§ 200.317 through 200.326

§200.317 Procurements by states.

When procuring property and services under a Federal award, a state must follow the same policies and
procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered *materials* and ensure that every purchase order or other contract includes any
clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§ 200.318 General procurement standards through 200.326 Contract
provisions.

§200.318 General procurement standards.

(a) The non-Federal entity must use its own documented procurement procedures which reflect

applicable State and local laws and regulations, provided that the procurements conform to applicable
Federal law and the standards identified in this section.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with
the terms, conditions, and specifications of their contracts or purchase orders.
(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and
governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a
contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a
conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate
family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered
for a contract. The officers, employees, and agents of the non-Federal entity must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for
disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the
non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local
government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct
covering organizational conflicts of interest. Organizational conflicts of interest means that because of
relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is
unable or appears to be unable to be impartial in conducting a procurement action involving a related
organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more
economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives,
and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use
of shared services across the Federal government, the non-Federal entity is encouraged to enter into
state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of

purchasing
new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction
projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a
systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to
perform successfully under the terms and conditions of a proposed procurement. Consideration will be
given to such matters as contractor integrity, compliance with public policy, record of past performance,
and financial and technical resources.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These
records will include, but are not necessarily limited to the following: rationale for the method of
procurement, selection of contract type, contractor selection or rejection, and the basis for the contract
price.

(j)(1) The non-Federal entity may use time and material type contracts only after a determination that no
other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own
risk. Time and material type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and
(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative
expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides
no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract
must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice
and sound business judgment, for the settlement of all contractual and administrative issues arising out of
procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and
claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its

contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity
unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or
Federal authority having proper jurisdiction.

§200.319 Competition.

(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and
eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements,
statements of work, and invitations for bids or requests for proposals must be excluded from competing
for such procurements. Some of the situations considered to be restrictive of competition include but are
not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and
describing the performance or other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(b) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or
administratively imposed state or local geographical preferences in the evaluation of bids or proposals,
except in those cases where applicable Federal statutes expressly mandate or encourage geographic
preference. Nothing in this section preempts state licensing laws. When contracting for architectural and
engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for
the contract.

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures
must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product,

or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

§200.320 Methods of procurement to be followed.

The non-Federal entity must use one of the following methods of procurement.

(a) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed $3,000 (or $2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:

(i) The invitation for bids will be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening
the bids;

(ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible
bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and
life cycle costs must be considered in determining which bid is lowest. Payment discounts will only
be used to determine the low bid when prior experience indicates that such discounts are usuallytaken advantage of; and

(v) Any or all bids may be rejected if there is a sound documented reason.

(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted
with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If
this method is used, the following requirements apply:

(1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum
extent practical;

(2) Proposals must be solicited from an adequate number of qualified sources;

(3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

(4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the

program, with price and other factors considered; and

(5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications
are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used
in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(e) [Reserved]

(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement
through solicitation of a proposal from only one source and may be used only when one or more of the
following circumstances apply:
(1) The item is available only from a single source;
(2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
(3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals
in response to a written request from the non-Federal entity; or
(4) After solicitation of a number of sources, competition is determined inadequate.
§200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.
(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses,
women's business enterprises, and labor surplus area firms are used when possible.
(b) Affirmative steps must include:
(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
(2)

PROCUREMENT

PURPOSE

States: When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with 2 CFR §200.322 (*Procurement of Recovered Materials*) and ensure that every purchase order or other contract includes any clauses required by section 2 CFR §200.326 (*Contract Provisions*). All other non- Federal entities, including subrecipients of a state, will follow 2 CFR §§200.318 (*General Procurement Standards*) through 200.326 (*Contract Provisions*).

Non-state recipients: The non-Federal entity must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, and conform to applicable Federal law and the standards identified in 2 CFR Part 200.

QUESTIONS TO BE EXAMINED

23. Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?

24. Does the recipient maintain written standards of conduct for its representatives engaged in the selection, award, and administration of FTA-funded contracts?

25. Does the recipient have and follow written procurement protest procedures?

26. Does the recipient make awards only to responsible contractors?

27. Does the recipient maintain records sufficient to detail the history of each procurement?

28. Does the recipient ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders?

29. Does the recipient ensure that it conducts all procurement transactions in a manner that provides full and open competition and does not restrict competition in its procurement process?

30. Did the recipient appropriately use each method of procurement?

31. Does the recipient procure A&E services in accordance with 49 U.S.C. §5325(b)?

32. Does the recipient develop cost estimates and conduct cost and/or price analysis for each procurement action above the Simplified Acquisition Threshold?

33. Did the recipient include applicable federal clauses in FTA-funded procurements exceeding the micro-purchase limit and construction contracts over $2,000?

34. Did the recipient include required certifications in solicitations and receive signed certifications from bidders as part of their bid or proposal, as applicable?

35. Did the recipient appropriately include and account for liquidated damages in its procurements?

36. Did the recipient approve, evaluate, and document change orders to procurements?

37. If the recipient included options in an FTA-funded procurement, did it base the amount on its reasonably foreseeable need and evaluate the option price prior to awarding the contract?

38. If the recipient procured bus or rail rolling stock or replacement parts with FTA funds, did it adhere to the time limitations on placing orders against the contracts?

39. If the recipient purchased FTA-funded assets through a "piggyback" procurement method, did it comply with applicable requirements regarding inclusion of Federal requirements, assignability, and price, and no cardinal changes?

40. If the recipient exercised an assigned option on a contract that was entered into before December 4, 2015, confirm that the assignment was incompliance with FTA's September 1, 2016 Policy Guidance on the implementation of the phased increase in domestic content contained in 49 USC §5323(j)?

41. Did the recipient ensure that appropriate FTA approval was acquired for advance payments and that adequate protection was exercised for progress payments?

42. If the recipient procured buses with FTA funds, did it comply with requirements for bus testing reports?

43. If the recipient procured rolling stock with FTA funds, did it comply with pre-award and post-delivery audit requirements?

44. Does the recipient perform oversight of its subrecipients' FTA-funded procurement activities?

INFORMATION NEEDED FROM RECIPIENT

Recipient Information Request

- Current procurement policies and procedures
- State statute regarding A&E (qualifications-based) procurements
- Procurement standards of conduct policies
- Procurement protest procedures
- List of FTA-funded procurements conducted since the last review. Identify the following items for each award:

    8. Date

    9. Dollar value

    10. Type (professional service, architectural & engineering, operations management services, rolling stock, construction, materials and supplies)

    11. Method: invitation for bid, request for proposal, pre-qualified bidders, sole source, single bid, brand name, award-to-other-than-low-bidder, piggyback, joint procurements, options

    12. New Start or Small Start-related procurement

    13. Awarded by contractors or subrecipients

    14. Change order, if applicableDBE goal, if applicable

- Listing of protests received or denied since last review

- List of revenue contracts awarded since the last review

BASIC REQUIREMENT:

States. When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with 2 CFR §200.322 (*Procurement of Recovered Materials*) and ensure that every purchase order or other contract includes any clauses required by 2 CFR
§200.326 (*Contract Provisions*). All other non-Federal entities, including subrecipients of a state, will follow 2 CFR §§200.318 (*General Procurement Standards*) through 200.326 (*Contract Provisions*).

Non-state recipients. The non-Federal entity must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, and conform to applicable Federal law and the standards identified in 2 CFR part 200.

23. Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?

APPLICABILITY

State and Non-state recipients

INDICATORS OF COMPLIANCE

a. If the recipient is a state, does it have written procurement policies and procedures?

b. If the recipient is not a state, does it have written procurement policies and procedures that conform to 2 CFR §§200.318 (General Procurement Standards) through 200.326 (Contract Provisions)?

DETERMINING COMPLIANCE

Request and review the recipient's procurement policies and procedures.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements with its non-Federal funds. The state will comply with 2 CFR §200.322 (*Procurement of Recovered Materials*) and ensure that every purchase order or other contract includes any clauses required by 2 CFR §200.326 (*Contract Provisions*) (see Question 11).

All other non-Federal entities, including subrecipients of a state, will follow 2 CFR §§200.318 (*General Procurement Standards*) through 200.326 (*Contract Provisions*). These documented procurement procedures must reflect applicable State, local, and tribal laws and regulations, and conform to applicable Federal law and the standards identified in 2 CFR part 200.

For non-state recipients, determine if the procurement policies and procedures contain provisions addressing the following:

- All procurement transactions must be conducted in a manner that provides full and open competition. Some of the situations considered to be restrictive of competition include but are not limited to:
    - Placing unreasonable requirements on firms in order for them to qualify to do business;
    - Requiring unnecessary experience and excessive bonding;
    - Noncompetitive pricing practices between firms or between affiliated companies;
    - Noncompetitive contracts to consultants that are on retainer contracts;Organizational conflicts of interest (In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements.);
    - Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
    - Any arbitrary action in the procurement process.
- Procedures to avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase.
- Where appropriate, an analysis of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.
- Award of contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.
- Federal funds may not be used to support a procurement that uses an exclusionary or discriminatory specification.
- Compliance with Buy America requirements in 49 U.S.C §5323(j) and 49 CFR parts 661 and 663.
- Prohibition of the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing

laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

- A contract or requirement for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services for a project for which Federal assistance is provided shall be awarded in the same way as a contract for architectural and engineering services is negotiated under chapter 11 of title 40 or an equivalent qualifications- based requirement of a State adopted before August 10, 2005 (i.e., the Brooks Act), including policies and procedures for conducting audits as required under 49 U.S.C. §5323(b)(2).

- Procedures for procurement transactions that ensure all solicitations:

    - Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement.

      The specific features of the named brand which must be met by offers must be clearly stated; and

    - Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

- Current prequalified lists of persons, firms, or products which are used in acquiring goods and services that include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

- Use of one of the following methods of procurement: (1) micro-purchases; (2) small purchase procedures; (3) sealed bid; (4) competitive proposals; or (4) non-competitive proposals.

- Procedures to resolve third-party contracting issues, including bid protest procedures.

- Recipients are encouraged, but not required to address the following issues in their procurement policies and procedures:

- To foster greater economy and efficiency, and in accordance with efforts to promote cost- effective use of shared services across the Federal Government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

- The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

- The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

POTENTIAL DEFICIENCY DETERMINATIONS

The state or non-state recipient is deficient if it does not have written procurement policies and procedures.

DEFICIENCY CODE: 22: Procurement policies and procedures not evident

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office procurement policies that include all required provisions.

Non-state recipients are deficient if procurement policies and procedures contain provisions that are contrary to the provisions outlined above or those provisions are not addressed.

DEFICIENCY CODE 740: Procurement policies or procedures not current/complete

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the

FTA regional office revised procurement policies that include all required provisions.

GOVERNING DIRECTIVE

2 CFR §§ 200.317 through 200.326

§200.317 Procurements by states.

When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered *materials* and ensure that every purchase order or other contract includes any clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§ 200.318 General procurement standards through 200.326 Contract provisions.

§200.318 General procurement standards.

(c) The non-Federal entity must use its own documented procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(d) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company,

affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(i) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(j) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

(k) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(l) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(m) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j)(1) The non-Federal entity may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and material type contract means a contract whose cost to a non-Federal entity is the sum of:

(i) The actual cost of materials; and

(ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.

§200.319 Competition.

(e) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive

advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive contracts to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(f) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(g) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and

(2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(h) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

§200.320 Methods of procurement to be followed.

The non-Federal entity must use one of the following methods of procurement.

(f) Procurement by micro-purchases. Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed $3,000 (or $2,000 in the case of acquisitions for construction subject to the Davis-Bacon Act). To the extent practicable, the non-Federal entity must distribute micro-purchases

equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(g) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(h) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:

(i) The invitation for bids will be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids;

(ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) Any or all bids may be rejected if there is a sound documented reason.

(i) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;

(2) Proposals must be solicited from an adequate number of qualified sources;

(3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

(4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and
reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.[Reserved]

(j) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

(1) The item is available only from a single source;

(2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or

(4) After solicitation of a number of sources, competition is determined inadequate.

§200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms.

(c) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(d) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.

§200.322 Procurement of recovered materials.

A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired by the preceding fiscal year exceeded $10,000; procuring solid waste

management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

§ 200.323 Contract cost and price.

(e) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(f) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(g) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(h) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

§200.324 Federal awarding agency or pass-through entity review.

(c) The non-Federal entity must make available, upon request of the Federal awarding agency or pass- through entity, technical specifications on proposed procurements where the Federal awarding agency or pass-through entity believes such review is needed to ensure that the item or service specified is the one being proposed for acquisition. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However, if the non-Federal entity desires to have the review accomplished after a solicitation has been developed, the Federal awarding agency or pass-through entity may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(d) The non-Federal entity must make available upon request, for the Federal awarding agency or pass- through entity pre-procurement review, procurement documents, such as requests for proposals or invitations for bids, or independent cost estimates, when:

(1) The non-Federal entity's procurement procedures or operation fails to comply with the procurement standards in this part;

(2) The procurement is expected to exceed the Simplified Acquisition Threshold and is to be awarded without competition or only one bid or offer is received in response to a solicitation;

(3) The procurement, which is expected to exceed the Simplified Acquisition Threshold, specifies a “brand name” product;

(4) The proposed contract is more than the Simplified Acquisition Threshold and is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(5) A proposed contract modification changes the scope of a contract or increases the contract amount by more than the Simplified Acquisition Threshold.

(6) The non-Federal entity is exempt from the pre-procurement review in paragraph (b) of this section if the Federal awarding agency or pass-through entity determines that its procurement systems comply with the standards of this part.The non-Federal entity may request that its procurement system be reviewed by the Federal awarding agency

or pass-through entity to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews must occur where there is continuous high- dollar funding, and third party contracts are awarded on a regular basis;

(7) The non-Federal entity may self-certify its procurement system. Such self-certification must not limit the Federal awarding agency's right to survey the system. Under a self-certification procedure, the Federal awarding agency may rely on written assurances from the non-Federal entity that it is complying with these standards. The non-Federal entity must cite specific policies, procedures, regulations, or standards as being in compliance with these requirements and have its system available for review.

§200.325 Bonding requirements.

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(d) A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

(e) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(f) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

§200.326 Contract provisions.

The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to Part 200— Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

Additional Guidance:
FTA Circular 4220.1F Chapter III

BASIC REQUIREMENT: The recipient must have and implement written standards of conduct for those involved in its procurement and contract administration actions.

24. Does the recipient maintain written standards of conduct for its representatives engaged in the selection, award, and administration of FTA-funded contracts?

APPLICABILITY
State and Non-state recipients

INDICATORS OF COMPLIANCE

a. Does the recipient have written standards of conduct?

b. Do the recipient's standards of conduct include all required elements?

DETERMINING COMPLIANCE

Request and review the recipient's standards of conduct for procurement-related actions. These may be contained in the recipient's policies and procedures, in a separate document(s), or different documents for employees and governing board members. Please note that state and/or local laws may have requirements that are more restrictive than the Federal requirements below. Recipients must adhere to those state and local requirements.

Review standards of conduct to ensure that, at a minimum, they:

- Preclude any employee officer, agent, or board member or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing from participating in the election, award, or administration of a contract supported with FTA assistance. Such a conflict would arise when any of those previously listed has a financial or other interest in a firm considered for a contract.

- Include information that the recipient's officers, employees, or agents may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal value.

- Provide for disciplinary action for violation of such standards by the recipient's officers, employees, or agents, or by contractors or subrecipients or their agents to the extent permitted by state or local law or regulations.

- If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not have written standards of conduct.

DEFICIENCY CODE 91: No written standards of conduct

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office written standards of conduct that include all required provisions.

The recipient is deficient if its written standards of conduct do not contain required elements.

DEFICIENCY CODE XXX: Incomplete standards of conduct

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office written standards of conduct that include all missing provisions.

GOVERNING DIRECTIVES
2 CFR 200.318 (c)(1) & (2)

"(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent
conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(3) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization."

FTA Master Agreement (23), Section 4:

"a. Standards of Conduct. At a minimum, the Recipient agrees to, and assures that its Subrecipients will, establish and maintain written Standards of Conduct covering conflicts of interest that:

(1) Apply to the following individuals who have a present or potential financial interest, or other significant interest, such as a present or potential employment interest in the selection, award, or administration of a third party contract or subcontract:

(a) The Recipient or its Subrecipients' officers, employees, board members, or agents engaged in the selection, award, or administration of any third party agreement,

(b) The immediate family members or partners of those listed above in section 4.a(1)(a) of this Master Agreement, and

(c) An entity or organization that employs or is about to employ any person that has a relationship with the Recipient or its Subrecipient listed above in sections 4.a(1)(a) and
(b) of this Master Agreement;

(2) Prohibit those individuals listed above in section 4.a(1) from:

(a) Engaging in any activities involving the Recipient or any of its Subrecipients' present or potential Third Party Participants at any tier, including selection, award, or administration of a third party agreement in which the individual has a present or potential financial or other significant interest, and

(b) Accepting a gratuity, favor, or anything of monetary value from a present or potential Third Party Participant in the Recipient's Underlying Agreement, unless the gift is unsolicited and has an insubstantial financial or nominal intrinsic value; and

(3) Establish penalties, sanctions, or other disciplinary actions for violations, as permitted by state or local law or regulations, that apply to those individuals listed above in section 4.a(1) and the Recipient or Subrecipient's Third Party Participants."

Additional Guidance:
FTA Circular. 4220.1F Chapter III

BASIC REQUIREMENT: The recipient must have and follow written protest procedures in compliance with all applicable state and local laws and regulations.

25. Does the recipient have and follow written procurement protest procedures?

APPLICABILITY
State and Non-State recipients

INDICATORS OF COMPLIANCE

a. *Does the recipient have written protest procedures?*

DETERMINING COMPLIANCE
Prior to the site visit, request and review the recipient's written protest procedures. Protest procedures may be contained in the recipient's policies and procedures or in a separate document.

b. *Has the recipient received any procurement protests since the last Comprehensive Review? If yes, did it follow its protest procedures.*

DETERMINING COMPLIANCE
Review milestone progress reports in TrAMS for protests noted. Onsite, ask the recipient for any bid protests received or denied. If there have been any protests during the review period, review related documentation to determine if the recipient followed its written protest procedures. If no protests were received, move to the next Question.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if it does not have written protest procedures.

DEFICIENCY CODE 152: No written protest procedures

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office written protest procedures.

The recipient is deficient if it has written protest procedures and received protests, but did not follow its procedures.

DEFICIENCY CODE XXX: Protest procedures not followed

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation of implemented procedures to ensure that its protest procedures are followed.

GOVERNING DIRECTIVES
2 CFR §200.318(k)

Section 200.318(k) provides that a recipient "alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the [recipient] of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the [recipient] unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction."

FTA recipients are responsible for resolving all contractual and administrative issues arising out of their third party procurements, including source evaluation and selection, protests of awards, disputes, and claims using good administrative practices and sound business judgment. FTA encourages the recipient to use appropriate alternative dispute resolution procedures.

Guidance note regarding notifying FTA of Protests and Appeals to FTA:

FTA's involvement in bid protests is limited. The Uniform Guidance, as adopted by DOT, no longer includes the language in 49 C.F.R. §18.36(b)(12) that provided for a direct appeal to FTA of a recipient's final decision on a bid protest. The Uniform Guidance provides that:

"The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction." – 2 C.F.R. § 200.318(k)

Thus, the FTA's role is limited to considering matters that are "primarily a Federal concern." Accordingly, Section (1)(b)(2)(a) of Chapter VII of FTA Circular 4220.1F, which provides for direct appeals to FTA, is no longer applicable.

BASIC REQUIREMENT: The recipient must only contract with responsible firms.

26. Does the recipient make awards only to responsible contractors?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *Do procurement files contain documentation that the recipient made written responsibility determinations prior to award, considering all required information?*

DETERMINING COMPLIANCE
Review the recipient's policies and procedures for its process of conducting and documenting responsibility determinations. During the site visit, examine selected procurement files, in accordance with records sampling procedures, to determine if the recipient makes responsibility determinations prior to awarding contracts.

Examine responsibility determinations, to verify that a written responsibility determination was made for each successful bidder prior to award, and that consideration was given to matters such as:

- contractor integrity,
- compliance with public policy,
- record of past performance, and

b. financial and technical resources.*Prior to award, does the recipient have documentation that third party contractors are not suspended or debarred?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient determines that it is not awarding contracts to debarred or suspended contractors or individuals. During the site visit, review contract and subrecipient files to verify if this determination is being made by the recipient before entering into any third party contracts.

Document that the recipient verified that bidders were not excluded or disqualified by:

- checking SAM Exclusions (at SAM.gov), or
- collecting a certification, or
- adding a clause or condition to the covered transaction.

c. Did the recipient extend a contract with a contractor after it determined that the contractor had been suspended or debarred?

g. DETERMINING COMPLIANCE

During the site visit, ask the recipient if it has become aware of any situation in which an excluded party is participating in a covered transaction. For the procurements reviewed, check SAM.gov to determine if the contractors are suspended or debarred. Determine if the recipient received FTA approval to extend (other than a no-cost extension) or renew a contract with a suspended or debarred contractor prior to taking those actions.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not make written responsibility determinations that include the required elements prior to award.

DEFICIENCY CODE 344: Responsibility determination deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation of an implemented process to make adequate responsibility determinations prior to award of a contract. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has not verified that excluded parties are not participating prior to applicable awards or actions.

DEFICIENCY CODE 183: No verification that excluded parties are not participating

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for making excluded party determinations before entering into applicable transactions. For the next procurement, submit to FTA documentation that the required process was implemented.

The recipient is deficient if it extended (other than a no-cost time extension) or renewed a contract with a contractor subsequent to it becoming suspended or debarred, unless approved by FTA.

DEFICIENCY CODE 189: Excluded parties participating in covered transactions

SUGGESTED CORRECTIVE ACTION: The recipient must confer with the FTA regional office for any contract that was extended or renewed with a suspended or debarred contractor.

GOVERNING DIRECTIVES

49 U.S.C 5325(j) AWARDS TO RESPONSIBLE CONTRACTORS."(1) IN GENERAL. Federal financial assistance under this chapter may be provided for contracts only if a recipient awards such contracts to responsible contractors possessing the ability to successfully perform under the terms and conditions of a proposed procurement.

(4) CRITERIA. Before making an award to a contractor under paragraph (1), a recipient shall consider:

(A) the integrity of the contractor;

(B) the contractor's compliance with public policy;

(C) the contractor's past performance, including the performance reported in the Contractor Performance Assessment Reports required under section 5309(l)(2); and

(D) the contractor's financial and technical resources."

2 CFR 180.300

"What must I do before I enter into a covered transaction with another person at the next lower tier? When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by: (a) Checking SAM Exclusions; or (b) Collecting a certification from that person; or (c) Adding a clause or condition to the covered transaction with that person."

2 CFR 180.310

"What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction? (a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate. (b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the Federal agency responsible for the transaction grants an exception under §180.135."

Additional Guidance:
FTA Master Agreement (23), Section 4(b) FTA

Circular 4220.1F Chapter III. d. (1) (c)

BASIC REQUIREMENT: The recipient must maintain a written history of each procurement.

27. Does the recipient maintain records sufficient to detail the history of each procurement?

APPLICABILITY
All recipients

INDICATOR OF COMPLIANCE

a. *Does the recipient have policies and/or procedures for documenting procurement files? Do procurement files reviewed include required historical information?*

DETERMINING COMPLIANCE

Review recipient's policies and/or procedures for documenting procurement files to ensure that the policy requires, at a minimum, written documentation of the following:

- Rationale for the method of procurement (i.e., request for proposals, invitation for bids, sole source)
- Selection of contract type (i.e., fixed price, cost reimbursement)
- Reason for contractor selection or rejection
- Basis for the contract price (i.e., cost/price analysis)

During the site visit, examine selected procurement files, in accordance with records sampling procedures, to determine if procurement records include the minimum information listed above, as well as all documentation required in the recipient's policies and/or procedures.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if, for each procurement examined, procurement records do not contain the minimum documentation required and any additional information noted in the recipient's policies and/or procedures.

DEFICIENCY CODE 130: Incomplete written documentation of procurement history

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that the deficiencies identified in its record-keeping process have been corrected.

GOVERNING DIRECTIVE
2 CFR 200.318(i)

"The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price."

BASIC REQUIREMENT: Recipients must have oversight mechanisms to ensure that contractors perform in accordance with the terms of their contracts.

28. *Does the recipient ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders?*

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *Does the recipient conduct oversight of third party contractors to ensure performance in accordance with contract terms?*

DETERMINING COMPLIANCE

Prior to the site visit, review milestone progress reports in TrAMS and information provided by the recipient to determine if there were any contracts noted as having issues with the contractor not performing in accordance with the terms, conditions, and specification of their contracts or purchase orders. Review information in TrAMS on the resolution of disputes or claims. Ask the regional office if there are any procurements that should be reviewed for contractor performance issues. Prior to the site visit, request and review the recipient's policies and procedures, which should include procedures to ensure contract performance and to resolve third party contracting issues, for any described contract administration processes and responsibilities.

Onsite, select a sample of contracts to determine if contract administration and oversight procedures are being implemented as described in policies and procedures. Determine if the recipient is monitoring the contractor's on-time delivery of products or services as detailed in any contractual milestones. Determine if the recipient is analyzing the cause of cost overruns, scope changes, or slippages in delivery schedules or milestone dates.

For any procurements examined for which enforcement of contract administration remedies appeared to be warranted (i.e. liquidated damages, remedies related to milestone or delivery dates or performance standards), determine if appropriate actions were taken. In accordance with 2 CFR §200.318(j)(1), recipients must assert a high degree of oversight for time and materials type contracts in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if the recipient does not have documentation evidencing contract oversight pursuant to the its internal policies and/or procedures. For example, the recipient is deficient if non- performance of contractors is a persistent problem, with contractors either not performing in accordance with the terms and conditions of their contracts, or issues remain unresolved for a substantial length of time, where the recipient cannot demonstrate that it has taken remedial action in accordance with its policies and procedures.

DEFICIENCY CODE 558: Contract administration system not implemented

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office revised procurement procedures that include oversight procedures and remedies for non-performance, along with evidence of implementation.

GOVERNING DIRECTIVE
2 CFR 200.318(b)

"Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders."

BASIC REQUIREMENT: Procurement transactions must be non-restrictive.

29. Does the recipient ensure that it conducts all procurement transactions in a manner that provides full and open competition and does not restrict competition in its procurement process?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. Does the recipient restrict competition by applying unreasonable requirements, requiring unnecessary experience or excessive bonding, or by specifying brand names only?

DETERMINING COMPLIANCE
Prior to the site visit, request and review the recipient's written procurement policies and listing of FTA-funded procurements. During the site visit, review procurement files (including procurements that received two or fewer bids or responses), particularly legal notices and solicitation documents, to determine whether procurements were unreasonably restrictive.

If a procurement only received one or two responses, did the recipient analyze why it received so few bids? For example, did the recipient interview potential bidders regarding why they did not bid? Did the recipient conduct market research of potential bidders? Do the specifications include non-essential requirements that only a single manufacturer can meet? Did potential bidders submit pre-submission questions regarding compliance with the specifications or other contract requirements? Examine any bid protests and any questions and answers to solicitations to determine if there are any perceived restrictions from potential bidders.

Some of the situations considered to be restrictive of competition include but are not limited to:

- Placing unreasonable requirements on firms in order for them to qualify to do business;
- Requiring unnecessary experience and/or excessive bonding;
- Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement;
- Having overly burdensome requirements for approval of an equal product;
- Noncompetitive pricing practices between firms or between affiliated companies;
- Noncompetitive contracts to consultants that are on retainer contracts;
- Organizational conflicts of interest; and
- Any arbitrary action in the procurement process.

b. Does the recipient include prohibited geographic preferences in procurements?

DETERMINING COMPLIANCE

Prior to the site visit, request and review the recipient's listing of FTA-funded procurements. During the site visit, review procurement files for use of geographic preferences outside of the allowable exceptions. Examine any bid protests and any questions and answers to solicitations to determine if there are any potential geographic preference issues. These may include bid/evaluation preferences for, or restricting competition to, in-state or local firms. In-state licensing requirements do not constitute geographic preference.

When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

Section 418 of the fiscal year (FY) 2015 Appropriations Act and Section 415 of the Consolidated Appropriations Act, 2016, Public Law 114-113 (FY 2016 Appropriations Act) prohibit FTA from using FY2015 or FY2016 funds to implement, administer, or enforce the prohibition of geographic preferences under 49 CFR 18.36(c)(2), (now 2 CFR 200.319(b)) for construction hiring purposes. "Construction hiring purposes" means hiring of the construction labor workforce for a construction project. Section 418 applies to all FTA awards, including awards funded under the Hurricane Sandy Emergency Relief and Transportation Investment Generating Economic Recovery (TIGER) programs. Recipients are asked to provide the FTA Regional Office notice of using local hiring preferences on construction projects.

On March 6, 2015, US DOT announced an initiative to permit, on an experimental basis, FTA recipients and subrecipients to utilize various contracting requirements that generally have been disallowed due to concerns about adverse impacts on competition. This initiative, being initially carried out as a pilot program was extended until March 6, 2017. Unless accepted into the pilot program, FTA recipients may not include local hiring or geographic preferences in FTA-funded projects, except for construction hiring purposes and other exceptions described above.

c. *If the recipient uses prequalification lists for any of its procurements, does it do so properly?*

DETERMINING COMPLIANCE

Prior to the site visit, request and review the recipient's written procurement policies. During the site visit, review procurement files, particularly legal notices and solicitation documents, to determine whether responses to procurements are limited to pre-qualified firms.

If a recipient requires prospective bidders to prequalify, determine if it has documented that it has ensured that all prequalification lists include enough sources to ensure full and open competition. Determine if the recipient permitted potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date).

d. *If the recipient awarded revenue contracts during the review period did it use a competitive process for the award, as applicable?*

DETERMINING COMPLIANCE

Prior to the site visit, review procurement policies and procedures for a discussion of procedures for awarding revenue contracts. Review the list of revenue contracts awarded. On site, discuss with the recipient, and evaluate procurement files to determine if a competitive process was used when the recipient provided access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA-assisted property when there were several potential competitors for a limited opportunity.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it has conducted a procurement without providing for full and open competition. Examples of failure to provide for full and open competition include impermissible or unnecessary restrictive requirements in

specifications or on prospective bidders in any of the procurement files reviewed.

DEFICIENCY CODE 37: Lacking full and open competition for one or more methods of procurement

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office procurement procedures that ensure full and open competition in all procurement transactions.

The recipient is deficient if it has improperly included geographic preferences in its procurements.

DEFICIENCY CODE 57: Improper use of geographic preferences

SUGGESTED CORRECTIVE ACTION: The recipient must cease using inappropriate geographic preferences in FTA-funded procurements and submit to the FTA regional office documentation of a revised procurement process that prohibits the improper use of geographic preferences. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if its prequalification lists do not include enough qualified sources to ensure maximum open and free competition or it has precluded potentials bidders from qualifying during the solicitation process:

DEFICIENCY CODE 181: Inadequate prequalification criteria

SUGGESTED CORRECTIVE ACTION: The recipient must provide to the FTA regional office documentation demonstrating that deficiencies identified in its prequalification process have been corrected. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it provided access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA-assisted property and there were several potential competitors for a limited opportunity, but it did not conduct a competitive process.

DEFICIENCY CODE XXX: Lacking full and open competition for revenue contracts

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office with evidence that it has updated its procurement process to include procedures for competing revenue contracts when applicable. The recipient must obtain prior FTA regional office approval before entering into the next revenue contract.

GOVERNING DIRECTIVES
49 U.S.C. 5325(a). Contract requirements

"(a) Competition. Recipients of assistance under this chapter shall conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary."

49 U.S.C. 5325(h). Contract requirements

"(h) Grant prohibition. A grant awarded under this chapter or the Federal Public Transportation Act of 2012 2015 may not be used to support a procurement that uses an exclusionary or discriminatory specification."

2 CFR 200.319 (a)

"All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive

advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to: (1) Placing unreasonable requirements on firms in order for them to qualify to do business; (2) Requiring unnecessary experience and excessive bonding; (3) Noncompetitive pricing practices between firms or between affiliated companies; (4) Noncompetitive contracts to consultants that are on retainer contracts; (5) Organizational conflicts of interest; (6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and (7) Any arbitrary action in the procurement process."

2 CFR 200.319 (c)(1)

"When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated."

2 CFR 200.319 (b)

"The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract."

2 CFR 200.319 (d)

"The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period."

Master Agreement (23), Section 16

FTA Circular 4220.1F Chapter VI 2. (g)

"In-State or Local Geographic Restrictions. Specifying in-State or local geographical preferences, or evaluating bids or proposals in light of in-State or local geographic preferences, even if those preferences are imposed by State or local laws or regulations. In particular, 49 U.S.C. Section 5325(i) prohibits an FTA recipient from limiting its bus purchases to in-State dealers. Exceptions expressly mandated or encouraged by Federal law include the following: 1) Architectural Engineering (A&E) Services. Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project. 2) Licensing. A State may enforce its licensing requirements, provided that those State requirements do not conflict with Federal law. 3) Major Disaster or Emergency Relief. Federal assistance awarded under the Stafford Act, 42 U.S.C. Section 5150, to support contracts and agreements for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities permits a preference, to the extent feasible and practicable, for organizations, firms, and individuals residing or doing business primarily in the area affected by a major disaster or emergency."

FTA Circular 4220.1F Chapter 2. b. (4) Revenue Contracts.

"A revenue contract is a contract in which the recipient or subrecipient provides access to public transportation assets for the primary purpose of either producing revenues in connection with an activity related to public transportation, or creating business opportunities with the use of FTA assisted property. The recipient has broad latitude in determining

the extent and type of competition appropriate for a particular revenue contract. Nevertheless, to ensure fair and equal access to FTA assisted property and to maximize revenue derived from such property, the recipient should conduct its revenue contracting as follows: (a) Limited Contract Opportunities. If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the recipient should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity. (b) Open Contract Opportunities. If, however, one party seeks access to a public transportation asset (such as a utility that

might seek cable access in a subway system), and the recipient is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties. In the case of joint development, as explained below, FTA will work with the recipient to determine appropriate procedures, as necessary."

BASIC REQUIREMENT: The non-Federal entity must appropriately use one of the following methods of procurement: micro-purchase, small purchase, sealed bid, competitive proposals or non-competitive proposals.

30. Did the recipient appropriately use each method of procurement?

APPLICABILITY
Non-State recipients

INDICATORS OF COMPLIANCE

a. *If the recipient used micro-purchase procedures, was it done in accordance with requirements?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine the recipient's threshold for micro-purchases and if any FTA-funded micro-purchases were made. Review selected procurements to determine if:

- this method was only used for procurements $3,500 or less,
- the procurements were distributed equitably if there was more than one qualified supplier in the local area,
- the recipient documented its determination that the price was reasonable with a description of how that determination was made, and
- there was no evidence that procurements were split to avoid procurement requirements for purchases above the micro-purchase threshold (such as repeated purchases of the same item(s)).

b. *If the recipient used small purchase procedures, was it done in accordance with requirements?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine what the recipient's threshold is for small purchases and if any FTA-funded small purchases were made. Review selected procurements to determine if:

- this method was only used for procurements when appropriate (2 CFR Part 200 increased the simplified acquisition threshold to $150,000 for procurements funded by awards issued on or after December 26, 2014. Procurements funded by awards issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of $100,000. (per 49 CFR 18.36(d)),

- price or rate quotations were obtained from an adequate (at least two) number of qualified sources, and
- there was no evidence that procurements were split to avoid procurement requirements for purchases above the small purchase threshold (such as repeated purchases of the same item(s)).

c. *If the recipient used sealed bid procedures, was it done in accordance with requirements?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine what the recipient's procedures are for sealed bids and if any FTA-funded sealed bid purchases were made. Review selected procurements to determine if:

- bids were solicited from an adequate number of known suppliers,
- bids were publicly advertised,
- the invitation for bids defined the items or services in order for the bidder to properly respond,
- bids were publicly opened at the time and place prescribed in the invitation for bids,
- a firm fixed price contract (lump sum or unit price) was awarded to the lowest responsive and responsible bidder, and
- any or all bids were rejected only if there was a sound, documented reason

d. *If the recipient used competitive proposal procedures, was it done in accordance with requirements?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine what the recipient's procedures are for competitive proposals and if any FTA-funded competitive proposal purchases were made. Review selected procurements to determine if:

- requests for proposals were publicly advertised,
- evaluation criteria and their relative importance were identified,
- proposals were solicited from an adequate number of qualified sources,
- there was a written method for conducting technical evaluations of the proposals received and for selecting recipients
- contracts were awarded to the responsible firm whose proposal is most advantageous, with price and other factors considered.

For A&E procurements, price should not be a factor in the selection criteria. These procurements are reviewed in a following question of the review.

e. *Did the recipient include written justification of any non-competitive or sole source procurements in the procurement file?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine what the recipient's procedures are for non-competitive or sole source procurements and if any such procurements were made. Review selected procurements to determine if one of the following conditions was met:

- The recipient appropriately determined that the item was available from only a single source. Property or services are available from one source if one of the conditions described below is present:
    - *Unique or Innovative Concept*. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the recipient only from one source and in the past has not been available from another source.
    - *Patents or Restricted Data Rights*. Patent or data rights restrictions preclude competition.
    - *Substantial Duplication Costs*. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.
    - *Unacceptable Delay*. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.
- There was a public exigency or emergency for the requirement which would not permit a delay resulting from competitive solicitation. When relying on this provision, recipients may use a non-competitive procurement method only for its reasonable needs to address the exigency or emergency. For example, a recipient's facility receives an unprecedented 24-inches of snow in 24 hours in October and it does not have a snow removal contract in place. The recipient may enter into a non-competitive snow removal contract to clear the snow. However, the recipient may not use this emergency to justify entering into a non-competitive snow removal contract for the entire winter season.
- FTA expressly authorized noncompetitive proposals in response to a written request from the recipient.

Determine if the recipient included a written sole source justification in its procurement file.

f. If the recipient had awarded a contract to a single bidder, did it appropriately determine that the item was available only from a single source?

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures and procurement listing to determine what the recipient's procedures are for single bid awards and if any such procurements were made.

Review selected procurements to determine if the procurement files include an explanation as to why a single bid was obtained and if the recipient's determination of adequate competition included a review of the specifications for undue restrictiveness and a survey of potential sources that chose not to submit a bid or proposal.

g. If the recipient awarded any time and materials type contracts during the review period, did it determine that it was the only method suitable and was a ceiling price identified?

(2) **DETERMINING COMPLIANCE**

Prior to the site visit, examine the procurement listing provided by the recipient to determine if any time and

materials type contracts were awarded during the review period. During the site visit, examine at least one time and materials procurement file to determine if there was information noting that this was the only suitable type of procurement and that a ceiling price was included.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it made procurements using micro-purchase procedures but used this method for procurements over $3,500, did not make reasonable price determinations, did not distribute purchases equitably if applicable, and/or if there is evidence of splitting improperly:

DEFICIENCY CODE XXX: Improper micro-purchase procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement micro-purchase procedures. For the next micro-purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using small purchase procedures for procurements over $150,000, price or rate quotations were not obtained from an adequate number of qualified sources, and/or if there is evidence of splitting procurements to be within the small purchase threshold.

DEFICIENCY CODE XXX: Improper small purchase procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement small purchase procedures. For the next small purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using sealed bid procedures but bids were not publicly advertised and/or a fixed price contract was not awarded to the lowest responsive, responsible bidder.

DEFICIENCY CODE XXX: Improper sealed bid procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement sealed bid procedures. For the next sealed bid, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using competitive proposal procedures but requests for proposals were not publicly advertised, evaluation criteria and their relative importance were not identified in the solicitation documents, and/or price and other factors were not considered in the award.

DEFICIENCY CODE XXX: Improper competitive proposal procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement competitive proposal procedures. For the next competitive proposal, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made sole source procurements but does not have a sole-source justification in its procurement files, and/or if its justification does not include at least one of the conditions permitting the use of a sole source procurement.

DEFICIENCY CODE 290*:* Lacking required justification(s) and documentation for non- competitive award(s)

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence of an implemented policy to ensure that future sole source procurements are properly conducted and documented. Where contracts are ongoing, confer with the FTA regional office to determine if the recipient should be directed

not to exercise any options, or possibly terminate the existing contract for convenience, and rebid for the required goods and services in accordance with Federal requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it does not have the appropriate justification for single-bid awards.

DEFICIENCY CODE 290*:* Lacking required justification(s) and documentation for non- competitive award(s)

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence of an implemented policy to ensure that future single bid procurements are properly documented. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if FTA funds were used for a time and materials contract and the files do not support the recipient's decision or the contract does not specify a ceiling price.

DEFICIENCY CODE 281: Improper time and materials contract

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to include procedures for the proper use of FTA-assisted time and materials contracts. The recipient must obtain prior FTA regional office approval before entering into the next time and materials contract.

GOVERNING DIRECTIVES

2 CFR 200.320 (a) Procurement by micro-purchases.

"Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold *($3,000 or less prior to October 1, 2015; $3,500 or less effective October 1, 2015)*. To the extent practicable, the non-Federal entity must distribute micro- purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable."

FTA 4220.1F Chapter VI 3. a. (2) (b) Prohibited Divisions.

"The recipient may not divide or reduce the size of its procurement to avoid the additional procurement requirements applicable to larger acquisitions."

FTA 4220.1F Chapter VI 3. a. (2) (c) Documentation.

"FTA's only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made its determination. FTA does not require the recipient to provide its rationale for the procurement method used, selection of contract type, or reasons for contractor selection or rejection."

2 CFR 200.320 (b) Procurement by small purchase procedures.

"Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources."

2 CFR 200.320 (c) Procurement by sealed bids (formal advertising).

"Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply. (1) In order for sealed bidding to be feasible, the following conditions should be present: (i) A complete, adequate, and realistic specification or purchase
description is available; (ii) Two or more responsible bidders are willing and able to compete effectively for the business; and (iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price. (2) If sealed bids are used, the following requirements apply: (i) Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments,
the invitation for bids must be publicly advertised; (ii) The invitation for bids, which will include any
specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond; (iii) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly; (iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and (v) Any or all bids may be rejected if there is a sound documented reason."

2 CFR 200.320 (d) Procurement by competitive proposals.

"The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply: (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical; (2) Proposals must be solicited from an adequate number of qualified sources;
(5) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients; (4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered"

2 CFR 200.320 (f) Procurement by noncompetitive proposals.

"Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply: (1) The item is available only from a single source; (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (3) The Federal awarding agency or pass-through

entity expressly authorizes noncompetitive proposals in response to a written request from the non- Federal entity; or (4) After solicitation of a number of sources, competition is determined inadequate."

FTA Circular 4220.1F Chapter VI 3. i. Other Than Full and Open Competition. *FTA Circular*

4220.1F Chapter VI 3. i. (1) (b) 2. Single Bid or Single Proposal.

"Upon receiving a single bid or single proposal in response to a solicitation, the recipient should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal.
a. Adequate Competition. FTA acknowledges competition to be adequate when the reasons for few responses were caused by conditions beyond the recipient's control. Many unrelated factors beyond the recipient's control might cause potential sources not to submit a bid or proposal. If the competition can be determined adequate, FTA's competition requirements will be fulfilled, and the procurement will qualify as a valid competitive award. b. Inadequate Competition. FTA acknowledges competition to be inadequate when, caused by conditions within the recipient's control. For example, if the specifications used were within the recipient's control and those specifications were unduly restrictive, competition will be inadequate."

2 CFR 200.318 (j)(1)

"The non-Federal entity may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to a non-Federal entity is the sum of:
(i) The actual cost of materials; and (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. (2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls."

BASIC REQUIREMENT: If the recipient procures services for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services (collectively referred to as "A&E services") for an FTA-funded project, it must use a qualifications-based method. This method is not to be used for procuring services other than A&E.

31. Does the recipient procure A&E services in accordance with 49 U.S.C. §5325(b)?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *If the recipient is a state, does it have and follow a statute prescribing a formal procedure for the procurement of A&E services, adopted prior to August 10, 2005 that it is an equivalent qualifications-based requirement of the Brooks Act?*

b. *If the recipient is not a state or is a state that does not have a procedure for the procurement of A&E services adopted prior to August 10, 2005, does it use competitive proposals based on the Brooks Act when procuring A&E services?*

DETERMINING COMPLIANCE

A&E services include program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services. FTA interprets 49 U.S.C. Section 5325(b) to authorize the use of qualifications-based procurement procedures only for those services that directly support or are directly connected or related to construction, alteration, or repair of real property. Unless FTA determines otherwise in writing, neither a recipient or its subrecipients may use qualifications-based procurement procedures to acquire other types of services if those services are not directly in support of, directly connected to, directly related to, or do not lead to construction, alteration, or repair of real property. For design/build procurements, FTA expects recipients and their subrecipients to use the procurement method appropriate for the services having the greater cost, even though the other necessary services would not typically be procured by that method.

When using FTA assistance to contract for A&E services, states are required to use competitive proposal procedures based on the Brooks Act or an equivalent qualifications-based requirement adopted before August 10, 2005.

For qualifications-based procurements under the Brooks Act, (unlike other two-step procurement procedures in which price is an evaluation factor), an offeror's qualifications are evaluated to determine contract award. Price must not be considered during the selection phase in these procurements. Firms are selected based only on their qualifications. Price is then negotiated with the most qualified firm. If an agreement cannot be reached, then the recipient may negotiate with the next most qualified firm and so on until an agreement is reached on a price that the State determines is fair and reasonable.

Recipients may make multiple awards to cover needs for various disciplines under an "on-call" type of contract. Typically, these contracts would not be used to procure design and engineering work for major projects. Large projects should be competed separately, with the most highly qualified A&E firm chosen for that specific project. On-call contracts would be suited for smaller jobs that would be too expensive (administratively) to compete individually. The Brooks Act does not permit a recipient to enter into a contract with multiple "qualified" A&E firms with work assignments to be distributed among the various firms. An on-call A&E contract means that the recipient has identified the most qualified firm and has entered into a contract with that firm for future A&E work, as needed.

Solicitations for on-call awards must describe how the work will be assigned, and not leave the process undefined. For example, if company A is initially evaluated as being the best for geothermal work, then all such work should be given to that company as tasks are defined, assuming the company can perform within the timeframes required for the task. The procurement officials should not leave it to someone's judgement later to withhold work from company A and give it to company B based on a subjective judgement that company B would be better than company A for this job even though company A was evaluated first, initially. The selected companies also should not be allowed to update their qualifications during the term of the contract and so be rated higher than they were initially. There should be a finite period for these contract awards, after which a new round of qualifications-based awards would be made.

Prior to the site visit, review State statutes, the state management plan, and other documentation of procurement procedures for procedures for contracting for A&E service through qualifications- based requirements. For recipients that are not a state, review their procedures for qualifications- based procurements. Review the list of procurements provided in advance of the review for procurements that would likely require these types of procedures. On site, discuss with the recipient, and evaluate procurement files to determine if these procedures were used when procuring applicable services, but not used when procuring services that do not meet the definition of A&E services.

Determine if A&E services were procured using a qualifications-based process in accordance with the Brooks Act, where firms are ranked based only on their qualifications and price is then negotiated with the most qualified firm. If an agreement cannot be reached, then the recipient may negotiate with the next most qualified firm and so on until an agreement is reached on a price that the recipient determines is fair and reasonable.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it is a state with a policy for A&E procurements adopted prior to August 10, 2005 but it is not following it or it is not following the Brooks Act, when procuring applicable services. The State also is deficient if it is using a qualifications-based method for procuring non-A&E services and does not have a State statute authorizing that type of procurement.

> DEFICIENCY CODE 349: Qualifications-based procurement deficiencies
>
> SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office procedures for following qualifications-based procedures when using FTA assistance to contract for A&E services. For the next procurement, the State must submit to the FTA regional office documentation that the required process was implemented.

A non-State recipient is deficient if it does not follow the Brooks Act when using FTA assistance to contract for A&E services or has used qualifications-based procedures when not appropriate.

> DEFICIENCY CODE 349: Qualifications-based procurement deficiencies
>
> SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office procedures for following qualifications-based procedures when using FTA assistance to contract for A&E services. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

49 U.S.C. 5325 (b) ARCHITECTURAL, ENGINEERING, AND DESIGN CONTRACTS

"(1) Procedures for awarding contract. A contract or requirement for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services for a project for which Federal assistance is provided under this chapter shall be awarded in the same way as a contract for architectural and engineering services is negotiated under chapter 11 of title 40 [aka "Brooks Act"] or an equivalent qualifications-based requirement of a State adopted before August 10, 2005."

40 U.S.C. §§ 1101- 1104 ("Brooks Act")

§1101: "The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices."

§1104(b): "Order of Negotiation. The agency head shall attempt to negotiate a contract, as provided in subsection (a), with the most highly qualified firm selected under section 1103 of this title. If the agency head is unable to negotiate a satisfactory contract with the firm, the agency head shall formally terminate negotiations and then undertake negotiations with the next most qualified of the selected firms, continuing the process until an agreement is reached. If the agency head is unable to negotiate a satisfactory contract with any of the selected firms, the agency head shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached."

2 CFR § 200.320(d)(5)

"The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort."

FTA Circular 4220.1F Chapter IV 2. h. (2) (a)

"FTA has long administered the requirement for using qualifications-based procurement procedures for selection of contractors that perform A&E services, generally associated with the construction, alteration, or repair of real property. FTA interprets 49 U.S.C. Section 5325(b) to authorize the use of qualifications- based procurement procedures only for those services that directly support or are directly connected or related to construction, alteration, or repair of real property. FTA's interpretation of 49 U.S.C. Section 5325(b) is consistent with typical Federal policies implementing the "Brooks Act," 40 U.S.C. Section 1102, which limits qualifications-based procurement procedures to research, planning, development, design, construction, alteration, or repair of real property. Thus, if services, such as program management, feasibility studies, or mapping, are not directly in support of, directly connected to, or directly related to, or lead to construction, alteration, or repair of real property, then the recipient may not use qualifications- based procurement procedures to select the contractor that will perform those services."

Third Party Contracting FAQs

Q. Can a transit authority make multiple awards to A&E firms for a discipline such as surveying, when no specific tasks have been identified, and then select the best firm for the specific task to negotiate with? We have several surveying projects that may materialize, but none are certain. We would like to advertise for "Surveying Services" and make multiple awards for on-call services. Then, when a project or task for surveying is identified we would select the best A&E firm for a specific task and negotiate with them. If an agreement could not be made we would proceed to negotiate with the next most qualified firm. The idea
is to identify qualified firms for surveying and avoid having to advertise and rank each firm for each task or project.

A. You may make multiple awards to cover your needs for various disciplines, as you described them; e.g., geothermal, railroad, surveying, etc. However, your solicitation needs to describe how the work will actually be assigned, and not leave the process undefined. For example, if you evaluate company A initially as being the best for geothermal work, then all such work should be given to that company as tasks are defined, assuming the company can perform within the timeframes required for the task. You should not leave it to someone's judgment later to withhold work from company A and give it to company B based on a subjective judgment that B would be better than A for this job even though A was evaluated first initially. We would also not let the selected companies update their qualifications during the term of the contract and so be rated higher that they were initially. There should be a finite period for these contract awards, after which a new round of qualifications-based awards would be made.

BASIC REQUIREMENT
Recipients must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold. As a starting point, the recipient must make independent estimates before receiving bids or proposals.

32. *Does the recipient develop cost estimates and conduct cost and/or price analysis for each procurement action above the Simplified Acquisition Threshold?*

APPLICABILITY
Non-State recipients

INDICATORS OF COMPLIANCE

a. *Did the recipient develop independent cost estimates (ICE) prior to the receipt of bids and proposals for procurements above the Simplified Acquisition Threshold?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures. Onsite, review selected procurements to determine if the recipient developed an independent estimate prior to receipt of bids or proposals for procurements above the Simplified Acquisition Threshold.

b. *Did the recipient conduct a cost analysis or price analysis for every procurement action above the Simplified Acquisition Threshold?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures. Onsite, review selected procurements to determine if the recipient documented a cost analysis or price analysis as required.

Determine if a cost analysis was performed for: (1) procurements which require that offerors submit detailed elements of direct and indirect costs; (2) procurements where adequate price competition is lacking; and/or (3) sole-source procurements.

Determine if the recipient documented a price analysis when a cost analysis was not required.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if it has not conducted independent cost estimates for procurements above the Simplified Acquisition Threshold.

DEFICIENCY CODE 340: Lacking independent cost estimate

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include development of independent cost estimates prior to receipt of bids or proposals. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it did not conduct a cost analysis or price analysis, as applicable, for procurements above the Simplified Acquisition Threshold.

DEFICIENCY CODE 271: Lacking required cost/price analysis

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include performing applicable cost or price analysis procurements above the Simplified Acquisition Threshold. For the next applicable procurement, submit to FTA documentation that the required analysis was implemented.

GOVERNING DIRECTIVES
2 CFR § 200.323

"(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a

starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(e) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(f) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(g) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used."

FTA Circular 4220.1F Chapter VI 6. a. Cost Analysis.

"The recipient must obtain a cost analysis when a price analysis will not provide sufficient information to determine the reasonableness of the contract cost. The recipient must obtain a cost analysis when the offeror submits elements (that is, labor hours, overhead, materials, and so forth) of the estimated cost, (such as professional consulting and A&E contracts, and so forth). The recipient is also expected to obtain a cost analysis when price competition is inadequate, when only a sole source is available, even if the procurement is a contract modification, or in the event of a change order. The recipient, however, need not obtain a cost analysis if it can justify price reasonableness of the proposed contract based on a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation."

FTA Circular 4220.1F Chapter VI 6. b. Price Analysis.

"If the recipient determines that competition was adequate, a price analysis, rather than a cost analysis, is required to determine the reasonableness of the proposed contract price. As discussed previously in subsection 3.a of this Chapter, the price analysis for micro-purchases may be limited. Similarly, the recipient may use an abbreviated price analysis for small purchases in most cases. One method to record this price analysis is through the use of a preprinted form on which a contracting officer (or other responsible person) can annotate a finding of fair and reasonable pricing and check off the most common reasons why this would be so, such as catalog or market prices offered in substantial quantities to the general public, regulated prices (for example, for many utilities purchases), or a comparison with recent prices for similar goods and services."

BASIC REQUIREMENT
Recipients must include and implement required clauses and certifications in its procurements.

33. *Did the recipient include applicable federal clauses in FTA-funded procurements exceeding the micro-purchase limit and construction contracts over $2,000?*

APPLICABILITY
All recipients

INDICATOR OF COMPLIANCE

a. *Did the recipient include applicable required clauses in FTA-funded procurements?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures. During the site visit, examine procurement files for inclusion of required clauses as detailed in the Exhibit at the end of this section.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if did not include all applicable required clauses in FTA-funded procurements reviewed.

DEFICIENCY CODE 129: Missing FTA clauses

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that address inclusion of all FTA-required third party contract clauses through use of a clause checklist or other mechanism. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES:

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS.

"In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(K) Contracts for more than the simplified acquisition threshold currently set at $150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

(L) All contracts in excess of $10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.

(M) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

(N) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of $2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the

wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

(O) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of $100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The
requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

(P) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of "funding agreement" under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

(Q) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of $150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401- 7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

(R) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension." SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

(S) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award exceeding $100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in

connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

(T) See §200.322 Procurement of recovered materials."

34. *Did the recipient include required certifications in solicitations and receive signed certifications from bidders as part of their bid or proposal, as applicable?*

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *For FTA-funded vehicle procurements including procurements of remanufactured vehicles, did the recipient include the required DBE transit vehicle manufacturer (TVM) certifications in solicitations and receive and verify signed certifications as part of bid responsiveness?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures. During the site visit, examine procurement files for inclusion of required DBE TVM certifications in solicitations and receipt of signed certifications from bidders.

For transit vehicle manufacturer purchases determine if, prior to award, the recipient documented that it verified TVM certifications received by either consulting FTA's Office of Civil Rights TVM website or contact the Office of Civil Rights directly. If the bidder is not listed on the website, confirm that recipient contacted FTA's Office of Civil Rights to verify bidder's or proposer's eligibility to bid at the time the bid or proposal was submitted. TVM status cannot be cured after bid or proposal submittal, but before contract award.

b. *Did the recipient include required lobbying certifications in solicitations and receive signed certifications from contractors as part of bid responsiveness in procurements over $100,000?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures. During the site visit, examine procurement files for inclusion of required certifications in solicitations and receipt of signed certifications from bidders at the time of submitting bids or proposals.

c. *Did the recipient include required Buy America certifications in solicitations and receive signed certifications from contractors as part of bid responsiveness in applicable procurements over $150,000 that included iron, steel or manufactured products?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures. During the site visit, examine procurement files for inclusion of required Buy America certifications in solicitations and receipt of signed certifications from bidders for:

- all purchases of steel, iron, and manufactured products greater than $150,000, regardless of whether they involve capital, operating, or planning funds
- contractors and subcontractors if the contract or subcontract is more than $150,000, including labor and options
- purchases made using an intergovernmental agreement and jointly purchased manufactured products
- purchases of used items

If a bidder or offeror cannot certify compliance with Buy America requirements, document if the recipient received a waiver of the Buy America statute before it awarded the contract to the bidder or offeror.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not include, where applicable, a provision in its bid specifications requiring TVM certifications, if the files do not contain TVM certifications from successful bidders, or if the TVM certification is out of date (References Part 23 instead of Part 26). The recipient is deficient if it cannot provide evidence that it ensured that the manufacturer was an eligible TVM at the time it submitted its bid or proposal.

DEFICIENCY CODE 272: No TVM certification

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO procedures for obtaining signed TVM certifications and for ensuring that manufacturers are eligible TVMs at the time of bid or proposal submission. The recipient must submit to the RCRO an updated TVM certification template to be used in future transit vehicle procurements. The recipient must submit to the FTA regional office a copy of the signed form with the next revenue rolling stock procurement.

The recipient is deficient if it has not included the lobbying certification in its agreements and procurement solicitations that exceed $100,000 or if it has not obtained the proper certifications from contractors and subrecipients awarded contracts or agreements that exceed $100,000.

DEFICIENCY CODE 12: Lobbying certifications not included in agreements/procurement solicitations

DEFICIENCY CODE 40: Lobbying certifications not signed by subrecipients, contractors, or subcontractors

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for obtaining signed lobbying certifications. The recipient must submit to the FTA regional office a copy of the signed lobbying certification with the next applicable procurement.

The recipient is deficient if it did not include applicable Buy America provision in its solicitation documents. The recipient also is deficient if it did not obtain signed Buy America certifications from vendors as part of the vendor's bid or proposal. The recipient is deficient if it awarded the contract to a contractor who certified non-compliance with Buy America and did not obtain a waiver from FTA or it awarded the contract to a contractor who certified both compliance and non-compliance.

DEFICIENCY CODE 138: Buy America provision not in solicitation and/or contract

DEFICIENCY CODE 156: Contract files lacking Buy America certifications DEFICIENCY

CODE 790: Contract awarded without Buy America waiver

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that require the recipient to include Buy America provisions in solicitation documents and to obtain signed certifications from vendors when procuring steel, iron, or manufactured products not subject to a general waiver. For the next procurement, submit to
the FTA regional office documentation that the required process was implemented.

For procurements for which a Buy America certification was not obtained, the recipient must provide the FTA regional office information documenting that the procurement complies with the Buy America provisions.

For procurements in progress for which bids have not been received, the recipient must submit to the FTA regional office documentation that it included, via an addendum, Buy America requirements in the solicitation.

The recipient must submit to the FTA regional office a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

GOVERNING DIRECTIVES
49 CFR 26.49 (a)

"If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section."

FTA Circular 9030.1E Chapter V 11. h.

"The recipient is obligated to determine, by checking the TVM listing on FTA's website or by checking with FTA's Office of Civil Rights at the time of bid opening, that the manufacturer likely to receive the contract is in compliance with part 26."

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL
AWARDS. (I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)

"Contractors that apply or bid for an award exceeding $100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award."

49 CFR 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."

49 CFR 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."

BASIC REQUIREMENT: If recipients include liquidated damages in procurements, the rate must be stated and it must be based on a calculation. Any recovered damages should be credited back to the project account.

35. Did the recipient appropriately include and account for liquidated damages in its procurements?

APPLICABILITY
Non-state recipients

INDICATORS OF COMPLIANCE

a. *If the recipient included liquidated damages in its procurements, did it specify the rate in the contract, based on a calculation and rationale?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient determines if it will use liquidated damages in contracts. During the site visits, examine selected contract files, in accordance with records sampling procedures, for liquidated damages clause(s). Determine if the rationale for and calculation of the dollar value of liquidated damages was documented in the procurement file and presented in the solicitation documents as a specific rate.

b. *If the recipient recovered liquidated damages in its FTA-funded procurements, did it appropriately account for those damages with FTA?*

DETERMINING COMPLIANCE
During the site visit, examine selected contract files and correspondence in TrAMS to determine if any liquidated damages recovered were credited to the project account involved or if FTA allowed the recipient to handle the recovered damages in a different manner.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if a liquidated damages rate is not specified in the solicitation documents but is included in a resulting contract. The recipient is deficient if it cannot provide a reasonable explanation regarding expected damages as a result of late completion and an appropriate mathematical basis for the dollar value of the liquidated damages.

DEFICIENCY CODE 315: Improper use of liquidated damage clause

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office written procedure for the correct use of liquidated damages clauses. If clauses are in existing contracts improperly, direct the recipient to modify the contract to eliminate the clause or provide a justification for the use and level of liquidated damages. Direct the recipient to obtain prior FTA regional office approval before awarding the next contract with a liquidated damage clause.

The recipient is deficient if it assessed liquidated damages, but did not credit these funds back to the project account or account for them as directed by FTA.

DEFICIENCY CODE XXX: Improper accounting for recovered liquidated damages SUGGESTED

CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for appropriately accounting for recovered liquidated damages.

GOVERNING DIRECTIVE
Master Agreement, section 39(c)

"Federal Interest in Recovery. The Federal Government retains the right to a proportionate share of any proceeds recovered from any third party, based on the percentage of the federal share for the Underlying Agreement. Notwithstanding the preceding sentence, the Recipient may return all liquidated damages it receives to its Award Budget for its Underlying Agreement rather than return the federal share of those liquidated damages to the Federal Government, provided that the Recipient receives FTA's prior written concurrence."

FTA Circular 4220.1F Chapter IV 2. b. (6) (b)1

"Liquidated Damages. FTA has determined that a recipient may use liquidated damages if the recipient reasonably expects to suffer damages through delayed contract completion, or if weight requirements are exceeded, and the extent or amount of such damages are uncertain and would be difficult or impossible to determine. The rate and measurement standards must be calculated to reasonably reflect the recipient's costs should the standards not be met, and must be specified in the solicitation and contract. The assessment for damages is often established at a specific rate per day for each day beyond the contract's delivery date or performance period. A measurement other than a day or another period of time, however, may be established if that measurement is appropriate, such as weight requirements in a rolling stock purchase. The procurement file should include a record of the calculation and rationale for the amount of damages established. Any liquidated damages recovered must be credited to the project account involved unless FTA permits otherwise."

BASIC REQUIREMENT: The recipient is responsible for issuing, evaluating, and making necessary decisions involving any change to its third party contracts, and any change orders, or modifications it may issue.

36. Did the recipient approve, evaluate, and document change orders to procurements?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. Did the recipient ensure that executed change orders were within the scope of the original contract?

DETERMINING COMPLIANCE
Prior to the site visit, receive and review the recipient's policies and procedures to determine how the recipient describes management of change orders. During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that had significant change orders issued. Determine if selected change orders were within the scope of the recipient's grant and reasonable for the completion of project's scope. A change to a contract that is beyond the scope of that contract, is a new non-competitive or sole source award that must be justified under the provisions for non-competitive procurements.

b. Did the recipient evaluate and document change orders?

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes evaluations of change orders and any thresholds and responsibilities for change order approvals. During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that had significant change orders issued. Determine if documentation for selected change orders included:

- Cost justification
- Approval by an authorized official

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if it executed change orders to contracts that were not within the scope of the contract, did not evaluate the cost of the change, and/or did not document authorized official approval in accordance with its procurement procedures.

DEFICIENCY CODE 277: Insufficient documentation to support change orders

SUGGESTED CORRECTIVE ACTION: The recipient must submit compliant change order procedures to the FTA regional office. For the next change order, submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES
FTA Circular 4220.1F Chapter VII 2. a. The Recipient's Role and Responsibilities.

"The recipient is responsible for issuing, evaluating, and making necessary decisions involving any change to its third party contracts, and any change orders, or modifications it may issue. The recipient is also responsible for evaluating and making the necessary decisions involving any claim of a constructive change. In general, FTA expects each recipient to comply with the following procedures: (1) Approval Requirements. FTA expects the recipient to have cost justifications supporting each change order it may issue. FTA also expects the recipient's authorized official to approve any proposed change order before it is issued. (2) Cost Restrictions. To be eligible for FTA assistance under the recipient's grant or cooperative agreement, the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its grant or cooperative agreement, and reasonable for the completion of project scope."

FTA Circular 4220.1F Chapter VI 3. i. (1) (b)

*"*When the recipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the recipient has made a sole source award that must be justified."

BASIC REQUIREMENT: Recipients that include options in FTA-funded contracts must ensure that options reflect their reasonably foreseeable need and are evaluated prior to contract award. Options for the procurement of buses or replacement parts must not extend for more than 5 years after the date of the original contract or 7 years for rail rolling stock.

15. If the recipient included options in an FTA-funded procurement, did it base the amount on its reasonably foreseeable need and evaluate the option price prior to awarding the contract?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. Did the recipient base the quantity or amount of options on its reasonably foreseeable need?

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient describes the use options. During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that included options. Determine if the recipient documented that the inclusion of options in the solicitation represented its foreseeable need. If the documentation does not appear to be sufficient, provide this information to the FTA regional office for their further review and action.

b. Did the recipient evaluate option prices included in solicitations prior to contract award?

DETERMINING COMPLIANCE
During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that included options. Determine if the recipient documented its evaluation of the option prices prior to contract award if it intended to exercise the option(s) at a later date.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if the contact quantities were not based on the recipient's foreseeable needs.

DEFICIENCY CODE 302: Improper use of options

SUGGESTED CORRECTIVE ACTION: The recipient must develop procedures for complying with FTA requirements when including options in solicitations.

The recipient is deficient if it exercised options that were not evaluated with the initial bid.

DEFICIENCY CODE 302: Improper use of options

SUGGESTED CORRECTIVE ACTION: The recipient must develop procedures for complying with FTA requirements when evaluating contracts which included options. For the next applicable procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient must provide to the FTA regional office a written assurance that it will not exercise the options unless FTA approval is granted for instances where options that may violate the requirements have not been exercised. The recipient may not assign the options to any other FTA recipients.

GOVERNING DIRECTIVES
2 CFR 200.318(d)

"The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach."

FTA Circular 4220.1F Chapter IV. 1.b. Necessity.

"…. requires the recipient to establish procedures to avoid the purchase of unnecessary property and services (including duplicative items and quantities or options it does not intend to use or whose use is unlikely)."

FTA Circular 4220.1F Chapter VI 7. b. (1). Evaluation Required.

"In general, FTA expects the recipient to evaluate bids or offers for any option quantities or periods contained in a solicitation if it intends to exercise those options after the contract is awarded."

37. *If the recipient procured bus or rail rolling stock or replacement parts with FTA funds, did it adhere to the time limitations on placing orders against the contracts?*

APPLICABILITY
All recipients

INDICATOR OF COMPLIANCE

a. *If the recipient procured bus or rail rolling stock or replacement parts did it ensure that the contracts met the five- and seven-year contract term restriction?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient describes management of options for rolling stock purchases. During the site visit, examine

selected rolling stock and replacement part contracts to ensure that these met the five- and seven-year contract term restriction. The five- and seven-year rules do not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. The recipient may not exercise the option to acquire buses or replacement parts later than five years (bus) or seven years (rail) after the date of its original contract.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it exercised rolling stock options outside of the five- or seven-year period.

> DEFICIENCY CODE 240: Contract(s) period of performance exceeds limitation SUGGESTED
>
> CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that include the five- and seven-year restriction on the period of performance for rolling stock and replacement part contracts supported with FTA funds. The recipient must provide the FTA regional office with an assurance that unexecuted options will not be executed on an existing contract that exceeds the five- or seven-year restriction. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVE

49 USC § 5325(e)

"(e) Multiyear rolling stock.

(2) Contracts. A recipient procuring rolling stock with Government financial assistance under this chapter may make a multiyear contract to buy the rolling stock and replacement parts under which the recipient has an option to buy additional rolling stock or replacement parts for:

(A) not more than 5 years after the date of the original contract for bus procurements; and

(B) not more than 7 years after the date of the original contract for rail procurements, provided that such option does not allow for significant changes or alterations to the rolling stock."

FTA Circular 4220.1F Chapter IV 2. e. (10) Time Limits for Options on Rolling Stock Contracts.

"MAP-21 amended 49 U.S.C. Section 5325(e)(1) by adding subsections (A) and (B), retaining the five (5) year option for the procurement of buses, while extending the option for rail procurements to seven (7) years. Consequently: (a) Buses. A recipient: 1 May enter into a multi-year contract to acquire buses or replacement parts, with an option not exceeding five (5) years to buy additional buses or replacement parts, 49 U.S.C. Section 5325(e)(1)(A), but 2 May not exercise the option to acquire buses or replacement parts later than five (5) years after the date of its original contract. (b) Rail. A recipient: May enter into a multi-year contract to acquire railcars or replacement parts, with an option not exceeding five
(5) years to buy additional railcars or replacement parts, 49 U.S.C. Section 5325(e)(1)(B), but 2 May not exercise the option to acquire railcars or replacement parts later than seven (7) years after the date of its original contract.

FTA interprets these five and seven-year periods as covering the recipient's "material requirements" for rolling stock and replacement needs from the first day when the contract becomes effective to its "material requirements" at the end of the fifth or seventh year, as applicable. In the case of rolling stock, which frequently cannot be delivered expeditiously, FTA recognizes that a recipient's "material requirements" for rolling stock will necessarily precede its actual need to put that rolling stock to use in public transportation service. This means that the contract may not have options for more rolling stock and replacement parts than a recipient's material requirements for the applicable five or seven-year period. This does not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. Instead it means

only that FTA limits a contract to purchasing no more than the recipient's material requirements for rolling stock or replacement parts for five or seven years based on the effective date of the contract."

BASIC REQUIREMENT: Recipients may use another recipient's contract rights if the original contract contained required Federal provisions, included an assignability provision, does not contain excessive options, the optioned vehicles do not include cardinal changes to the original vehicles, and the contract price is fair and reasonable.

38. If the recipient purchased FTA-funded assets through a "piggyback" procurement method, did it comply with applicable requirements regarding inclusion of Federal requirements, assignability, price, and no cardinal changes?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. For "piggyback" procurements, did the recipient ensure that the underlying contract was solicited and awarded in accordance with Federal and FTA requirements?

DETERMINING COMPLIANCE
For reasons of economy, FTA permits the assignment of unneeded contract rights, sometimes called "piggybacking." FTA discourages the assignment of another recipient's contract rights as a substitute for a stand-alone procurement. Piggybacking is different from joint procurements. A joint procurement is a method of contracting in which two or more recipients agree from the
outset to use a single solicitation document and enter into a single contract with a vendor. FTA encourages the use of joint procurements when combining requirements into a larger order can result in a more advantageous contract for the participating recipients.

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with "piggybacking" purchases. During the site visit, examine selected "piggyback" procurement files to ensure that the recipient files include sufficient documentation that the underlying contract was solicited and awarded in compliance with Federal and FTA requirements and included required contract provisions.

b. For "piggyback" procurements, did the recipient ensure that original contract contained an assignability clause and that the quantities it used were available?

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with "piggybacking" purchases. During the site visit, examine selected "piggyback" procurement files to determine if the recipient verified that:

- the original contract contained an assignability provision, and
- the quantities acquired, coupled with the quantities already assigned, did not exceed the amounts available under the assigning recipient's contract

c. For "piggyback" procurements, did the recipient document that the price of assignments acquired was fair and reasonable?

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with "piggybacking" purchases. During the site visit, examine selected "piggyback" procurement files to ensure that the recipient files include sufficient documentation that the original contract price remained fair and reasonable.

d. *For "piggyback" procurements, did the recipient make cardinal changes to the vehicle ordered under the option (e.g., ordered a different size vehicle, fuel option, etc.)?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with "piggybacking" purchases. During the site visit, examine selected "piggyback" procurement files to ensure that the recipient files include sufficient documentation that the vehicle ordered under the option is substantially the same as the original vehicle in the contract.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it cannot document that:

- the original award met Federal requirements,
- the contract contained an assignability clause, and that assigned quantities did not exceed contract allowable amounts,
- the price was determined to be fair and reasonable, and/or
- the option vehicle did not contain a cardinal change to the original vehicle.

DEFICIENCY CODE 231: Improper piggyback purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office piggybacking procedures that comply with FTA requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient may be required by FTA to terminate the agreement for convenience if an improper piggyback procurement is in process.

39. *If the recipient exercised an assigned option on a contract that was entered into before December 4, 2015, confirm that the assignment was incompliance with FTA's September 1, 2016 Policy Guidance on the implementation of the phased increase in domestic content contained in 49 USC §5323(j)?*

APPLICABILITY

All recipients

INDICATOR OF COMPLIANCE

a. *If the assigned option is exercised for delivery of vehicles in FY2018 or FY2019, did the original contract include a provision for domestic content of more than 65 percent? If the assigned option is exercised for delivery of vehicles in FY2020 and beyond, did the original contract include a provision for domestic content of more than 70 percent?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's listing of procurements to identify any piggybacking procurements entered into subsequent to December 4, 2015. Onsite, review the date of the underlying contract on which the recipient is piggybacking. Determine if that contract was awarded subsequent to December 4, 2015.

A manufacturer may not agree to amend the contract to provide for a higher domestic content in order to permit a recipient to piggyback on an existing contract. Such an amendment is considered a cardinal change to the original contract.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if, subsequent to December 4, 2015, it acquired options through piggybacking on a contract that was awarded prior to October 1, 2015 in violation of FTA's September 1, 2016 Policy Statement.

DEFICIENCY CODE 231: Improper piggyback purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office piggybacking procedures that comply with FTA requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient may be required by FTA to terminate the agreement for convenience if an improper piggyback procurement is in process.

GOVERNING DIRECTIVES

Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances IV, 81 Federal Register 60278 (September 1, 2016)

FTA Circular 4220.1F Chapter V (7)(2) Assignment of Contract Rights

"…The recipient may assign those contract rights to other recipients if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions. Some refer to this process as "piggybacking…" "…A recipient that obtains contractual rights through assignment may use them after first determining that the original contract price remains fair and reasonable, and the original contract provisions are adequate for compliance with all Federal requirements. The recipient need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the recipient to determine whether the contract price or prices originally established are still fair and reasonable before using those rights."

FTA Circular 4220.1F Chapter V 7. a. (1) (b). Exercise of Options.

"A recipient may use contract options held by another recipient with the following limitations:… The recipient may not exercise an option unless it has determined that the option price is better than prices available in the market, or that when it intends to exercise the option, the option is more advantageous."

FTA Circular 4220.1F Chapter V, Section 7. b. (2) (d)

"In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change would, at this time, include a change from a high-floor to a low-floor vehicle. Changing an engine might result in a cardinal change depending on the circumstances surrounding the project and whether a compatible replacement could be obtained through competition. FTA, however,

considers changes to seating, fabrics, and colors, exterior paint schemes, signage, and floor covering, and other similar changes to be permissible changes."

BASIC REQUIREMENT: The recipient must receive FTA approval for advance payments and protect FTA's interest on progress payments.

40. Did the recipient ensure that appropriate FTA approval was acquired for advance payments and that adequate protection was exercised for progress payments?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. If the recipient used FTA funds for advance payments to contractors, is prior FTA approval documented in procurement files?

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes management of payments to contractors. During the site visit, examine selected contract files, in accordance with records sampling procedures, for payments that may be categorized as payment to a contractor before the contractor incurred contract costs. Progress payments that do not reflect contractor incurred costs could be determined to be advance payments. If such payments are evident, determine if the recipient documented that it received prior FTA approval in advance of the payments.

b. If the recipient used FTA funds for progress payments to contractors, did it adequately protect FTA's interest and substantiate the work for which payment was made?

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes administration and management of progress payments. During the site visit, examine selected contract files, in accordance with records sampling procedures, for description of how and when progress payments will be made. Determine if the recipient documented appropriate measures it took to protect FTA's interest before making any progress payments and that it has written documentation to substantiate the work for which payment was made.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if it has used advance payments without prior FTA approval.

DEFICIENCY CODE 309: Improper advance/progress payments

SUGGESTED CORRECTIVE ACTION: The recipient must report immediately to the FTA regional office any improper advance payments with an explanation of the circumstances surrounding the payments. The recipient must submit to the FTA regional office procedures for obtaining prior FTA approval for advance payments. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has made progress payments but has not obtained adequate security for those payments and does not have written documentation to substantiate the work for which payment was made.

DEFICIENCY CODE 309*:* Improper advance/progress payments

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for obtaining adequate security and or sufficient written documentation to substantiate the work for progress payments. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES
2 CFR 200.305

2 CFR part 205

FTA C. 5010.1E, page IV-15

Provisions in 2 CFR § 200.305 and 31 CFR part 205 govern payments to recipients for financing operations under federal assistance and other programs. These regulations require that advance payment to a recipient be limited to the minimum amounts needed and timed to be in accord with only the actual, immediate cash requirements of the recipient in carrying out the purpose of the Award. The timing and amount of advance payments must be as close as is administratively feasible to the actual disbursements by the recipient for direct program or costs of the Award and the proportionate share of any allowable indirect costs. The recipient must make timely payment to third-party contractors in accordance with the third-party contract provisions.

FTA C. 4220.1F, Ch. IV, Sections 2. b. (5)(b) Advance Payments.

"Advance payments are payments made to a contractor before the contractor incurs contract costs. The recipient may use its local share funds for advance payments. However, if there is no automatic preaward authority for its project, then advance payments made with local share funds before FTA assistance has been awarded, or before a letter of no prejudice has been issued or other preaward authority has been provided, or before FTA approval for the specific advance payment has been obtained, are ineligible for reimbursement. The following principles and restrictions apply: 1 Use of FTA Assistance Prohibited. The recipient may not use FTA assistance to make payments to a third party contractor before the contractor has incurred the costs for which the payments would be attributable. 2 Exceptions for Sound Business Reasons. Apart from advance payments that are customary, as discussed further, FTA does occasionally make exceptions to its advance payment prohibitions, if the recipient can provide sound business reasons for doing so and has obtained FTA's advance written concurrence. A recipient that seeks to use FTA assistance to support advance payments should contact the regional office administering its project to obtain FTA concurrence. a Adequate Security for Advance Payments. FTA recognizes that advance payments may be needed for certain costs supported by sound business judgment. Adequate security for the advance payment is an essential pre-condition to FTA's concurrence in the use of FTA or local share funds. b Customary Advance Payments. FTA recognizes that advance payments are typically required
for, but are not limited to, public utility connections and services, rent, tuition, insurance premiums, subscriptions to publications, software licenses, construction mobilization costs, transportation, hotel reservations, and conference and convention registrations. Accordingly, the recipient may use FTA assistance to support or reimburse the costs of such acquisitions. FTA concurrence is required only when such advance payment or payments customarily required in the marketplace exceed $100,000."

FTA C. 4220.1F, Ch. IV, Sections 2. b. (5)(c) Progress Payments.

"Progress payments are payments for contract work that has not been completed. The recipient may use FTA assistance to support progress payments provided the recipient obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested. 1. Adequate Security for Progress Payments. Adequate security for progress payments may include taking title or obtaining a letter of credit or taking equivalent measures to protect the recipient's financial interest in the progress payment. Adequate security should reflect the practical realities of different procurement scenarios and factual circumstances. FTA acknowledges the practical reality that taking title to work in progress may not be desirable in some circumstances. The recipient should always consider the costs associated with providing security (for example, the recipient may need to acquire bonds or letters of credit in the commercial marketplace) and the impact of those costs on the contract price, as well as the consequences

of incomplete performance. 2. Adequate Documentation. Sufficient documentation is required to demonstrate completion of the amount of work for which progress payments are made."

BASIC REQUIREMENT: For bus procurements, the recipient must have in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle.

41. If the recipient procured buses with FTA funds, did it comply with requirements for bus testing reports?

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *Were the bus models that the recipient purchased during the review period tested?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the make and models of all buses procured since the last Comprehensive Review. Review the Altoona Bus Research and Testing Center Database at http://altoonabustest.psu.edu/ to determine if a bus report has been issued for that model. For bus models tested subsequent to October 31, 2016, determine if the bus model received a passing score.

b. *Did the recipient obtain the bus testing report showing the bus model met FTA's bus testing requirements prior to acceptance of the first vehicle?*

DETERMINING COMPLIANCE
During the site visit, examine selected bus procurement files to ensure that the recipient had in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle and that, subsequent to October 31, 2016, any new bus model tested received a passing score.

POTENTIAL DEFICIENCY DETERMINATIONS
The recipient is deficient if the bus model purchased with FTA funds was not tested or, for new bus models tested after October 31, 2016, the bus model did not receive a passing score.

DEFICIENCY CODE 317: Deficiency with bus model testing requirements

SUGGESTED CORRECTIVE ACTION: If any vehicles have not been tested and the recipient has accepted the vehicles, the recipient must notify the FTA regional office immediately. The recipient must provide procedures for only accepting vehicles that were tested and received a passing score for future bus purchases to the FTA regional office. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if a copy of the Altoona Bus Test Report is not in the recipient's procurement files.

DEFICIENCY CODE 317: Deficiency with bus model testing requirements

SUGGESTED CORRECTIVE ACTION: The recipient must obtain the Altoona Bus Test Report for the specific make/model purchased and provide a copy of it and procedures for obtaining the report for future bus purchases to the FTA regional office.

GOVERNING DIRECTIVE

49 CFR 665.7 Certification of compliance.

(a) In each application to FTA for the purchase or lease of any new bus model, or any bus model with a major change in configuration or components to be acquired or leased with funds obligated by the FTA, the recipient shall certify that the bus was tested at the Bus Testing Facility and that the bus received a passing test score as required in this part. The recipient shall receive the appropriate full Bus Testing Report and any applicable partial testing report(s) before final acceptance of the first vehicle.

BASIC REQUIREMENT: A recipient purchasing revenue service rolling stock with Federal funds must conduct pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser's requirements, and Federal Motor Vehicle Safety Standards (FMVSS).

42. *If the recipient procured rolling stock with FTA funds, did it comply with pre-award and post- delivery audit requirements?*

APPLICABILITY
All recipients

INDICATORS OF COMPLIANCE

a. *For rolling stock procurements, did the recipient include the appropriate Buy America domestic content requirements in its solicitation?*

DETERMINING COMPLIANCE
Prior to the site visit, review the recipient's list of rolling stock procurements to determine which Buy America domestic content percentage is required. Onsite, review contract documents to ensure that the appropriate domestic content requirements are included.

- For contracts entered into before October 1, 2015, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract must contain a domestic content of 60 percent or more.
- The FAST Act amendments below regarding increasing domestic content do not apply to contracts entered into before October 1, 2015, even if the contract provides for the delivery of the first production vehicle after FY2017.
- For rolling stock contracts entered into on or after October 1, 2015, the applicable domestic content percentage is based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding.
- If the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent.
- If the delivery date of the first production vehicle is delayed such that it will be delivered in a year with a higher domestic content, FTA will address those situations on a case- by-case basis.

b. *For rolling stock purchases, did the recipient conduct pre-award and post-delivery audits to ensure the manufacturer(s) complied with contract specifications and Buy America?*

DETERMINING COMPLIANCE
Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with pre-award and post-delivery audits for rolling stock purchases. During the site visit, examine

selected rolling stock procurement files to ensure that, for each group of vehicles purchased, the recipient conducted the following audits:

- Pre-award Buy America
- Pre-award Purchaser's Requirements
- Post-delivery Buy America
- Post-delivery Purchaser's Requirements
- Post-delivery Federal Motor Vehicle Safety Standards (FMVSS)

c. *Did the recipient document its pre-award and post-delivery audits by completing and maintaining written certifications?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with pre-award and post-delivery audit certifications for rolling stock purchases. During the site visit, examine selected rolling stock procurement files to ensure that, for each group of vehicles purchased, the recipient made and included in their files:

- Pre-award Buy America certifications
- Pre-award Purchaser's Requirements certifications
- Post-delivery Buy America certifications
- Post-delivery Purchaser's Requirements certifications
- Post-delivery Federal Motor Vehicle Safety Standards (FMVSS) certifications

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it did not include the appropriate Buy America domestic content requirements in its rolling stock procurements

DEFICIENCY CODE: XXX Buy America domestic content deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must confer with the FTA regional office for the appropriate remedy based on the stage of the procurement process.

The recipient is deficient if it did not conduct all of the required audits for revenue rolling stock procurements. The recipient is deficient if it ordered a group of vehicles from a multi-year procurement before the pre-award audit was conducted.

DEFICIENCY CODE 253: Pre-award and/or post-delivery audits not performed

SUGGESTED CORRECTIVE ACTION: The recipient must confer with the FTA regional office for the appropriate corrective action. The recipient must submit to the FTA regional office procedures for pre-award and post-delivery review and inspection. For the next

procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient must submit to the FTA regional office procedures for conducting pre-award audits for options and/or multi-year contracts so that future procurements will comply with this requirement. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it did not make pre-award and/or post delivery certifications for applicable rolling stock procurements.

DEFICIENCY CODE 265: Pre-award and/or post-delivery certifications lacking

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office the certifications for the procurement reviewed and procedures for completing the applicable pre- award and post-delivery audits certifications for future revenue rolling stock procurements. If the recipient cannot certify compliance, it must confer with the FTA regional office for the appropriate corrective action. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

For the next revenue rolling stock procurement, the recipient must submit to the FTA regional office pre-award audit information and certifications before awarding the contract and the post- delivery audit information and certifications before drawing FTA funds.

GOVERNING DIRECTIVES
49 U.S.C. §5323(j)

49 CFR 663 Pre-award and Post-delivery Audits of Rolling Stock Purchases "Subpart B—Pre-Award Audits

§663.21 Pre-award audit requirements.

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a pre-award audit under this part is complete before the recipient enters into a formal contract for the purchase of such rolling stock.

§663.23 Description of pre-award audit.

A pre-award audit under this part includes—(a) A Buy America certification as described in §663.25 of this part; (b) A purchaser's requirements certification as described in §663.27 of this part; and (c) Where appropriate, a manufacturer's Federal Motor Vehicle Safety certification information as described in §663.41 or §663.43 of this part.

§663.25 Pre-award Buy America certification.

For purposes of this part, a pre-award Buy America certification is a certification that the recipient keeps on file that—(a) There is a letter from FTA which grants a waiver to the rolling stock to be purchased from the Buy America requirements under section 165(b)(1), (b)(2), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or (b) The recipient is satisfied that the rolling stock to be purchased meets the requirements of section 165(a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or through an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—(1) Component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and (2) The location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.

§663.27 Pre-award purchaser's requirements certification.

For purposes of this part, a pre-award purchaser's requirements certification is a certification a recipient keeps on file that— (a) The rolling stock the recipient is contracting for is the same product described in the purchaser's solicitation

specification; and (b) The proposed manufacturer is a responsible manufacturer with the capability to produce a vehicle that meets the recipient's specification set forth in the recipient's solicitation. Subpart C—Post-Delivery Audits

§663.31 Post-delivery audit requirements.

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a post-delivery audit under this part is complete before title to the rolling stock is transferred to the recipient.

§663.33 Description of post-delivery audit.

A post-delivery audit under this part includes—(a) A post-delivery Buy America certification as described in §663.35 of this part; (b) A post-delivery purchaser's requirements certification as described in §663.37 of this part; and (c) When appropriate, a manufacturer's Federal Motor Vehicle Safety Standard self- certification information as described in §663.41 or §663.43 of this part.

§663.35 Post-delivery Buy America certification.

For purposes of this part, a post-delivery Buy America certification is a certification that the recipient keeps on file that—(a) There is a letter from FTA which grants a waiver to the rolling stock received from the Buy America requirements under sections 165 (b)(1), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or (b) The recipient is satisfied that the rolling stock received meets the requirements of section 165 (a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or by means of an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—(1) Components and subcomponent parts of the rolling stock identified by manufacturer of the parts, their country of origin and costs; and (2) The actual location of the final assembly point for the rolling stock including a description of the activities which took place at the final assembly point and the cost of the final assembly.

§663.37 Post-delivery purchaser's requirements certification.

For purposes of this part, a post-delivery purchaser's requirements certification is a certification that the recipient keeps on file that—(a) Except for procurements covered under paragraph (c) in this section, a resident inspector (other than an agent or employee of the manufacturer) was at the manufacturing site throughout the period of manufacture of the rolling stock to be purchased and monitored and completed a report on the manufacture of such rolling stock. Such a report, at a minimum, shall—(1) Provide accurate records of all vehicle construction activities; and (2) Address how the construction and operation of the vehicles fulfills the contract specifications. (b) After reviewing the report required under paragraph (a) of this section, and visually inspecting and road testing the delivered vehicles, the vehicles meet the contract specifications. (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.

§663.39 Post-delivery audit review.

(a) If a recipient cannot complete a post-delivery audit because the recipient or its agent cannot certify Buy America compliance or that the rolling stock meets the purchaser's requirements specified in the contract, the rolling stock may be rejected and final acceptance by the recipient will not be required. The recipient may exercise any legal rights it has under the contract or at law. (b) This provision does not preclude the recipient and manufacturer from agreeing to a conditional acceptance of rolling stock pending manufacturer's correction of deviations within a reasonable period of time. Subpart D— Certification of Compliance With or Inapplicability of Federal Motor Vehicle Safety Standards

§663.41 Certification of compliance with Federal motor vehicle safety standards.

If a vehicle purchased under this part is subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, a recipient shall keep on file its certification that it received, both at the pre-award and post-delivery stage, a copy of the manufacturer's self-certification information that the vehicle

complies with relevant Federal Motor Vehicle Safety Standards.

§663.43 Certification that Federal motor vehicle standards do not apply.

(b) Except for rolling stock subject to paragraph (b) of this section, if a vehicle purchased under this part is not subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, the recipient shall keep on file its certification that it received a statement to that effect from the manufacturer.
(b) This subpart shall not apply to rolling stock that is not
a motor vehicle."

Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances IV, 81 Federal Register 60278 (September 1, 2016)

For rolling stock contracts entered into on or after October 1, 2015, i.e., the effective date of the FAST Act, the applicable domestic content percentage under section 5323(j)(2)(C) will be based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding. Thus, if a recipient or group of recipients as part of a joint procurement enter into a contract for rolling stock on or after October 1, 2015, then the new FAST Act provisions applicable for the date of delivery of the first production vehicle shall apply. Accordingly, if the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65
percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent. These delivery provisions apply to contracts entered into on or after October 1, 2015, unless a waiver is granted. If the delivery date of the first production vehicle is delayed such that it will be delivered in a year with a higher domestic content, FTA will address those situations on a case-by- case basis. The FAST Act amendments do not apply to contracts entered into before October 1, 2015, even if the contract provides for the delivery of the first production vehicle after FY2017. For contracts entered into before October 1, 2015, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract may contain a domestic content of more than 60 percent, per the pre-FAST Act requirements."

FTA is issuing two general public interest waivers to address two categories of recipients and manufacturers: (1) Recipients who entered into contracts or placed purchase orders against State schedules between October 1, 2015 and December 4, 2015; and (2) recipients who have entered into contracts after December 4, 2015, as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015. In addition, FTA is issuing a third public interest waiver for recipients who solicited contracts on or after December 4, 2015, provided they enter into a contract within 60 days of publication of this Notice.

BASIC REQUIREMENT: The recipient is responsible for ensuring that subrecipients administer FTA-funded procurements in accordance with the requirements in 2 CFR Part 200 and FTA Circular 4220.1F.

43. Does the recipient perform oversight of its subrecipients' FTA-funded procurement activities?

APPLICABILITY
All recipients of FTA funds

INDICATORS OF COMPLIANCE

a. *Does the recipient implement oversight procedures of its subrecipients for FTA-funded procurements?*

DETERMINING COMPLIANCE
Request and review a listing of subrecipients. Request and review the recipient's oversight procedures, State Management Plans, and any procurement requirements that have been included in subrecipient agreements. Discuss with the recipient onsite and determine who monitors the subrecipients' procurement processes. Examine written reports or audit reports of the process to determine if the recipient is monitoring in accordance with its documented procedures.

c. *Do subrecipient procurement files reviewed demonstrate adequate oversight by the recipient?*

DETERMINING COMPLIANCE
Onsite, during subrecipient visits, select sample procurements for compliance with 2 CFR Part 200 and FTA Circular 4220.1F. Governmental subrecipients may use State procurement procedures and only procurement provisions that apply to the State apply to them. Private, non- profit subrecipients must follow 4220.1F.

Subrecipients of states that are public entities and contractors must comply with FTA requirements that apply to states. Subrecipients of states that are private nonprofit or for profit entities must comply with all the FTA requirements of FTA C. 4220.1F. FTA considers all metropolitan planning organizations (MPOs), even those incorporated as a nonprofit organization under state law, to be "local governments." Consequently, MPOs must comply with the FTA requirements that apply to states.

The following procurement requirements apply to states and their public entity subrecipients and contractors:

- Comply with its own procurement regulations
- Conduct all procurements in a manner providing full and open competition
- Exclude the use of statutorily or administratively imposed in-state or local geographical preferences in the evaluation of bids or proposals except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference
- Use competitive proposal procedures based on the Brooks Act when contracting for architectural and engineering services, if the State has not adopted a statute governing the procurement of such services before August 10, 2005
- Award to only responsible contractors possessing the ability, willingness and integrity to perform successfully under the terms and conditions of the contract
- Ensure that every purchase order and contract executed using Federal funds includes all clauses required by Federal statutes and executive orders and their implementing regulations
- Do not enter into any contract for rolling stock with a period of performance for ordering exceeding five years (seven years for rail) inclusive of options without prior FTA approval

- Comply with Buy America requirements, including pre-award and post-delivery requirements
- • Comply with debarment and suspension requirements
- Comply with lobbying requirements
- Comply with piggybacking requirements in addition to the requirements that apply to states,

FTA C. 4220.1F requirements that apply to private nonprofit or for-profit entities include, but are not limited to, the following:

- Maintain a written code of standards of conduct governing the performance of employees engaged in the award and administration of contracts
- Have written procurement policies and procedures
- Have written protest procedures to handle and resolve disputes relating to the award of contracts
- Have procedures for settlement of contract issues/disputes
- Analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest
- Review procurement requests to avoid duplicative or unnecessary purchases
- Incorporate a clear and accurate description of the material, product, or services being procured; identify all requirements that offerors must fulfill; and identify evaluation factors in solicitations
- Develop an ICE before receiving bids or proposals
- Conduct a contract cost or price analysis for every procurement Evaluate options at the time of bid award, exercise the options at the agreed upon terms, and determine that the option price is better than current market prices before exercising the options
- Maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions and specifications of their contracts or purchase orders
- Maintain a written record of procurement history FTA C. 4220.1F contains a complete list of third party contracting requirements

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it is not providing oversight of its subrecipients' procurement processes as described in its written documents or it does not monitor subrecipients or contractors making direct procurements with FTA assistance for compliance with the requirements.

DEFICIENCY CODE 278: Insufficient oversight of procurement

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office with documentation that it has implemented a procurement monitoring program.

The recipient is deficient if, during a review of subrecipient procurements, deficiencies are found.

DEFICIENCY CODE 278: Insufficient oversight of procurement

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has implemented a procurement monitoring program of its subrecipients.

GOVERNING DIRECTIVE

2 CFR §200.331 "Requirement for pass-through entities:

All pass-through entities must:...(d) Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved. Pass-through entity monitoring of the subrecipient must include: (1) Reviewing financial and performance reports required by the pass-through entity. (2) Following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and other means. (3) Issuing a management decision for audit findings pertaining to the Federal award provided to the subrecipient from the pass-through entity as required by §200.521 Management decision."

ATTACHMENT D/ EXHIBIT 6
APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over $2,000)

CLAUSE	TYPE OF PROCUREMENT				
	Professional Services/A&E	**Operations/ Management/ Subrecipients**	**Rolling Stock Purchase**	**Construction**	**Materials & Supplies**
No Federal government obligations to third parties by use of a disclaimer	All	All	All	All	All
Program fraud and false or fraudulent statements and related acts	All	All	All	All	All
Access to Records	All	All	All	All	All
Federal changes	All	All	All	All	All
Civil Rights (EEO, Title VI & ADA)	All	All	All	All	All
Incorporation of FTA Terms	All	All	All	All	All
Energy Conservation	All	All	All	All	All
Termination Provisions (not required of states)	>$10,000	>$10,000	>$10,000	>$10,000	>$10,000
Debarment and Suspension	>$25,000	>$25,000	>$25,000	>$25,000	>$25,000
Buy America			>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (for steel, iron, manufacture d products)
Provisions for resolution of disputes, breaches, or other litigation	>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (see Note)	>$100,000 (see Note)
Lobbying	>$100,000	>$100,000	>$100,000	>$100,000	>$100,000
Clean Air	>$100,000	>$100,000	>$100,000	>$100,000	>$100,000
Clean Water	>$100,000	>$100,000	>$100,000	>$100,000	>$100,000
Cargo Preference			Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel

ATTACHMENT D/ EXHIBIT 6
APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over $2,000)

CLAUSE	TYPE OF PROCUREMENT				
	Professional Services/A&E	**Operations/ Management/ Subrecipients**	**Rolling Stock Purchase**	**Construction**	**Materials & Supplies**
Fly America	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air
Davis Bacon Act				>$2,000 (including ferry vessels)	
Copeland Anti-Kickback Act Section 1 Section 2				All >$2,000 (including ferry vessels)	
Contract Work Hours & Safety Standards Act		>$100,000	>$100,000	>$100,000 (including ferry vessels)	
Bonding (not required of states)				>$100,000 (including ferry vessels)	
Seismic Safety	A&E for new buildings &additions			New buildings &additions	
Transit Employee Protective Arrangements		Transit operations funded with Section 5307, 5309, 5311 or 5316 funds			
Charter Service Operations		All			
School Bus Operations		All			

ATTACHMENT D/ EXHIBIT 6
APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over $2,000)
)

	TYPE OF PROCUREMENT				
CLAUSE	**Professional Services/A&E**	**Operations/ Management/ Subrecipients**	**Rolling Stock Purchase**	**Construction**	**Materials & Supplies**
Drug and Alcohol Testing		Transit operations funded with Section 5307, 5309 or 5311 funds			
Patent Rights	Research &development				
Rights in Data and Copyrights requirements	Research &development				
Special DOL EEO clause for construction projects				>$10,000	
Disadvantaged Business Enterprises (DBEs)	All	All	All	All	All
Prompt Payment	All if threshold for DBE program met	All if threshold for DBE program met	All if threshold for DBE program met	All if threshold for DBE program met	All if threshold for DBE program met
Recycled Products		Contracts for items designated by EPA, when procuring $10,000 or more per year		Contracts for items designated by EPA, when procuring $10,000 or more per year	Contracts for items designated by EPA, when procuring $10,000 or more per year
ADA Access	A&E	All	All	All	
Special Notification Requirements for States	Limited to states	Limited to states	Limited to states	Limited to states	Limited to states

***FTA MASTER AGREEMENT: The fiscal year 2017 FTA Master Agreement is under development.

Pending transportation legislation may result in additional changes to the agreement. The anticipated release date is late calendar year 2016. Once it is finalized and released, FTA will update the relevant citations and provide grantees with revised sections through their respective regional FTA office and Comprehensive reviewer.

ATTACHMENT D/ EXHIBIT 6.1 REQUIRED THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)		
REQUIREMENT	**COMMENTS**	**MASTER AGREEMENT REFERENCE*** **
All FTA-Assisted Third Party Contracts and Subcontracts		
No Federal government obligations to third parties by use of a disclaimer		§3.1
Program fraud and false or fraudulent statements and related acts		§4.3.f
Access to Records		§9.c
Federal changes		§3.1
Civil Rights (EEO, Title VI & ADA)		§12,c,e,and h
Incorporation of FTA Terms	Per FTA C. 4220.1F	
Energy Conservation		§26.j
Awards Exceeding $10,000		
Termination provisions	49 CFR Part 18 Not required of states	§16.d()12
Awards Exceeding $25,000		
Debarment and Suspension	2 CFR Parts 180 and 1200	§4.b
Awards Exceeding the Simplified Acquisition Threshold ($150,000 – see Note)		
Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.		
Buy America	When tangible property or construction will be acquired	§15.a
Provisions for resolution of disputes, breaches, or other litigation		§39
Awards Exceeding $100,000 by Statute		
Lobbying		§3.d
Clean Air		§16.d(7)7.n
Clean Water		§16.d(7)

ATTACHMENT D/ EXHIBIT 6.1 REQUIRED THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)		
REQUIREMENT	**COMMENTS**	**MASTER AGREEMENT REFERENCE*** **
Transport of Property or Persons		
Cargo Preference	When acquiring property suitable for shipment by ocean vessel	§15.b
Fly America	When property or persons transported by air between U.S. and foreign destinations, or between foreign locations	§15c
Construction Activities		
Davis Bacon Act	Except for contracts <$2,000 or third party contracts for supplies, materials, or articles ordinarily available on the open market	§16.d(4)
Copeland Anti-Kickback Act Section 1 Section 2	All Contracts >$2,000	§24.a(3)
Contract Work Hours & Safety Standards Act	Contracts >$100,000	§16.d(5)
Bonding for construction activities exceeding $100,000	5% bid guarantee; 100% performance bond; and Payment bond equal to: • 50% for contracts < $1 M • 40% for contracts > $1 M, but < $5 M • $2.5 M for contracts > $5 M Not required of states	§16.n(1)
Seismic Safety	Contracts for construction of new buildings or additions to existing buildings	§23.b
Special DOL Clause	Contracts >$10,000	§12.d(3)
Non-construction Activities		
Nonconstruction Employee Protection (Contract Work Hours and Safety Standards Act)	Applicable to all turnkey, rolling stock and operational contracts (excluding contracts for transportation services) > $100,000	§28.b

ATTACHMENT D/ EXHIBIT 6.1 REQUIRED THIRD-PARTY CONTRACT CLAUSES (excluding micro-purchases, except for construction contracts over $2,000)		
REQUIREMENT	**COMMENTS**	**MASTER AGREEMENT REFERENCE*** **
Transit Operations		
Transit Employee Protective Arrangements	Applies to Section 5307, 5309, 5311 and 5316 projects	§24.d28.d
Charter Service Operations		§2832
School Bus Operations		§29
Drug and Alcohol Testing	Safety sensitive functions. Applies to Section 5307, 5309 and 5311 projects	§40.b
Planning, Research, Development, and Documentation Projects		
Patent Rights		§17
Rights in Data and Copyrights		§1820
Miscellaneous Special Requirements		
Disadvantaged Business Enterprises (DBEs)	Contracts awarded on the basis of a bid or proposal offering to use DBEs	§12.e3.d
Prompt Payment and Return of Retainage	Per 49 CFR Part 26, if grantee meets the threshold for a DBE program	§12.e
Recycled Products	Contracts for items designated by EPA, when procuring $10,000 or more per year	§16.d(10)
ADA Access	Contracts for rolling stock or facilities construction/ renovation	§12.h3.g
Assignability Clause	Piggyback procurements	§16.a(3)
State Requirements		
Special Notification Requirements for Stares		§37

Note:On December 19, 2014, a joint interim final rule was published, implementing for all Federal award-making agencies the final guidance "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards" (commonly referred to as the "Super Circular"), which was published by the Office of Management and Budget (OMB) on December 26, 2013. The Super Circular consolidates eight existing grant-related circulars into one set of uniform regulations located in Title 2 of the CFR.

2 CFR Part 200 applies to the administration of all Federal grants, cooperative agreements, and amendments as of December 26, 2014. Procurements under grants and cooperative agreements executed prior to December 26, 2014 continue to be subject to 49 CFR Parts 18 and 19 as in effect on the date of such grants or agreements.

2 CFR Part 200 contains certain notable changes to FTA grants management. The Super Circular increases the simplified acquisition threshold to $150,000 (per 2 CFR 200.88) to bring it in alignment with the FAR. This new threshold applies to procurements funded by grants issued on or after December 26, 2014. Procurements funded by grants issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of $100,000 (per 18 CFR 36(d)).

Similarly, the Buy America public interest waiver exempts "small purchases" from Buy America regulations, which incorporated by reference a provision from US DOT's Common Grant Rule (49 CFR 18.36(d)) that set that threshold at $100,000 or less. This threshold continues to apply for all grants obligated on or before December 25, 2014. On December 26, 2014, however, US DOT's Common Grant Rule in 49 CFR Part 18 was replaced with a new regulation, 2 CFR Part 1201, which incorporates by reference OMB's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR Part 200), and contains a higher threshold for simplified acquisitions.

Therefore, for grants obligated on or after December 26, 2014, the threshold is raised to match the simplified acquisition threshold set by 2 CFR 200.88, which incorporates by reference the Federal Acquisition Regulation at 48 CFR 2.1 (definitions), and currently is set at $150,000. This amount will be adjusted periodically for inflation. FTA will continue to base the exemption on the total amount of the project and not on the individual price of items being purchased. For example, if a recipient purchases ten items costing $20,000 each under a single purchase order, the $200,000 contract would make the procurement subject to Buy America Requirements, 49 CFR 661.7.

Exhibit 6.2
REQUIRED CERTIFICATIONS, REPORTS AND FORMS
(excluding micro-purchases, except for construction contracts over $2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE***
Bus Testing Certification and Report	Procurements of buses and modified mass produced vans	§16.m
Transit Vehicle Manufacturer Certification	Procurements of railcars or buses and modified mass produced vans	§12.d(4)
Buy America Certification	Projects >$150,000 that contain steel, iron or manufactured products (see note)	§15.a
Pre-Award Audit	Rolling stock procurements	§16.m
Pre-Award Buy America Certification	Rolling stock procurements>$100,000 (see note)	§16.m
Pre-Award Purchaser's Requirement Certification	Rolling stock procurements	§16.m
Post-Delivery Audit	Rolling stock procurements	§16.m
Post-Delivery Buy America Certification	Rolling stock procurements >$150,000 (see note)	§16.m
Post-Delivery Purchaser's Requirement Certification	Rolling stock procurements	§16.m7.p(3)
On-Site Inspector's Report	Rolling stock procurements for more than 10 vehicles for areas >200,000 in population and 20 for areas <200,000 in population	§16.m
Federal Motor Vehicles Safety Standards Pre-Award and Post-Delivery Certification	Non-rail rolling stock procurements	§16.m
Excluded Parties Listing System search	Procurements > $25,000	§4.b
Lobbying Certification	Procurements > $100,000	§4.d
Standard Form LLL and Quarterly Updates (when required)	Procurements > $100,000 where contractor engages in lobbying activities	§4.d

REFERENCES

ATTACHMENT D/EXHIBIT 6.2
REQUIRED CERTIFICATIONS, REPORTS AND FORMS
(excluding micro-purchases, except for construction contracts over $2,000)

1. 49 U.S.C. Chapter 53, Federal Transit Laws
2. 2 CFR Part 1201, incorporating 2 CFR Part 200, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards"
3. FTA Circular 4220.1F, "Third Party Contracting Guidance"
4. FTA Master Agreement
5. 49 USC 5323(j), as amended by the FAST Act
6. 49 CFR Part 661, "Buy America Requirements"
7. 49 CFR Part 663, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases"
8. 49 CFR Part 571, "Federal Motor Vehicle Safety Standards"
9. 49 CFR Part 665, "Bus Testing"
10. 2 CFR Part 180, "OMB Guidelines to Agencies on Government-wide Debarment and Suspension"
11. 2 CFR Part 180, "Non-procurement Suspension and Debarment"
12. 49 CFR Part 20, "New Restrictions on Lobbying"
13. ***2 CFR §§200.318 (General Procurement Standards) through 200.326 (Contract Provisions)***

USEFUL WEBLINKS

1. FTA Procurement Frequently Asked Questions
2. FTA Buy America Website
3. Bus Testing Website
4. National RTAP ProcurementPRO
5. System for Award Management (SAM)

- Procedures, methods, and examples of procurement practices in the Best Practices Procurement Manual
- An extensive set of Third Party Procurement FAQs to provide a means for its customers to get answers to their procurement questions online
- FAQs listed in the Review 2018 Manual located at www.augustaga.gov procurement
- An extensive set of Third Party Procurement FAQs to provide a means for its customers to get answers to their procurement questions online

OTHER PROCUREMENT RESOURCES

- Joint Procurement Clearinghouse. To establish a mechanism to allow grantees to work together to purchase rolling stock, FTA has created an online tool for joint procurement.
- Letter from U.S. Transportation Secretary Anthony Foxx - U.S. Employment Plan
- Online Tools & Resources
- For Contractors

Note: The guide is available at FTA's website at www.transit.dot.gov, along with additional information on FTA's oversight programs and other resources. FTA-sponsored workshops will also be conducted throughout the year to

provide additional information on the content of the FTA Comprehensive Review Guide and the review process. For technical assistance or additional information, please reach out to one of the FTA's ten regional offices. Augusta, Georgia is Region 4

SECTION 30

CONDUCTING PRE-AWARD AND POST-DELIVERY AUDITS FOR ROLLING STOCK PROCUREMENTS

Best practices Handbook for recipients, auditors, manufacturers, and suppliers

AUGUSTA PUBLIC TRANSIT
AUGUSTA, GEORGIA

June 26, 2018

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Foreword

The information contained in this Handbook is based on the 49 CFR part 663 Pre-Award and Post-Delivery Audits of Rolling Stock Purchases and 49 CFR part 661 Buy America Requirements.

The guidance in this Handbook does not constitute a determination of compliance with the Department of Transportation (DOT) standards and rules or with your rights or responsibilities under the rules and is not binding on the DOT.

This is a best practices Handbook (a non-binding guidance document) for use by auditors as well as recipients, vendors, and interested members of the public.

1. Introduction

The Federal Transit Administration's (FTA) objective in implementing 49 CFR part 661 Buy America Requirements and 49 CFR part 663 - Pre-Award and Post-Delivery Audits of Rolling Stock Purchases is to support U.S. jobs and the U.S. manufacturing industry.[1]

As part of the federal grant application for any revenue service rolling stock grant, an agency that uses federal funds (recipient) to procure vehicles "must certify to FTA that it will conduct or cause to be conducted pre-award and post-delivery audits" as prescribed by 49 CFR part 663. By signing the FTA Master Agreement, recipients have certified that they will conduct or cause to be conducted the requisite pre-award and post-delivery audits. However, 49 CFR part 663 imposes additional requirements on recipients in terms of ensuring and documenting that the rolling stock to be purchased (pre-award audit) and the rolling stock received (post-delivery audit) comply with FTA's Buy America requirements.[2]

The purpose of this Handbook is to assist recipients, auditors, rolling stock manufacturers (manufacturers), and subcontractors and suppliers (suppliers) in understanding and correctly applying FTA's pre-award and post-delivery audit requirements for rolling stock vehicle (vehicle) purchases.

The overall aim is to guide Handbook users through the necessary steps to meet the pre-award audit and post-delivery audit requirements as well as to bring greater uniformity to the way the industry conducts and documents pre-award and post-delivery audits of rolling stock purchases.

1.1. Scope

This Handbook applies only to the procurement of rolling stock used in revenue service, which includes new buses, vans, cars, railcars, locomotives, trolley cars, trolley buses, ferry boats, and vehicles used for guideways and incline planes, and intended for public transportation of passengers.[3] This Handbook does not apply to: used vehicles; non-revenue service vehicles; vehicle rehabilitations, rebuilds, repowers, or overhauls, undertaken on a recipient's existing vehicles; vehicle end products, such as traction power distribution, signal and control systems, and communications; or the provision of services.

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[1] These requirements are distinct from the Buy American Act of 1933, which governs procurements made directly by the Federal government.
[2] See 49 CFR §§ 663.7, 663.21–27, 663.31–39.
[3] FTA also defines rolling stock end products as off-vehicle train control, communication, and traction power equipment. See, e.g., Appendix A to 49 CFR § 661.3. This Handbook's guidance is limited to vehicles and does not address Buy America compliance for rolling stock end products (e.g., off-vehicle elements such as train control, communication, and traction power equipment) described in Buy America regulations in 49 CFR § 661.11 (t) through (w).

The Handbook describes approaches and recommends processes for recipients to consider in preparing to conduct pre-award and post-delivery vehicle audits from the solicitation phase through the final acceptance of vehicles. The Handbook also includes examples of how to calculate domestic content, and verify and document compliance for all participating parties. The Handbook is designed as a reference tool and a guide that includes recommendations on auditing and compliance topics. It also provides examples as well as sample forms and templates.

In 1995, FTA published two separate Handbooks on this subject, one for rail vehicles and one for buses. This Handbook replaces both of those documents.

Information in this Handbook is subordinate to the regulations in 49 CFR part 661 - Buy America Requirements and 49 CFR part 663 - Pre-Award and Post-Delivery Audits of Rolling Stock Purchases.

Recipients, auditors, manufacturers, and suppliers should all be familiar with the most current revision of both 49 CFR parts 661 and 663.[4] It is important to keep current on FTA guidance and final decisions affecting these regulations as published in the *Federal Register* or on the FTA website. The FTA website has links to the regulations, relevant *Federal Register* publications, waivers, and letters of interpretation, frequently asked questions, this vehicle Handbook, and related Dear Colleague letters.

In case of a conflict between the contents of this Handbook and FTA's Buy America regulations and decisions, the regulations and decisions shall control.

1.2. Background

FTA's Buy America requirements apply to third-party procurements by FTA grant recipients. The first Buy America provision was included in the Surface Transportation Assistance Act and is currently codified at 49 U.S.C. 5323(j) and implemented under 49 CFR part 661.[5] This provision prohibits FTA from obligating funds for a project unless the steel, iron, and manufactured products used in the project are produced in the United States. Recipients are required to conduct Pre-Award and Post-Delivery audits of rolling stock under 49 U.S.C. 5323(m), as implemented by 49 CFR part 663.

As a condition to receiving FTA grant funds for the purchase of rolling stock, recipients must certify compliance with Buy America and the pre-award and post-delivery audit requirements.

[4] The regulations can be found online on the FTA "Buy America" webpage in the "Regulations" Section. https://www.transit.dot.gov/regulations-and-guidance/buy-america/buy-america.

[5] 49 U.S.C. 5323(j) (formerly sec.165 of the Surface Transportation Assistance Act of 1982 (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; sec. 3023(i) and (k), Pub. L. 109–59; sec. 20016, Pub. L. 112-141; sec. 3011, Pub. L. 114-94); 49 CFR 1.91.

The recipient must either verify that the vehicles will contain the **required domestic content,**[6] by cost, or request a waiver from FTA. Also, if rolling stock frames or car shells are not produced in the U.S., but the steel or iron used is domestic, and the average cost of a rolling stock vehicle in the procurement is more than $300,000, then the steel or iron in the frames or car shells shall be included in the domestic content calculation.[7] In addition, to comply with Buy America, **final assembly of the vehicles must take place in the United States** in accordance with 49 CFR § 661.11. At each phase in the vehicle procurement cycle, there are specific actions that a recipient must take to ensure compliance with 49 CFR part 661 Buy America Requirements and 49 CFR part 663 - Pre-Award and Post-Delivery Audits of Rolling Stock Purchases.

Recipients purchasing vehicles must ensure that a pre-award audit, as described in 49 CFR §§ 663.21 – 27, is completed **before the recipient enters into a formal contract** to purchase vehicles. Similarly, those recipients purchasing vehicles must also ensure that a post-delivery audit, as described in 49 CFR §§ 663.31 – 39, is completed **before the title to the vehicle is transferred** to the recipient or before the rolling stock is placed in revenue service, whichever comes first.

1.3. Organization of Handbook

This Handbook is divided into five major sections addressing the following areas:

- Section One – Introduction
- Section Two – Pre-Award Audit
- Section Three – Post-Delivery Audit
- Section Four – Domestic Content Calculations
- Section Five – Frequently Asked Questions
- Appendices

Each major section presents guidance to recipients, auditors, manufacturers, and component/subcomponent suppliers.

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[6] Effective October 1, 2015, Congress amended 49 U.S.C. 5323(j) to provide a phased increase in domestic content from more than 60 percent for FY16 & FY17, to more than 65 percent in FY18 & FY19 and more than 70 percent in FY20 and beyond. On September 1, 2016, FTA issued final policy guidance on implementing the phased increase in domestic content. This policy guidance is available at 81 FR 60278 and on FTA's website at https://www.transit.dot.gov/buyamerica.

[7] See 49 U.S.C. 5323(j)(5). Note that the general Buy America requirements for manufactured products in 49 CFR § 661.5 requiring 100% U.S. steel/iron and 100% of components to be manufactured in the United States are separate and apart from the 49 CFR § 661.11 requirements for rolling stock. Therefore, the structural steel requirements in § 661.5 do not apply to the vehicular steel used in rolling stock, as noted in § 661.5(c).

A brief overview of each section of the Handbook is provided below.

Section 1 – Introduction

Describes the objectives, purpose, and scope of the Handbook, background, definitions, relevant references, and acronyms.

Section 2 – Pre-Award Audit

Recommends processes to the recipient for conducting effective pre-award audits. It includes general guidance on best practices during the vehicle solicitation (i.e., source selection and contract award), and contract execution phases to facilitate verification of compliance. It also seeks to clarify requirements and provide guidance to manufacturers and its suppliers about how to prepare documentation to satisfy pre-award requirements.

Section 3 – Post-Delivery Audit

Provides recommended post-delivery audit processes, including a discussion about Post-Delivery Domestic Content Monitoring in Section 3.1.3.4. It includes guidance to clarify the post-delivery requirements of 49 CFR parts 661 and 663. This section includes guidance to assist recipients, auditors, vehicle manufacturers, and suppliers with various aspects of the post-delivery audits. It also describes the information necessary to substantiate compliance.

Section 4 – Domestic Content Calculations

Provides guidance and clarification on methods used to correctly calculate domestic content. This section discusses the distinctions in the treatment of domestic content for components and subcomponents and offers clarification on how to determine what is a component versus a subcomponent. Finally, this section provides an example of calculating domestic content with step by step instructions.

Section 5 – Frequently Asked Questions (FAQs)

Provides FTA responses to FAQs concerning the pre-award and post-delivery audits of rolling stock purchases. The responses also incorporate lessons learned from FTA Project Management Oversight Contractor's (PMOC's) oversight of federally funded projects.

Appendices

The appendices include process checklists, sample certification forms, Buy America waiver references, and sample Buy America audit reports.

1.4. References

The principal references for FTA's Pre-Award and Post-Delivery Audit and Buy America regulations are:

United States Code

49 U.S.C. Chapter 53, Section 5323(j)

49 U.S.C. Chapter 53, Section 5323(m)

Legislation

Surface Transportation Assistance Act of 1978, Pub. L. 95-599

Surface Transportation Assistance Act of 1982, Pub. L. 97-424

Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. 100-17

Buy America Act of 1988, Pub. L. 100-418

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, (SAFETEA-LU), Pub. L. 109-59

The Moving Ahead for Progress in the 21st Century Act, (MAP-21), Pub. L. 112-141

Fixing America's Surface Transportation (FAST) Act, Pub. L. 114-94

Regulations

Buy America Requirements, 49 CFR part 661

Pre-Award and Post-Delivery Audits, 49 CFR part 663

Federal Acquisition Regulation; Foreign Acquisition, Exempted Articles, Materials and Supplies, 48 CFR part 25

1.5. Definitions

The definitions below are provided to assist the reader with terms used in the manual. Definitions from the Pre-Award and Post-Delivery Audits of Rolling Stock Purchases Rule (49 CFR part 663) and the Buy America Requirements Rule (49 CFR part 661) are identified in italics. Non-italicized definitions are provided for clarification to assist the reader in correctly implementing the requirements.

Audit*:* *A review resulting in a report containing the necessary certifications of compliance with Buy America standards, purchaser's requirements specifications, and, where appropriate, a manufacturer's certification of compliance with or inapplicability of the Federal Motor Vehicle Safety Standards. (49 CFR § 663.5).*

Auditor: Person or persons who verify Buy America compliance and prepare pre-award and post-delivery reports. Pre-award and post-delivery audits may be performed directly by recipient staff or by qualified independent auditors. An auditor conducting the pre-award audit must be qualified and independent from the manufacturer and the manufacturer's agents.

Component: *Any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location (49 CFR § 661.11(c)).* Appendices B and C to section 661.11 provide lists of typical components of buses and rail rolling stock, respectively.

End product*:* *Any vehicle, structure, product, article, material, supply, or system, which directly incorporates constituent components at the final assembly location, that is acquired for public use under a federally-funded third-party contract, and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s). A list of representative end products is included in Appendix A to 49 CFR § 661.3 End Products.*

Final assembly*:* *Final assembly is the creation of the end product from individual elements brought together for that purpose through application of manufacturing processes. If a system is being procured as the end product by the grantee, the installation of the system qualifies as final assembly. 49 CFR 661.11(r).* Minimum final assembly requirements are described in Appendix D to section 661.11.

FMVSS: Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration under 49 CFR part 571.

Manufactured product: *An item produced as a result of the manufacturing process (49 CFR § 661.3).*

Manufacturing process: *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 (49 CFR § 661.3).*

Post-delivery: *The time period in the procurement process from when the rolling stock is delivered to the recipient until title to the rolling stock is transferred to the recipient or the rolling stock is put into revenue service, whichever is first (49 CFR § 663.5).*

Pre-award: *That period in the procurement process before the recipient enters into a formal contract with the supplier (49 CFR § 663.5).*

Recipient: *Any entity that is a recipient of Federal financial assistance from FTA (49 CFR § 663.5).*

Rolling stock: *Buses, vans, cars, railcars, locomotives, trolley cars and buses, ferry boats, vehicles used for guideways and incline planes. (49 CFR § 663.5).*[8]

Subcomponent: *Any article, material, or supply, whether manufactured or unmanufactured, that is one step removed from a component in the manufacturing process and that is incorporated directly into a component, but does not include raw materials produced in the United States and then exported for incorporation into a component. (49 CFR § 661.11(f) & (h)-(k)).*

Supplier: Any entity that provides components or subcomponents which are incorporated into the vehicle, either as part of the manufacturing process or during final assembly.

United States: *The several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (49 CFR § 661.3)*

[8] Note that section 661.3 defines rolling stock to include vehicles used for support services. However, pre-award and post-delivery audit requirements do not apply to vehicles used for support services.

1.6. Acronyms

CFR	Code of Federal Regulations
DOT	Department of Transportation
FAQ	Frequently Asked Questions
FAST	Fixing America's Surface Transportation Act
FMVSS	Federal Motor Vehicle Safety Standards
FTA	Federal Transit Administration
OEM	Original Equipment Manufacturer
QA/QC	Quality Assurance/Quality Control
U.S.	United States of America
U.S.C.	United States Code

2. Pre-Award Audit

> *A recipient purchasing revenue service rolling stock with FTA funds must ensure that a pre-award audit under [49 CFR part 663] is complete before the recipient enters into a formal contract for the purchase of such rolling stock. 49 CFR § 663.21.*

The Pre-Award Audit includes making and obtaining required certifications and reviewing the documentation provided by the manufacturer in support of its certification. The Pre-Award Audit is undertaken **before** contract award and is for the purpose of ensuring that the vehicles delivered by the manufacturer will comply with Buy America and the contract specifications.

This section addresses the requirements for a pre-award audit conducted pursuant to the Pre-Award and Post-Delivery Audits of Rolling Stock Purchases regulations.[9] This section also provides some best practices for the recipient, auditor, manufacturer or supplier, when conducting or participating in a pre-award audit. While FTA does not require the use of these best practices, FTA does encourage all parties to adopt such procedures and processes to the extent they will help achieve compliance. Sample forms and certifications are provided in the appendices.

2.1. Requirements for the Pre-Award Audit

Recipients of FTA financial assistance purchasing rolling stock must complete a pre-award audit before entering into a formal contract with a manufacturer. Recipients may perform the audit processes using internal staff or hire third-party auditors to carry out all or some of the review functions on the recipient's behalf. In either case, the person(s) conducting the pre-award audit must be qualified and independent from the manufacturer and the manufacturer's agents.

Appendix A.2 provides useful pre-award checklists.

There are three certifications that must be included in the pre-award audit:

- **Pre-Award Buy America Certification or Pre-Award Buy America Certificate of Non-Compliance**
  - Note: To complete this Certification, the recipient must receive the Manufacturer's Certification of Compliance or Non-Compliance with Buy America Rolling Stock Requirements per 49 CFR § 661.12.
- **Pre-Award Purchaser's Requirements Certification**, and

[9] 49 CFR part 663.

- **Pre-Award Certification of Compliance with or Inapplicability of Federal Motor Vehicle Safety Standards (FMVSS)**.

Table 1. Pre-Award Audit Certification Responsibilities

	Recipient	Manufacturer
SOLICITATION		
Pre-Award Buy America Certification (49 CFR § 663.25)	✓	
Pre-Award Buy America Certificate of Non-Compliance (if applicable) (49 CFR § 663.25)	✓	
Certification of Compliance or Non-Compliance with Buy America Rolling Stock Requirements (49 CFR § 661.12)		✓
Pre-Award Purchaser's Requirements Certification (49 CFR § 663.27)	✓	
Pre-Award FMVSS Compliance Certification (49 CFR § 663.41)	✓	
Pre-Award Certification of FMVSS Inapplicability (49 CFR § 663.43)	✓	

The recipient is responsible for obtaining the Pre-award Buy America Certification, Purchaser's Requirement Certification, and the FMVSS Certification (if applicable) or the Pre-Award Certification of FMVSS Inapplicability. In order for the recipient to certify Buy America compliance or that it received a Buy America waiver, the recipient must obtain and keep on file the bidder's or the offeror's (the manufacturer or supplier) Certification of Compliance (or Non-Compliance) with Buy America Rolling Stock Requirements.[10]

[10] See 49 CFR § 663.25 and 49 CFR § 661.12.

2.2. Pre-Award Buy America Certification

The recipient must keep on file a **Pre-Award Buy America Certification** that certifies that:

- There is a letter from FTA granting a waiver from the Buy America requirements for the vehicle procurement, or
- The recipient is satisfied that the rolling stock to be purchased meets the Buy America requirements after having reviewed itself or through an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—

  (1) Component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and

  (2) The location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.[11]

This subsection describes the **Pre-Award Buy America Certification** requirements and recommends best practices to facilitate compliance with the pre-award audit requirements.

2.2.1. Recipient's Pre-Award Certification of an Applicable Buy America Waiver

By statute, the procurement of rolling stock is subject to a waiver from the requirement that manufactured goods must contain 100 percent domestic content. Section 5323(j)(2)(C) allows FTA to waive Buy America requirements for rolling stock procurements by permitting domestic content less than 100 percent.[12] The Buy America statute also includes three additional waivers: public interest waivers; non-availability waivers; and price differential waivers.[13] The procedures for each of these statutory waivers are set forth in 49 CFR § 661.7. Only waivers based on public interest or non-availability may be granted for a component or subcomponent in the case of the procurement of rolling stock.[14]

Generally, recipients, not the manufacturer, must apply for the Buy America waiver.[15] However, a potential bidder, offeror or supplier may seek a public interest or non-availability waiver for a component or subcomponent.[16] Waiver requests must be made before contract award and the process for obtaining a waiver is time-consuming. Therefore, recipients or manufacturers or

[11] 49 CFR § 663.25.
[12] 49 USC § 5323(j)(2)(C).
[13] 49 U.S.C. § 5323(j)(2)(A), (B), and (D).
[14] See 49 CFR § 661.7(f).
[15] 49 CFR § 661.9(c).
[16] 49 CFR § 661.9(d).

suppliers who wish to seek a waiver from FTA are encouraged to apply for the waiver as early as possible in the procurement process.

2.2.2. Documentation for Pre-Award Buy America Certification (Pre-Award Audit Report)

A recipient's Pre-Award Audit Report will summarize the process the recipient has used to verify the proposed manufacturer's compliance with the Buy America requirements.

The recipient must maintain a file for FTA review that includes the following documentation:

- A copy of the Pre-Award Audit Report;
- The recipient's Pre-Award Buy America Certification;
- The manufacturer's certificate of compliance or non-compliance with Buy America rolling stock requirements (see Appendices B.1 and B.2 for certification templates);
- The pre-award purchaser's requirements certification; and
- The manufacturer's FMVSS certification, if appropriate.

A sample Pre-Award Audit Report is included in Appendix C.1.

The recipient, or an auditor acting on the recipient's behalf, will review the supporting cost documents in order to verify the estimated domestic content, especially if the manufacturer provides such domestic content only as a percentage. Manufacturers may provide estimated domestic content by cost either in dollar figures or as percentages of total materials cost. Therefore, auditors will verify that the manufacturer's pre-award audit documentation supports all costs used in developing the domestic content list (worksheet) and request any additional information necessary in order to verify and certify compliance with Buy America. In the absence of purchase orders or supplier quotes, this verification may be based on, among other things, estimates or other sources used in developing the bid.

Manufacturers may have concerns about recipients' review of cost data. The manufacturer and recipient may agree that the recipient will contract with an external auditor to conduct the manufacturer's Buy America certification review—and assure the manufacturer that the cost data will be kept confidential. Alternatively, a recipient may be able to keep its Buy America audit function independent by using a "firewall" and assuring the manufacturer that those employees of the recipient performing the Buy America audit are prohibited from disclosing any of the manufacturer's proprietary data. Further, the review of documents may occur at the manufacturer's place of business; there is no requirement that the recipient or its auditors obtain copies of the documents; they need simply to review them. Whether conducted by a contractor or the recipient's employees, the manufacturer may require the auditor to sign a non-disclosure agreement prior to reviewing the documents.

2.2.3. Best Practices for Pre-Award Buy America Certifications

This subsection describes best practices to aid recipients, auditors, manufacturers, and suppliers in achieving compliance with the **Pre-Award Buy America Certification** requirements. This subsection includes descriptions of recommended processes and special considerations, beginning with key steps that recipients may take early in the solicitation process, as well as processes to verify compliance with domestic content and U.S. final assembly requirements.

Throughout the vehicle procurement process recipients should be alert to conditions that could pose challenges for Buy America compliance. Examples of these conditions include:

- Manufacturers who are inexperienced with the U.S. market and regulations.
- A new subcomponent/component supplier.
- Vehicles with the domestic content close to the minimum threshold.
- Components with the domestic content close to the minimum threshold.
- Manufacturers creating new U.S. final assembly facilities.
- Engineering changes, field modifications or contract change orders causing changes in project scope (completed projects must comply with Buy America requirements after all change orders have been implemented for all vehicles).

Recipients may adopt practices to lessen the risks of non-compliance. It is important to clearly define and communicate the recipients' processes and expectations about verifying compliance to manufacturers throughout the procurement and production periods. Another useful tool that recipients may use is intermediate audits (see Section 3.1.3.4 for a discussion of Post-Delivery Domestic Content Monitoring). Some recipients also consider a requirement that vehicles have domestic content percentages even greater than the required domestic content percentage for vehicles and/or components to prevent inadvertent noncompliance with Federal requirements. Further, recipients may provide incentives for bidders to increase domestic content as long as those incentives are consistent with Federal and local law.

The following are some recommended best practices for the pre-award audit stage.

2.2.3.1 Solicitation Phase

As the pre-award audit must be completed prior to the recipient entering into a formal contract with a manufacturer or supplier, there are several steps that the recipient may take during the procurement process to help ensure Buy America compliance.

Table 2. Recommended Discussion Topics During the Solicitation Phase of the Procurement.

Recommended Discussion Topics During the Solicitation Phase of the Procurement
Buy America requirements, *e.g.,* domestic content requirements, supply chain implications, manufacturer's certification, etc.
Recipient & Manufacturer or Supplier's (Bidder or Offeror) monitoring responsibilities of the status of compliance during production (e.g., the Resident Inspector program).
Recipient's processes for conducting Pre-Award, Intermediate and Post-Delivery Audit reviews.
Manufacturer's procedures for collecting, reviewing, and maintaining supporting documentation.
Recipient's procedures and requirements for collecting, reviewing, and maintaining supporting documentation.
Recipient's procedures for managing requests for waivers from Buy America requirements.
Recipient's process for selecting a Buy America auditor.

A pre-proposal conference is a good opportunity for recipients to highlight important Buy America requirements and identify specific Buy America related documentation that manufacturers will be expected to include in their bids or produce at the pre-award audit phase. For example, recipients may want to emphasize that in a competitive sealed procurement, a bidder must submit a signed certification with the bid. If a bidder submits the wrong certification, or certifies both compliance and non-compliance, the bid generally will be deemed non-responsive.[17]

Also during the solicitation period, recipients will communicate to manufacturers their expectations for periodic status reporting on Buy America compliance from the manufacturer(s), including if there are any changes to Buy America content or final assembly that may occur during vehicle production due to modifications or substitutes of component or subcomponent suppliers. Periodic reporting helps prevent post- delivery surprises in changes in domestic content and potential issues regarding compliance. For reference, a Proposal Compliance Checklist can be found in Appendix A.1.

[17] 49 CFR § 661.13(b).

2.2.3.2. Verifying Domestic Content Compliance

Preparing and verifying domestic content compliance is a key element of the pre-award audit process. Errors and misinterpretations during the calculation process can undermine the overall domestic content percentage and jeopardize the vehicle's compliance with Buy America requirements. Please see Section 4, Domestic Content Calculations, for detailed instructions on calculating domestic content.

While conducting a pre-award audit, auditors should pay close attention to components with the highest dollar or percentage values. The impact on the vehicle's overall domestic content may be impacted significantly if a high-dollar component is no longer considered to be of domestic origin under 49 CFR § 661.11(g). Section 661.11(g) provides that a component may be considered of domestic origin, if "more that 60 percent of the subcomponents of that component, by cost, must be of domestic origin, and the manufacture of the component must take place in the United States. If, under the terms of this part, a component is determined to be of domestic origin, its entire cost may be used in calculating the cost of domestic content of an end product."[18] If a component's domestic content falls below the minimum threshold at any point during the production cycle, it could reduce the vehicle's domestic content percentage and potentially cause the entire vehicle to fall out of compliance. Therefore, components with domestic content percentages that are close to the minimum domestic content threshold should be noted and followed up with during and at the end of the production cycle.

Similarly, when reviewing the manufacturer's pre-award documentation, auditors should pay particular attention to vehicles that are expected to have a total domestic content that is close to the minimum domestic content threshold. Subsequent change orders or errors in the calculations or documentation (even to smaller value components) could potentially alter the total domestic content and result in noncompliance.

Finally, auditors should confirm that labor costs for final assembly are not included in the domestic content by cost calculations.[19]

2.2.3.3. Verifying U.S. Final Assembly

Another essential step in the pre-award audit process is to verify that the proposed procurement would comply with the U.S. final assembly requirements. In order to verify that the proposed final assembly activities comply with Buy America requirements, the recipient must review documentation provided by the manufacturer to determine whether the manufacturer's planned final assembly activities in the United

[18] Note that under the September 1, 2106 FTA Policy Guidance, increase in the required domestic content (i.e., more than 65% or 70%), requires a similar increase in domestic content under 49 CFR § 661.11(g).
[19] 49 CFR § 661.11(p).

States are adequate to meet the requirements of 49 CFR § 661.11 and Appendix D to § 661.11 (required documentation is discussed in Section 2.2.2).

The specific scope of final assembly activities may vary from manufacturer to manufacturer and even from vehicle to vehicle. Therefore, in order to verify compliance, the auditor may perform due diligence through a variety of methods, including, among other things, reviewing:

- The manufacturer's flow chart(s) or detailed drawing(s) of the production work station,
- The manufacturer's work instructions,
- The manufacturing plans, and
- The assembly drawings (usually kept or posted on a production (shop) floor).

Final assembly costs include the proposed direct labor associated with the U.S. final assembly production line. For the pre-award audit, costs may be established from the manufacturer's estimate of hours, subcontractors' labor quotes, and actual costs from similar projects. Auditors must collect as much information as needed to determine whether the final assembly costs reflect the minimum requirements for final assembly as described in Appendix D to 49 CFR § 661.11.

2.2.3.4. Supplier Buy America Certificate at Pre-Award

The manufacturer is responsible for ensuring that suppliers and subcontractors comply with Buy America requirements. At the pre-award audit state, manufacturers will need to deomonstrate their process for verifying suppliers' compliance with Buy America. This may take the form of obtaining certifications and other documentation or information from suppliers.[20] A suggested template that captures relevant information is discussed in Section 4.5 and a sample is provided in Appendix B.6, "Sample Supplier Buy America Certification."

In order to certify compliance, manufacturers and suppliers must be knowledgeable about the correct method of calculating a component's percentage of domestic content. Section 4, "Domestic Content Calculations," provides detailed instructions for calculating domestic content.

[20] While not required, to verify compliance with the pre-award audit and Buy America requirements, the manufacturer may consider conducting supplier qualification reviews (e.g., via site visits), detailed reviews of supplier documents, first article inspections, qualification testing, and source/pre-shipment inspections to verify suppliers' certifications.

2.3. Pre-Award Purchaser's Requirements Certification

A recipient of FTA financial assistance purchasing revenue service vehicles must certify pre-award that:

(1) The rolling stock it is purchasing is the same product described in its solicitation specification, and
(2) The proposed manufacturer is a responsible manufacturer with the capability to produce a vehicle that meets the recipient's specification (Purchaser's Requirements). [21]

A sample **Pre-Award Purchaser's Requirements Certification** is provided in Appendix B.5. This certification must be retained by the recipient and available for FTA inspection.

2.3.1. Best Practices for Purchaser's Requirements Certification at Pre-Award

Verficiation of the information required in the **Pre-Award Purchaser's Requirements Certification** typically is conducted by the recipient's procurement office and the technical evaluation team before contract award.

To verify that the proposed manufacturer's bid complies with the recipient's specification, the recipient will compare the solicitation specification for the vehicle with the proposed manufacturer's technical bid. A manufacturer's technical information can include documentation submitted with the manufacturer's bid proposal, including, but not limited to, specifications, product brochures, technical data sheets, bills of material, drawings, etc.

Recipients also need to assess a proposed manufacturer's capacity and capability to produce the specific vehicles. The scope and depth of the assessment will vary depending on the size and complexity of the procurement and the past performance of the manufacturer. The solicitation should include requirements that bidders provide information about their manufacturing capacity and capability to produce the specified vehicles. This information may include the following:

- Past performance on previous vehicle orders;
- Qualifications of key personnel;
- Facility layouts/drawings, production line layout/flowchart;
- Plant output capacity (i.e., max. production rate per week);
- Staffing counts by craft;
- Readiness of fixtures for carbody construction;
- Quality assurance and control plan; and
- Other items necessary to execute the work.

[21] 49 CFR § 663.27.

Additionally, recipients should verify a manufacturer's financial viability as part of the review to certify compliance with the pre-award purchaser's requirements. At a minimum, recipients should review the proposed manufacturer's public financial statements (if available).

2.4. Pre-Award Federal Motor Vehicle Safety Standards (FMVSS) Certification of Compliance or Inapplicability

The **Pre-Award FMVSS Certification** is a requirement for most, if not all, motor vehicle procurements. The National Highway Traffic Safety Administration (NHTSA) has a legislative mandate under title 49 U.S.C., chapter 301, Motor Vehicle Safety, to issue FMVSS regulations. The term "motor vehicle" is defined for the purpose of the statute and regulations that NHTSA administers as "a vehicle that is driven or drawn by mechanical power and manufactured primarily for use on public streets, roads, and highways, but does not include a vehicle operated only on a rail line." [22] These Federal safety standards are the minimum safety performance requirements for motor vehicles.

Recipients purchasing motor vehicles, such as buses, **must** keep on file its certification that it received, both at the pre-award and post-delivery stage, a copy of the manufacturer's self-certification information that the vehicle complies with the relevant FMVSS or a copy of the manufacturer's self-cerfication that the vehicle is not subject to the FMVSS. [23] (See Appendix B.6 and B.7 for sample certifications).

[22] See 49 U.S.C. § 30102(a)(7).
[23] 49 CFR §§ 663.41, 663.43(a).

3. Post-Delivery Audit

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a post-delivery audit under this part is complete before title to the rolling stock is transferred to the recipient, or before the rolling stock is put into service, whichever is first. *49 CFR § 663.31 and § 663.5(b).*

This section describes the processes, certifications, and documentation required to validate the post-delivery audit. Appendix A.3 provides useful post-delivery checklists.

This section also provides best practices to assist in complying with the regulations.

The post-delivery audit is similar to the pre-award audit and follows the same multi-step process as the pre-award audit described in Section 2. In the post-delivery audit, however, recipients verify that the manufacturer complied with applicable Buy America requirements in the production of the rolling stock and this verification therefore must be based on actual data rather than plans and proposals. The conclusions of this review are captured in a Post-Delivery Audit Report.

Recipients continue to have the ultimate responsibility for ensuring compliance with all Federal requirements, post-delivery. As discussed in Section 2, Buy America requirements flow down from the FTA recipients to the manufacturers through the contract documents.

In turn, the manufacturer has the responsibility to document the domestic content and the responsibility to maintain documentation that demonstrates compliance with Buy America regulations.[24]

Post-delivery, a manufacturer certifies that the requirements of the Buy America provisions were satisfied for the total vehicle(s) and all of its components, which includes collecting and evaluating suppliers' documentation. The manufacturer will ensure that any **Supplier Buy America Certificates** (See Appendix B.6) are valid and can provide to auditors the supplier information necessary to demonstrate compliance.

Because all parties have a responsibility to ensure compliance by verifying domestic content percentages and domestic manufacturing locations, manufacturers will communicate Buy America requirements to their component suppliers and expect suppliers to perform due diligence of their subcomponent suppliers.

[24] 49 CFR § 661.15(d).

3.1. Requirements for the Post-Delivery Audit

The post-delivery audit period is the "time period in the procurement process from when the rolling stock is delivered to the recipient until title to the rolling stock is transferred to the recipient or the rolling stock is put into revenue service, whichever is first."[25] As in the pre-award phase, recipients may perform the audit processes, or use third-party auditors to perform the review functions on the recipients' behalf.

The purpose of the post-delivery audit is for recipients to verify that the built vehicle(s) comply with Buy America requirements, meet the recipient's solicitation specification requirements, and if applicable, FMVSS.

Recipients must maintain contract files for the post-delivery phase that include certifications and supporting documentation. The required certifications are:

- **Post-Delivery Buy America Certification**;
- **Post-Delivery Purchaser's Requirements Certification** (based upon a review of the Resident Inspector's Report); and,
- **Post-Delivery Certification of FMVSS Compliance or Inapplicability**, when appropriate.

The findings of the post-delivery audit process must be described in the Post-Delivery Audit Report.

3.1.1. Post-Delivery Buy America Certification Requirements

A review for the **Post-Delivery Buy America Certification** must be completed before the vehicle title is transferred to the recipient or before the rolling stock is placed in revenue service, whichever comes first.

A recipient's Post-Delivery Buy America Certification certifies either that the recipient:

- Obtained a letter from FTA granting a waiver from Buy America requirements for the vehicle procurement; or
- Confirmed, on the basis of an audit prepared by someone other than the manufacturer or the manufacturer's agent, that:
  - The vehicle(s) contain components that meet or exceed the required percentage of domestic content, by cost;
  - Final assembly of the vehicles took place in the U.S.; and
  - Final assembly activities were compliant with Buy America requirements.

The review period begins when the rolling stock is delivered to the recipient and ends before the title transfer or before the rolling stock is placed in revenue service, whichever comes first. If a

[25] 49 CFR § 663.5(b).

waiver was not requested, or the request was denied, the auditor will verify that the manufacturer has provided enough detail in its documentation to demonstrate that FTA's Buy America requirements have been met.

The recipient must confirm that the manufacturer has complied with U.S. final assembly requirements and that the cost of components and subcomponents is greater than the required domestic content percentage of the aggregate cost for all components. If the manufacturer does not provide sufficient information, the recipient must seek additional information.

- Buy America-Exempt Rolling Stock Vehicles

  If a vehicle is eligible for a waiver, the recipient must:

  - Obtain a Buy America waiver letter from FTA before a contract is awarded;
  - Complete a Post-Delivery Buy America Certificate of Non-Compliance (see Appendix B.9 for sample certification); and
  - Keep the Pre-Award Buy America Certificate of Non-Compliance on file for future FTA reviews.

3.1.2. Documentation for Post-Delivery Buy America Certification

A recipient's Post-Delivery Audit Report summarizes the process the recipient used to verify the manufacturer's compliance with the Buy America requirements.

At the conclusion of the audit, the recipient must maintain a file for FTA reviews that includes:

- A copy of the Post-Delivery Audit Report;
- The recipient's Post-Delivery Buy America Certificate;
- The post-delivery purchaser's requirement certification;
- A manufacturer's FMVSS certification, when appropriate;
- The manufacturer's certificate of compliance or non-compliance with Buy America rolling stock requirements.

A sample Post-Delivery Audit Report is included in Appendix C.2.

The manufacturer provides the following documents for the **Post-Delivery Buy America Certification**:

- A detailed list of components and subcomponents which includes the manufacturer/supplier and country of origin;
- Cost of each component and corresponding subcomponents;
- Both domestic and foreign content, in dollars or as a percentage;
- The final assembly location;
- Description of all work performed at the final assembly location; and
- Cost of the work performed at the final assembly location.

Although the manufacturer can provide its domestic content worksheet in terms of percentages rather than dollars, the recipient or its auditor needs to review supporting actual cost documents in order to verify compliance. The manufacturer must be able to support all the costs depicted in the domestic content worksheet and final assembly scope of work. The Post-Delivery Audit Report should not include confidential data provided to the recipient or an auditor but should summarize the data reviewed to support the conclusions in the report.

Manufacturers may have concerns about recipients' review of cost data. The manufacturer and recipient may agree that the recipient will contract with an external auditor to conduct the manufacturer's Buy America certification review—and assure the manufacturer that the cost data will be kept confidential. Alternatively, a recipient may be able to keep its Buy America audit function independent by using a "firewall" and assuring the manufacturer that those employees of the recipient performing the Buy America audit are prohibited from disclosing any of the manufacturer's proprietary data. Further, the review of documents may occur at the manufacturer's place of business. There is no requirement that the recipient or its auditors obtain copies of the documents they review. Whether conducted by a contractor or the recipient's employees, the manufacturer may require the reviewer to sign a non-disclosure agreement prior to reviewing the documents.

3.1.3. Additional Information for Post-Delivery Buy America Certifications

This subsection provides guidance to assist recipients, auditors, manufacturers, and suppliers in achieving compliance with the post-delivery certification requirements.

3.1.3.1. Verifying Domestic Content

As discussed for the pre-award audit, preparing and verifying domestic content compliance is fundamental to the audit process. Recipients will review and verify the stated domestic content, by cost; and verify that the final assembly location and costs confirm that the minimum activities for final assembly are performed in the U.S.

Auditors will obtain current information on the cost of components and subcomponents from manufacturers, as illustrated in Section 4. The manufacturers' worksheets will note any changes in component suppliers and component percent domestic content, by cost.

Auditors may validate manufacturers' worksheets by reviewing paid invoices, purchase orders, or other source documents. Auditors may link the costs presented by the manufacturer to the specific source documents. Some auditors find it useful to add a column to the domestic content worksheet and track costs associated with specific paid invoices or purchase orders so they can more easily monitor changes over time.

Auditors will verify that the manufacturer is accounting for all components in its domestic content calculation and that all components and subcomponents are properly classified. See Section 4.2.1, "Component/Subcomponent," for further discussion on classifying components and determining their classification as being of domestic or foreign origin.

3.1.3.2. Components with Domestic Content Percentages Close to the Minimum Threshold

During a post-delivery audit, auditors should direct specific attention to components with the highest dollar (or percentage) values as well as to components with domestic content percentages close to the minimum threshold. Similarly, auditors should also pay particular attention to vehicles with total domestic content that is very near the minimum threshold. Change orders and errors (even to smaller value components) could potentially slip the total domestic content percentage below the requirements.

As discussed in Section 2 Pre-Award Audit, auditors may also need to examine component suppliers to evaluate whether or not the suppliers have satisfied Buy America requirements.

3.1.3.3. Reasonableness of Component and Subcomponent Costs

Auditors should compare costs for components and subcomponents listed on the manufacturers' domestic content worksheet to comparable vehicle procurement costs. The purpose of this comparison is to check that the manufacturers' domestic content worksheet appropriately depicts costs, so that component costs are not under- or over-valued in an effort to meet the domestic content requirement for rolling stock procurements. Please see Section 4 for more information on domestic content calculations.

3.1.3.4. Verification of U.S. Final Assembly

In order to verify that final assembly activities comply with Buy America requirements, recipients must review documentation provided by the manufacturer that demonstrates:

- That the final assembly site is located in the U.S.;
- That the final assembly activities meet the minimum requirements listed in Appendix D to 49 CFR § 661.11; and
- The total cost of final assembly, including labor and overhead costs.

Appendix D to 49 CFR § 661.11 provides the minimum requirements for final assembly of vehicles that manufacturers must meet to comply with Buy America regulations. The manufacturer's documentation will provide enough detail to

allow a recipient to determine that its final assembly activities would constitute adequate final assembly under Buy America requirements.

The scope of final assembly activities may vary from manufacturer to manufacturer and even from vehicle to vehicle. During a post-delivery audit, auditors will review the manufacturer's activities and verify that the manufacturer performed the final assembly activities in the U.S. This may be accomplished by reviewing the Resident Inspector Report, when such a report is required.

An auditor may verify compliance through a variety of methods at the post-delivery stage, including, but not limited to:

- Reviewing the manufacturer's flow chart(s) of the production work station;
- Work instructions;
- QC/QA inspections (hold points);
- Manufacturing plans; and
- Assembly drawings (as would be kept or posted on a shop floor).

In the event an on-site inspector is not required by 49 CFR § 663.37, recipients will consider whether auditor(s) should make on-site visits to verify final assembly activities. Site visits may be merited if a final assembly facility is new or if there are concerns about the manufacturer's capacity.

If a recipient determines that a manufacturer's final assembly processes do not include all the activities that are typically considered the minimum requirements, it can request an FTA determination of compliance. FTA will review these requests on a case-by-case basis to determine compliance with Buy America.

Buy America regulations also require that the manufacturer provide the cost of U.S. final assembly. While reviewing a manufacturer's final assembly documentation, auditors consider the following:

- Whether the manufacturer has provided sufficient documentation for the cost of final assembly; and
- Whether the manufacturer's actual total cost for final assembly includes all costs consistent with the minimum requirements for final assembly contained in Appendix D to 49 CFR 661.11.

If necessary, auditors should obtain a breakdown of the labor hours and hourly rates by craft (or a composite rate based on the ratio of the associated skill sets and supervisory personnel). The auditor should verify that the information the manufacturer provided is commensurate with the labor actually employed for the final assembly activity.

3.1.3.5. Supplier Buy America Certificate Documentation for Buy America Certification at Post-Delivery

The manufacturer is responsible for ensuring that suppliers and subcontractors comply with Buy America requirements. Suppliers must provide sufficient documentation to manufacturers that demonstrates compliance with post-delivery audit requirements.

It also is recommended, but not required, that manufacturers obtain executed (signed and dated) certifications from all their suppliers for the post-delivery audit. A suggested template that captures the relevant information is provided in Appendix B.6, "Sample Supplier Buy America Certification."

In order to certify compliance, manufacturers and suppliers must be knowledgeable about the correct method of calculating a component's percentage of domestic content. Section 4, "Domestic Content Calculations," provides detailed instructions for calculating domestic content.

Manufacturers will conduct due diligence when documenting the location of a supplier's manufacturing facility for each component (and ideally for each subcomponent). Manufacturers may perform supplier qualifications, which include site visits, detailed reviews of supplier documents, first article inspections, qualification testing, and source/pre-shipment inspection to verify suppliers' certifications. Component suppliers executing the certificate have additional responsibility to verify that subcomponents conform to specified standards.

3.1.3.6. Post-Delivery Domestic Content Monitoring

Post-Delivery Domestic Content Monitoring, or intermediate review, is a recommended best practice that occurs after the vehicle manufacturer delivers the first vehicle to the recipient and until the vehicle manufacturer transfers title to the last vehicle to the recipient or the recipient puts the last vehicle into revenue service, whichever is first. The recipient will complete the Post-Delivery Audit as described in 49 CFR § 663.5(f) and 49 CFR § 663.33 on the first vehicle delivered.

The resident inspector, or an agent or employee of the recipient, would perform the Post-Delivery Domestic Content Monitoring. The purpose of the Post-Delivery Domestic Content Monitoring is to ensure that all vehicles after the first vehicle are compliant with the regulations.

The personnel performing the Post-Delivery Domestic Content Monitoring monitor all of the following for changes to determine that any changes detected do not affect the compliance of any vehicle:

- Change Orders
- Changes to the Bill of Materials

- Changes to the assembly or manufacturing processes
- Changes to the final assembly location
- Any changes to the cost or origin of any components and subcomponents
- Any change that would affect the domestic content of the vehicle

If the recipient (or its agent) detects any changes, the recipient (or its agent) would perform an evaluation to determine if the domestic content of the vehicles has changed. If the domestic content is below the minimum requirement, then the recipient should notify the manufacturer of non-compliance and require the manufacturer to comply with Buy America. If the manufacturer is unable or unwilling to comply with Buy America on the production vehicles, the recipient should contact its Regional Office regarding the non-compliance.

3.2. Post-Delivery Purchaser's Requirements Certification – 49 CFR § 663.37

This subsection describes the process that recipients will follow in order to demonstrate compliance with the **Post-Delivery Purchaser's Requirements Certification** in 49 CFR § 663.37.

The **Post-Delivery Purchaser's Requirements Certification** certifies that the delivered vehicles meet the contract specifications, based on the recipient's visual inspections, road tests, monitoring of the final assembly process and the Resident Inspector's Report of manufacturing activities.

The intent of the **Post-Delivery Purchaser's Requirements Certification** is to safeguard recipients by ensuring that the delivered vehicles comply with contract specifications.

3.2.1. Post-Delivery Purchaser's Requirements Certification Requirements

Recipients must keep a **Post-Delivery Purchaser's Requirements Certification** on file that certifies:

- When required by 49 CFR § 663.37, a resident inspector (other than an agent or employee of the manufacturer) was at the manufacturing site throughout the period of manufacture and completed a report on the manufacture of the vehicles; AND
- After reviewing the **Resident Inspector's Report**, and visually inspecting and road testing the delivered vehicles, the vehicles meet the contract specifications.

With certain exceptions described below, recipients are required to have an on-site resident inspector at the manufacturing site throughout the manufacturing period. The resident inspector must:

- Remain full-time at, or periodically visit, the final assembly location during the period of manufacture; and
- Visually inspect, participate in, and witness performance tests of the vehicles.

Further, the resident inspector may visit component manufacturing sites, as necessary, during the period of manufacture of the rolling stock.

The resident inspector must prepare the Resident Inspector's Report that, at a minimum, provides:

- Accurate records of all vehicle construction activities (e.g., component manufacturing processes, final assembly activities, and collected quality control data); and
- A summary of how the construction and operation of the vehicles meet (or do not meet) the contract specifications. The report will reference the above cited manufacturing processes, final assembly activities, and quality control data.

It is the recipient's responsibility to verify that the vehicles comply with the contract specifications and to identify areas of noncompliance. The purpose of the Resident Inspector's Report is to assist the recipient in verifying that the vehicles meet the contract specifications.

Upon delivery of the vehicles and following receipt and review of the Resident Inspector's Report, the recipient must visually inspect and road test the vehicles to ensure the vehicles meet the contract specifications.

Exceptions for on-site resident inspector. An on-site resident inspector is not required for (1) procurements of 10 or fewer buses; or (2) procurements of 20 or fewer vehicles serving rural (other than urbanized) areas, or urbanized areas of 200,000 people or fewer; or (3) procurements of any number of primary manufacturer standard production and unmodified vans. 49 CFR § 663.37. For such procurements, only visual inspection and road testing upon delivery to the recipient are required to certify compliance with the contract specifications.

3.2.2. Required Purchaser's Requirements Documentation at Post-Delivery

Once the recipient has reviewed the Resident Inspector's Report, successfully inspected and tested the delivered vehicles, and is satisfied the Purchaser's Requirements have been met, the recipient will then:

- Complete a **Post-Delivery Purchaser's Requirements Certification** (See Appendices B.10 and B.11 for sample certifications).

Recipients must maintain a file for future FTA reviews that includes:

- The Post-Delivery Purchaser's Requirements Certification,
- A copy of the Resident Inspector's Report and any associated supporting documentation,
- The solicitation specification,
- The manufacturer's bid specification,
- Authorizations of approved equals, and
- Any other supporting documentation.

3.2.3. Best Practices for Purchaser's Requirements Certification at Post-Delivery

While various approaches can be used to verify and document compliance for the **Post-Delivery Purchaser's Requirements Certification**, the following best practices are presented to assist recipients.

3.2.3.1 Assignment of Resident Inspector to Manufacturing/Final Assembly Site

The intent of the regulation is to help recipients verify that the vehicles will comply with its contract specifications. It is not meant to require that a resident inspector remain "full-time" at the manufacturer's site throughout the period of manufacture. Although this may be recommended for some vehicle procurements, the resident inspector requirements may be fulfilled with periodic visits.

3.2.3.2. Resident Inspector's Report for Purchaser's Requirements at Post-Delivery

As previously mentioned, the Resident Inspector's Report includes, at a minimum, accurate records of all vehicle construction activities (e.g., component manufacturing processes, final assembly activities, and collected quality control data) and a description of how the construction and operation of the vehicles meet (or do not meet) the contract specifications. Manufacturers will provide the necessary documentation to complete the review.

As a best practice, the Resident Inspector's Report and supporting documentation may include,

- A summary of the Resident Inspector's Report describing the scope of work performed on behalf of the recipient. The report would identify all activities that verify that the vehicle(s) comply with the contract specifications, and would include inspection qualification, and production testing.
- Recipient's independent inspections, in addition to the manufacturer's quality control (QC). This may be demonstrated by signed inspection reports (usually by

hold point inspections where the manufacturer cannot proceed with work until the resident inspector's approval is obtained).

- The vehicle history books provided by the manufacturer and reviewed by the resident inspector prior to authorization for shipment of the vehicle(s). The resident inspector would briefly summarize the content of the vehicle history books provided by the manufacturer and include samples or excerpts that demonstrate accurate record of vehicle construction activities and adherence to quality control processes.
- Sample(s) of the Authorization-for-Shipment forms. The forms would include a sign-off signature by the resident inspector for each vehicle. The forms would list any open action items at the time of shipment.
- A summary describing how the manufacturer adequately implemented its QC processes throughout the manufacturing process. The summary would also address how the manufacturer adhered to appropriate FTA elements of quality.[26] For example, a sample Closed Nonconformance Report would be included that identifies any corrective rework/repairs that were made and approved by the recipient or its designated representative. Note that nonconforming material that was repaired (that is, not fully conforming to OEM/specification requirements), or that is permitted to be used "as is" must be approved by the recipient.
- Verification that the manufacturer has maintained complete records of construction for each vehicle. These documents (typically called car files) would likely contain details beyond the scope of the Resident Inspector's Report such as all of the manufacturer's quality control (QC) inspections.
- Evidence that delivered vehicles have been inspected and road tested to confirm they meet contract specifications. The report would include a summary list of static, dynamic, and performance tests performed on each vehicle. A sample of key test report results that show sign-offs for completed tests, failed tests, and any corrective action will also be included. This summary list of test results would be compared to the contract specifications to validate that the vehicles meet (or do not meet) contact specifications. Any elements that do not meet specification requirements must be accompanied by a contract modification approved by the recipient and identified in the Resident Inspector's Report summary.

[26] See FTA Quality Management System Guidelines, https://www.transit.dot.gov/funding/procurement/project-management-oversight-pmo.

3.3. Post-Delivery Federal Motor Vehicle Safety Standards (FMVSS) Certification of Compliance or Inapplicability

Recipients purchasing motor vehicles must demonstrate that the vehicles comply with FMVSS as part of the requirement for the post-delivery audit. The recipient must keep on file the certification that it received a copy of the manufacturer's self-certification information that the vehicle complies with FMVSS.[27]

For FMVSS compliant motor vehicles, the recipient must:

- Obtain the FMVSS self-certification sticker information from the motor vehicle manufacturer;
- Confirm the manufacturer's FMVSS sticker is affixed to each motor vehicle. [The sticker is usually located in the interior front curbside of the motor vehicle (see Appendix B.15 – B.19 for sample FMVSS stickers)]; and
- Complete a **Post-Delivery FMVSS Compliance Certification** (see Appendix B.12 for a sample certification).

The recipient must keep the manufacturer's Post-Delivery FMVSS self-certification information with the FMVSS Compliance Certification in its file.

There are instances when motor vehicles are not subject to FMVSS. Consider, for example, 49 CFR § 571.7 (Applicability of FMVSS Regulation) and 49 CFR part 555 (Temporary Exemptions from Motor Vehicle Safety Standards). In such cases, recipients must keep on file certification that the contracted motor vehicles are not subject to FMVSS.[28]

If the contracted motor vehicles are not subject to FMVSS, the recipient must:

- Obtain the manufacturer's certified statement indicating that the contracted motor vehicles are not subject to FMVSS;
- Complete a **Post-Delivery Certification of FMVSS Inapplicability** (see Appendix B.14 for a sample certification).

The recipient must keep the manufacturer's Post-Delivery FMVSS exemption statement with the Pre-Award Certification of FMVSS Inapplicability in its file.

[27] 49 CFR § 663.41.
[28] 49 CFR § 663.43.

4. Domestic Content Calculations

This section provides guidance and clarification on how to calculate domestic content correctly. It clarifies the distinctions in the treatment of domestic content for components and subcomponents and offers clarification on how to determine what is a component versus what is a subcomponent for rolling stock. The intent is to assist recipients in the verification and validation of domestic content calculations to verify compliance with the Buy America requirements.

In order to verify compliance with Buy America's domestic content requirements, the recipient will need to undertake an analysis that accounts for the costs of all components and subcomponents, both foreign and domestic, consistent with 49 CFR § 661.11and subcomponents. The Domestic Content Calculation must demonstrate compliance with the requirement that the cost of components and subcomponents produced in the United States equals or exceeds the required minimum percentage of the cost of all components and subcomponents.[29] Section 4.3.3 provides guidance to calculate the Vehicle Material Total Cost, which is the summation of all component costs and is the proper value that must be used in calculating the percentage of domestic content of the vehicle consistent with 49 CFR § 661.11.

FTA has observed that some recipients and vendors, or their agents or auditors, are calculating the domestic content amount by dividing the total costs of the domestic components by the estimated value of the vehicle, found by subtracting certain costs from the Contract Total Price of the vehicle. This calculation is not consistent with 49 CFR § 661.11 and fails to demonstrate compliance.

4.1. Vehicle Level Domestic Content Calculations

Calculation of the domestic content is conducted at two levels: the vehicle level, and the component level. Each is somewhat different in nature.

a) At the vehicle level – The rolling stock manufacturer must demonstrate that the cost of components produced in the U.S. is equal to or more than the required minimum percentage of the cost of all components on the vehicle.[30] The recipient must verify the manufacturer's information.

b) At the component level – For a component to be of domestic origin, more than 60 percent[31] of its subcomponents, by cost, must be manufactured in the United States, and

[29] 49 U.S.C. 5323(j)(2).
[30] 49 U.S.C. § 5323(j)(2).
[31] As the domestic content percentage increases in FY 2018 and FY 2020, the minimum domestic content of subcomponents will also increase, to more than 65 percent in FY 2018 and more than 70 percent in FY 2020.

the manufacture of the component must occur in the U.S.[32] If the component is deemed to be of domestic origin, then the manufacturer receives credit for the entire cost of the component (including the foreign subcomponents). If a component contains less than the minimum domestic content percentage, i.e., is of foreign origin, then the manufacturer only receives domestic credit for those subcomponents manufactured in the U.S.

4.2. Domestic Content - Relevant Definitions

For vehicle components to be considered domestic, the subcomponents, by cost, must be the required minimum percentage of domestic origin, and manufacturing must occur in the U.S. Therefore, when evaluating domestic content, it is important to have a full understanding of **the manufacturer of the component, its country of origin**, and **the percent cost of its subcomponents** relative to the cost of the component.

4.2.1. Component/Subcomponent

A component, as defined in 49 CFR § 661.11(c), is any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an end product at the final assembly location. A component may be manufactured at the final assembly location if the manufacturing process to produce the component is an activity separate and distinct from the final assembly of the end product.[33] Typical components of buses and rail rolling stock are listed in Appendices B and C to 49 CFR § 661.11; these illustrative lists are not intended to be exhaustive. Also, 49 CFR § 661.11(t), (u), and (v) list specific components that make-up train control (t), communication equipment (u), and traction power equipment (v).

For a component to be of domestic origin, more that 60 percent of the subcomponents of that component, by cost, must be of domestic origin, and the manufacture of the component must take place in the United States. [34] Under FTA's September 1, 2016 policy guidance implementing the increased domestic content included in the FAST Act, the requirement for domestic subcomponents will increase accordingly. Therefore, if the domestic content for the vehicle is more than 65 percent, then a component must contain more than 65 percent of domestic subcomponents. If a component is determined to be domestic, its entire cost may be used in calculating the cost of domestic content of the vehicle.[35] If a component is determined to be foreign, only the cost of U.S. manufactured subcomponents, if any, may be used in calculating the cost of domestic content of the vehicle.

[32] 49 CFR § 661.11(g).
[33] See 49 CFR § 661.11(d).
[34] 49 CFR § 661.11(g).
[35] See 49 CFR § 661.11(g).

In contrast, a subcomponent is any article, material, or supply, whether manufactured or unmanufactured, that is one step removed from a component in the manufacturing process and that is incorporated directly into a component. 49 CFR § 661.11(f). A subcomponent need only be manufactured in the U.S. to be considered domestic. 49 CFR § 661.11(h).If a subcomponent manufactured in the U.S. is exported for inclusion in a component that is manufactured outside the U.S. and it receives tariff exemptions under the procedures set forth in 19 CFR 10.11 through 10.24, the subcomponent retains its domestic identity and can be included in the calculation of the domestic content of an end product even if such a subcomponent represents less than 60 percent of the cost of a particular component. 49 CFR §661.11(i)

If a subcomponent manufactured in the United States is exported for inclusion in a component manufactured outside the United States and it does not receive tariff exemption under the procedures set forth in 19 CFR 10.11 through 10.24, the subcomponent loses its domestic identity and cannot be included in the calculation of the domestic content of an end product. 49 CFR § 661.11(j)

Finally, except as provided in 49 U.S.C. § 5323(j)(5), raw materials produced in the United States and then exported for incorporation into a component are not considered to be a subcomponent for the purpose of calculating domestic content. 49 CFR § 661.11(k). The value of such raw materials is to be included in the cost of the foreign component.

4.2.2. Lists of Typical Components

The manufacturer's list of typical components for rail rolling stock is in Appendix C to 49 CFR part § 661.11, and includes:

car shells

engines

main transformer

pantographs

traction motors

propulsion gear boxes

interior linings

acceleration and braking resistors

propulsion controls

low voltage auxiliary power supplies

air conditioning equipment

air brake compressors

brake controls

foundation brake equipment

articulation assemblies

train control systems

window assemblies

communication equipment

lighting, seating

doors

door actuators and controls

wheelchair lifts and ramps to make the vehicle accessible to persons with disabilities

couplers and draft gear

trucks

journal bearings	*diagnostic equipment*
axles	*third rail pick-up equipment*

The manufacturer's typical list of components for buses is in Appendix B to 49 CFR part § 661.11:

car body shells

engines

transmissions

front axle assemblies

rear axle assemblies

drive shaft assemblies

front suspension assemblies

rear suspension assemblies

air compressor and pneumatic systems

generator/ alternator and electrical systems

steering system assemblies

front and rear air brake assemblies

air conditioning compressor assemblies

air conditioning evaporator/ condenser assemblies

heating systems

passenger seats

driver's seat assemblies

window assemblies

entrance and exit door assemblies

door control systems

destination sign assemblies

interior lighting assemblies

front and rear end cap assemblies

front and rear bumper assemblies

specialty steel (structural steel tubing, etc.) aluminum extrusions, aluminum, steel or fiberglass exterior panels

interior trim, flooring, and floor coverings

At a minimum, the items listed in Appendices B and C of 49 CFR § 661.11 are components for domestic content calculation purposes. If there are new technologies that supersede the items in Appendices B and C of 49 CFR § 661.11, these should be reviewed to verify that the component/subcomponent designations applied for that project are consistent with the regulations. If there is any question of compliance, recipients should consult with FTA.

4.2.3. Calculating Costs of Components and Subcomponents

The domestic content calculation is based on ***costs***, not the contract price. The total cost of all components of the rolling stock will not be a number that can be derived from the bidder's bid price or final contract price.

As part of the pre-award and post-delivery audit requirements, the recipient must certify that it "is satisfied that the rolling stock to be purchased" (pre-award audit) or "received" (post-delivery) "meets the requirements of [49 U.S.C. § 5323(j)(2)(C)] after having reviewed itself or through an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer, which lists:"

Pre-Award Audit Documentation	Post-Delivery Audit Documentation
(1) Component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin, and costs; and (2) The location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.	(1) Components and subcomponent parts of the rolling stock identified by manufacturer of the parts, their country of origin, and costs; and (2) The actual location of the final assembly point for the rolling stock including a description of the activities which took place at the final assembly point and the cost of the final assembly.

The methodology for calculating the costs of components and subcomponets is set forth in FTA's Buy America regulation at 49 CFR § 661.11. Both manufacturers and Buy America auditers need to understand section 661.11 in order to calculate domestic content for rolling stock.

Rolling stock will include components and subcomponents from one of two sources: (1) outside suppliers; or (2) the bidder. Section § 661.11(m) sets forth the basic methodology for calculating costs for components or subcomponents received from suppliers or manfuctured by the bidder:

> (1) The cost of a component or a subcomponent is the price that a bidder or offeror must pay to a subcontractor or supplier for that component or subcomponent. Transportation costs to the final assembly location must be included in calculating the cost of foreign components and subcomponents.
>
> (2) If a component or subcomponent is manufactured by the bidder or offeror, the cost of the component is the cost of labor and materials incorporated into the component or subcomponent, an allowance for profit, and the administrative and overhead costs attributable to that component or subcomponent under normal accounting principles.

For the post-delivery audit, the actual cost, not the bid price, of a component is to be considered in calculating domestic content. Thus, the cost for the component would be the purchase price paid by the bidder (i.e., vehicle manufacturer) to the component or subcomponent supplier. Similarly, the cost for the subcomponent would be the actual purchase price paid by the component supplier to the subcomponent supplier. If the component is manufactured by the bidder, the cost of the component is calculated by adding the cost of labor and materials incorporated into the component or subcomponent, an allowance for profit, and the administrative and overhead costs attributable to that component or subcomponent under normal accounting principles.

4.2.4 Final Assembly

Manufacturing, as discussed above, refers to the activities that transform the subcomponents into a new and functionally different component.[36] A component may be manufactured at the final assembly location if the manufacturing process to produce the component is an activity separate and distinct from the final assembly of the end product.[37] The allowable costs for components manufactured by the bidder or offeror (i.e., the OEM) are set forth in 49 CFR § 661.11(m)(2).

Final assembly, in contrast, is the creation of the end product from individual elements brought together for that purpose through application of manufacturing processes. Final assembly activities for rail cars and buses are set forth in Appendix D to 49 CFR § 661.11. Labor costs involved in final assembly shall not be included in calculating component costs.

In the case of a rolling stock vehicle, while the car body is itself a component of the completed vehicle, it is also the component onto which the other components will be installed. Therefore, each item installed directly onto the car body is a component.

In the case of a railcar, the truck is likewise a component, as it is the structure onto which the individual components will be installed. Therefore, each item installed directly onto the truck (frame) would be a component.

The same rationale is applied for other equipment, such as propulsion equipment and communication equipment. In each case, the individual items that are installed on the vehicle are components.

4.3. Domestic Content Worksheet

This section illustrates one method for calculating domestic content of rolling stock. The sample spreadsheet is intended to allow a standard presentation of domestic content calculations for bus and rail vehicles, as well as facilitate verification that:

- All components are accounted for in the domestic content calculation and all of the vehicle's domestic and foreign content is accounted for.
- The cost of components and subcomponents are calculated in accordance with 49 CFR § 661.11.
- Each component has been correctly identified as either domestic or foreign based on the supplier identification and the manufacturing location.
- Each subcomponent has been correctly identified as either domestic or foreign based on the supplier identification and the manufacturing location.

[36] See 49 CFR § 661.11(e).
[37] See 49 CFR § 661.11(d).

4.3.1. Domestic Content Worksheet Instructions

Below is a sample of a Domestic Content Worksheet with step-by-step instructions for filling in the worksheet.[38]

Component /Subcomponent	Supplier Name	Manufacturing Location	Manufacturing Location (if U.S. - City & State;	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %		U.S. Content by Cost	Foreign Content by Cost	Component % of Vehicle Material Costs	
Component											
		(U.S. or Foreign)	If Foreign - City & Country)	U.S.	Foreign	U.S.	Foreign			U.S.	Foreign
Component 1											
Component 1	OEM	U.S.	Any town, State								
Subcomponent 1.1	OEM	U.S.	Any town, State	$20,000.00	$0.00	6.6%	0.0%				
Subcomponent 1.2	OEM	U.S.	Any town, State	$20,000.00	$0.00	0.0%	0.0%				
Subcomponent 1.3	Sub Supplier 1.3	U.S.	Any town, State	$60,000.00	$0.00	19.8%	0.0%				
Subcomponent 1.4	Sub Supplier 1.3	Foreign	Any city, Country	$0.00	$85,000.00	0.0%	28.1%				
Subcomponent 1.5	Sub Supplier 1.5	U.S.	Any town, State	$103,000.00	$0.00	34.7%	0.0%				
OEM Labor/Overhead/profit	OEM	U.S.	Any town, State	$3,000.00	$0.00	1.0%	0.0%				
Component 1 - U.S. & Foreign Costs Subtotal				$218,000.00	$85,000.00	71.9%	28.1%				
Component 1 Total Cost	per 49 CFR § 611.11(m)(2)		$303,000.00					$303,000.00	$0.00	48.48%	0.00%
Component 2											
Component 2	Component Supplier	Foreign	Any city, Country								
Subcomponent 2.1	Sub Supplier 2.1	U.S. w/tariff exempt	Any town, State	$50,000.00	$0.00	29.9%	0.0%				
Subcomponent 2.2	Sub Supplier 2.2	U.S. w/tariff exempt	Any town, State	$10,000.00	$0.00	6.0%	0.0%				
Subcomponent 2.3	Sub Supplier 2.3	Foreign	Any city, Country	$0.00	$55,000.00	0.0%	32.9%				
Subcomponent 2.4	Sub Supplier 2.3	Foreign	Any city, Country	$0.00	$25,000.00	0.0%	15.0%				
Subcomponent 2.5	Sub Supplier 2.4	Foreign	Any city, Country	$0.00	$18,000.00	0.0%	10.8%				
Subcomponent 2.6	Sub Supplier 2.5	Foreign	Any city, Country	$0.00	$9,000.00	0.0%	5.4%				
Component 2 - U.S. & Foreign Costs Subtotal				$60,000.00	$107,000.00	35.9%	64.1%				
Component 2 Total Cost	per 49 CFR § 611.11(m)(1)		$167,000.00					$60,000.00	$107,000.00	9.60%	37.92%
Component 3											
Component 3	Component Supplier	U.S.	Any town, State								
Subcomponent 3.1	Sub Supplier 3.1	Foreign	Any city, Country	$0.00	$50,000.00	0.0%	32.3%				
Subcomponent 3.2	Sub Supplier 3.2	U.S.	Any town, State	$15,000.00	$0.00	9.7%	0.0%				
Subcomponent 3.3	Sub Supplier 3.3	Foreign	Any city, Country	$0.00	$55,000.00	0.0%	35.5%				
Subcomponent 3.4	Sub Supplier 3.4	Foreign	Any city, Country	$0.00	$25,000.00	0.0%	16.1%				
U.S. Component manufacturing costs	Component Supplier	U.S.	Any town, State	$10,000.00	$0.00	6.5%	0.0%				
Component 3 - U.S. & Foreign Costs Subtotal				$25,000.00	$130,000.00	16.1%	83.9%				
Component 3 Total Cost	per 49 CFR § 611.11(l) and (m)(1)		$155,000.00					$25,000.00	$130,000.00	4.00%	20.80%
Vehicle Material Subtotals -- U.S. & Foreign								$388,000.00	$237,000.00	62.08%	37.92%
Vehicle Material Total Cost (Total Cost of all Components)				$625,000.00							

For simplicity, the vehicle consists of three components, one of which is manufactured by the bidder (i.e., the OEM), one is of foreign manufacture, and one is manufactured by a U.S. supplier. Those cells that are colored gray or white are intended for input based on documentation provided by the manufacturer. Other cells highlighted in yellow are calculated based on the information input to the worksheet.

Component 1 is manufactured by the OEM, contains more than 60% domestic content by cost, and is manufactured in the United States. Thus, the component is of domestic origin and the entire cost of the component may be used to calculate the domestic content of the vehicle. 49 CFR § 661.11(g). Because Component 1 is manufactured by the OEM, the cost of the component includes the labor and materials incorporated into the component, an allowance for profit and the administrative and overhead costs attributable to that component or subcomponent under normal accounting principles. 49 CFR § 661.11(m)(2)

Component 2 is manufactured overseas, contains less than 60% domestic content, and the U.S. subcomponents contained in the component received a tariff exemption. Thus, the U.S.

[38] The worksheet here reflects a domestic content requirement of more than 60%. Pursuant to 49 U.S.C.

5329(j)(2)(C), the domestic content percentage will increase starting in FY 2018. This worksheet provides an example of calculating the percentage of domestic content and uses the greater than 60% domestic content percentage requirement in place at the time of the FAST Act's passage. The worksheet can be modified to accommodate vehicles subject to higher domestic content.

subcomponents retain their domestic identity and can be included in the calculation of the domestic content of the vehicle. The manufacturing and transportation costs are included in calculating the cost of the foreign component. 49 CFR § 661.11(i), (m)(1).

Component 3 is manufactured in the U.S., but contains less than 60% domestic content. If a component is manufactured in the United States, but contains less than 60 percent domestic subcomponents, by cost, the cost of the domestic subcomponents and the cost of manufacturing the component may be included in the calculation of the domestic content of the end product. 49 CFR § 661.11(l).

STEP 1

In *Component/Subcomponent* column, fill in all vehicle components. The list of items that typically would be considered components of rolling stock identified in Appendices B and C to 49 CFR part § 661.11 is not all-inclusive. Identify components and subcomponents by name and/or part number traceable to the procurement. For each component, fill in the corresponding subcomponents as applicable. Identify subcomponents as separate line items. For components manufactured by the OEM, include a line for OEM labor/overhead/profit per section 661.11(m)(2). In *Supplier Name* column, fill in supplier's name for each component and corresponding subcomponent(s).

Component /Subcomponent	Supplier Name	Manufacturing Location	Manufacturing Location (if U.S. - City & State; Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %	
Component				U.S.	Foreign	U.S.	Foreign
Component 1							
Component 1	OEM	U.S.	Any town, State				
Subcomponent 1.1	OEM	U.S.	Any town, State	$20,000.00	$0.00	6.6%	0.0%
Subcomponent 1.2	OEM	U.S.	Any town, State	$30,000.00	$0.00	9.9%	0.0%
Subcomponent 1.3	Sub Supplier 1.3	U.S.	Any town, State	$60,000.00	$0.00	19.8%	0.0%
Subcomponent 1.4	Sub Supplier 1.3	Foreign	Any city, Country	$0.00	$85,000.00	0.0%	28.1%
Subcomponent 1.5	Sub Supplier 1.5	U.S.	Any town, State	$105,000.00	$0.00	34.7%	0.0%
OEM Labor/Overhead/profit	OEM	U.S.	Any town, State	$3,000.00	$0.00	1.0%	0.0%
Component 1 - U.S. & Foreign Costs Subtotal				$218,000.00	$85,000.00	71.9%	28.1%
Component 1 Total Cost	per 49 CFR § 611.11(m)(2)		$303,000.00				
Component 2							
Component 2	Component Supplier	Foreign	Any city, Country				
Subcomponent 2.1	Sub Supplier 2.1	U.S. w/tariff exempt	Any town, State	$50,000.00	$0.00	29.9%	0.0%
Subcomponent 2.2	Sub Supplier 2.2	U.S. w/tariff exempt	Any town, State	$10,000.00	$0.00	6.0%	0.0%
Subcomponent 2.3	Sub Supplier 2.3	Foreign	Any city, Country	$0.00	$55,000.00	0.0%	32.9%
Subcomponent 2.4	Sub Supplier 2.3	Foreign	Any city, Country	$0.00	$25,000.00	0.0%	15.0%
Subcomponent 2.5	Sub Supplier 2.4	Foreign	Any city, Country	$0.00	$18,000.00	0.0%	10.8%
Subcomponent 2.6	Sub Supplier 2.5	Foreign	Any city, Country	$0.00	$9,000.00	0.0%	5.4%
Component 2 - U.S. & Foreign Costs Subtotal				$60,000.00	$107,000.00	35.9%	64.1%
Component 2 Total Cost	per 49 CFR § 611.11(m)(1)		$167,000.00				
Component 3							
Component 3	Component Supplier	U.S.	Any town, State				
Subcomponent 3.1	Sub Supplier 3.1	Foreign	Any city, Country	$0.00	$50,000.00	0.0%	32.3%
Subcomponent 3.2	Sub Supplier 3.2	U.S.	Any town, State	$15,000.00	$0.00	9.7%	0.0%
Subcomponent 3.3	Sub Supplier 3.3	Foreign	Any city, Country	$0.00	$55,000.00	0.0%	35.5%
Subcomponent 3.4	Sub Supplier 3.4	Foreign	Any city, Country	$0.00	$25,000.00	0.0%	16.1%
U.S. Component manufacturing costs	Component Supplier	U.S.	Any town, State	$10,000.00	$0.00	6.5%	0.0%
Component 3 - U.S. & Foreign Costs Subtotal				$25,000.00	$130,000.00	16.1%	83.9%
Component 3 Total Cost	per 49 CFR § 611.11(l) and (m)(1)		$155,000.00				
Vehicle Material Subtotals -- U.S. & Foreign							
Vehicle Material Total Cost (Total Cost of all Components)				**$625,000.00**			

STEP 3

In the first *Manufacturing Location* column, for each component enter U.S. or Foreign. For each subcomponent, enter U.S., U.S. with tariff exemption, or Foreign.

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (if U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %	
				U.S.	Foreign	U.S.	Foreign
Component 1							
Component 1	OEM	U.S.	Any town, State				
Subcomponent 1.1	*OEM*	*U.S.*	*Any town, State*	$20,000.00	$0.00	6.6%	0.0%
Subcomponent 1.2	*OEM*	*U.S.*	*Any town, State*	$30,000.00	$0.00	9.9%	0.0%
Subcomponent 1.3	*Sub Supplier 1.3*	*U.S.*	*Any town, State*	$60,000.00	$0.00	19.8%	0.0%
Subcomponent 1.4	*Sub Supplier 1.3*	*Foreign*	*Any city, Country*	$0.00	$85,000.00	0.0%	28.1%
Subcomponent 1.5	*Sub Supplier 1.5*	*U.S.*	*Any town, State*	$105,000.00	$0.00	34.7%	0.0%
OEM Labor/Overhead/profit	*OEM*	*U.S.*	*Any town, State*	$3,000.00	$0.00	1.0%	0.0%
Component 1 - U.S. & Foreign Costs Subtotal				$218,000.00	$85,000.00	71.9%	28.1%
Component 1 Total Cost	*per 49 CFR § 611.11(m)(2)*		*$303,000.00*				

STEP 4

In the second *Manufacturing Location* column for each component and corresponding subcomponent(s), fill in the City and State for U.S. or the City and Country for Foreign.

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (if U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %	
				U.S.	Foreign	U.S.	Foreign
Component 1							
Component 1	OEM	U.S.	Any town, State				
Subcomponent 1.1	*OEM*	*U.S.*	*Any town, State*	$20,000.00	$0.00	6.6%	0.0%
Subcomponent 1.2	*OEM*	*U.S.*	*Any town, State*	$30,000.00	$0.00	9.9%	0.0%
Subcomponent 1.3	*Sub Supplier 1.3*	*U.S.*	*Any town, State*	$60,000.00	$0.00	19.8%	0.0%
Subcomponent 1.4	*Sub Supplier 1.3*	*Foreign*	*Any city, Country*	$0.00	$85,000.00	0.0%	28.1%
Subcomponent 1.5	*Sub Supplier 1.5*	*U.S.*	*Any town, State*	$105,000.00	$0.00	34.7%	0.0%
OEM Labor/Overhead/profit	*OEM*	*U.S.*	*Any town, State*	$3,000.00	$0.00	1.0%	0.0%
Component 1 - U.S. & Foreign Costs Subtotal				$218,000.00	$85,000.00	71.9%	28.1%
Component 1 Total Cost	*per 49 CFR § 611.11(m)(2)*		*$303,000.00*				

STEP 5

In *Component Total Cost* row, fill in the component total cost. If the component was manufactured by the OEM, the cost of the component will include an allowance for profit and the administrative and overhead costs attributable to that component under normal accounting principles. 49 CFR § 661.11(m)(2). If the component was manufactured by a third-party supplier, then the component total cost is the actual cost of component. If the component is manufactured overseas, the cost of the component is what the OEM pays for it, plus transportation costs to the final assembly location. 49 CFR § 661.11(m)(1). If a component is manufactured in the United States, but contains less than the minimum domestic content, by cost, the cost of the domestic subcomponents and the cost of manufacturing the component may be included in the calculation of the domestic content of the end product. 49 CFR § 661.11(l).

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (if U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %	
				U.S.	Foreign	U.S.	Foreign
Component 1							
Component 1	OEM	U.S.	Any town, State				
Subcomponent 1.1	*OEM*	*U.S.*	*Any town, State*	$20,000.00	$0.00	6.6%	0.0%
Subcomponent 1.2	*OEM*	*U.S.*	*Any town, State*	$30,000.00	$0.00	9.9%	0.0%
Subcomponent 1.3	*Sub Supplier 1.3*	*U.S.*	*Any town, State*	$60,000.00	$0.00	19.8%	0.0%
Subcomponent 1.4	*Sub Supplier 1.3*	*Foreign*	*Any city, Country*	$0.00	$85,000.00	0.0%	28.1%
Subcomponent 1.5	*Sub Suppler 1.5*	*U.S.*	*Any town, State*	$105,000.00	$0.00	34.7%	0.0%
OEM Labor/Overhead/profit	*OEM*	*U.S.*	*Any town, State*	$3,000.00	$0.00	1.0%	0.0%
Component 1 - U.S. & Foreign Costs Subtotal				$218,000.00	$85,000.00	71.9%	28.1%
Component 1 Total Cost	*per 49 CFR § 611.11(m)(2)*		$303,000.00				

STEP 6

In *Component and Subcomponent Material Costs* columns:

a) For each component, enter the dollar amount of the corresponding subcomponent(s) under the *U.S. and Foreign* sub-columns, on the designated row(s). The cost of each subcomponent is the price the OEM must pay to a subcontractor or supplier for that subcomponent. Transportation costs to the final assembly location must be included in calculating the cost of foreign subcomponents. 49 CFR § 661.11(m)(1). If a component or subcomponent is manufactured by the bidder or offeror, an allowance for profit, and the administrative and overhead costs attributable to that component or subcomponent under normal accounting principles may be included. 49 CFR § 661.11(m)(2)

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (if U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %	
				U.S.	Foreign	U.S.	Foreign
Component 1							
Component 1	OEM	U.S.	Any town, State				
Subcomponent 1.1	*OEM*	*U.S.*	*Any town, State*	$20,000.00	$0.00	6.6%	0.0%
Subcomponent 1.2	*OEM*	*U.S.*	*Any town, State*	$30,000.00	$0.00	9.9%	0.0%
Subcomponent 1.3	*Sub Supplier 1.3*	*U.S.*	*Any town, State*	$60,000.00	$0.00	19.8%	0.0%
Subcomponent 1.4	*Sub Supplier 1.3*	*Foreign*	*Any city, Country*	$0.00	$85,000.00	0.0%	28.1%
Subcomponent 1.5	*Sub Suppler 1.5*	*U.S.*	*Any town, State*	$105,000.00	$0.00	34.7%	0.0%
OEM Labor/Overhead/profit	*OEM*	*U.S.*	*Any town, State*	$3,000.00	$0.00	1.0%	0.0%
Component 1 - U.S. & Foreign Costs Subtotal				$218,000.00	$85,000.00	71.9%	28.1%
Component 1 Total Cost	*per 49 CFR § 611.11(m)(2)*		$303,000.00				

b) Compute the material subtotal cost for each component by adding the cost of all of its U.S. and Foreign corresponding subcomponents, and enter on the row designated *Component Material Subtotal* under the *U.S. and Foreign* sub-columns as applicable.

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (if U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %	
				U.S.	Foreign	U.S.	Foreign
Component 1							
Component 1	OEM	U.S.	Any town, State				
Subcomponent 1.1	OEM	U.S.	Any town, State	$20,000.00	$0.00	6.6%	0.0%
Subcomponent 1.2	OEM	U.S.	Any town, State	$30,000.00	$0.00	9.9%	0.0%
Subcomponent 1.3	Sub Supplier 1.3	U.S.	Any town, State	$60,000.00	$0.00	19.8%	0.0%
Subcomponent 1.4	Sub Supplier 1.3	Foreign	Any city, Country	$0.00	$85,000.00	0.0%	28.1%
Subcomponent 1.5	Sub Supplier 1.5	U.S.	Any town, State	$105,000.00	$0.00	34.7%	0.0%
OEM Labor/Overhead/profit	OEM	U.S.	Any town, State	$3,000.00	$0.00	1.0%	0.0%
Component 1 - U.S. & Foreign Costs Subtotal				$218,000.00	$85,000.00	71.9%	28.1%
Component 1 Total Cost	per 49 CFR § 611.11(m)(2)		$303,000.00				

STEP 7

In *Subcomponent % of Component and Component Total %* columns:

a) For each component, compute the material cost percentage of each of its U.S. and Foreign corresponding subcomponents, and enter on the designated rows under *U.S.* and *Foreign* sub-columns as applicable. This percentage is calculated by taking the cost of the subcomponent and dividing it by the total cost of the component.

Subcomponent Domestic Content Calculation	Subcomponent Foreign Content Calculation
$20,000 (Subcomponent 1.1) ÷ $303,000 (Component 1 Material Subtotal) = 6.6% U.S. Domestic Content	$85,000 (Subcomponent 1.4) ÷ $303,000 (Component 1 Material Subtotal) = 28.1% Foreign Content

b) Calculate the total percentage by cost of U.S. content by dividing the *U.S. Subcomponents Subtotal* into *Component Total Cost.* Calculate the total percentage by cost of foreign content by dividing the *Foreign Subcomponents Subtotal* into *Component Total Cost.* These two numbers should total 100%.

Total Domestic Content Calculation	Total Foreign Content Calculation
$218,000 (U.S. Subcomponents Subtotal) ÷ $303,000 (Component 1 Material Subtotal) = 71.9% U.S. Domestic Content	$85,000 (Foreign Subcomponents Subtotal) ÷ $303,000 (Component 1 Material Subtotal) = 28.1% Foreign Content

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (if U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %	
				U.S.	Foreign	U.S.	Foreign
Component 1							
Component 1	OEM	U.S.	Any town, State				
Subcomponent 1.1	***OEM***	***U.S.***	***Any town, State***	***$20,000.00***	***$0.00***	*6.6%*	*0.0%*
Subcomponent 1.2	***OEM***	***U.S.***	***Any town, State***	***$30,000.00***	***$0.00***	*9.9%*	*0.0%*
Subcomponent 1.3	***Sub Supplier 1.3***	***U.S.***	***Any town, State***	***$60,000.00***	***$0.00***	*19.8%*	*0.0%*
Subcomponent 1.4	***Sub Supplier 1.3***	***Foreign***	***Any city, Country***	***$0.00***	***$85,000.00***	*0.0%*	*28.1%*
Subcomponent 1.5	***Sub Suppler 1.5***	***U.S.***	***Any town, State***	***$105,000.00***	***$0.00***	*34.7%*	*0.0%*
OEM Labor/Overhead/profit	***OEM***	***U.S.***	***Any town, State***	***$3,000.00***	***$0.00***	*1.0%*	*0.0%*
Component 1 - U.S. & Foreign Costs Subtotal				*$218,000.00*	*$85,000.00*	*71.9%*	*28.1%*
Component 1 Total Cost	*per 49 CFR § 611.11(m)(2)*		*$303,000.00*				

STEP 8

In *U.S. Content by Cost* column and on the row designated *Component 1 Total Cost* for each component, enter the total U.S. and Foreign material costs for that component.

a) If the component is of domestic origin (manufactured in the U.S.) and its subcomponents equal the required minimum percentage *(U.S. content >60% (or 65% in FY 18 and 19, or 70% in FY20),* the whole component by cost is domestic.

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (if U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %		U.S. Content by Cost	Foreign Content by Cost	Component % of Vehicle Material Costs	
				U.S.	Foreign	U.S.	Foreign			U.S.	Foreign
Component 1											
Component 1	OEM	U.S.	Any town, State								
Subcomponent 1.1	OEM	U.S.	Any town, State	$20,000.00	$0.00	6.6%	0.0%				
Subcomponent 1.2	OEM	U.S.	Any town, State	$30,000.00	$0.00	9.9%	0.0%				
Subcomponent 1.3	Sub Supplier 1.3	U.S.	Any town, State	$60,000.00	$0.00	19.8%	0.0%				
Subcomponent 1.4	Sub Supplier 1.3	Foreign	Any city, Country	$0.00	$85,000.00	0.0%	28.1%				
Subcomponent 1.5	Sub Suppler 1.5	U.S.	Any town, State	$105,000.00	$0.00	34.7%	0.0%				
OEM Labor/Overhead/profit	OEM	U.S.	Any town, State	$3,000.00	$0.00	1.0%	0.0%				
Component 1 - U.S. & Foreign Costs Subtotal				*$218,000.00*	*$85,000.00*	*71.9%*	*28.1%*				
Component 1 Total Cost	*per 49 CFR § 611.11(m)(2)*		*$303,000.00*					*$303,000.00*	*$0.00*	48.48%	0.00%

b) If the component is domestic and its subcomponents contain less than the required domestic minimum percentage, then add the total of only U.S. subcomponent material costs as well as the cost to manufacture the component, on the row *Component 3-U.S. & Foreign Costs Subtotal* to the column *U.S. Content by Cost*;

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (if U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %		U.S. Content by Cost	Foreign Content by Cost	Component % of Vehicle Material Costs	
				U.S.	Foreign	U.S.	Foreign			U.S.	Foreign
Component 3											
Component 3	Component Supplier	U.S.	Any town, State								
Subcomponent 3.1	Sub Supplier 3.1	Foreign	Any city, Country	$0.00	$50,000.00	0.0%	32.3%				
Subcomponent 3.2	Sub Supplier 3.2	U.S.	Any town, State	$15,000.00	$0.00	9.7%	0.0%				
Subcomponent 3.3	Sub Supplier 3.3	Foreign	Any city, Country	$0.00	$55,000.00	0.0%	35.5%				
Subcomponent 3.4	Sub Supplier 3.4	Foreign	Any city, Country	$0.00	$25,000.00	0.0%	16.1%				
U.S. Component manufacturing costs	Component Supplier	U.S.	Any town, State	$10,000.00	$0.00	6.5%	0.0%				
Component 3 - U.S. & Foreign Costs Subtotal				*$25,000.00*	*$130,000.00*	16.1%	83.9%				
Component 3 Total Cost	*per 49 CFR § 611.11(l) and (m)(1)*		$155,000.00					*$25,000.00*	*$130,000.00*	4.00%	20.80%

c) If the component is foreign and the U.S. subcomponents being incorporated into the foreign component receive a tariff exemption, [39] then add the total of only U.S. subcomponent material costs on the row *Component 2 Material Subtotal*, to the column *U.S. Content by Cost.*

System (or Group of Components) / Component / Subcomponent	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (if U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %		U.S. Content by Cost	Component % of Vehicle Material Costs	
				U.S.	Foreign	U.S.	Foreign		U.S.	Foreign
System 2										
Component 2	Component Supplier	Foreign	Any city, Country							
Subcomponent 2.1	Sub Supplier 2.1	U.S. w/tariff exempt	Any town, State	$50,000.00	$0.00	29.9%	0.0%			
Subcomponent 2.2	Sub Supplier 2.2	U.S. w/tariff exempt	Any town, State	$10,000.00	$0.00	6.0%	0.0%			
Subcomponent 2.3	Sub Supplier 2.3	Foreign	Any city, Country	$0.00	$55,000.00	0.0%	32.9%			
Subcomponent 2.4	Sub Supplier 2.3	Foreign	Any city, Country	$0.00	$25,000.00	0.0%	15.0%			
Subcomponent 2.5	Sub Supplier 2.4	Foreign	Any city, Country	$0.00	$18,000.00	0.0%	10.8%			
Subcomponent 2.6	Sub Supplier 2.5	Foreign	Any city, Country	$0.00	$9,000.00	0.0%	5.4%			
Component 2 Material Subtotal				$60,000.00	$107,000.00	35.9%	64.1%			
Component 2 Total Cost	per 49 CFR § 611.11(m)(1)		$100,000.00					$60,000.00	11.65%	25.24%

STEP 9

In *Component % of Vehicle* columns under *U.S.* and *Foreign* sub-columns, for each component, enter its U.S. and Foreign material cost percentage in relation to the total vehicle content percentage on the row designated *Vehicle Material Total Cost* under *U.S.* and *Foreign* sub-columns as applicable. Calculate the percentage as follows:

a) If the component is of domestic origin and the minimum percentage of the subcomponents of that component by cost are domestic, then divide the cost on the row designated *U.S. Content* into the row designated *Vehicle Material Total Cost*. There will only be an entry for the *Component % of Vehicle* columns under the *U.S.* sub-column. The *Foreign* sub-column should record zero percentage.

	Component 1Total Cost	$303,000
÷	Vehicle Material Total Cost	$625,000
=	U.S. Component % of Vehicle	48.48%

[39] For more information on tariff exemptions *see* 49 CFR § 661.11(i).

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (If U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %		U.S. Content by Cost	Foreign Content by Cost	Component % of Vehicle Material Costs	
				U.S.	Foreign	U.S.	Foreign			U.S.	Foreign
Component 1											
Component 1	*OEM*	*U.S.*	*Any town, State*								
Subcomponent 1.1	*OEM*	*U.S.*	*Any town, State*	*$20,000.00*	*$0.00*	*6.6%*	*0.0%*				
Subcomponent 1.2	*OEM*	*U.S.*	*Any town, State*	*$30,000.00*	*$0.00*	*9.9%*	*0.0%*				
Subcomponent 1.3	*Sub Supplier 1.3*	*U.S.*	*Any town, State*	*$60,000.00*	*$0.00*	*19.8%*	*0.0%*				
Subcomponent 1.4	*Sub Supplier 1.3*	*Foreign*	*Any city, Country*	*$0.00*	*$85,000.00*	*0.0%*	*28.1%*				
Subcomponent 1.5	*Sub Suppler 1.5*	*U.S.*	*Any town, State*	*$105,000.00*	*$0.00*	*34.7%*	*0.0%*				
OEM Labor/Overhead/profit	*OEM*	*U.S.*	*Any town, State*	*$3,000.00*	*$0.00*	*1.0%*	*0.0%*				
Component 1 - U.S. & Foreign Costs Subtotal				*$218,000.00*	*$85,000.00*	*71.9%*	*28.1%*				
Component 1 Total Cost	*per 49 CFR § 611.11(m)(2)*		*$303,000.00*					*$303,000.00*	*$0.00*	48.48%	0.00%
Vehicle Material Total Cost (Total Cost of all Components)				**$625,000.00**							

b) If the component is domestic and contains less than the required minimum domestic components by cost, you will need to calculate the total percentage of domestic and foreign content. divide the cost on the row designated *U.S. Content* into row designated *Vehicle Material Total Cost*.

Total Domestic Content Calculation	Total Foreign Content Calculation
$25,000 (U.S. Subcomponents Subtotal)	$130,000 (Foreign Subcomponents Subtotal)
÷	÷
$625,000 (Vehicle Material Total Cost)	$625,000(Vehicle Material Total Cost)
=	=
4.0% U.S. Domestic Content	20.80% Foreign Content

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (If U.S. - City & State; if Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %		U.S. Content by Cost	Foreign Content by Cost	Component % of Vehicle Material Costs	
				U.S.	Foreign	U.S.	Foreign			U.S.	Foreign
Component 3											
Component 3	*Component Supplier*	*U.S.*	*Any town, State*								
Subcomponent 3.1	*Sub Supplier 3.1*	*Foreign*	*Any city, Country*	*$0.00*	*$50,000.00*	*0.0%*	*32.3%*				
Subcomponent 3.2	*Sub Supplier 3.2*	*U.S.*	*Any town, State*	*$15,000.00*	*$0.00*	*9.7%*	*0.0%*				
Subcomponent 3.3	*Sub Supplier 3.3*	*Foreign*	*Any city, Country*	*$0.00*	*$55,000.00*	*0.0%*	*35.5%*				
Subcomponent 3.4	*Sub Supplier 3.4*	*Foreign*	*Any city, Country*	*$0.00*	*$25,000.00*	*0.0%*	*16.1%*				
U.S. Component manufacturing costs	*Component Supplier*	*U.S.*	*Any town, State*	*$10,000.00*	*$0.00*	*6.5%*	*0.0%*				
Component 3 - U.S. & Foreign Costs Subtotal				*$25,000.00*	*$130,000.00*	*16.1%*	*83.9%*				
Component 3 Total Cost	*per 49 CFR § 611.11(l) and (m)(1)*		*$155,000.00*					*$25,000.00*	*$130,000.00*	4.00%	20.80%
Vehicle Material Total Cost (Total Cost of all Components)				**$625,000.00**							

STEP 10

Add up all the percentages in the column *Component % of Vehicle Material* and the corresponding *U.S.* and *Foreign* sub-columns to determine the overall domestic content of the vehicle.

Component /Subcomponent Component	Supplier Name	Manufacturing Location (U.S. or Foreign)	Manufacturing Location (If U.S. - City & State; If Foreign - City & Country)	Component and Subcomponent Material Costs		Subcomponent % of Component and Component Total %		U.S. Content by Cost	Foreign Content by Cost	Component % of Vehicle Material Costs	
				U.S.	Foreign	U.S.	Foreign			U.S.	Foreign
Component 1											
Component 1	OEM	U.S.	Any town, State								
Subcomponent 1.1	OEM	U.S.	Any town, State	$20,000.00	$0.00	6.6%	0.0%				
Subcomponent 1.2	OEM	U.S.	Any town, State	$30,000.00	$0.00	9.9%	0.0%				
Subcomponent 1.3	Sub Supplier 1.3	U.S.	Any town, State	$60,000.00	$0.00	19.8%	0.0%				
Subcomponent 1.4	Sub Supplier 1.3	Foreign	Any city, Country	$0.00	$85,000.00	0.0%	28.1%				
Subcomponent 1.5	Sub Suppler 1.5	U.S.	Any town, State	$105,000.00	$0.00	34.7%	0.0%				
OEM Labor/Overhead/profit	OEM	U.S.	Any town, State	$3,000.00	$0.00	1.0%	0.0%				
Component 1 - U.S. & Foreign Costs Subtotal				$218,000.00	$85,000.00	71.9%	28.1%				
Component 1 Total Cost	per 49 CFR § 611.11(m)(2)		$303,000.00					$303,000.00	$0.00	48.48%	0.00%
Component 2											
Component 2	Component Supplier	Foreign	Any city, Country								
Subcomponent 2.1	Sub Supplier 2.1	U.S. w/tariff exempt	Any town, State	$50,000.00	$0.00	29.9%	0.0%				
Subcomponent 2.2	Sub Supplier 2.2	U.S. w/tariff exempt	Any town, State	$10,000.00	$0.00	6.0%	0.0%				
Subcomponent 2.3	Sub Supplier 2.3	Foreign	Any city, Country	$0.00	$55,000.00	0.0%	32.9%				
Subcomponent 2.4	Sub Supplier 2.3	Foreign	Any city, Country	$0.00	$25,000.00	0.0%	15.0%				
Subcomponent 2.5	Sub Supplier 2.4	Foreign	Any city, Country	$0.00	$18,000.00	0.0%	10.8%				
Subcomponent 2.6	Sub Supplier 2.5	Foreign	Any city, Country	$0.00	$9,000.00	0.0%	5.4%				
Component 2 - U.S. & Foreign Costs Subtotal				$60,000.00	$107,000.00	35.9%	64.1%				
Component 2 Total Cost	per 49 CFR § 611.11(m)(1)		$167,000.00					$60,000.00	$107,000.00	9.60%	37.92%
Component 3											
Component 3	Component Supplier	U.S.	Any town, State								
Subcomponent 3.1	Sub Supplier 3.1	Foreign	Any city, Country	$0.00	$50,000.00	0.0%	32.3%				
Subcomponent 3.2	Sub Supplier 3.2	U.S.	Any town, State	$15,000.00	$0.00	9.7%	0.0%				
Subcomponent 3.3	Sub Supplier 3.3	Foreign	Any city, Country	$0.00	$55,000.00	0.0%	35.5%				
Subcomponent 3.4	Sub Supplier 3.4	Foreign	Any city, Country	$0.00	$25,000.00	0.0%	16.1%				
U.S. Component manufacturing costs	Component Supplier	U.S.	Any town, State	$10,000.00	$0.00	6.5%	0.0%				
Component 3 - U.S. & Foreign Costs Subtotal				$25,000.00	$130,000.00	16.1%	83.9%				
Component 3 Total Cost	per 49 CFR § 611.11(l) and (m)(1)		$155,000.00					$25,000.00	$130,000.00	4.00%	20.80%

4.4. Special Considerations

This section discusses the best practices for special considerations encountered in the domestic content calculations.

4.4.1. Exchange Rates

The Buy America rule 49 CFR § 661.11(n) states "*The cost of a component of foreign origin is set using the foreign exchange rate at the time the bidder or offeror executes the appropriate Buy America certificate.*" The manufacturer will also use the same exchange rate(s) to calculate the foreign component cost for the post-delivery audit and submit to the recipient's auditor for verification.

4.4.2. Transportation Costs

Transportation costs to the U.S. final assembly location must be included in calculating the cost of foreign components and foreign subcomponents. For components/subcomponents

manufactured outside the U.S., the cost for transportation must be included in the foreign content total (even if a U.S. shipping company or vessel is used).[40]

4.4.3. Tariff Exemptions

If a tariff exemption is claimed for U.S. subcomponents of foreign manufactured components, the manufacturer must keep on file, for review by an auditor, proof of the tariff exemption for such items, in accordance with 49 CFR § 661.11(i) and (j). In turn, this requirement refers to the U.S. Code Harmonized Tariff Schedule in 19 U.S.C. 1202, which requires specific declarations/ forms.

In the event these declarations and/or forms may be difficult to acquire for a Buy America audit, the auditor may accept alternate form(s) of documentation, which proves that the duty was not paid. These may include NAFTA affidavits, Purchase Orders, or letters/emails from responsible parties.

4.5. Manufacturer Documentation

The recipient's final pre-award and post-delivery audit reports will not include confidential and proprietary information shared with the recipient or its auditor. Rather, the report is likely to include a list of components and their domestic content as a percentage. However, manufacturers should be mindful that FTA may audit a rolling stock's procurment's compliance with Buy America. Therefore, it is a best practice for manufacturers to maintain detailed records of the information and documentation shared with the recipient, particularly for the post-delivery audit.

Another best practice is for the manufacturer to require its suppliers to complete a Buy America Supplier Certificate for any item for which domestic content is being claimed. Appendix B.5 provides a sample Supplier Buy America Certification template for bus and rail vehicles. The Buy America Supplier Certificate is the supplier's certification of its domestic content and U.S. manufacturing for the products being provided for this procurement.

The instructions for completing the certification are as follows:

[40] 49 CFR § 661.11(m)(1).

STEP 1

Fill in the supplier's contact information in the designated space at the top part of the form.

SAMPLE BUY AMERICA SUPPLIER CERTIFICATION			
Supplier:	_____		
Address:	_____		
Phone:	_____	Fax:	_____
Email:	_____		

STEP 2

Fill in the vehicle manufacturer's name and vehicle/contract/purchase order number that connects this certificate to the specific procurement project.

Vehicle Manufacturer:	____
Vehicle/Contract/Purchase Order:	_____

STEP 3

Identify which of the three calculation scenarios apply for each component by checking the respective box.

a) Check the first box if the component is manufactured in the U.S. and the required percentage of its subcomponents, by cost, are manufactured in the U.S. In this case, 100% of the cost of the component is domestic content.

b) Check the second box if the component is manufactured in the U.S. and less than the required percentage of its subcomponents, by cost, are manufactured in the U.S. In this case, the cost of the U.S. subcomponents and the manufacturing costs of the component (considered to be the difference between the cost of the foreign subcomponents and the total cost of the component) are included in the domestic content calculation.

c) Check the third box if the component is NOT manufactured in the U.S. but does contain U.S. subcomponents for which the supplier has documentation showing tariff exemption. In this case, the cost to manufacture the component and transportation costs to the final assembly location must be included in the foreign content calculation.

Calculate the cost of U.S. subcomponents by dividing the cost of U.S. subcomponents by the cost of all subcomponents for each component. Use extra pages as needed to cover all components and subcomponents in the supplier's scope of provision.

This certifies the Supplier's status of compliance with FTA Buy America Regulations set forth in 49 C.F.R § 661.11.	
For each component supplied for the Contract, the Supplier attests that (CHECK ONE BOX):	
☐	More than the required percentage of the subcomponents, by cost, are of U.S. origin/manufacture, and the component is manufactured in the U.S. The Supplier attests that the U.S. content of subcomponents, by cost, is as indicated below.
☐	Less than the required percentage of the subcomponents, by cost, are of U.S. origin/manufacture, and the component is manufactured in the U.S. (in such case, the cost of U.S. subcomponents and cost of U.S. manufacturing labor are eligible for inclusion towards domestic content calculations). The Supplier attests that the U.S. content of subcomponents, by cost, is as indicated below.
☐	The component contains subcomponents of domestic origin, the component is NOT manufactured in the U.S., and the supplier has documentation showing a tariff exemption (in such case, the cost of U.S. subcomponents are eligible for inclusion towards domestic content calculations). The Supplier attests that the U.S. content of subcomponents, by cost, is as indicated below.

STEP 4

List each component and its subcomponents on the designated rows. Identify Components by name and part number traceable to the subject procurement.

a) Indicate the manufacturing location for each component and subcomponent in the designated space;

b) Indicate the component's percentage of domestic subcomponents for each component in the designated space;

c) Indicate each subcomponent's percentage of the component's domestic content in the designated space; the sum of the domestic content percentages of all subcomponents will add up to the total domestic content percentage of the component.

	MANUFACTURING LOCATION	% DOMESTIC CONTENT	% FOREIGN CONTENT
[COMPONENT NAME]	[*Location of individual component*]	[*Total domestic content % of all subcomponents*]	[*Total content % of all subcomponents*]
[SUBCOMPONENT NAME] *(use separate row for each subcomponent)*	[*Location of individual subcomponent*]	[*Total domestic content % of individual subcomponent*]	[*Total U.S. content % of all subcomponents*]
Attach additional sheets as needed			

STEP 5

Sign and date the form by an authorized official of the supplier. Print the name and title of the signatory beneath the signature line.

Information on this form is subject to audit by the Purchaser (i.e., recipient of federal funds, and/or by the FTA and/or its agents).

Date: _____

Supplier Authorized Signature: _____

Print Name: ____

Title: _____

5. Frequently Asked Questions

This section addresses some of the most frequently asked questions about pre-award and post-delivery audit. This guidance is for information only. The responses do not constitute a determination of compliance with the Department of Transportation (DOT) rules and standards.

5.1. General

5.1.1. Who must conduct the pre-award and post-delivery audits?

The recipient, or auditor appointed by the recipient, must conduct the audits. The auditor may not be an employee of the manufacturer or its agent. In many instances, a recipient will retain the services of a consultant to conduct the audit.

5.1.2. When will the Buy America pre-award audit be conducted?

The law requires that the recipient must conduct a pre-award audit to confirm compliance with Buy America regulations prior to award of the contract. The recipient's executed Pre-award Buy America certificate and Pre-award Purchaser's Requirements certificate must be signed and dated prior to contract award.

5.1.3. When will the Buy America post-delivery audit be conducted?

The recipient must conduct a post-delivery audit prior to transfer of title of the rolling stock, or prior to the rolling stock being put into revenue service, whichever is first. The timing of the post-delivery audit is typically identified in the contract documents. "A recipient purchasing revenue service rolling stock with FTA funds must ensure that a post-delivery audit … is complete before title to the rolling stock is transferred to the recipient."[41] The post-delivery audit will be performed on the first vehicle so as to quickly remedy any potential compliance problems.

The recipient should consider several factors in determining the appropriate time to verify that all material and work performed for the entire contract (including the last vehicle and all change orders) meets the Buy America requirements. A post-delivery audit is performed just prior to the transfer of title or entry into revenue service of the first vehicle, whichever comes first. For small procurements with short post-delivery periods, an audit conducted at that time may be sufficient. However, the recipient may consider whether an audit conducted on the first vehicle is sufficient

[41] 49 CFR § 663.31. In the definitions section, § 663.5 defines "post-delivery" as "the time period in the procurement process from when the rolling stock is delivered to the recipient until title to the rolling stock is transferred to the recipient or the rolling stock is put into revenue service, whichever is first."

to verify the actual domestic material content for the entire order. Because the post-delivery audit is conducted on the first vehicle, the recipient may need to conduct additional verifications to confirm that the full order satisfies the Buy America requirements, particularly if there are changes made in materials or scope after the first post-delivery audit. In certain cases, particularly on large orders with multi-year delivery schedules, recipients may find it appropriate to conduct Post-Delivery Domestic Content Monitoring as described in Section 3, to minimize the risk that subsequent vehicles in the order do not meet Buy America Requirements.

5.1.4. Do pre-award and post-delivery audits have to be conducted for procurements of support vehicles and wayside equipment?

No. The requirement to conduct pre-award and post-delivery audits only applies to rolling stock intended to carry passengers in revenue service, which include buses, vans, cars, railcars, locomotives, trolley cars and buses, ferry boats, and vehicles used for guideways and incline planes (49 CFR §§ 663.3 and 663.5(e)). Support vehicles and wayside equipment must comply with Buy America, but there is no requirement for pre-award and post-delivery audits.

5.1.5. Do support vehicles have to meet the minimum domestic content requirement and final assembly in U.S.?

Yes. All rolling stock, including support vehicles, must meet the requirements of the Buy America regulation, namely that final assembly of the rolling stock takes place in the United States, and that greater than 60% (65% in FY18 and FY19, 70% in FY20) of the cost of all components be U.S. manufactured.

5.2. Buy America Certification

5.2.1. Does a Buy America certification need to be conducted for every procurement,[42] even if identical vehicles are being purchased from the same contractor year after year?

Yes. A manufacturer's past compliance with the Buy America rule does not mean that the manufacturer's products will always be compliant. Changes in design and technical developments, as well as changing suppliers and scope of manufacturing and/or final assembly, may make new products noncompliant. In the case that pre-award and post-delivery audits have been conducted for a given vehicle, the same information may be used to demonstrate compliance at a later date as long as it is verified and documented that there have been no changes made affecting compliance since the last certification.

[42] Refers to a single procurement (even if multi-year), a multi-state procurement, and/or multiple individual procurements by several recipients or subrecipients.

5.2.2. Is the domestic content threshold calculated as a percentage of the total vehicle price?

No. The domestic content threshold is calculated as a percentage of the total cost of all components, excluding the cost for final assembly of the vehicle. The cost of an individual domestic component is the price a vehicle manufacturer pays a supplier for that domestic component. For foreign components, the cost of the individual foreign component is the price a vehicle manufacturer pays the foreign supplier for that individual foreign component, plus transportation costs. 49 CFR § 661.11(m)(1).

All non-recurring expenses such as engineering, mockups, fixtures/tooling, spare parts, manuals, and training also are excluded from the Buy America component calculations.

5.2.3. How is the origin of a component determined?

A component is considered to be of domestic origin if more than the required percentage, by cost, of the subcomponents of that component are of domestic origin, and component manufacturing takes place in the United States. If the component meets these requirements, the entire cost of the component may be counted as domestic content in the Buy America calculation of the vehicle.

The cost of an individual domestic subcomponent is the price a subcomponent manufacturer pays a supplier for that domestic subcomponent. For foreign subcomponents, the cost of the individual foreign subcomponent is the price a manufacturer pays the foreign supplier for that foreign subcomponent plus transportation costs. 49 CFR § 661.11(m)(1).

A component may be manufactured at the final assembly location if the manufacturing process to produce the component is an activity separate and distinct from the final assembly of the end product. 49 CFR § 661.11(d).

5.2.4. How is the origin of a subcomponent determined?

Subcomponents manufactured in the United States are considered to be domestic.

Subcomponents manufactured in the United States and exported for inclusion in a component manufactured outside the United States are considered to be of domestic origin if they received a documented tariff exemption for importation back into the United States. If this is the case, then the cost of the subcomponent may be included in the component's domestic content calculation. The cost of the subcomponent at the time of export is the cost that should be used in the calculation. If the subcomponent has not received a tariff exemption, then it may not be included in the domestic content calculation, and will be counted as foreign content.

Raw materials exported for use in a component manufactured outside the United States, are not considered to be a subcomponent for the purpose of calculating domestic content. The value of those raw materials is included in the cost of the foreign component. 49 CFR § 661.11(k).

5.2.5. Do the subcomponents have to be broken down into sub-subcomponents?

No. The Buy America regulation does not extend down to the sub-subcomponent level for Buy America calculation purposes.

5.2.6. Are the costs of both domestic and foreign subcomponents used in the Buy America Domestic Content Calculation for Components?

The entire cost of a component is used in its content calculation. A component is considered domestic if it is manufactured in the United States and its subcomponents have the required domestic content percentage[43] by cost. 49 CFR § 661.11(g). If this is so, then the entire cost (selling price) of the component can be claimed as domestic content, including its foreign subcomponents.

5.2.7. Do only components of domestic origin contribute towards the domestic Buy America calculations?

No. Domestic subcomponents of components manufactured in the United States that do not contain the required minimum percentage of domestic subcomponents, by cost, and domestic subcomponents incorporated into foreign-manufactured components that received a tariff exemption for importation back into the United States, also may be used in the Buy America domestic content calculation. For example, if a component manufactured in the U.S. contains 20 percent of its subcomponents manufactured in the U.S. and 80 percent of its subcomponents manufactured outside the U.S., the manufacturer receives credit for the cost of the 20 percent of U.S. subcomponents.

5.2.8. If a component contains less than the required minimum percentage of domestic subcomponents, how would it be used in the calculation?

If a component is manufactured in the U.S., only the cost of the domestic subcomponents and the cost of manufacturing the domestic component are included in the calculation of the domestic content of the end product. 49 CFR § 661.11(l). The cost of its foreign subcomponents must be counted as foreign content.

5.2.9. Can components from foreign sources with domestic subcomponents be used in the calculation?

[43] Minimum threshold is more than 60% for FY16 and FY17, more than 65% for FY18 and FY19, and more than 70% for FY20.

Yes. If foreign-manufactured components have domestic subcomponents that received a tariff exemption for importation back into the United States, then the cost of those domestic subcomponents may be used in the domestic content calculation. The cost of manufacturing the component, and the overhead costs associated with manufacturing that component, plus the cost of transporting the component, may not be used in the domestic content calculation, because it has been manufactured outside of the United States.

5.2.10. How are currency exchange rates addressed for Buy America audits?

The cost of a component of foreign origin is set using the foreign exchange rate at the time the bidder or offeror executes the Buy America certificate. 49 CFR § 661.11(n). However, large projects with long post-delivery periods and economic fluctuations can affect material costs between the times of the pre-award and post-delivery audits. In all cases, component and subcomponent costs paid in other than U.S. currency must use exchange rates as of the date of the supplier's executed supplier Buy America certificate. The post-delivery audit needs to verify the actual costs paid to suppliers for all components and subcomponents.

5.2.11. Can systems be components for domestic content calculations? (Examples would be air compressor and pneumatic systems, electrical systems, and train control systems.)

Yes. Pursuant to Appendix B to § 661.11, "Typical Components of Buses," the following systems are identified as components: air compressor and pneumatic systems, generator/alternator and electrical systems, steering system assemblies, heating systems, and door control systems. In addition, pursuant to Appendix C to § 661.11, "Typical Components of Rail Rolling Stock," the following systems are identified as components: train control systems.

5.2.12 What if the manufacturer is concerned about releasing proprietary information?

If the manufacturer is concerned about releasing proprietary information, the manufacturer and recipient may agree that the recipient will contract with an external auditor to conduct the manufacturer's Buy America certification review—and assure the manufacturer that the cost data will be kept confidential. Alternatively, a recipient may be able to keep its Buy America audit function independent by using a "firewall" and assuring the manufacturer that those employees of the recipient performing the Buy America audit are prohibited from disclosing any of the manufacturer's propriety data. Further, the review of documents may occur at the manufacturer's place of business; there is no requirement that the recipient or its auditors obtain copies of the documents; they need simply to review them. Whether conducted by a contractor or the recipient's employees, the manufacturer may require the reviewer to sign a non- disclosure agreement prior to reviewing the documents.

5.3. Purchaser's Requirements Certification

5.3.1. What is the responsibility of the resident inspector?

A resident inspector is required to visit the manufacturer's final assembly facility during the manufacturing period for purchases of more than 10 buses intended for revenue passenger service. The inspector must prepare a report summarizing how the construction and operation of the vehicles meet (or do not meet) the terms of the contract and provide accurate records of all vehicle construction activities. The intent of the requirement[44] is to help recipients ensure that the vehicles will comply with their contract specifications.

The recipient must ensure that the resident inspector's report satisfies all requirements of the regulations. It is the recipient's responsibility to ensure the vehicles comply with contract specifications, and the purpose of the resident inspector's report is to assist the recipient in verifying that the vehicles meet the required specifications.

5.3.2. Where the contract provides for more than one post-delivery period, must the recipient conduct a post-delivery audit for each delivery period?

Yes. When a contract provides for multiple deliveries and the post-delivery periods are scheduled at substantially different time intervals, such as 6 months or 1 year apart, the recipient must complete a post-delivery audit for each period. This does not mean that a separate audit is required for each vehicle within a post-delivery period.

5.4. FMVSS Certification

5.4.1. Which FMVSS certifications are required?

Title 49 CFR part 571 covers all Federal Motor Vehicle Safety Standards. Examples of the types of FMVSS certifications are included in this Handbook in Appendices B.7, B.8, B.13, and B.14

5.4.2. Must ADA compliant vehicles be FMVSS certified?

Yes. All motor vehicles subject to the FMVSS regulations must be certified to meet the applicable standards.

[44] 49 CFR § 663.37(a).

Appendix A *Checklists*

A.1 Proposal Compliance Checklist

KEY TRANSIT AGENCY SOLICITATION REQUIREMENTS	CHECK OF ROLLING STOCK MANUFACTURER'S COMPLIANCE	KEY COMMENTS
COMPLIANCE WITH KEY FEDERAL REQUIREMENTS		
Buy America	**YES**	Pre-Award Certificate on file
Pre-Award and Post-Delivery Audit	**YES**	Pre-Award Audit underway
Lobbying	**YES**	No exceptions taken
Providing Fraudulent Information, False Statements and Related Acts	**YES**	No exceptions taken
Civil Rights	**YES**	No exceptions taken
Disadvantage Business Enterprises (i.e., Transit Vehicle Manufacturer[45] requirement)	**YES**	No exceptions taken
Americans with Disability Act	**YES**	No exceptions taken
Compliance with **ALL** other required federal provisions	**YES**	No exceptions taken
COMPLIANCE WITH ALL TRANSIT AGENCY SPECIAL PROVISIONS		
Terms of schedule and liquidated damages	**YES**	No exceptions taken
Shipment and delivery	**YES**	No exceptions taken
City Inspection and testing	**YES**	No exceptions taken
Acceptance	**YES**	No exceptions taken
Payment provisions	**YES**	Agreed to additional payment item for completion of Pilot Car Testing.
Spare parts	**YES**	Negotiated Spare parts items
Warranty terms	**YES**	Negotiated terms for extended warranties of components
COMPLIANCE WITH ALL TECHNICAL SPECIFICATIONS REQUIREMENTS		
Carbody/bus body/trucks and axles	**YES**	No exceptions taken
Cab/drivers area and controls	**YES**	No exceptions taken
Passenger doors	**YES**	No exceptions taken
HVAC	**YES**	No exceptions taken
Auxiliary electric equipment	**YES**	No exceptions taken
Propulsion	**YES**	Agreed to Addendum 2.
Brakes	**YES**	No exceptions taken
Communications	**YES**	No exceptions taken
Train control (rail vehicles only)	**YES**	No exceptions taken
Monitoring and diagnostics	**YES**	No exceptions taken
Materials and overall work quality	**YES**	No exceptions taken
Software	**YES**	No exceptions taken
Manuals and training	**YES**	Manuals and Training hours and terms negotiated.

[45] *See* 49 U.S.C. §26.49.

A.2 Pre-Award Checklists

A.2.1 Recipient at Pre-Award Audit

Pre-Award Audit (Before signing Contract with Bidder)	**Buy America Certification** A. ☐ Reviewed and Verified Minimum Domestic Content; AND Reviewed and Verified Proposed U.S. Final Assembly, Location, Operations, and Total Cost OR B. ☐ Requested and Received Buy America Waiver
	Purchaser's Requirements Certification A. ☐ Checked Bid Specification Compliance with Solicitation Specifications; AND Completed a Manufacturer Capability and Capacity Review
	FMVSS Certifications (IF APPLICABLE): Requested and Received Manufacturer's letter stating:
	A. ☐ The information to be included on the FMVSS Stickers OR B. ☐ The Vehicles Are Not Subject to FMVSS

A.2.2 Manufacturer at Pre-Award Audit

Pre-Award Audit (Before signing Contract with Bidder)	**Buy America Certification** A. ☐ Prepared and provided to recipient documentation, including but not limited to, documentation from suppliers sufficient for recipient to verify domestic content of vehicle; AND Provided documentation of U.S. Final Assembly, Location, Operations, and Total Cost OR B. ☐ Submitted a Buy America Waiver
	Purchaser's Requirements Certification A. ☐ Responded to recipient solicitation clearly indicating Bid Specification Compliance with Solicitation Specifications; AND Responded to sections in the Solicitation regarding Manufacturer Capability and Capacity Review
	FMVSS Certifications (IF APPLICABLE): Prepared letter stating:
	A. ☐ The information to be included on the FMVSS Stickers OR B. ☐ The Vehicles Are Not Subject to FMVSS

A.2.3 Pre-Award Audit Purchaser's Requirements Certification for Recipients

For Pre-award Purchaser's Requirements Certification, the recipient must verify that the rolling stock the recipient is contracting for is the same product described in the purchaser's solicitation

specification, and the proposed manufacturer is a responsible manufacturer with the capability to produce a vehicle that meets the recipient's solicitation specification. Recipients may employ a combination of different departments or third parties to conduct these verifications. In such case, the party responsible for verification will sign/initial the items in their scope. The following items represent a checklist of the tasks to complete the pre-award purchaser's requirements audit.

Activity	Supporting Document	Verified
Part 1		
Comparison of rolling stock manufacturer's specification with purchaser's solicitation specification	• Recipient's checklist for comparison of manufacturer's specification with solicitation specification;	☐
	• Manufacturer's supporting documents such as its proposal, manufacturer and supplier specifications, product brochures, technical data sheets, drawings, and bills of material.	☐
Part 2		
Assessment of manufacturer's capability	• Recipient's checklist for manufacturer's capability assessment;	☐
	• Manufacturer's supporting documents such as descriptions of facilities and equipment, plant output capacity, facility layout drawing/flow diagram, production line layout/flow diagram, staffing counts by craft, QA/QC Plan, mobilization plan, list of concurrent work, list of past performance on similar projects, financial records, and other documents;	☐
	• Major supplier/subcontractor supporting documents same as described in previous bullet above;	☐
	• Manufacturer's project level plans such as QA/QC plan, schedule, supplier management plan, and document/configuration control plan.	☐
Reviewed and accepted by:		
Signature		**Date**
Title		

A.2.4 Comparison of Manufacturer's Specification with Purchaser's Solicitation Specification

As part of the Pre-award Purchaser's Requirements Certification process, the recipient shall verify that the rolling stock the recipient is contracting for is the same product described in the purchaser's solicitation specification. The following items would typically be considered for this review.

	Solicitation Specification Item	Remark	Manufacturer's Specification Complies?
1.	Carbody: structure, high/low boarding, diaphragm		
2.	Windows: windshield, passenger side windows, emergency windows, door windows, sliding sash		
3.	Interior: flooring, seats, wheelchair securement, bicycle storage, luggage racks, exit path marking (as applicable)		
4.	Trucks/axles, sanding equipment (if required)		
5	Propulsion equipment		
6	Brake equipment: wheel slip/slide, parking brake		
7	Auxiliary electrical equipment		
8.	Cab/driver's area controls and equipment		
9.	HVAC		
10.	Doors and door control system with ADA audible alarm and warning lights		
11.	Lighting: interior, emergency, exterior		
12.	Communications		
13.	Toilet room: water and waste system (if required)		
14.	Coupler/draft gear (rail vehicles only)		
15.	Intercar trainlines/receptacles (rail vehicles only)		
16.	Train control/cab signal equipment (rail vehicles only)		
17.	Monitoring and diagnostics		
18.	Materials and workmanship standards		
19.	Software		
20.	Manuals and training		
	Other Provisions		
21.	Compliance with applicable Federal, State, local regulations		
22.	Buy America		
23	Warranty terms		

Reviewed and accepted by:

Signature	**Date**
Title	

A.3 Post-Delivery Checklists

A.3.1 Recipient at Post-Delivery Audit

Post-Delivery Audit (Before using the Rolling Stock in Transit Service or Before Transfer of Title, Whichever Occurs First)	**Buy America Certification** A. ☐ Reviewed and Verified the amount of Domestic Content; AND ☐ Reviewed and Verified Proposed U.S. Final Assembly, Location, Operations, and Total Cost OR B. ☐ Requested and Received Buy America Waiver **Purchaser's Requirements Certification** A. For Procurements of Rail Vehicles and More than 10 Buses or Modified Vans (and More than 20 Buses in Rural Areas and Small UZAs) Completed Resident Inspector's Report; AND Completed Visual Inspections and Road Tests OR B. For Procurement of 10 or Fewer Buses or Modified Vans, any Number of Unmodified Vans, and 20 or Fewer Buses in Rural Areas and Small UZAs Completed Visual Inspection and Road Test **FMVSS Certifications (IF APPLICABLE)** A. ☐ Verified FMVSS Sticker is Affixed to Each Vehicle OR B. ☐ Requested and Received Manufacturer's Letter Stating that the Vehicles Are Not Subject to FMVSS.

A.3.2 Manufacturer at Post-Delivery Audit

Post-Delivery Audit (Before using the Rolling Stock in Transit Service or Before Transfer of Title, Whichever Occurs First)	**Buy America Certification** A. ☐ Prepared and provided to the recipient the Domestic Content Worksheet based on actual cost; AND ☐ Provide actual U.S. Final Assembly Total Cost OR B. ☐ Submitted a Buy America Waiver prior to award **Purchaser's Requirements Certification** C. ☐ Completed Visual Inspections and Road Tests and Provide reports to the Resident Inspector. **FMVSS Certifications (IF APPLICABLE)** C. ☐ Affixed FMVSS Stickers to Each Vehicle OR D. ☐ Provided letter stating that the Vehicles Are Not Subject to FMVSS.

A.3.3 Supplier at Post-Delivery Audit

Post-Delivery Audit (Before using the Rolling Stock in Transit Service or Before Transfer of Title, Whichever Occurs First)	**Buy America Certification** A. ☐ Prepared and provided to Rolling Stock Manufacturer the Component Supplier Buy America Certification including any updates from the Pre-Award Audit on the location of component manufacture and the percent domestic and foreign content of each subcomponent.

A.3.4 Resident Inspector's Report for Post-Delivery Purchaser's Requirements Certification

For the Post-delivery Purchaser's Requirements Certification, the recipient shall review and retain the resident inspector's report of the recipient's oversight of the period of manufacture of the rolling stock being purchased. The following items would typically be included in the resident inspector's report documentation, as applicable.

Resident Inspector's Report Contents	Verified
1. Description of recipient's overall program to oversee manufacture of the rolling stock identifying all activities that verify compliance of product with contract and specifications including pilot car program, FAI, qualification testing, production inspection and production testing.	☐
2. Description of activities performed by recipient's resident inspection staff or designee at manufacturer's site(s) including pilot car inspection, qualification testing, first article inspections, source inspections, production in-process inspections, hold point inspections and final static and dynamic functional testing.	☐
3. Description of final assembly activities performed by manufacturer at U.S. final assembly site.	☐
4. Reference that vehicle history books were provided by the manufacturer to the recipient and reviewed prior to authorization for shipment briefly summarizing the contents of the vehicle history books and providing samples of critical documents such as final test results.	☐
5. Include sample authorization for shipment form for each vehicle showing place to record open items and resident inspector signature and date.	☐
6. Include sample documents demonstrating the manufacturer's implementation of its quality program; for example, a completed Nonconformance Report form will be included that identifies the deficiency and corrective action that was made. Any nonconforming material that was repaired (to other than full conformance with specification) or deemed usable as is must be approved/signed by the recipient/resident inspector.	☐
7. Reference that manufacturer maintained complete records of construction of each vehicle containing details beyond the scope of the resident inspector's report (such as the manufacturer's QA/QC inspections.	☐
8. Confirmation that delivered vehicles have been inspected and road tested to confirm that they meet contract requirements including a summary of static, dynamic and performance tests performed on each vehicle and a sample of key test report results showing sign-offs for completed tests, failed tests and any corrective action. Include sample documents.	☐
9.	☐
Reviewed and accepted by:	
Signature	**Date**
Title	

Appendix B *Certificates and Forms*

The forms provided in this Appendix are samples only, intended to provide guidance to recipients. The first two forms, B.1 and B.2, track the regulation and therefore the format is required. The other forms may be modified to suit the needs of the recipient, as long as the form developed by the recipient includes the information required by the regulations.

B.1 ***Certificate of Compliance with Buy America Rolling Stock Requirements***

CERTIFICATE OF COMPLIANCE WITH

BUY AMERICA ROLLING STOCK REQUIREMENTS

The bidder or offeror hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j), and the applicable regulations in 49 CFR § 661.11.

Date: _____

Signature: _____

Company: _____

Print Name: _____

Title: _____

B.2 Certificate of Non-Compliance with Buy America Rolling Stock Requirements

CERTIFICATE OF NON-COMPLIANCE WITH

BUY AMERICA ROLLING STOCK REQUIREMENTS

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j), but may qualify for an exemption to the requirement consistent with 49 U.S.C. 5323(j)(2), as amended, and the applicable regulations in 49 CFR § 661.7.

Date: _____

Signature: _____

Company: _____

Print Name: _____

Title: _____

B.3 Sample Pre-Award Buy America Certification

PRE-AWARD BUY AMERICA CERTIFICATION

As required by 49 CFR part 663 – Subpart B, _____ (the recipient) is satisfied that the vehicles to be purchased, _____ (number and description of vehicles) from _____ (the manufacturer), meet the requirements of 49 U.S.C. 5323(j), as amended. The recipient ☐, or its appointed auditor ☐ _____ (the auditor – not the manufacturer or its agent), has reviewed documentation provided by the manufacturer, which lists (1) the proposed component and subcomponent parts of the vehicles identified by manufacturer, country of origin, and cost; and (2) the proposed location of the final assembly point for the vehicles, including a description of the activities that will take place at the final assembly point and the cost of final assembly.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.4 Sample Pre-Award Buy America Certificate of Non-Compliance

PRE-AWARD BUY AMERICA CERTIFICATE OF NON-COMPLIANCE

As required by 49 CFR part 663 – Subpart B,_____(the recipient) keeps on file a certification that there is a letter from FTA which grants a waiver to the rolling stock to be purchased,_____ (number and description of rolling stock), from the Buy America requirements under 49 U.S.C. 5323(j)(2)(A), (2)(B), or (2)(D), as amended.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.5 Sample Pre-Award Purchaser's Requirements Certification

PRE-AWARD PURCHASER'S REQUIREMENTS CERTIFICATION

As required by 49 CFR part 663 – Subpart B, _____ (the recipient) certifies that the vehicles to be purchased, _____ (number and description of vehicles) from _____ (the manufacturer), are the same product described in the recipient's solicitation specification and that the proposed manufacturer is a responsible manufacturer with the capability to produce vehicles that meet the specifications set forth in the solicitation.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.6 Sample Supplier Buy America Certification

Instructions for Completing the Buy America Supplier Certificate

The manufacturer may require suppliers to complete a Buy America Supplier Certificate for any item for which domestic content is being claimed. The Buy America Supplier Certificate is the supplier's legal attestation of its domestic content and location of manufacturing for the products being provided for the procurement.

1. Fill in the supplier's contact information in the designated space at the top part of the form.

2. Fill in the vehicle manufacturer's name and the vehicle/contract/purchase order number that connects the certificate to the specific procurement project.

3. Identify which of the three calculation scenarios apply for each component by checking the respective box.
   a) Check the first box if the component is manufactured in the U.S. and more than the required percentage of its subcomponents, by cost, are manufactured in the U.S.
   b) Check the second box if the component is manufactured in the U.S. and has less than the required percentage of its subcomponents, by cost, manufactured in the U.S.
   c) Check the third box if the component is NOT manufactured in the U.S. but does contain U.S. subcomponents for which the supplier has documentation showing a tariff exemption.

The cost of U.S. subcomponents is calculated by dividing the cost of U.S. subcomponents by the cost of all subcomponents for each component. Generally, the cost of each subcomponent is the price the bidder or offeror paid to the supplier for the subcomponent. Transportation costs to the final assembly location must be included in calculating the cost of foreign subcomponents. 49 CFR § 661.11(m)(1). For exceptions, see 49 CFR § 661.11(o).

Use extra pages as needed to cover all components and subcomponents in the supplier's scope of provision.

4. List each component and its subcomponents on the designated rows. Components should be identified by name and/or part number traceable to the subject procurement.
   a) Indicate the manufacturing location for each component and subcomponent in the designated space;
   b) Indicate the component's percentage of domestic subcomponents for each component in the designated space;
   c) Indicate each subcomponent's percentage of the component's domestic content in the designated space; the sum of all the subcomponents' domestic content percentages will equal the domestic content percentage of the component.

5. The form must be signed and dated by an authorized official of the supplier. Print the name and title of the signatory beneath the signature line.

Information on this form is subject to audit by the Purchaser, i.e., recipient of FTA funds, and/or by the Federal Transit Administration (and/or its agents).

SAMPLE BUY AMERICA SUPPLIER CERTIFICATION

Supplier: _____

Address: _____

Phone: _____ Fax: _____

Email: _____

Vehicle Manufacturer: _____

Vehicle/Contract/Purchase Order: _____

This certifies the Supplier's status of compliance with FTA Buy America Regulations set forth in 49 CFR § 661.11.

For each component supplied for the Contract, the Supplier attests that (CHECK ONE BOX):

☐	The required percentage of subcomponents, by cost, are of U.S. origin/manufacture, and the component is manufactured in the U.S. The Supplier attests that the U.S. content of subcomponents, by cost, is as indicated below. *See* 49 CFR § 661.11(g).
☐	Less than the required percentage of the subcomponents, by cost, are of U.S. origin/manufacture, and the component is manufactured in the U.S. (in such case, the cost of U.S. subcomponents is eligible for inclusion towards domestic content calculations). The Supplier attests that the U.S. content of subcomponents, by cost, is as indicated below. *See* 49 CFR § 661.11(l).
☐	The component contains subcomponents of domestic origin, however, the component is NOT manufactured in the U.S. (in such case, the cost of U.S. subcomponents is eligible for inclusion towards domestic content calculations only if the U.S. subcomponent(s) received a tariff exemption). The Supplier attests that the U.S. content of subcomponents, by cost, is as indicated below. *See* 49 CFR § 661.11(i).

	MANUFACTURING LOCATION	% DOMESTIC CONTENT	% FOREIGN CONTENT
[COMPONENT NAME]	[*Location of individual component manufacturer*]	[*Total domestic content % of all subcomponents*]	[*Total foreign content % of all subcomponents*]
[SUBCOMPONENT NAME] *(use rows for each subcomponent)*	[*Location of individual subcomponent manufacturer*]	[*Total domestic content % of individual subcomponent*]	[*Total foreign content % of individual subcomponents*]

Attach additional sheets as needed

Date: _____

Supplier Authorized Signature: _____

Print Name: _____

Title: _____

B.7 Sample Pre-Award FMVSS Compliance Certification

PRE-AWARD FMVSS COMPLIANCE CERTIFICATION

As required by 49 CFR part 663 – Subpart D, _____

(the recipient) certifies that it received, at the pre-award stage, a copy of

_____ ’s (the manufacturer) self-certification

information stating that the vehicles, _____

(number and description of vehicles), will comply with the relevant Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in 49 CFR part 571.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.8 Sample Pre-Award Certification of FMVSS Inapplicability

PRE-AWARD CERTIFICATION OF FMVSS INAPPLICABILITY

As required by 49 CFR part 663 – Subpart D,_____(the recipient) certifies that it received at the pre-award stage, a statement from _____(the manufacturer) indicating that the vehicles,_____(number and description of vehicles), will not be subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in 49 CFR part 571.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.9 Sample Post-Delivery Buy America Certification

POST-DELIVERY BUY AMERICA CERTIFICATION

As required by 49 CFR part 663 – Subpart C,_____(the recipient) certifies that it is satisfied that the vehicles received,

_____(number and description of vehicles) from_____(the manufacturer), meet the requirements of 49 U.S.C. 5323(j), as amended. The recipient ☐, or its appointed auditor ☐ _____(the auditor – not the manufacturer or its agent), has reviewed documentation provided by the manufacturer, which lists (1) the actual component and subcomponent parts of the vehicles identified by the manufacturer, country of origin, and cost; and (2) the actual location of the final assembly point for the vehicles, including a description of the activities that took place at the final assembly point and the cost of final assembly.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.10 Sample Post-Delivery Buy America Certificate of Non-Compliance

POST-DELIVERY BUY AMERICA CERTIFICATE OF NON-COMPLIANCE

As required by 49 CFR part 663 – Subpart C, _____ (the recipient) certifies that there is a letter from FTA which grants a waiver to the vehicles received, _____ (manufacturer, number and description of vehicles) from the Buy America requirements under 49 U.S.C. 5323(j), as amended.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.11 Sample Post-Delivery Purchaser's Requirements Certification (More Than Ten Buses or Modified Vans)

POST-DELIVERY PURCHASER'S REQUIREMENTS CERTIFICATION

As required by 49 CFR part 663 – Subpart C, _____

(the recipient) certifies that a resident inspector, _____

(the resident inspector – not an agent or employee of the manufacturer), was at

_____ 's (the manufacturer),

manufacturing site during the period of manufacture of the vehicles,

_____(number and

description of the vehicles). The inspector monitored manufacturing and completed a report on the manufacture of the vehicles, and provided accurate records of all vehicle construction activities. The report addresses how the construction and operation of the vehicles fulfill the contract specifications. After reviewing the report, visually inspecting the vehicles, and performance testing the vehicles, the recipient certifies that the vehicles meet the contract specifications.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.12 Sample Post-Delivery Purchaser's Requirements Certification (Ten or Fewer Buses or Modified Vans, or any Number of Unmodified Vans)

POST-DELIVERY PURCHASER'S REQUIREMENTS CERTIFICATION

As required by 49 CFR part 663 – Subpart C, after visually inspecting and road testing the contract vehicles,_____(the recipient) certifies that the vehicles,_____(number and description of vehicles) from _____ (the manufacturer), meet the contract specifications.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.13 Sample Post-Delivery FMVSS Compliance Certification

POST-DELIVERY FMVSS COMPLIANCE CERTIFICATION

As required by 49 CFR part 663 – Subpart D, _____

(the recipient) certifies that it received, at the post-delivery stage, a copy of

_____ ’s (the manufacturer) self-certification

information stating that the vehicles, _____

(number and description of vehicles), comply with the relevant Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in 49 CFR part 571.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.14 Sample Post-Delivery Certification of FMVSS Inapplicability

POST-DELIVERY CERTIFICATION OF FMVSS INAPPLICABILITY

As required by 49 CFR part 663 – Subpart D,_____(the recipient) certifies that it received, at the post-delivery stage, a statement from

_____’s (the manufacturer)

indicating that the vehicles _____ (number and description of vehicles), are not subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in 49 CFR part 571.

Date: _____

Recipient Authorized Signature: _____

Print Name: _____

Title: _____

B.15 Sample Completed Vehicle FMVSS Sticker

<table>
<tr><td colspan="2">MANUFACTURED BY (NAME)</td></tr>
<tr><td>DATE: (MONTH/YEAR)</td><td>GVWR: (WEIGHT) LB</td></tr>
<tr><td>FRONT GAWR: (WEIGHT) LB WITH (SIZE) TIRES,
(SIZE/TYPE) RIMS,
AT PSI COLD (SINGLE/DUAL)</td><td>REAR GAWR: (WEIGHT) LB WITH (SIZE) TIRES,
(SIZE/TYPE) RIMS,
AT PSI COLD (SINGLE/DUAL)</td></tr>
<tr><td colspan="2">THIS VEHICLE CONFORMS TO ALL APPLICABLE U.S. FEDERAL MOTOR VEHICLE SAFETY STANDARDS IN EFFECT ON THE DATE OF MANUFACTURE SHOWN ABOVE.

VIN: (VEHICLE IDENTIFICATION NUMBER)

TYPE: (VEHICLE TYPE)</td></tr>
</table>

B.16 Sample Altered Vehicle Manufacturer's FMVSS Sticker

<table>
<tr><td colspan="2">THIS VEHICLE WAS ALTERED BY (NAME) IN (MONTH/YEAR) AND AS ALTERED, IT CONFORMS TO ALL APPLICABLE FEDERAL MOTOR VEHICLE SAFETY STANDARDS AFFECTED BY THE ALTERATION AND IN EFFECT IN (MONTH/YEAR)</td></tr>
<tr><td colspan="2">GVWR: (WEIGHT) LB</td></tr>
<tr><td>FRONT GAWR: (WEIGHT) LB WITH (SIZE) TIRES,
(SIZE/TYPE) RIMS,
AT PSI COLD (SINGLE/DUAL)</td><td>REAR GAWR: (WEIGHT) LB WITH (SIZE) TIRES,
(SIZE/TYPE) RIMS,
AT PSI COLD (SINGLE/DUAL)</td></tr>
<tr><td colspan="2">TYPE: (VEHICLE TYPE)</td></tr>
</table>

B.17 Sample Incomplete Vehicle Manufacturer's FMVSS Sticker

THIS CHASSIS-CAB CONFORMS TO FEDERAL MOTOR VEHICLE SAFETY STANDARD NOS. (APPLICABLE FMVSS NUMBERS)**. THIS VEHICLE WILL CONFORM TO STANDARD NOS.** (APPLICABLE FMVSS NUMBERS) **IF IT IS COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS CONTAINED IN THE INCOMPLETE VEHICLE DOCUMENT FURNISHED PURSUANT TO 49 CFR PART 568. CONFORMITY TO THE OTHER SAFETY STANDARDS APPLICABLE TO THIS VEHICLE WHEN COMPLETED IS NOT SUBSTANTIALLY AFFECTED BY THE DESIGN OF THE CHASSIS-CAB.**

CHASSIS-CAB MANUFACTURED BY (NAME)**.**

(MONTH/YEAR)

B.18 Sample Intermediate Vehicle Manufacturer's FMVSS Sticker

WITH RESPECT TO STANDARD NOS. (APPLICABLE FMVSS NUMBERS)**, THE INSTRUCTIONS OF PRIOR MANUFACTURERS HAVE BEEN FOLLOWED SO THAT THE CHASSIS-CAB NOW CONFORMS TO THESE STANDARDS. THIS CHASSIS-CAB CONFORMS TO FEDERAL MOTOR VEHICLE SAFETY STANDARD NOS.** (APPLICABLE FMVSS NUMBERS)**. WILL CONFORM TO STANDARD NOS.** (APPLICABLE FMVSS NUMBERS) **IF IT IS COMPLETED IN ACCORDANCE WITH THE INSTRUCTIONS CONTAINED IN THE AMENDED INCOMPLETE VEHICLE DOCUMENT FURNISHED PURSUANT TO 49 CFR PART 568. CONFORMITY TO STANDARD NOS.** (APPLICABLE FMVSS NUMBERS) **IS NO LONGER SUBSTANTIALLY AFFECTED BY THE DESIGN OF THIS CHASSIS-CAB.**

INTERMEDIATE MANUFACTURE BY (NAME)**.**

(MONTH/YEAR)

B.19 Samples of Final-Stage Vehicle Manufacturer's FMVSS Stickers

MANUFACTURED BY (NAME)**.** **DATE:** (MONTH/YEAR) **INCOMPLETE VEHICLE MANUFACTURED BY** (NAME)**.** **DATE:** (MONTH/YEAR)	
GVWR: (WEIGHT) **LB**	
FRONT GAWR: (WEIGHT) **LB WITH** (SIZE) **TIRES,** (SIZE/TYPE) **RIMS, AT PSI COLD** (SINGLE/DUAL)	**REAR GAWR:** (WEIGHT) **LB WITH** (SIZE) **TIRES,** (SIZE/TYPE) **RIMS, AT PSI COLD** (SINGLE/DUAL)
CONFORMITY OF THE CHASSIS-CAB TO FEDERAL MOTOR VEHICLE SAFETY STANDARDS, WHICH HAVE BEEN PREVIOUSLY FULLY CERTIFIED BY THE INCOMPLETE VEHICLE MANUFACTURER OR INTERMEDIATE VEHICLE MANUFACTURER, HAS NOT BEEN AFFECTED BY FINAL-STAGE MANUFACTURE, THE VEHICLE HAS BEEN COMPLETED IN ACCORDANCE WITH THE PRIOR MANUFACTURER'S INSTRUCTIONS, WHERE APPLICABLE. THIS VEHICLE CONFORMS TO ALL OTHER APPLICABLE FEDERAL MOTOR VEHICLE SAFETY STANDARDS IN EFFECT IN (MONTH/YEAR)**.** **VIN:** (VEHICLE IDENTIFICATION NUMBER) **TYPE:** (VEHICLE TYPE)	

OR

CONFORMITY OF THE CHASSIS-CAB TO FEDERAL MOTOR VEHICLE SAFETY STANDARD NOS. (APPLICABLE FMVSS NUMBERS) **HAS NOT BEEN AFFECTED BY FINAL-STAGE MANUFACTURE. WITH RESPECT TO THE STANDARD NOS.** (APPLICABLE FMVSS NUMBERS)**, THE VEHICLE HAS BEEN COMPLETED IN ACCORDANCE WITH THE PRIOR MANUFACTURER'S INSTRUCTIONS. THIS VEHICLE CONFORMS TO ALL OTHER APPLICABLE FEDERAL MOTOR VEHICLE SAFETY STANDARDS IN EFFECT IN** (MONTH/YEAR)**.** **VIN:** (VEHICLE IDENTIFICATION NUMBER)

TYPE: (VEHICLE TYPE)

OR

THIS VEHICLE CONFORMS TO ALL OTHER APPLICABLE FEDERAL MOTOR VEHICLE SAFETY STANDARDS IN EFFECT IN (MONTH/YEAR)**.**

VIN: (VEHICLE IDENTIFICATION NUMBER)

TYPE: (VEHICLE TYPE)

Appendix C Sample Buy America Audit Reports

C.1 Pre-Award Audit Reports

ABC TRANSIT AGENCY

ROLLING STOCK VEHICLE PROCUREMENT

Pre-Award Audit Report

Submitted By:

[Recipient and/or Consultant Information]

[Date]

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1.0 EXECUTIVE SUMMARY

2.0 AUDIT PROCEDURES

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3.1 Verification of Domestic Content Estimate and Final Assembly Cost

3.2 Verification of Final Assembly Location and Activities

4.0 PRE-AWARD PURCHASER'S REQUIREMENTS CERTIFICATION

4.1 Verification of the Product as Described in the Specification

4.2 Verification Manufacturer is Responsible with Capability and Capacity to Delivery the Product

5.0 FEDERAL MOTOR VEHICLE SAFETY STANDARDS (FMVSS CERTIFICATION) (WHEN APPLICABLE)

6.0 PRE-AWARD AUDIT CONCLUSIONS

Attachments

Pre-Award Buy America Certification

Pre-Award Purchaser's Requirements Certification

Table of Domestic Content

1.0 EXECUTIVE SUMMARY

Provide description of report including manufacturer, number and type of vehicles, and references to key FTA guidelines.

Provide statement about whether rolling stock vehicle manufacturer is compliant with Buy America pre-award audit requirements and whether the recipient has copies of the following

i) Pre-Award Buy America Certification,

ii) Pre-Award Purchaser's Requirements Certification, and

iii) Pre-Award FMVSS CERTIFICATION, if applicable.

Include a statement as to the organization of the report and any attachments. Provide a statement about whether the rolling stock vehicle manufacturer meets Buy America requirements.

2.0 AUDIT PROCEDURES

Provide a brief description of the procedures used to perform the overall audit, including whether in-house staff or consultants were used. Include a brief statement about Pre-Award Buy America documentation received from the rolling stock vehicle manufacturer, and provide a brief overview of the review and analysis performed to determine compliance with Buy America requirements, including any onsite visits to the rolling stock manufacturer or component supplier sites. Include a brief statement about procedures used to determine the validity of the PreAward Purchaser's Requirements Certification, including documentation reviewed and site visits, if any, performed to determine if the proposal meets the solicitation requirements. and that the rolling stock manufacturer is responsible, with the capability and capacity to produce the vehicle in compliance with the Contract Requirements.

3.0 **PRE-AWARD BUY AMERICA CERTIFICATION**

Provide a brief summary addressing the rolling stock vehicle manufacturer's Pre-Award Buy America documentation and how the manufacturer meets or does not meet the domestic content and final assembly requirements. Provide a brief summary of the documentation provided by the rolling stock vehicle manufacturer and reviewed by the recipient or its designated auditor. 3.1 Verification of Domestic Content and Final Assembly Cost Provide a summary of the documentation provided by the manufacturer and confirm that the documentation included sufficient detail such that the reviewer was able to verify that the vehicle will contain the minimum domestic content and the final assembly costs. The self-certification of the manufacturer of domestic content or compliance is not sufficient. The reviewer should examine documentation that in concludes sufficient detail for the reviewer to determine whether the manufacturer is likely to meet the domestic content requirements.

Relevant information may include, but is not limited to, documentation of the breakdown of components, subcomponents, manufacture of origin, percent cost or actual cost of components, percent cost or actual cost of corresponding subcomponents, and whether the manufacturer has Buy America certifications from its suppliers. Provide a brief summary on the formulas and calculations used to determine domestic content and whether they are accurate. The Buy America pre-award audit report may include a summary table that lists the domestic components and their cost as a percentage of the total cost. The table should not include proprietary or confidential information.

Provide a summary statement of the manufacturer's claimed domestic content based on the independent analysis of the reviewer.

3.2 Verification of U.S. Final Assembly Location and Activities

Provide a brief description of the rolling stock vehicle manufacturer's proposed U.S. final assembly location and how the rolling stock vehicle manufacturer's final assembly activities will correspond to minimum final assembly activities in 49 CFR part 661. Provide a summary of the final assembly costs.

4.0 PRE-AWARD PURCHASER'S REQUIREMENTS CERTIFICATION

Provide a summary addressing the manufacturer's Pre-Award Purchaser's Requirements Certification and the reviewer's methods of review and analysis to determine whether the requirements were satisfied. The summary may include a a brief summary regarding how ABC Transit Agency's Evaluation Team reviewed the Manufacturer's Bid (Proposal), compared it to the solicitation specifications, and, after reviewing the manufacturer's bid, issued any addenda, received responses to clarifications, and found the Manufacturer to be compliant.

Additionally, the report may include a summary explaining how the recipient determined that the manufacturer is responsible. The summary may include, for example, a list of past deliveries of similar orders over the past 5 years. The summary also may indicate whether the manufacturer will use the same or similar processes and the same final assembly facility.

Provide a summary statement based on the above review as to whether or not the rolling stock manufacturer has the capacity and capability to produce the rolling stock to meet the contract requirements.

5.0 FEDERAL MOTOR VEHICLE SAFETY STANDARDS (FMVSS CERTIFICATION) (IF APPLICABLE) Provide a summary statement that a sample of the Manufacturer's FMVSS self-certification sticker information was obtained and reviewed against a sample FMVSS sticker and was found to include the content required for the Pre-Award Audit. (Ref. Appendix 6)

6.0 PRE-AWARD AUDIT CONCLUSION

Provide a summary regarding how the procedures used, analysis performed and results found on the Pre-Award audit of the rolling stock manufacturer indicates the manufacturer meets Buy America Compliance and the Purchaser's requirements certification.

C.2 Post-Delivery Audit Reports

ABC TRANSIT AGENCY

ROLLING STOCK VEHICLE PROCUREMENT

Post-Delivery Audit Report

Submitted By:

[Recipient and/or Consultant Information]

[Date]

A B C TRANSIT AGENCY NAME HERE

Post-Delivery Buy America Certification for
(Rolling Stock Manufacturer Name Here)

POST- DELIVERY BUY AMERICA CERTIFICATION

As required by 49 CFR part 663 – subpart C, _____ (the recipient) certifies that it is satisfied that the rolling stock vehicles received, _____ (number and description of rolling stock vehicles) from _____ (the manufacturer), meet the requirements of 49 U.S.C. 5323(j). The recipient ☐ , or its appointed auditor ☐ (the auditor – not the manufacturer or its agent), has reviewed documentation provided by the manufacturer, which lists (1) the actual component and subcomponent parts of the rolling stock vehicles identified by manufacturer, country of origin, and cost; and (2) the actual location of the final assembly point for rolling stock vehicles, including a description of the activities that took place at the final assembly point and the cost of final assembly.

Name: _____ Date: _____
Signature: Title:

Post-Delivery Purchaser's Requirements Certification for
(Rolling Stock Manufacturer Name Here)

POST-DELIVERY PURCHASER'S REQUIREMENTS CERTIFICATION

As required by 49 CFR part 663 – subpart C, _____ (the recipient) certifies that a resident inspector, _____ (the resident inspector – not an agent or employee of the manufacturer), was at _____ (the manufacturer), manufacturing site during the period of manufacture of the rolling stock, _____ (number and description of the rolling stock). The inspector monitored manufacturing and completed a report on the manufacture of the rolling stock, and provided accurate records of all vehicle construction activities. The report addresses how the construction and operation of the rolling stock fulfill the contract specifications. After reviewing the report, visually inspecting the rolling stock, and performance testing the rolling stock, the recipient certifies that the rolling stock meets the contract specifications.

Name: _____ Date: _____
Signature: Title:

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4.1 Assignment of Resident Inspector to Final Assembly Location and Rolling Stock Vehicle Manufacturer's Cababilty and Capacity

4.2 Inspection Testing and Commissioning to Show Vehicles Fulfill Contract Specifications

5.0 FEDERAL MOTOR VEHICLE SAFETY STANDARDS (FMVSS CERTIFICATION) (IF APPLICABLE)

6.0 POST-DELIVERY AUDIT CONCLUSIONS

APPENDICES

Appendix 1 Rolling Stock Vehicle Manufacturer's Post-Delivery Buy America Worksheet, Auditor's associated analysis and verification of final assembly cost

Appendix 2 Rolling Stock Vehicle Manufacturer's Buy America Certification

Appendix 3 Resident Inspector's Post-Delivery Purchaser's Requirements Report

1.0 EXECUTIVE SUMMARY

Provide a description of the report including manufacturer, number and type of vehicles, and references to key FTA guidelines.

Provide a statement about whether the rolling stock vehicle manufacturer is compliant with both (or all three) certifications; reference FTA regulations (49 CFR parts 661 and 663).

Provide a description of how the report is divided into two (or three) major sections in accordance with the regulation's requirements, namely:

i) Post-Delivery Buy America Certification

ii) Post-Delivery Purchaser's Requirements Certification

iii) Post-Delivery FMVSS Certification (if applicable)

Include a statement about the appendices of the report containing the relevant attachments to support the two (or three) major sections.

Provide a statement as to whether the rolling stock vehicle manufacturer meets the requirements of 49 CFR part 663.

2.0 POST-DELIVERY AUDIT PROCEDURES

Provide a brief description of the procedures used to perform the overall audit, including whether recipient's staff or consultants were used. Include a brief statement about the Post- Delivery Buy America documentation received from the rolling stock vehicle manufacturer, and provide a brief overview of the review and analysis performed to determine compliance with Buy America Requirements, including onsite visits to the rolling stock manufacturer or component supplier sites. Include a brief statement about the procedures used to verify the Post-Delivery Purchaser's Requirements Certification, including the presence of a resident inspector and confirmation of receipt and review of the resident inspector's report, to determine compliance with Post-Delivery Purchaser's Requirements Certification.

3.0 POST-DELIVERY BUY AMERICA CERTIFICATION

Provide a brief summary addressing the rolling stock vehicle manufacturer's Post-Delivery Buy America documentation, and whether the manufacturer meets or does not meet the domestic content and final assembly requirements. Provide a brief summary of the documentation provided by the rolling stock vehicle manufacturer and reviewed by the recipient or its designated auditor.

3.1 Verification of Domestic Content and Final Assembly Cost

Provide a detailed summary of the auditor's review of the rolling stock vehicle manufacturer's Buy America worksheet and whether it includes all the typical components of the rolling stock being purchased per 49 CFR § 661.11. State the total % domestic content claimed by the rolling stock vehicle manufacturer.

Include information about the information and documentation reviewed by the auditor to verify the domestic content, including, but not limited to, whether information about the breakdown of components, subcomponents, manufacture of origin, percent cost or actual cost of components and percent cost or actual cost of corresponding subcomponents. Provide a brief summary about the formulas and calculations used to determine domestic content and whether it is accurate. Provide any other unique details about the manufacturer's Buy America worksheet.

Provide a summary of the auditor's review of the bill of material and whether it was used to verify components.

Provide a summary of the auditor's review of purchase orders or paid invoices of components and whether costs were traceable to the rolling stock manufacturer's Buy America domestic content worksheet. Provide a brief summary about whether the manufacturer has signed certificates from component suppliers certifying U.S. content 46 and a statement about the sampling of the components supplier's certifications. Provide a summary statement affirming the manufacturer's claimed domestic content based on the independent analysis. Provide a final statement about whether the Rolling Stock Manufacturer's Buy America Worksheet is accurate and documented.

3.2 Verification of U.S. Final Assembly Location and Activities Provide a brief summary confirming the U.S. final assembly location and how final assembly activities correspond to minimum final assembly activities in 49 CFR § 661.11 Appendix D. Make reference to the Resident Inspector's report that details this information (as an Appendix).

4.0 POST-DELIVERY PURCHASER'S REQUIREMENTS CERTIFICATION

Provide a summary that this section addresses the manufacturer's Post-Delivery Purchaser's Requirements Certification. Provide a brief summary on the methods of review and analysis to determine if the requirements were satisfied, including presence of the resident inspector, resident inspector's report, and verification and results of visual inspection and test sheets.

Provide a summary statement as to whether the Rolling Stock Vehicle Manufacturer meets the Post-Delivery Purchaser's Requirements, as stated in 49 CFR part 663 Pre-Award and Post Delivery Audits of Rolling Stock Purchases.

4.1 Assignment of Resident Inspector to Final Assembly Location; Verification of Manufacturer's Capability and Capacity

Provide a brief summary of the Resident Inspector's report and how it demonstrates the Rolling Stock Manufacturer's Capability and Capacity. Include information such as whether the resident inspector was at the facility full time or part time, the number of resident inspectors at the final assembly plant, and the type of inspections performed on vehicles as summarized in the resident inspector's report (Appendix 5). Provide a summary of quality assurance and control

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46 Note this is just a statement as to whether the manufacturer has obtained certificates from its suppliers; signed certificates from suppliers is not requirement, but is a recommended practice.

processes and whether the processes are consistent with the appropriate FTA elements of quality[47] (as an Appendix).

4.2 Inspection Testing and Commissioning to Show Vehicles Fulfill Contract Specifications

Provide a brief summary of key inspection, testing, test witnessing and commissioning activities as summarized in the resident inspector's report, making reference to sample inspection check sheets, testing procedures, reports, and examples of how the inspection and testing results meet the technical specification requirements (as an Appendix).

5.0 FEDERAL MOTOR VEHICLE SAFETY STANDARDS (FMVSS CERTIFICATION) (IF APPLICABLE)

Provide a summary statement that the rolling stock vehicle manufacturer's actual FMVSS self-certification sticker information was obtained and reviewed against a sample FMVSS sticker and was found to include the content required for the Post-Delivery Audit. (Ref. Appendix 6).

6.0 POST-DELIVERY AUDIT CONCLUSION

Provide a summary regarding how the procedures used, analysis performed, and results found on Post-Delivery Audit of the rolling stock manufacturer indicate that the Buy America Compliance and the Purchaser's requirements certification have been satisfied.

[47] Available on FTA's website: https://www.transit.dot.gov/funding/procurement/project-management-oversight-pmo.

EXHIBIT 7

PLEASE REPLACE SECTION 4 – GENERAL PROCUREMENT PRACTICE

WITH FTA BEST PRACTICES PROCUREMENT & LESSONS LEARNED

SECTIONS 3 and 4

NOTE: FTA Circular 4220.1F has not been updated to incorporate the provisions of the Uniform Administrative Requirements, 2 CFR Part 200. Until that update is issued, when there is a conflict between guidance contained in Circular 4220.1F and the Uniform Administrative Requirements, the Uniform Administrative Requirements supersede C.4220.1F. Information on procurement thresholds for federally-funded procurements: • Micro-purchase threshold is $3,500 or less if awarded prior to June 20, 2018, or $10,000 or less for contracts awarded after June 20, 2018. • Simplified Acquisition (small purchase) threshold is $150,000 or less, if awarded prior to June 20, 2018, or $250,000 or less for procurements awarded after June 20, 2018. Procurements funded by awards issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of $100,000. (per 49 CFR 18.36(d)

ALWAYS SEARCH FOR AND REVIEW FTA's most recent circulars for updates. Call the Transit Department for recent updates.

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SECTION 3

Types of Contracts

The selection of contract type is one of the single most important decisions that the procurement specialist will make in the acquisition process. A properly selected contracting method will work in the interests of the procuring agency to provide a product or service that meets the agency's needs at a reasonable price without undue risks to the contractor and without excessive contract administration costs and contractor claims. A contracting method poorly suited to the complexity of the requirement may shift greater risk to the procuring agency that could result in less than desirable project outcomes.

When procuring property and services under a Federal award, a State must follow the same policies and procedures it uses for procurements funded with non- Federal monies. See 2 C.F.R. § 200.317. Non-state recipients and subrecipients must use their own procurement procedures, which reflect applicable state and local laws and regulations. See 2 C.F.R. § 200.318. Regardless of a recipient's status (i.e., state or non-state entity), all FTA funded procurements must comply with applicable Federal laws and regulations. Some of those laws and regulations will affect the third party contract for providing the property or services and may even determine which entities may qualify as a third party contractor. Other laws and regulations will affect the nature of the property or services to be acquired or the terms under which the property or services must be acquired.

3.1 General Federal Requirements

REQUIREMENT
In order to use FTA assistance to support the acquisition of property or services, a recipient must comply with all applicable Federal laws and regulations. General requirements applicable to all FTA-funded projects may be found at 2 C.F.R. part 200 (particularly, §§ 200.317-326). Additionally, FTA's Third Party Contracting Circular 4220.1F sets forth the particular provisions that apply to each federally funded contract by type of project and contracting method used. (Caution: When consulting FTA Circular 4220.1F, recipients and vendors should be mindful that there are statutory and regulatory requirements that may not be reflected in the current version of the circular. When this occurs, the current federal law or regulations supersede the circular.)

The receipt of Federal funds requires recipients to comply with certain Federal statutes and regulations. A recipient may not use FTA assistance to support acquisitions that do not comply with the applicable Federal requirements.
Therefore, it is important for recipients to know whether FTA funds will be used for the contract or the project. Once a recipient decides to use federal funds for a project, all contracts entered into in support of that project must comply with FTA requirements, even if the individual contract is to be funded with only local funds.

First and foremost, each recipient must establish whether the products and services to be acquired are eligible for FTA assistance under Federal law. Most Federal transit laws are codified at 49 Chapter 53, as amended by the Fixing America's Surface Transportation (FAST) Act, Public Law 114-94, December 4, 2015. The procurement of eligible goods and services must with 49 U.S.C. §§ 5323 and 5325, section 3019 (Innovative Procurement) in the FAST Act, 2 C.F.R. part 200 (Uniform Guidance or Super Circular), and FTA Circular 4220.1F (Third Party Procurement).

Once the recipient has established the need and eligibility for the products or services to be acquired, the recipient must then determine which Federal requirements apply and whether the recipient is able to comply with those
requirements. Compliance with Federal requirements is a condition of receipt of Federal funds. Failure to comply with the applicable third party contracting provisions may cause the recipient to be in default of its grant agreement with FTA that could result in the loss of project funds.

If a recipient is unable to comply with all or some of the applicable requirements, the recipient has several options:

- Apply to FTA for a waiver – FTA reserves the right to waive any third party contracting provision to the extent permitted by Federal law or regulation;
- Propose to FTA alternative methods for complying with applicable Federal statute and regulation; or
- Proceed with the procurement and finance entirely with non-Federal funding sources.

Appendix A of this Manual contains 26 model contract clauses that are either federally required or are suggested model clauses that a recipient may include in a contract. Many of the required clauses come directly from requirements in various sections of the Code of Federal Regulations (C.F.R.), which is published by executive departments of the Federal government. The most common requirements for FTA recipients come from various parts of Titles 2 and 49 of the C.F.R. Where clauses are not mandated by an executive department, they are frequently modeled after clauses in the Federal Acquisition Regulations (FAR), which are applicable to those executive departments. Even though the

FAR does not apply to FTA funded procurements, one advantage of using FAR clauses in the absence of a specific requirement imposed upon a transit agency is that a body of Federal law has been developed that interprets those clauses.

A State, local jurisdiction, or transit agency also may have enacted a procurement code or body of regulations that establishes specific clauses that must be used by a recipient in its contract documents. As discussed in the introduction to this section, each State and non-state recipient must follow their respective state and local procurement procedures in conjunction with the federally- mandated statutes and regulations that are codified in the model clauses contained in Appendix A. Many of the Federal, state and locally-mandated clauses may be suitable for incorporating by reference into each contract, particularly if they are published in a Federal, State, or local statute, code, or ordinance, or in an official regulation such as the C.F.R. Recipients are advised to check with their legal counsel on what clauses can and cannot be incorporated by reference and the manner in which they may be incorporated.

FTA's third party contracting requirements apply in varying degrees to the following types of contracts.

3.1.1 *Capital Contracts for equipment, supplies and services, including construction and rolling stock* – FTA third party contracting requirements apply to all capital contracts that are part of an FTA funded project. All activities related to a Federal undertaking will be identified as the Federal project, and local funds used to match Federal grants may only be spent on eligible activities and in accordance with FTA's third party contracting requirements. Recipient's capital projects that are unrelated to an FTA assisted capital project and that the recipient can demonstrate are entirely financed without FTA assistance or other Federal funds will not require application of FTA's third party contracting requirements.

3.1.2 *Preventive Maintenance Contracts* – Third party contracts for preventive maintenance are eligible for FTA capital assistance, and≠, therefore, FTA's third party contracting requirements apply to those contracts when financed with FTA assistance. If a recipient uses its FTA assistance to support specific preventive maintenance contracts that are separate and distinct from its other maintenance or operations contracts, and if, through its accounting procedures, a recipient can allocate and trace all its Federal assistance for capital preventive maintenance to those separate and distinct preventive maintenance contracts, this circular applies only to those specific FTA assisted contracts. If, however, the recipient applies its Federal capital assistance for preventive maintenance as a percentage of its total maintenance costs, and the recipient cannot allocate all of its Federal assistance for capital maintenance to specific preventive maintenance contracts that are separate and distinct from its other maintenance or operations contracts, this circular applies to all the recipient's preventive maintenance contracts, even if specific maintenance or operations contracts were financed wholly without

FTA assistance.

3.1.3 *Operations Contracts* – FTA third party contracting requirements apply to all operating contracts financed with FTA assistance. However, third party contracting requirements will not apply to operations contracts that recipients finance entirely without FTA assistance.

3.1.4 *Revenue Contracts* – A revenue contract is a contract in which the recipient provides access to public transportation assets for the primary purpose of either producing revenues in connection with an activity related to public transportation or creating business opportunities with the use of FTA assisted property. For example, recipients typically lease transit property for retail services and advertising purposes.

The recipient has broad latitude in determining the extent and type of competition appropriate for a particular revenue contract. Nevertheless, to ensure fair and equal access to FTA assisted property and to maximize revenue derived from such property, the recipient should, to the maximum extent practicable, conduct its revenue contracting as follows:

- *Limited Contract Opportunities* – If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the recipient should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity.
- *Open Contract Opportunities* – If, however, one party seeks access to a public transportation asset (such as a utility that might seek cable access in a subway system), and the recipient is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties.

3.1.5 *Legal and Associated Services* – FTA third party contracting requirements apply to the procurement of legal and associated services, such as paralegals, investigators, expert witnesses, etc. that are paid for with FTA funds. Such services are to be procured competitively as with other types of FTA funded service agreements. There may be cases, however, where the recipient has pending litigation that might be jeopardized by advertising the procurement beforehand. In such cases, the recipient may have valid grounds for limiting the competition to the degree of not publicly advertising the procurement or proceeding with a sole source procurement if warranted. If the recipient determines a sole source procurement is warranted, FTA's third party contract standards for sole source awards, including documentation, apply. FTA third party contracting

requirements would not apply if the legal and associated services are funded entirely with local funding sources.

3.1.6 *Employment Contracts* – These are contracts with individuals that result in those individuals becoming "employees" of the agency. These are not "third party contracts" within the meaning of FTA Circular 4220.1F,
and thus the requirements of that Circular do not apply to employment contracts. The term "employment contract" does not refer to a contract that retains a consultant to perform temporary services for the agency. The individual retained on these consultant-services contracts remains an independent contractor and does not become an employee of the agency; thus these contracts are not "employment contracts,"
and they are subject to the requirements of FTA Circular 4220.1F.

3.1.7 *Real Estate Contracts* – FTA third party contracting requirements do not apply to acquisitions of real property. Purchases of land and any existing buildings and structures on that land are generally beyond the scope of Circular 4220.1F (and any successor circular). Real property acquisition, use and disposal is also covered by FTA Circular 5010.1D;
49 C.F.R. part 200; 49 C.F.R. part 24 Subpart B; and by the FTA Master Agreement. The third party contracting provisions of this circular, however, do apply to FTA assisted construction of buildings, structures, or appurtenances that were not on land to be used for the project when that land was acquired. FTA's third party contracting provisions do apply to any alteration or repair to buildings or structures existing on that land when that land was acquired or made available for the FTA assisted project.

3.1.8 *Restricted or Prohibited Types of Contracts* – The following contract types are restricted or prohibited:

- *Cost Plus a Percentage of Cost and Percentage of Construction Cost—Prohibited* – Federal law prohibits the use of cost plus a percentage of cost (CPPC) and percentage of construction cost methods of contracting, and, therefore, FTA may not grant waivers for use of these contracting methods. See 2 C.F.R. § 200.323(d). Recipients must not only avoid using this type of contract, they must also insert clauses in their cost-type contracts (i.e., those where the contractor is reimbursed for the allowable costs incurred in performance of the contract) that prohibit their prime contractors from using CPPC subcontracts. Care must be taken to avoid any kind of agreement whereby the contractor's fee would be increased automatically with increases in a particular cost element. Generally, any contractual arrangement whereby the contractor is assured of greater profits by incurring additional costs will be held illegal. The obvious problem with this form of contract is that profits increase in proportion to dollars spent thereby providing a positive incentive

to inefficiency.

- *Time and Materials—Restricted* – Recipients are permitted to use time and materials contracts only: (1) after determining that no other type of contract is suitable; and (2) if the contract specifies a ceiling price that the contractor will not exceed except at its own risk. (See 2 C.F.R. Section 300.318(j)) The reason this type of contract is the least preferable of all allowable types is that it creates a disincentive for the contractor to complete the contract in a timely manner. Since each labor hour expended carries with it a profit (and a predetermined overhead charge) built into the fixed hourly rate, the contractor is motivated to work as many hours as possible. There is no incentive to complete the contract quickly and minimize total costs to the buyer, which is why FTA restricts its use by recipients on FTA funded contracts. Per the Uniform Guidance,
- *Cost-Plus-Fixed-Fee—Restricted* – Recipients may need a contract for projects where the requirement can only be defined over a period of time. Such contracts are also known as on-call contracts, task order contracts, or Indefinite Delivery Indefinite Quantity (IDIQ) contracts and may be priced either on a firm fixed price or cost-plus- fixed-fee (CPFF) basis, depending on the nature of the work and the uncertainties and risks of performance. See FTA Circular 4220.1F, Ch. V-7a(2) for a description of IDIQ contracts. FTA discourages the use of CPFF except when the "uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed price contract." See FTA Circular 4220.1F, Chapter VI-2.c (1) (b). If a CPFF basis is taken, the initial award should include a commitment from the contractor on rates the contractor will use in pricing each individual task. The procedure should provide for the negotiation of fully burdened rates for each category of labor that the contractor expects to need over the course of the contract prior to the basic contract award. These rates will be fixed for the life of the contract and applied to each task order, as applicable. For examples of procurement practices related to IDIQ/on-call/task order contracts using CPFF, see Appendix B, Section B-3.4.

The two most significant types of procurement actions where specific Federal third party contracting requirements apply, construction and rolling stock, are discussed in detail below.

3.2 Construction Contracts

Construction contracting presents a unique set of challenges for transit agencies. In recent years the trend in the industry has been away from the traditional design-bid-build delivery method to a variety of alternative project delivery methods. Project delivery method is a term used to refer to all the contractual relationships, roles, and responsibilities of the entities involved in a project. Among them, the Construction Manager/General Contractor (CM/
GC) or Construction Management at Risk (CMR) approach is perhaps the most innovative method, but it also can be challenging for transit agencies to manage. While the traditional design-bid-build delivery method still remains the most common method used by FTA recipients and for some recipients, it is the only project delivery method available, state laws are changing rapidly to allow for use of alternative methods of project delivery to save money and time.

Although FTA does not require the use of any particular project delivery method on FTA funded construction projects, it does require its recipients to justify any innovative approach that they use in order to ensure that the recipient has the legal authority under state law to proceed with the proposed alternative delivery method and to ensure risk is carefully managed so as not to negatively impact a project's scope, schedule, and budget.

The construction project delivery methods, described in Sections 3.2.1 through 3.2.5 below, are representative of the most common delivery methods used by FTA recipients, but by no means is this list exhaustive. Recipients using other project delivery systems are encouraged to discuss their approach with FTA before moving ahead with their procurements. See Appendix B, Section B-3.2, for practices in evaluating or documenting project delivery methods.

After selecting a construction project delivery method, recipients are encouraged to incorporate certain analyses, such as Value Engineering, into the development and execution of their construction contracts.

3.2.1 *Design-Bid-Build (DBB)* – DBB refers to the traditional construction project delivery method under which a recipient commissions an architect or engineer to prepare drawings and specifications under
a design services contract and separately contracts for construction by engaging the services of a contractor through sealed bidding (e.g.,) invitation for bid or competitive negotiations) to construct the project. The owner/recipient is responsible for the details of the design and warrants the quality of the construction design documents to the construction contractor.

- *Advantages* – A major advantage of the DBB sequential approach is that complex or one- of-a-kind projects can be thoroughly planned and thought through before construction begins. This approach produces,

in the design phase of the project, the most accurate estimate of final project costs. If problems are encountered with design aspects for the later stages of the project, the earlier design features or phases can be modified before any construction work has been done, thus avoiding construction contractor claims and delays. Another advantage is that the agency has a fixed price to complete the project before construction begins. This may facilitate the process for obtaining the necessary financing and project approvals. Overall management of the project also may be simplified by this approach.

- *Disadvantages* – DBB projects require a longer time to complete than design-build or other more innovative project delivery methods. The recipient assumes the design/construction integration risk. And since time pressures are often the most intense issues confronting an agency, the sequential method may not be feasible. Alternative contracting approaches have arisen to shorten the project completion time. These include phased design and construction ("fast tracking"), which often involves the use of a construction manager, and turnkey (design-build) contracting.

3.2.2 *Design-Build (DB)* – The DB procurement method consists of contracting for design and construction simultaneously with contract award to a single contractor, consortium, joint venture, team, or partnership that will be responsible for both the project's design and construction. FTA's enabling legislation expressly authorizes the use of FTA capital assistance to support design-build projects "after the recipient complies with Government requirements," 49 U.S.C. § 5325(d)(2). This method typically uses a request for qualifications (RFQ)/request for proposals (RFP) procedures rather than the DBB IFB or competitive negotiations method.

- *Advantages* – Design-build procurements provide for better risk allocation and management for the owner, particularly with respect to reducing the size and frequency of change orders. Specifically, the risk for errors and omissions in the plans is transferred from the owner to the DB contractor. Having a single point of accountability for design and construction helps the owner avoid a situation in which the designer and constructor are blaming each other for changes in the cost or schedule for the project
- *Disadvantages* – Because the owner transfers responsibility for all design and construction in the DB contract, the owner also loses the ability to foster competition between design sub-consultants and construction trade subcontractors. Also, since the contract is awarded before the design is complete, DB can create an unfavorable risk environment for subcontractors whose cost estimating systems lack the sophistication to price work without completed construction documents.

3.2.3 *Construction Manager/General Contractor (CM/GC) or Construction Manager at Risk (CMR)* – CM/GC or CMR is a project delivery system in which an owner contracts with a construction manager based on qualifications, experience, fees for management services, and target construction price, to manage and construct a project within a guaranteed maximum price (GMP). The construction manager acts as a consultant to the owner in the development and design phases and as the general contractor during the construction phase. Usually there is a self-perform requirement by the CM/GC as well. (For examples of different practices related to the self-perform requirement, see Appendix B, Section B-3.2.) CM/GC contracting, like any other project delivery method (DBB, DB, etc.) is one of several methods that can be employed successfully in the proper circumstances, and, as with any method, effective implementation during construction is a key to success.

- *Advantages* – With the CM/GC or CMR delivery method, the contractor acts as the consultant in the design process thereby having an opportunity to offer new innovations, best practices, and opportunities to reduce cost and schedule risks based on years of proven experience in doing the actual work. This delivery method allows the project owner to employ new innovations, assist in the design process, and make informed decisions regarding cost and schedule. The CM/GC or CMR method encourages both the contractor and project owner to look at all options including using innovative techniques or approaches that reduce time and cost. The project owner is also able to better understand the risks associated with the project and explore the feasibility of mitigation options with the contractor. The contractor is able to review the design early on in the project development phase and provide feedback to the owner, answer design questions and provide changes. By including the contractor early in the design stage, the designer can produce better designs that reduce issues in construction thereby preventing or minimizing change orders that can lead to project overruns. Further, the CM/GC process allows the contractor to begin planning the construction schedule during the design phase, thus allowing the team to view how construction will impact traffic and adjust the construction schedule accordingly to minimize traffic impacts. Typically, CM/GC or CMR contracts contain a provision that establishes a Guaranteed Maximum Price (GMP), above which the owner is not liable for additional payment.
- *Disadvantages* – CM/GC contracting is a relatively new technique for public transportation projects and the contracting method is not necessarily well understood by that construction community.

Recipients that implemented CM/GC contracts as a means to address limited staff resources and management capacity were generally less successful than other recipients. It does not appear that the CM/ GC method reduces the requirement for qualified recipient staff to manage the design or construction processes. In fact, the CM/GC method places additional demands on staff during the design process to facilitate the required coordination between the design team and the CM/GC and to resolve differences regarding the appropriate design solutions to implement. Use of the CM/GC project delivery strategy does not guarantee that the objectives that led to its selection by the recipient will be met and that the contract will be completed successfully.

3.2.4 *Design-Build-Operate and Maintain (DBOM)* – A delivery system in which one single entity performs the design and construction of a project, operates the project, and, if desired by the owner, also contracts to maintain the project for a specified period of time all under one contract.

- *Advantages* – This delivery method integrates design, construction, operations, and maintenance under one contract, thereby providing faster project delivery and better life-cycle costs.
- *Disadvantages* – This delivery method requires a longer, more costly and involved procurement process.

3.2.5 *Joint Development* – A project delivery system in which a private entity or developer takes a part in financing a construction project in return for monetary compensation. The project is a transit capital project that integrally relates to, and often co-locates with commercial, residential, mixed-use or other non-transit development. Joint development may include partnerships for public or private development associated with any mode of the transit system that is being improved through new construction, renovation, or extension. Joint development may also include intermodal facilities, intercity bus and rail facilities, transit malls, or historic transportation facilities. A joint development project, awarded with FTA federal assistance, must satisfy the eligibility criteria of 49 U.S.C. § 5302(3) (G) and as described in FTA Circular 7050.1, Guidance on Joint Development. Please refer to that FTA Circular for further information if seeking to pursue a joint development with federally assisted property.

- *Advantages* - Joint Development projects typically expedite completion of the project as compared against conventional project delivery methods. By joining forces with another public or private entity, the owner has an opportunity to generate cost savings and

improve quality of output and system performance. Joint Development projects typically benefit from the use of innovative materials and management

techniques, substitution of private resources and personnel for public resources, access to new sources of private capital, greater risk sharing, and mutual rewards.

- *Disadvantages* – Joint Development projects may be difficult to get off the ground, as their success depends a great deal on economic uncertainties and they may require a major cultural shift within a recipient's organization. Joint Development projects also require extensive contract negotiations, performance enforcement, and political acceptability, which oftentimes is a barrier to success.

3.2.6 *Value Engineering* – VE is the systematic, multi-disciplined approach designed to optimize the value of each dollar spent. Pursuant to the Uniform Guidance (2 C.F.R. 200.318(g)), recipients are "encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost." To accomplish VE, a team of architects/engineers identifies, analyzes, and establishes a value for a function of an item or system. The objective of VE is to satisfy the required function at the lowest total cost over the life of a project consistent with the requirements of performance, reliability, maintainability, safety, and aesthetics. VE must be used by recipients on major capital projects and is encouraged on all other construction projects, including but not limited to bus maintenance and storage facilities, intermodal facilities, transfer facilities, railcar acquisition and rehabilitation, and offices, with the level of VE study to be commensurate with the size of the project. Recipients who are constructing major capital projects should consult the guidance and requirements for that program, which can be found on FTA's website. Some contractual arrangements (e.g., design-build contracts) may include value engineering. Where this is the case, separate and additional value engineering proposals, change orders, or other processes may not be needed.

- *Advantages* – Contractors may be reluctant to propose changes that will reduce their contract price and have the effect of reducing their profit on the contract. VE is a technique designed to overcome this disincentive by offering contractors a share of the savings resulting from their change proposals. It is designed to incentivize contractors to submit change proposals that reduce the cost of contract performance by promising the contractor a share of the savings. Contractors can often find less expensive ways to perform their contracts than the methods prescribed in the contract specifications.

- *Disadvantages* – VE should be performed early in the design process before major decisions have been completely incorporated into the design, at or near the end of project development. A recipient's project management team must proactively manage the VE process to ensure that time and effort are not wasted and that the outcomes from the VE process do not have a negative impact on the project's scope, schedule, and budget. On small projects, the cost of doing a VE review may not yield substantial savings.

3.2.7 *Special Contract Provisions for Construction Contracts* – Construction contracts require certain contract provisions that are unique to that activity. The following requirements may affect FTA assisted construction procurements.

3.2.8 *Bonding* – Bonds are required for all construction contracts exceeding the Simplified Acquisition Threshold, currently set at $150,000, unless FTA determines that other arrangements adequately protect the Federal interest. FTA's bonding policies are as follows:

- *Bid Guarantee* – Each bidder is generally required to provide a bid guarantee equivalent to 5 percent of its bid price. The bid guarantee must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid to ensure that the bidder will honor its bid upon acceptance.
- *Performance Bond* – Contractors generally must obtain a performance bond for 100 percent of the contract price. A performance bond is obtained to ensure completion of the obligations under the third party contract.
- *Payment Bond* – Contractors generally must obtain a standard payment bond. A payment bond is obtained to ensure that the contractor will pay all people supplying labor and material for the third party contract as required by law. FTA has determined that payment bonds in the following amounts are adequate to protect FTA's interest and will accept a local bonding policy that meets the following minimums:
  - *Less Than $1 Million* – Fifty percent of the contract price if the contract price is not more than $1 million;
  - *More Than $1 Million but Less Than $5 Million* – Forty percent of the contract price if the contract price is more than $1 million but not more than $5 million; or
  - *More Than $5 Million* – Two and one half million dollars if the contract price is more than $5 million.
- *Reduced Bonding* – FTA recognizes that bonding costs can be expensive. FTA will accept a local bonding policy that conforms to the minimums described above. FTA reserves the right to approve bonding amounts

that do not conform to these minimums if the local bonding policy adequately protects the Federal interest. A recipient interested in adopting less stringent bonding requirements for a specific class
of projects or for a particular project should submit its policy and rationale to the Regional Administrator for the region administering the project.

- *Excessive Bonding* – Compliance with State and local bonding policies that are greater than FTA's bonding requirements do not require FTA approval. FTA recognizes that in some situations bond requirements can be useful if the recipient has a material risk of loss because of a failure of the prospective contractor. This is particularly so if the risk results from the likelihood of the contractor's bankruptcy or financial failure when the work is partially completed. Nevertheless, if the recipient's excessive bonding requirements would restrict competition, FTA may choose not to provide Federal assistance for procurements encumbered by those requirements. In those instances where a recipient's bonding policy could potentially restrict competition, FTA encourages its recipients to submit their bonding policy and rationale to their local FTA Regional Administrator for review prior to undertaking any procurement actions in support of the project.

3.2.9 *Seismic Safety* –The recipient must include seismic safety provisions in its third party contracts for the construction of new buildings or additions to existing buildings as required by the Earthquake Hazards Reduction Act of 1977, 42 U.S.C. § 7701 et seq., and DOT regulations, "Seismic Safety," 49 C.F.R. §§ 41.117 and 41.120.

3.2.10 *Equal Employment Opportunity* – Third party construction contracts must include provisions ensuring compliance with Department of Labor regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. Chapter 60, which implement Executive Order 11246, "Equal Employment Opportunity," September 24, 1965, as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," October 13, 1967.

3.2.11 *Prevailing Wages* – Under 49 U.S.C. § 5333(a), Davis-Bacon Act prevailing wage protections apply to laborers and mechanics employed on FTA assisted construction, alteration, and repair projects. Third party contracts for construction, alteration, or repair at any contract tier exceeding $2,000 must include provisions requiring compliance with
the Davis-Bacon Act, 40 U.S.C. § 3141 et seq., and implementing DOL regulations "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction," 29 C.F.R. part
5. The Davis-Bacon Act requires that contractors pay wages to laborers and mechanics at a rate not less than the minimum

wages specified in the wage determination made by the Secretary of Labor. The Davis- Bacon Act also requires contractors to pay wages not less than once a week. The recipient must include a copy of the current prevailing wage determination issued by DOL in each contract solicitation and must condition contract award upon the acceptance of that wage determination.

3.2.12 *Anti-Kickback* – Section 1 of the Copeland "Anti-Kickback" Act, at 18 U.S.C. § 874, prohibits anyone from inducing, by any means, any person employed on construction, prosecution, completion, or repair of a federally assisted building or work, to give up any part of his or her compensation to which he or she is otherwise entitled. Section 2 of that Act, at 40 U.S.C. § 3145, and implementing DOL regulations, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States," 29 C.F.R. part 3, imposes record keeping requirements on all third party contracts for construction, alteration, or repair exceeding $2,000. Under Appendix II to 2 C.F.R. part 200— *Contract Provisions for Non-Federal Entity Contracts Under Federal Awards*, recipients' third party contracts must include a provision for compliance with the Copeland "Anti-Kickback" Act, as amended, and implementing DOL regulations.

3.2.13 *Contract Work Hours and Construction Safety* – Where applicable, all contracts awarded by a non-Federal entity in excess of $100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. §§ 3702 and 3704, as supplemented by Department of Labor regulations (29 C.F.R. part 5). Pursuant to 40 U.S.C. § 3702, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. § 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions that are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market or contracts for transportation or transmission of intelligence.

3.2.14 *Labor Neutrality* – A recipient may require the use of a project labor agreement (PLA) in its third party contracts, and a third party contract or subcontractor may use a PLA should it choose to do so.

3.2.15 Buy America – For any FTA assisted project, the steel, iron, and manufactured products acquired for use in the construction project must be produced in the United States, unless FTA has granted a waiver. See 49 U.S.C. § 5323(j); 49 C.F.R. part 661. FTA cautions that its Buy America regulations are complex and different from the Federal "Buy American Act" regulations in the Federal Acquisition Regulation (FAR) at 48 C.F.R. chapter 1, subchapter D, part 25, subparts 25.1 and 25.2. Recipients can obtain detailed information on FTA's Buy America regulation at the Federal Transit Administration's Buy America website.

3.2.16 *Accessibility* – Facilities to be used in public transportation service must comply with the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*; DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. part 37; and Joint Access Board/DOT regulations, "Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 C.F.R. part 1192 and 49 C.F.R. part 38. Notably, DOT incorporated by reference into Appendix A of its regulations at 49 C.F.R. part 37 the Access Board's "Americans with Disabilities Act Accessibility Guidelines" (ADAAG), revised July 2004, which include accessibility guidelines for buildings and facilities. DOT also added specific provisions to Appendix A of 49 C.F.R. part 37 modifying the ADAAG with the result that buildings and facilities must comply with both the ADAAG and the DOT amendments.

3.3 Rolling Stock Contracts

The term "rolling stock" applies to vehicles used to transport passengers and includes buses, vans, sedans, railcars, locomotives, trolley cars, ferryboats, and other vehicles used for guideways and inclined planes. Light duty vehicles such as vans, sedans, and pick-up trucks used for administrative and maintenance purposes are considered equipment. Light duty vehicles used to transport passengers are considered rolling stock.

FTA recipients are permitted to use all of the following procurement methods as permitted by state and local laws for acquiring rolling stock.

3.3.1 *Solicitation or Invitation for Bids or Proposals* – Most recipients likely will acquire their rolling stock through procurements in the open market that involve the typical standard bidding and proposal procedures. Recipients may contract only for their current and reasonably expected public transportation needs and may not add quantities or options to third party rolling stock contracts solely for the purpose of permitting assignment to another party at a

later date.

3.3.2 *Joint Procurements* – The Uniform Guidance (2 C.F.R. Section 200.318(e)) states that recipients are "encouraged to enter into state and local intergovernmental agreements or inter-entity agreements, where appropriate, for procurement or use of common or shared goods and services." FTA refers to such procurements as "joint procurements." FTA encourages joint procurements in which two or more grantees issue a single solicitation document and enter into a single contract with a vendor or vendors for rolling stock in a fixed quantity, which may be expressed with both a total minimum and total maximum. Unlike a State or nonprofit cooperative procurement contract (discussed below), a joint procurement does not permit non-parties to participate in the contract except through the assignment of options. Joint procurements offer the advantage of obtaining goods and services that better meet the needs of each participating recipient than those goods and services likely to be available through an assignment of another recipient's contract rights.

Like all solicitations, joint procurements must be tailored to the specific quantities that participants anticipate needing, and are cautioned to not inflate the maximum quantity of vehicles so that other recipients may "piggyback" on the contract later. At a minimum, the maximum quantity available under the contract should bare a reasonable relationship to the recipients' number of peak service vehicles. For example, a joint procurement with a maximum quantity of 600 buses likely would not be reasonable if the combined number of vehicles in peak service of the participants in the joint procurement is only 75 buses. The parties to a joint procurement can agree to share responsibility for different portions of the process, e.g., one recipient may prepare the technical specification and another prepares and conducts the solicitation process. As stated in FTA Circular 4220.1F, "Participation in a joint procurement, however, does not relieve any participating recipient from the requirements and responsibilities it would have if it were procuring the property or services itself, and does not relinquish responsibility for the actions of other participants merely because the primary administrative responsibility for a particular action resides in an entity other than in itself. All elements of the procurement should be subject to the review and approval of all participants. Each participant should have the right to take part in the evaluation and selection process."

Notwithstanding the single contract award nature of a joint procurement, purchasers in a joint procurement may award individual contracts for their particular needs as long as those contracts reflect the terms and conditions in the joint procurement competitive solicitation and the proposal that was

submitted by the winning contractor. One approach that has been used for joint bus procurements is for the lead agency to award the basic contract with pricing, specifications, terms and conditions, etc., and then to have the participating agencies issue individual purchase orders against the basic contract as funding becomes available to the agencies during the life of the contract. The purchase orders would reflect the basic contract unit prices and reference the basic contract for other terms and conditions.

3.3.3 *Exercise of Options* – A recipient may use its own contract options with the following limitations:

- *Consistency with the Underlying Contract* – The terms and conditions of the option must be substantially similar to the terms and conditions of the option as stated in the original contract at the time it was awarded.
- *Price* – The recipient may not exercise an option unless it has determined that the option price is better than prices available in the market, or that when it intends to exercise the option, the option is more advantageous than what can be obtained in the open market.
- *Awards Treated as Sole Source Procurements* – The following actions constitute sole source awards and recipients must be able to justify the use of a non-competitive award, i.e., a sole source procurement, before it enters into a contract.
  - *Failure to Evaluate Options before Awarding the Underlying Contract* – If a contract has one or more options and those options were not evaluated in determining the low bid for the original contract award, exercising those options after contract award will result in a sole source award. This means that the original contract award must be made on the total price of all items, both base and option, even if the base items' prices being offered by the overall low bidder are higher than those offered by another bidder.
  - *Negotiating a Lower Option Price* – Exercising an option after the recipient has negotiated a lower or higher price will also result in a sole source award unless that price can be reasonably determined from the terms of the original contract, or that price results from Federal actions that can be reliably measured, such as changes in Federal prevailing labor rates, for example.

3.3.4 *Acquisition Through Assigned Contract Rights/Piggybacking* – Recipients may find it useful to acquire contract options through assignment by another recipient. This practice also is known as "piggybacking." A recipient that obtains contractual rights through assignment may use these rights after determining: (1) that the original contract price remains fair and reasonable; (2) that the original contract provisions comply with all applicable Federal requirements; and (3) that the assigning recipient originally procured quantities necessary for their needs (i.e., they did not procure unreasonably

large quantities). Before proceeding with the assignment, the recipient seeking the assignment must review the original contract to be sure that the quantities the assigning recipient acquired, together with the quantities the acquiring recipient seeks, do not exceed the amounts available under the assigning recipient's contract. Recipients do not need to perform a second price analysis if one was performed for the original contract. FTA does, however, expect the recipient to determine whether the contract price or prices that were established under the original agreement are still fair and reasonable. Also, recipients using assigned contract rights are separately responsible for ensuring that the contractor complies with FTA's Buy America requirements for the assigned quantities. Finally, recipients should be mindful that piggybacking on contracts with the pre-FAST Act domestic content requirement of more than 60 percent may be restricted as well. For further information on Buy America and piggybacking, please consult FTA's website's Buy America page.

3.3.5 *State Cooperative Purchasing Contracts* – Under Section 3019 of the FAST Act, grantees may purchase rolling stock and related equipment from a State cooperative procurement contract. A "cooperative procurement contract" means a contract entered into between a State government or eligible nonprofit entities and 1 or more vendors under which the vendors agree to provide an option to purchase rolling stock and related equipment to multiple participants. The contract term for a cooperative procurement contract may be for an initial term of not more than two years and may include three optional extensions of one year each. A lead procurement agency or lead nonprofit entity in such a procurement may charge participants in the contract no more than 1 percent of the total value of the contract.

Under prior law, FTA referred to these types of State contracts as "State purchasing schedules" and, as such, were only available to recipients within that State. Under the FAST Act, a grantee may purchase rolling stock and related equipment from any State's cooperative procurement contract or schedule.

State cooperative purchasing contracts or state schedules are subject to federal requirements, including, but not limited to, full and open competition, no geographic preferences, Buy America, and bus testing, and must include all FTA required clauses and certifications with its purchase orders issued under the State contract. Pursuant to Section 3019 of the FAST Act, recipients may purchase from another State's schedule.

3.3.6 *Capital Lease* – Federal funds may be used to lease instead of buy rolling stock, and leases are considered third party contracts. Notably, Buy America requirements apply to capital leases. The

FAST Act made

several changes to Federal transit law as it relates to capital leases; recipients should reach out to their FTA regional office for assistance if contemplating a capital lease of rolling stock.

3.3.7 *Special Contract Provisions for Rolling Stock Contracts* – The following requirements may affect rolling stock procurements:

- *Accessibility* – Rolling stock must comply with the accessibility requirements of DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 C.F.R. part 37, and Joint Access Board/DOT regulations, "Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 C.F.R. part 1192 and 49 C.F.R. part 38.
- *Transit Vehicle Manufacturer Compliance with DBE Requirements* – Before a transit vehicle manufacturer (TVM) may submit a bid or proposal to provide vehicles to be financed with FTA assistance, 49 C.F.R. § 26.49 requires the TVM to submit a certification that it has complied with FTA's DBE requirements. FTA's website contains a list of current certified TVMs and it is a best practice to confirm a TVMs certification with this list. If a TVM is not on the FTA list, recipients should contact the civil rights officer in their region before awarding the contract.
- *Minimum Useful Life* – FTA requires each recipient to maintain satisfactory continuing control of FTA assisted property. For buses and certain other vehicles, FTA has established minimum service life policies that may affect the quantity of vehicles that the recipient may acquire. See the most recent version of FTA Circular 5010.1, "Grant Management Requirements," which address minimum useful life for vehicles.
- *Spare Ratios* – All FTA assistance for third party procurements must be limited to property and services the recipient will use in the near future. Generally, FTA will not approve acquisition of an excessive number of spare vehicles not regularly used in public transportation service. See the most recent version of FTA Circular 5010.1, "Grant Management Requirements," for additional information.
- *Air Pollution and Fuel Economy* – Each third party contract to acquire rolling stock must include provisions to ensure compliance with applicable Federal air pollution control and fuel economy regulations, such as EPA regulations, "Control of Air Pollution from Mobile Sources," 40 C.F.R. part 85; EPA regulations, "Control of Air Pollution from New and In-Use Motor Vehicles and New and In-Use Motor Vehicle Engines," 40 C.F.R. part 86; and EPA regulations, "Fuel Economy of Motor Vehicles," 40 C.F.R. part 600.
- *Bus Testing* – Each third party contract to acquire a new bus model or a bus with significant alterations to an existing model must include provisions to assure compliance with applicable requirements of 49

U.S.C. § 5318, and FTA regulations, "Bus Testing," 49 C.F.R. part 665. Buses must achieve a passing score on eight performance measures in order to be eligible for FTA funding.

- *In-State Dealers* – The recipient may not limit its third party bus procurements to its in-State dealers, 49 U.S.C. § 5325(i). Although FTA respects State licensing requirements, FTA is prohibited by law from providing assistance to support bus procurements that have the result of limiting competition to entities that have been able to obtain a State license.
- *Basis for Contract Award* – As permitted by 49 U.S.C. § 5325(f), the recipient may award a third party contract for rolling stock based on initial capital costs, or based on performance, standardization, life cycle costs, and other factors, or by selection through a competitive procurement process.
- *Time Limits for Options on Rolling Stock Contracts* – Under 49 U.S.C. § 5325(e)(1)(A), a recipient may enter into a multiyear contract to acquire buses or replacement parts with options not exceeding
  a total of five (5) years to buy additional buses or replacement parts. Under 49 U.S.C. § 5325(e)(1)(B), a recipient may enter into a multiyear contract to acquire railcars or replacement parts with options not exceeding a total of seven (7) years to buy additional railcars or replacement parts provided that such option does not allow for significant changes or alterations to the rolling stock. FTA interprets these five and seven year periods as covering the recipient's "material requirements" for rolling stock and replacement needs from the first day when the contract becomes effective to its "material requirements" at the end of the fifth or seventh year, as applicable. In the case of rolling stock, which frequently cannot be delivered expeditiously, FTA recognizes that a recipient's "material requirements" for rolling stock will necessarily precede its actual need to put that rolling stock to use in public transportation service. This means that the contract may not have options for more rolling stock and replacement parts than a recipient's material requirements for the applicable five or seven-year period. This does not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. Instead it means only that FTA limits a contract to purchasing
  no more than the recipient's material requirements for rolling stock or replacement parts for five or seven years based on the effective date of the contract. However, rolling stock options must be exercised within the original contract term.
- *Buy America* – When procuring rolling stock, recipients must ensure that the cost of the components and subcomponents produced in
  the United States meets the following threshold requirements: (i) for fiscal years 2016 and 2017, more than 60 percent of the cost of all components of the rolling stock; (ii) for fiscal years 2018 and 2019,

more than 65 percent of the cost of all components of the rolling stock; and (iii) for fiscal year 2020 and each fiscal year thereafter, more than 70 percent of the cost of all components of the rolling stock.
Additionally, final assembly of the rolling stock must occur in the United States. See 49 U.S.C. § 5323(j) (2) (C). For further information about implementation of this requirement, see FTA's *Federal Register* Notice of Policy on the Implementation of the Phased Increase in Domestic Content under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances, Sept. 1, 2016. Please click here for a link to the Federal Register notice.

- *Pre-Award and Post Delivery Reviews for Rolling Stock* – FTA requires that recipients purchasing revenue passenger rolling stock undertake reviews of the rolling stock before award of the bid, during manufacture, and following delivery of the rolling stock. Applicants seeking to acquire rolling stock must certify that they will comply with FTA's pre-award and post-delivery review requirements. See 49 U.S.C.
§ 5323(m) and FTA regulation, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases," 49 C.F.R. part 663.

Recipients can obtain detailed information on FTA's Buy America regulation at the FTA website's Buy America Page.

3.4 Procurement Methods

Recipients may choose from the following procurement methods, provided they comply with the recipient's State and local laws and regulations. Micro and small purchase thresholds may vary by State and local governments. If a recipient has the legal authority under State law to implement a micro-purchase and small purchase program, they must comply with their State and local requirements. If
a State has lower threshold requirements than FTA has established, the recipient must comply with those State levels. However, the FTA threshold is a ceiling,
and procurements using FTA funds that exceed the FTA threshold will not be considered micro-purchase or small purchases, even if the State threshold is higher.

There is no Federal requirement that a recipient use the sealed bid or competitive proposal method for any of its federally funded procurements. There is a mixture of history and tradition behind the use of sealed bidding in the public sector that is frequently embodied in legislative requirements at both the Federal and State levels. Although Federal legislative requirements mandating the use of this method have been relaxed in recent years, many States still require its use for many commodities or services being procured and it is still the "preferred" method for the acquisition of construction services in the public sector, including by FTA. Sealed bidding is perceived to be a faster, more objective method of procurement. Recipients of FTA funds are advised to check State and local laws and ordinances to determine what flexibility or constraints, if any, exist regarding use of the various procurement methods. Although Federal law permits a variety of procurement methods, a recipient may be restricted by State and local law
on the methods available to it in a given situation. Provided recipients properly comply with the applicable Federal requirements, FTA will defer to the judgment of its recipients in

deciding which method to use for each of its procurements.

Recipients may develop internal checklists or processes for determining the most appropriate method of procurement and for ensuring that its procurement files contain all required documents. For examples of checklists used by some recipients, see Appendix B, Section B-3.4.

3.4.1 *Micro-purchases for Contracts that Do Not Exceed $3,500* – This value is set by the Federal Acquisition Regulation (FAR) at 48 C.F.R. part 2, subpart 2.1 (Definitions) and is periodically adjusted for inflation. These purchases may be made without obtaining competitive quotes if the recipient determines the price to be paid is fair and reasonable. These purchases should be distributed equitably among qualified suppliers in the local area and purchases should not be split to avoid the requirements for competition above the $3,500 micro-purchase threshold.

Davis-Bacon prevailing wage requirements will apply to construction contracts exceeding $2,000, even if the recipient uses micro-purchase procurement procedures.

3.4.2 *Simplified Acquisition Threshold or Small Purchases* – Small purchase procedures may be used to acquire services, supplies, or other property valued at more than the micro-purchase threshold (currently set at $3,500) but less than the Federal Simplified Acquisition Threshold, set by the Federal Acquisition Regulation at 48 C.F.R. Subpart 2.1 in accordance with 41 U.S.C. § 403(11), currently set at $150,000. (Note: This threshold is periodically adjusted for inflation. For the latest threshold, refer to 48
C.F.R. Subpart 2.1.) For small purchases, recipients must obtain price or rate quotes from an adequate number of qualified sources.

Recipients are not allowed to divide or split the procurement to avoid additional procurement requirements that apply to the larger acquisitions. Recipients are permitted to manage their scheduled acquisitions according to their needs even when individual periodic
procurements for the same or similar items keep the transaction below the small purchase threshold. For examples of small purchase procedures developed by recipients, see Appendix B, Section B- 3.4.

3.4.3 *Federal Supply Schedules* – A recipient must be authorized specifically by Federal law to use a GSA Federal Supply Schedule. Currently, recipients are limited in their use of the Federal Supply Schedules. These uses include: (1) to acquire information technology (IT); (2) to purchase products and services to facilitate recovery from a major disaster; or (3) to acquire law enforcement, security and certain related items of various types.

- *Information Technology* – Section 211 of the E-Government Act of 2002, 40 U.S.C. Section 502(c)(1), authorizes State and local governments, within limits established by law, to acquire IT of various types through GSA 's Cooperative Purchasing Program, Federal Supply Schedule 70. For other procurement practices related to information technology contracts, see Appendix B, Section B-3.4.
- *Major Disaster or Emergency Recovery* – Section 502(d) of title 40 U.S.C. authorizes State and local government entities to use any GSA Federal Supply Schedule to acquire property and services in advance of a major disaster declared by the President of the United States, as well as in the aftermath of an emergency event. The State or local government is then responsible for ensuring that the property or services acquired will be used for recovery. More information about major disaster and emergency recovery acquisition is available at GSA's web site, State and Local Disaster Purchasing page
- *Local Preparedness Acquisition* – Section 502(c)(2) of title 40 U.S.C. authorizes State and local governments, within limits established by law, to acquire law enforcement, security and certain related items of various types through GSA's Cooperative Purchasing Program Federal Supply Schedule 84, or any amended or later version of that Federal supply classification group. Information about cooperative purchasing is available at GSA 's website at Cooperative Purchasing Portal.

When using GSA schedules to acquire property or services in this manner, recipients must ensure all Federal requirements, required clauses, and certifications (including FTA's Buy America requirements) are properly followed. One way of achieving compliance with FTA requirements is for all parties to agree to append the required Federal clauses in the purchase order. When buying from these schedules, recipients must obtain an FTA Buy America certification before entering into the purchase order. If the property to be purchased is Buy America compliant under FTA regulations, the recipient may proceed with its acquisition. If the property is not Buy America compliant under FTA regulations, the recipient will need to obtain a waiver from FTA before proceeding. (Note: GSA schedules are not subject to FTA's Buy America regulations and therefore, may include manufactured products that are not eligible for FTA funds.)

Also, when using GSA schedules to acquire property or services, recipients can fulfill the requirement for full and open competition by seeking offers from at least three sources. FTA expects a recipient using a price published on a GSA schedule to consider whether the GSA price is reasonable.

3.4.4 *Combined Bid/Contract* – Recipients typically conduct a large number of relatively small sealed-bid procurements involving simple commodities. The combination of bid submittal and contract acceptance within a single document is designed to create efficient purchases. By eliminating the need to combine two separate documents the potential for mistakes in copying is minimized. This procedure is not appropriate for larger, more complex bids where there may be alternative pricing and options or for negotiated procurements. Typically, the acceptance block does permit split awards or awards of less than the full number of line items on the bid. The solicitation document should reserve to the recipient the right to split the award or to award only a portion of the items sought. If the procurement document requires bidders to submit information other than price (e.g., samples, schedules, descriptive brochures or product specifications), the combined bid/contract method may not be appropriate. For examples of combined bid/contract forms used by recipients, see Appendix B, section B-3.4.

3.4.5 *Sealed Bids* – Sealed bidding is a generally accepted procurement method in which bids are publicly solicited, and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder, whose bid, conforming to all the material terms and conditions of the invitation for bids (IFB), is lowest in price. Sealed bidding does not allow the recipients to evaluate the merits of technical proposals and to pay more for a higher quality product. Rather, it requires the award be made to the bidder who meets the technical requirements in the solicitation, even if the product is only minimally acceptable. Therefore, the contract specifications should precisely describe the recipient's minimum requirements that the contractor will be contractually bound to meet.

Sealed bid procurements should be used when the following circumstances are present:

- A complete, adequate, precise, and realistic specification or purchase description is available;
- Two or more responsible bidders are willing and able to compete effectively for the business;
- The procurement generally lends itself to a firm fixed price contract;
- The successful bidder can be selected on the basis of price and those price-related factors listed in the solicitation including, but not limited to, transportation costs, life cycle costs, and discounts expected to be taken; and
- Discussions with one or more bidders after bids have been submitted

are expected to be unnecessary as award of the contract will be made based on price and price- related factors alone. Pre-bid conferences, however, with prospective bidders are permitted and oftentimes are very useful to both recipients and bidders.

3.4.6 *Two-Step Procurement* – A variation in the sealed bid procurement method that has long been recognized in public procurement is referred to as the two-step method of procurement. This process allows, in the first phase, for bidders to submit technical proposals describing how they intend to meet the agency's requirements. In the second phase, only those firms that have been found to be technically qualified in the first phase are invited to submit sealed bids with pricing information as though it were a sealed-bid procurement. Award is then made to the lowest, responsive and responsible bidder. The second step is conducted as a sealed bid procurement and the award is based solely on price and not some combination of price and technical merit as would be the case in a negotiated procurement.

Two-step sealed bidding procedures offer flexibility to agencies when discussions may be necessary with bidders, as is the case when procuring non-standard equipment or services, while also preserving the benefits of sealed bidding. This method may encourage more proposals to be submitted since it encourages the submission of alternative design approaches/specifications. This feature allows the agency to take advantage of industry experience and expertise in meeting agency needs. There are, however, disadvantages in the two-step method when compared to competitive negotiations. The latter would allow for tradeoffs between technical performance and price so as to select the best overall combination of the two (i.e., the best value). Two-step sealed bidding, however, requires the agency to select the lowest price, technically acceptable bid, even though a somewhat higher priced bid offers a more advantageous technical performance.

3.4.7 *Competitive Proposals (Request for Proposal)* – Competitive proposals, commonly known as a request for proposals, or RFP, are a generally accepted procurement method when the nature of the procurement does not lend itself to sealed bidding and the recipient expects that more than one source will be willing and able to submit an offer or proposal. FTA does not require use of competitive negotiations for any particular procurement. This method is simply one of many that may be used, as appropriate and when permitted by State or local laws. Competitive negotiations offer an important advantage over sealed bids—they afford the recipient and the offerors an opportunity to discuss/negotiate important aspects of the project, including the impact that the offeror's perceived performance and schedule risks have on the price being offered. These discussions may

very well result in negotiated adjustments to the specifications, delivery schedule, etc. and thus a more cost effective approach to accomplishing the project objectives. In contrast to competitive negotiations, the sealed bid method affords no opportunity to discuss or negotiate the price, specifications, delivery requirements, or other important aspects of the contract, such as a contractor's key personnel, insurance, warranties, etc. Another important advantage of competitive negotiations is that it allows the recipient to choose the winning proposal on the basis of factors other than price alone. For example, the recipient may choose the proposal that represents the "best value" to the agency. Under this method, the recipient makes tradeoffs between price and technical factors in determining the best overall value to the agency.

3.4.8 Competitive procurements may be used when the following circumstances are present:

- The property or services to be acquired are described in a performance or functional specification; or, if described in detailed technical specifications, other circumstances such as the need for discussions or the importance of basing the contract award on factors other than price alone are present.
- Uncertainty about whether more than one bid will be submitted in response to an IFB, and the recipient lacks the authority or flexibility under State or local law to negotiate the contract price if it receives only a single bid.
- Due to the nature of the procurement, contract award need not be based exclusively on price or price-related factors. In different types of negotiated acquisitions, the relative importance of cost or price may vary. When the recipient's material requirements are clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirements, the more development work required, or, the greater the performance risk, the more technical or past performance considerations play a dominant role in source selection. All of these considerations tend to supersede the need for the low-priced bid.
- Separate discussions with individual offerors are expected to be necessary after receipt of proposals. This contrasts with the sealed bid procedures in which discussions with individual bidders are not permitted, as award of the contract is based on price and price-related factors alone.

3.4.9 *Qualifications-Based Procurements for Architectural and Engineering Services (A&E)* – FTA's enabling legislation at 49 U.S.C. § 5325(b)(1) requires the use of the qualifications-based procurement procedures contained in the Brooks Act , 40 U.S.C. §§ 1101-1104, to acquire program management, architectural engineering, construction management, feasibility studies, preliminary

engineering, design, architectural, engineering, surveying, mapping, or related services for an FTA-funded project. The nature of the services to be performed and its relationship to construction, not the nature of the prospective contractor, determines whether qualifications-based procurement procedures may be used.

FTA has long administered the requirement for using qualifications-based procurement procedures for selection of contractors that perform
A&E services, generally associated with the construction, alteration, or repair of real property. FTA interprets 49 U.S.C. § 5325(b) to
authorize the use of qualifications-based procurement procedures only for those services that directly support or are directly connected or related to construction, alteration, or repair of real property. FTA's interpretation of 49 U.S.C. § 5325(b) is consistent with typical Federal policies implementing the "Brooks Act," 40 U.S.C. § 1102, which limits qualifications-based procurement procedures to research, planning, development, design, construction, alteration, or repair of real property. Thus if services, such as program management, feasibility studies, or mapping, are not directly in support of, directly connected to, or directly related to, or lead to construction, alteration, or repair of real property, then the recipient may not use qualifications-based procurement procedures to select the contractor that will perform those services.

A project involving construction (including an ITS project) does not always require the use of qualifications-based procurement procedures. Whether qualifications-based procurement procedures may be used depends on the actual services to be performed in connection with the construction project, not the firm providing the service. Unless FTA determines otherwise in writing, a recipient may not use qualifications- based procurement procedures to acquire other types of services if those services are not directly in support of, directly connected to, directly related to, or do not lead to construction, alteration, or repair of real property. Even if a contractor has performed services listed herein in support of a construction, alteration, or repair project involving real property, selection of that contractor to perform similar services not relating or leading to construction may not be made through the
use of qualifications-based procurement procedures. For example, the design or fabrication of message signs, signals, movable barriers, and similar property that will become off-the-shelf items or will be fabricated

and delivered as final end products for installation in an FTA assisted construction project are not services for which qualifications-based procurement procedures may be used. (For these contracts, recipients may consider on-call or Indefinite Delivery/Indefinite Quantity (IDIQ) contract types described in Appendix B Section B-3.4.) Nor is actual construction, alteration, or repair to real property the type of services for which qualifications-based procurement procedures may be used.

The following procedures apply to qualifications-based procurements:

- *Qualifications* – Unlike other procurement methods where price is an evaluation factor, an offeror's qualifications are evaluated to determine contract award.
- *Price* – Price is excluded as an evaluation factor.
- *Most Qualified* – Negotiations are first conducted with only the most qualified offeror.
- *Next Most Qualified* – Only after failing to agree on a fair and reasonable price may negotiations be conducted with the next most qualified offeror. Then, if necessary, negotiations with successive offerors in descending order may be conducted until contract award can be made to the offeror whose price the recipient believes is fair and reasonable.
- *Effect of State Laws* – To the extent that a State has, before August 10, 2005, adopted by law an equivalent State qualifications-based-
  procurement requirement for acquiring architectural, engineering, and design services, State procedures, rather than Federal Brooks Act procedures (40 U.S.C. §§ 1101 through 1104), may be used.
- *Audits and Indirect Costs* – As required by 49 U.S.C. § 5325(b)(2), the following requirements apply to a third party contract for program management, architectural engineering, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services:
  - *Performance of Audits* – The third party contract or subcontract must be performed and audited in compliance with FAR part 31 cost principles.
  - *Indirect Cost Rates* – The recipient, third party contractor and its subcontractors, if any, must accept FAR indirect cost rates for the one-year applicable accounting periods established by a cognizant Federal or State government agency, if those rates are not currently under dispute.
  - *Application of Rates* – After a firm's indirect cost rates established as described above are accepted, those rates will apply for purposes
    of contract estimation, negotiation, administration, reporting, and payments, and will not be limited by administrative or de

facto ceilings.

- *Pre-notification; Confidentiality of Data* – Before requesting or using cost or rate data described above, a recipient must notify the affected firm(s). That data must be kept confidential and may not be accessible by or provided by the agency or group of agencies that share cost data, except by written permission of the audited firm. If prohibited by law, that cost and rate data may not be disclosed under any circumstances. FTA recognizes that many States have "Open Records" laws that may make it difficult to maintain confidential cost or rate data. As a result, before requesting or using a firm's cost or rate data, not only should a recipient notify the affected firm, but it must also obtain permission to provide those data in response to a valid request under applicable State law. The confidentiality requirements of 49 U.S.C. § 5325(b) (2) (D) cannot be waived, even if those confidentiality requirements conflict with State law or regulations.

3.4.10 *Procurement by Noncompetitive Proposal (Sole Source)* – Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source (a/k/a a "sole source"). Noncompetitive or sole source procurements may be used only when one or more of the following circumstances apply: (1) The item is available only from a single source; (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non- Federal entity; or (4) After solicitation of a number of sources, competition is determined inadequate. 2 C.F.R. § 200.320(f).

FTA acknowledges that sole sourcing is generally an accepted procurement method; however, it is one that is subject to close scrutiny due to the limited circumstances which justify its use. If the recipient decides to solicit an offer from only one source, the recipient must justify its decision adequately in light of the standards discussed in Section 2.8 (Other than Full and Open Competition). Recipients should retain copies of its sole source award justification in its procurement files. In some circumstances, FTA may request that the recipient provide FTA with a sole source justification before entering into the contract.

3.4.11 *Unsolicited Proposal* – A recipient may enter into a third party contract based on an unsolicited proposal when authorized by applicable State or local law or regulation. Receipt of an unsolicited proposal does not, by itself, justify contract award without providing for full and open competition. Unless the unsolicited proposal offers a proprietary concept that is essential to contract performance, FTA expects the recipient to

seek competition. To satisfy the requirement for full and open competition, FTA expects the recipient to take the following sactions before entering into a contract resulting from an unsolicited proposal:

- Publicize receipt of the unsolicited proposal and include an adequate description of the property or services offered without improperly disclosing proprietary information or disclosing the originality of thought or innovativeness of the property or services sought;
- Publicize recipient's interest in acquiring the property or services described in the proposal and provide an adequate opportunity for interested parties to comment or submit competing proposals; and
- Publicize recipient's intention to award a contract based on the unsolicited proposal or another proposal submitted in response to the publication.

If it is impossible to describe the property or services offered without revealing proprietary information or disclosing the originality of thought or innovativeness of the property or services sought, the recipient may make a sole source award to the offeror. A sole source award may not be based solely on the unique capability of the offeror to provide the specific property or services proposed.

3.5 Common Elements of the Solicitation Process

In addition to the general requirements for achieving full and open competition, there are several pre-bid and pre-proposal procedural requirements that recipients can undertake as best practices.

3.5.1 *Develop solicitation list* – Development and use of a solicitation list is a critical part of the procurement process. The list includes all eligible and qualified entities that have expressed an interest in receiving the solicitation or that the agency considers capable of filling the requirements of a particular procurement. Over a period of time and after repetitive procurements for the same items or services, the list for some items will stabilize and recipients will not be adding too many new names to the list even after an aggressive and comprehensive advertisement campaign. It is important, however, that recipients continue to manage their lists and ensure they are kept current. Firms expressing an interest or desire to participate in upcoming procurements should routinely be added to these lists. After a recipient releases/ advertises a solicitation, the solicitation list takes on added significance because it is the record detailing which firms received the solicitation and to whom amendments are issued.

Lists can be developed from a variety of sources, including:

- Prior procurements, which would include firms who expressed an interest in an IFB or RFP as well as those companies who competed for an award
- Internal customers who can provide names of qualified companies;
- Third party consultants who prepare specifications
- The Disadvantage Business Enterprise (DBE) program office within the transit agency or other recognized certifying entity
- National, state, and local agencies, e.g., a State economic development office or national trade associations
- Various trade associations or chambers of commerce

3.5.2 *Develop contract terms and conditions, including technical requirements* – Regardless of which procurement method is used, i.e., IFB or RFP, there are certain common elements that will be present in every solicitation that is issued. The most common elements include:

- A solicitation number for reference
- Contact information for questions
- Whether there is a pre-bid or pre-proposal conference and where and when it will be held
- The date, time, and place bids or proposals are to be received
- A list of documents and forms that are included in the solicitation and directions concerning which of these documents and forms must be completed and submitted with the bid or proposal (e.g., certifications and representations)
- Space for the price (offer) to be included
- Space where amendments to the solicitation can be acknowledged
- Space where the firm can be identified
- Space for the firm official to sign and date the bid or proposal

In addition to the common elements, each IFB in the case of a sealed bidding method must fully describe the item or service requirements as completely, clearly, accurately, and unambiguously as possible.
Stated another way, the invitation must define the minimum acceptable performance requirements of the items or services sought in order
for the bidders to properly respond. The risk of receiving claims due to errors and ambiguities in the specifications make this a critical task.
FTA recommends that a separate section of the IFB contain all required certifications and forms to be signed so that bidders will not overlook any form that is required to be signed.

Each RFP would typically include all of the elements of an IFB as well as the evaluation factors and their relative importance. The RFP can specify the information needed to perform the evaluation, and may require that cost/price information be physically separated so the technical evaluation can be performed separately from the price evaluation.

The technical requirements or specifications, on the other hand, are tailored specifically to the individual procurement. Specifications can be very detailed in describing the product or work to be done, may simply require an end result, or may contain a combination of these two approaches. There are different levels of risks and responsibilities inherent in these different approaches for developing specifications. As a general rule, the more design details there are in the specification, the more the buying agency becomes responsible for the performance of the product. Conversely, the more the specification describes the performance of the product instead of its design features, the more responsible the contractor becomes for the end product.

Following are the various types of specifications and the risks inherent in each type.

- *Design Specifications* – Specifications detailing the manner or method of performance are often treated as design specifications. Design specifications are those that set forth precise measurements, tolerances, materials, in process and finished product tests, quality control, inspection requirements, drawings and other specific information. When the contractor is required to follow a design specification as one would follow a road map, the concept of implied warranty arises. With a design specification, the buying agency, as the author of the specifications, will be held responsible for design and related omissions, errors, and deficiencies in the specifications and drawings. There is an implied warranty that the detailed designs or processes will result in an end product that functions as required.

  Conversely, there is no implied warranty when a specification simply sets forth an objective or end result to be achieved. In those instances where the contractor is permitted to select the means of accomplishing the task, the contractor assumes responsibility for its selection.

  Performance specifications dictate the performance of the end product and not how the contractor will do the work. These are specifications that give the contractor discretion in how to achieve the end result called for by the contract, although there may be elements of design type requirements included in a performance specification.

  Performance specifications are sometimes described as functional specifications, which describe the work to be

performed in terms of end purpose rather than how the work is to be performed. In either case, whether they are referred to as performance specifications or functional specifications, they place the greatest degree of responsibility on the contractor and represent the lowest degree of legal risk (but not necessarily the lowest program risk) to the buying agency. As a general rule, when a performance-type specification is used, the buying agency will not be liable for a contractor's increased costs in performing the contract unless the performance specification embodies requirements which are impossible to attain. It should also be noted that the fact that the buying agency specifies a minimum requirement for some component or some aspect of performance (e.g., "at least 3 HP"; "no more than 2 inches wide") does not change a performance specification into a design specification; i.e., the buying agency is not warranting that an item which meets the minimum
requirement will perform properly when incorporated into the system.

In those cases where the specification contains a combination of design and performance requirements, responsibility will lie with the party who controlled how the work is performed. Specific situations that could relieve the contractor from responsibility include:

- When the contractor is left no discretion or choice in the materials to be used
- When specifications set forth dimensions and the item built to the dimensions cannot be used as anticipated because of those dimensions
- When specifications define a method of performance or the particular manufacturing processes a contractor must follow
  (e.g., detailed procedures for pouring concrete, detailed soldering methods, etc.)
- When specified equipment cannot be successfully used in performing the contract
- When detailed specifications require performance contradictory to local codes or ordinances
- When the specifications provide for alternate methods of performance and the contractor selects a method from among alternatives in the specification that does not accomplish the desired results.

• *Risk Identification* – It can be helpful to identify project risks and their description in a Request For Proposals (RFP), and require offerors to present specific plans for mitigating the risks as well as to identify (and offer solutions to) other potential risks not identified by the recipient. The recipient can then evaluate the various approaches to managing the project risks as part of its technical proposal evaluation and source selection process.

Before identifying risks for inclusion in the RFP, a recipient should ask the following questions:

- What expertise is needed in order to brainstorm the potential project risks that must be mitigated (e.g., engineering, legal, procurement, budget, DBE specialists).
- Who are the stakeholders and what are the issues that must be addressed in project planning so as to identify the risk that each of them represents (e.g., FTA/EPA regulations, prospective funding sources, unions, permits, utilities, rights-of-way, etc.)?
- Have all risks been documented in a risk assessment matrix for communication with agency management, contractors, third parties, etc.?

Examples of risk identification criteria included in recipient RFPs can be found in Appendix B, section B-3.5.

3.5.3 *Pre-bid and pre-proposal conferences* – Pre-bid and pre-proposal conferences are generally used to brief prospective bidders and offerors and explain complicated specifications and requirements soon after a solicitation has been issued and well before bids and proposals are received. These conferences provide an open forum for potential respondents to address ambiguities in the solicitation documents that require clarification. Recipients must provide notice of the conference in the solicitation at the time of issuance. Although not mandatory, pre-bid and pre-proposal conferences have proven to be a valuable tool for both the agency and prospective offerors. If a conference is held, it is helpful for recipients to include in their solicitations a defined process whereby interested parties can submit questions in advance of the conference so that recipients are prepared to answer those questions at the conference. Also, any information communicated by recipients at a pre- bid or pre-proposal conference that is relevant to the IFB or RFP must be put in writing at the conclusion of the conference and communicated to all prospective bidders or offerors. Some recipients are using technology such as Skype, Go to Meeting or Zoom as a way to hold these meetings. This reduces the travel cost for potential participants.

3.5.4 *Publicly advertise* – IFBs and RFPs must be publicly advertised and publicized, respectively, however the precise manner and content is at the recipient's discretion in accordance with State and local requirements. While the major local newspapers in a recipient's commercial community are the most commonly used media, varying procurements will dictate varying media and notice periods to most cost-effectively notify the greatest feasible number of potential competitors. Outreach through diverse media may be the most cost-effective means to

increase competition, e.g., through market communication networks such as trade associations, commercial procurement listing services, or solicitation list enhancement as discussed in Section 3.5.1 (Develop solicitation list). Advertising in appropriate media, however, is a prudent manner of ensuring unbiased notification and of making new contacts. In addition to increasing competition, advertising procurement actions also broadens industry participation in meeting industry requirements and provides greater assistance to small businesses and DBE firms interested in obtaining contracts and subcontracts.

3.5.5 A*mend solicitation* – Frequently, in the course of the solicitation process and prior to receipt of bids or offers, the recipient will find something within the solicitation package that needs to be corrected or clarified.

This can be done easily and may enhance competition if the changes are significant (i.e., impact quantity, specifications, or delivery). Each prospective offeror should receive the amendments and should acknowledge that receipt by the time of submitting its offer. Recipients should consider extending the time for receipt of offers, if necessary, to permit offerors to compete effectively under the modified terms.

In many solicitations, a vendor may bring to the recipient's attention a problem with the package that necessitates a change. The problem may have something to do with the "boilerplate," changes in quantity, the specifications, delivery schedules, opening dates, or drawings. It may have to do with correcting an ambiguous provision or resolving conflicting provisions. Regardless of who asks for the amendment, there are a few simple steps that are normally followed.

As discussed in the pre-bid and pre-proposal conferences section, if a change was mentioned during a pre-bid or pre-proposal conference, the recipient should issue an amendment to the solicitation. When changing the written terms of the solicitation, the recipient must do this formally in writing. This serves two purposes: (1) it documents the change in writing so there are no misunderstandings; and (2) it provides the changes to offerors who were not at the conference.

As with other normally repetitive requirements in the procurement process, many agencies have adopted a pre-printed form for amending solicitations. These forms normally include the following elements:

- Solicitation number of the original solicitation
- Amendment number
- Contact person and phone number within the agency's department for further information

- Whether or not the time and date specified in the original solicitation is changed as a result of the amendment
- How offerors should acknowledge receipt of the amendment
- Description of the changes
- Copy of the amendment signed by the appropriate procurement official, most frequently the contracting officer

Amendments are typically sent to every firm that has been furnished the original solicitation (the IFB or RFP). Once the solicitation has been issued, using the solicitation list to ensure that any amendments are furnished to all entities that received the original solicitation is very important. This is an obvious issue but some agencies will not realize there is a problem until bids or proposals are received that do not acknowledge a material amendment. Recipients then would likely declare the offeror or bidder non-responsive. Some agencies include clauses in solicitations making it the offeror's responsibility to obtain addenda. While this may assist in overcoming a protest from an offeror found non- responsive, it will not necessarily transform the offer into a responsive or acceptable one.

One of the critical issues when issuing an amendment is whether or not to extend the time and date for receipt of offers. Recipients should consider the impact any changes may have on the amount of time it will take a prudent offeror to incorporate those changes into their bids or proposals. This includes the time impact on the work already done in preparing the bid or proposal. The impact could be minimal or very significant and there is no one-size-fits- all answer to how much additional time, if any, should be allowed. Recipients will want to allow sufficient time for the changes to be considered in a meaningful manner.

3.6 Common Elements of Offers

The culmination of the solicitation process is the receipt of bids or proposals. Regardless of the method used, great importance is attached to the process for receiving and accepting an offer. Timeliness and completeness of the submission is paramount.

3.6.1 *Timeliness* – The rationale for having rules against considering late bids or offers is tied to the importance of maintaining the integrity of the competitive procurement process and this outweighs the possibility of any savings the public entity might realize in a particular procurement by considering a late offer. Unfortunately, late offers are such a common problem that recipients should develop language that addresses what rules will be followed if an offer is received late. That language is typically included in the solicitation so that

offerors know ahead of time what the consequences will be if their offer is received late at the place designated for receipt. For examples of such language, see Appendix B, Section B-3.6.

3.6.2 *Completeness* – Typically included with every bid and proposal submission are a number of representations and certifications provided by the offeror that fulfill legal as well as procurement process requirements.
A number of these submissions normally address responsibility-type questions that aid in selection process. Others, such as acknowledgment of solicitation amendments and bid bonds, address the issue of whether the offeror is responsive. Section 3.5 (Common Elements of the Solicitation Process) discusses the common practice of having a list of documents and forms included in the solicitation that contains all the representations and certifications the recipient wants each offeror to provide and return with its offer. If these documents and forms are all in one place, it will be much easier for offerors to ensure they have furnished everything needed by an agency to assist in determining responsibility and responsiveness.

3.6.3 *Federally Required Submissions* – A current but not all inclusive and comprehensive list of statutory and regulatory requirements applicable to recipient procurements (such as Davis-Bacon Act, Disadvantaged Business Enterprise, Clean Air, and Buy America) is contained in the FTA Master Agreement, which is published annually and made available on FTA's website at Federal Transit Administration Grant Agreements webpage. Recipients are responsible for evaluating these requirements to determine their relevance and applicability to each federally funded procurement.

3.7 Other Types of Contracts

Recipients should be aware of the following three additional contract types, two of which are restricted or prohibited:

3.7.1 *Cost Plus a Percentage of Cost and Percentage of Construction Cost—Prohibited* – Federal law prohibits the use of cost plus a percentage of cost (CPPC) and percentage of construction cost methods of contracting, and, therefore, FTA may not grant waivers for use of these contracting methods. See 2 C.F.R. § 200.323. Recipients must not only avoid using this type of contract, they must also insert clauses in their cost-type contracts (i.e., those where the contractor is reimbursed for the allowable costs incurred in performance of the contract) that prohibit their prime contractors from using CPPC subcontracts. Care must be taken to avoid any kind of agreement whereby the contractor's fee would be increased automatically with increases in a particular cost element. Generally, any contractual arrangement whereby the

contractor is assured of greater profits by incurring additional costs will be held illegal. The obvious problem with this form of contract is that profits increase in proportion to dollars spent thereby providing a positive incentive to inefficiency.

3.7.2 *Time and Materials—Restricted* – Time and materials contracts are defined by the Uniform Guidance as contracts whose cost to a recipient is the sum of the actual cost of the materials; and direct labor hours charged at fixed hourly rates that reflect wages, general, and administrative expenses, and profit. 2 C.F.R. Section 200.318(j). Recipients are permitted to use time and materials contracts only: (1) after determining that no other type of contract is suitable; and (2) if the contract specifies a ceiling price that the contractor will not exceed except at its own risk. The reason this type of contract is the least preferable of all allowable types is that it creates a disincentive for the contractor to complete the contract in a timely manner. Since each labor hour expended carries with it a profit (and a predetermined overhead charge) built into the fixed hourly rate, the contractor is motivated to work as many hours as possible. There is no incentive to complete the contract quickly and minimize total costs to the buyer, which is why FTA restricts its use by recipients on FTA funded contracts. Per the Uniform Guidance, recipients awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

3.7.3 *Cost-Plus-Fixed-Fee or Cost-Reimbursement Contracts* – Recipients may need a contract for projects where the requirement can only be defined over a period of time. Such contracts are also known as on-call contracts, task order contracts, or Indefinite Delivery Indefinite Quantity (IDIQ) contracts and may be priced either on a firm fixed price, cost-plus-fixed-fee (CPFF), or cost-reimbursement basis, depending on the nature of the work and the uncertainties and risks of performance. See FTA Circular 4220.1F, Ch. V-7a(2) for a description of IDIQ contracts. Cost- reimbursement or CPFF contracts are suitable for use only when the "uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed price contract." See FTA Circular 4220.1F, Chapter VI-2.c (1) (b). If this approach is taken, the initial award should include a commitment from the contractor on rates the contractor will use in pricing each individual task. The procedure should provide for the negotiation of fully burdened rates for each category of labor that the contractor expects to need over the course of the contract prior to the basic contract award. These rates will be fixed for the life of the contract and applied to each task order, as applicable. Recipients are required to include FAR Part 31 cost principles in their cost reimbursement contracts for the purpose of determining allowable costs under the contract. This means that contractors are not entitled to be reimbursed for unallowable costs as defined in FAR

Part 31.

For examples of procurement practices related to IDIQ/on-call/task order contracts using CPFF or cost reimbursement contracts, see Appendix B, Section B-3.4.

SECTION 4

Evaluation of Proposals and Contract Award

One of the final steps in the procurement process involves a determination that the potential contractor is qualified and eligible to serve as the transit agency's contractor on a federally funded project. Recipients should have a well-established process that is memorialized in a written procurement policies and procedures manual. Many recipients develop a Source Selection Procedures Handbook that clearly defines their approach for evaluating bids and proposals and establishes a framework for fully documenting the procurement action. FTA expects the recipient to consider all evaluation factors specified in its solicitation documents, and evaluate offers only on the evaluation factors included in those solicitation documents. The recipient may not modify its evaluation factors after offers have been submitted without re-opening the solicitation. In accordance with 2 C.F.R. § 200.318(i), recipients must maintain records sufficient to detail the history of the procurement.

4.1 Responsibility of Contractor

REQUIREMENT
Recipients must make awards only to responsible contractors possessing the ability, willingness, and integrity to perform successfully under the terms and conditions of the contract. 49 U.S.C. 5325(j). See also FTA Circular 4220.1F, Chapter IV, paragraph 8.b. – *Award Only to a Responsible Bidder or Offeror*.

The recipient determines whether each offeror is responsible after receipt of bids or proposals and prior to the time of contract award. Bidders or offerors must demonstrate affirmatively to the recipient that it qualifies as "responsible" under the standards of 49 U.S.C. § 5325(j) and that its proposed subcontractors also qualify as "responsible."

To be deemed responsible, a prospective contractor must meet all of the following requirements:

- Have the financial resources adequate to perform the contract or the ability to obtain them;
- Have the ability to meet the required delivery or performance schedule, taking into consideration all existing commitments;
- Have a satisfactory performance record;
- Have a satisfactory record of integrity and business ethics;

- Be neither debarred nor suspended from Federal programs under DOT regulations, "Nonprocurement Suspension and Debarment, " 2 C.F.R. parts 180 and 1200, or under the FAR at 48 C.F.R. part 9, subpart 9.4;
- Have the necessary organization, experience, accounting and operational controls, and technical skills or the ability to obtain them;
- Be in compliance with applicable licensing and tax laws and regulations;
- Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them;
- Be in compliance with applicable Disadvantaged Business Enterprise (DBE) requirements; and
- Have other qualifications necessary to receive an award under applicable laws and regulations.

Recipients may also have a particular procurement or class of procurements which, due to the complexity of the products being acquired, require that prospective contractors meet special standards of responsibility. These special standards of responsibility must be set forth in the solicitation. Failure to meet the special standards will disqualify a bidder from consideration for award.

Before making a determination of responsibility, a recipient must possess or obtain information sufficient to satisfy itself that a prospective contractor meets the applicable standards and requirements for responsibility set forth in this section. In doing the research necessary to make a responsibility determination, recipients are permitted to discuss with the bidder or offeror any concerns regarding the bidder or offeror's responsibility.

Examples of recipients' responsibility determinations, forms, and documentation can be found in Appendix B, section B-4.1.

4.2 Sealed Bid Evaluation Process

REQUIREMENT
A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Any or all bids may be rejected if there is a sound documented reason. See 2 C.F.R. § 200.320, Methods of procurement to be followed, and FTA Circular 4220.1F, Chapter VI, paragraph 3.c. (2) – *Sealed Bids Procurement Procedures*.

4.2.1 Bid Opening

All bids should be date and time stamped when received. Bids received in advance of the bid opening should be carefully secured in a locked bid box to ensure that no bidder has access to the other bids. Prior to bid opening,

information as to the number or identity of bidders must be kept confidential. At the designated time, the recipient may announce to those in attendance that the time set for receipt of bids has arrived and that no further bids will be received. Recipients then publicly open bids, publicly announce bid prices, and bids are available for review by interested persons. A public opening is required even if only one bid is received. In the event that a bid is cancelled, each submission should be returned to the bidder. If irregularities or discrepancies are discovered during the public reading, it is best to simply note them and not discuss these in public. These matters are best discussed only with appropriate agency personnel, including the appropriate procurement, engineering, maintenance, and legal staff members.

Many recipients include a clause in the IFB package that addresses the late submission, modification, and withdrawal of bids. Such clause may be required by state law or patterned after a Federal provision. (See FAR § 52.214-7.) The FAR generally specifies those circumstances (e.g. documented failure by specific mail or delivery services), that are exceptions to the general rule of rejecting a bid; for example, bids received at the place designated in the IFB after the exact time set for bid opening are late and will not be considered under any circumstances. Whether or not the late bid would have been low in price is of no consequence. It must be rejected because maintaining the integrity of the sealed bid procurement process is more important than the possible advantage gained by considering a late bid in a particular procurement. Although the burden of getting the bids to the bid opening location on time is on the bidder, it is easier for recipients to take measures to ensure all bids are at the proper location at the proper time than it is to explain the need to maintain the integrity of the process after the fact.

4.2.2 Bid Evaluation Sequence

Although it may be stated differently in the rules or statutes governing a recipient's procurement process, the concept of awarding a contract to the lowest responsive and responsible bidder is a common precept in public contracting at the Federal, State, and local levels throughout the country. It is helpful to maintain the distinction among these concepts in reviewing bids and to consider them in the stated sequence. First, identify the lowest bid, then find the lowest responsive bid, and then find the lowest responsive and responsible bidder. Examination of the bids logically begins with the lowest bidder. Once the lowest bidder is determined, the recipient should determine if the bidder is responsive. In order for a bid to be acceptable, it must conform in all material respects to the requirements stated in the IFB. Responsiveness is determined from the bid documents themselves, and, with very few exceptions, it is determined with no discussions or further input from the bidder.

The precise definition of "responsiveness" may vary from jurisdiction to jurisdiction and the definition applicable to a recipient's organization may be stated in the recipient's State or local procurement regulations or statute. If the initial low bidder is not responsive (the bid does not conform to the material requirements of the invitation), the recipient need go no further with that bidder. Instead the recipient may go back and look at the second lowest bid and determine if it is responsive. Once the recipient has determined that there is a low priced bidder who is responsive as discussed in Section 4.2.3 (Responsive Bidder) below, the recipient then begins the more subjective process of determining the bidder's responsibility, as described in Section 4.1 (Responsibility of Contractor).

4.2.3 Responsive Bidder

If a bid conforms in all material aspects to the requirements of the solicitation at the scheduled time of submission and does not require further discussions with the bidder, the bid is responsive. To understand the concept of "responsiveness" and its practical rigidity in the public contracting environment, recall that the IFB issued by a recipient is designed so that all bidders who respond can make comparable offers under the same terms and conditions. When a bidder submits its bid to the entity in response to the IFB, the entity must be able to accept that bid as submitted, thereby creating a binding contract. The responsiveness requirement exists to ensure that a bidder cannot win the award by offering to perform the work at a lower price but in a manner that would be a material deviation from the terms and conditions of the IFB. This protects the interests of the other bidders that might have offered the same methods had they known the agency would accept such deviations in the requirements.

A first step in determining responsiveness is to examine the bid package thoroughly. Some of the questions the package should answer include:

- Does the cover letter take exception to any material terms and conditions?
- Is the bid ambiguous? Is it susceptible to two or more reasonable interpretations?
- Are all material amendments to the solicitation acknowledged?
- Is the bid signed?
- Are all material representations and certifications completed?
- Is the Buy America certificate required by 49 C.F.R. § 661.6 or § 661.12 signed?
- Is the required descriptive literature and bid samples included with the bid?
- If required, is a bid bond or bid guarantee submitted and properly documented per the requirements of the bid document?
- Is the bid defective?

- Is the price offered firm and definite?
- Are the material items or information required by the invitation submitted with the bid?
- Was the bid received at the place designated in the invitation at the exact time specified or was it late?

Entire courses are taught on sealed bidding and the issue of responsiveness. The list of questions and issues raised here should not be considered as all encompassing. Rather, they are intended to draw attention to some of the most important issues that impact responsiveness. The single most important concept impacting responsiveness is "materiality." For example, does the inclusion or omission of a specific fact, item, or requirement affect the bid price, quantity, quality, or delivery of the items offered? If so, the bid is probably nonresponsive. If not, the bid is likely responsive. There are, however, many facts and situations that do not clearly fall within these parameters and, consequently, become issues that may require analysis and input from the recipient's legal advisor.

To be considered nonresponsive, the bid must be found to contain a *material nonconformity*. Some examples of bids typically considered nonresponsive include:

- The bid is not signed (i.e., not binding);
- The bid does not conform to applicable specifications (unless the invitation allowed alternates);
- The bid fails to conform to delivery schedule or permissible alternates;
- The bid imposes conditions that would modify the requirements of the invitation or limit the bidder's liability to the entity;
- There is a condition of the bid which affects the substance of the bid (e.g., price, quantity, quality, or delivery of the items offered) or works an injustice on other bidders;
- The bid contains prices for line items that are materially unbalanced, i.e., figures in the bid conflict with the total bid price;
- The bidder fails to furnish a bid guarantee in accordance with the requirements of the invitation; or
- The bidder does not submit the required Buy America Certification.

A bid containing an *immaterial nonconformity* is not considered a nonresponsive bid. Such nonconformities are called *minor informalities*. A minor informality is one of form and not of substance. It is also one that can be corrected or waived without prejudice to the other bidders. The defect is often considered immaterial when the effect on price, quantity, quality, or delivery is negligible when compared with the total cost or scope of the supplies or services being acquired. Upon finding any defect, the procurement officer should work with its legal counsel to determine whether the deficiency is immaterial and may be waived or whether the bidder may be given the opportunity to cure the deficiency. Although state laws differ in their definition of minor or immaterial, examples of minor informalities may include:

- Failure to return the number of signed copies of bids required by the solicitation;
- Failure to furnish required information concerning the number of

employees;

- Nonconformities that have a trivial effect on price. For example, in some states, failure to acknowledge a wage rate amendment that increased the price by only 0.8% of the difference between the low bidder and the second low bidder may be considered a trivial nonconformity;
- Failure to submit mandatory information (such as descriptive literature, price lists, etc.) when the agency does not intend to use the information to determine which bid is in line for the award;
- Failure to acknowledge an IFB amendment, which resulted in less stringent obligations on the bidder.

Another important criterion that has been applied to the issue of bidder responsiveness is that of *prejudice to other bidders*. When this criterion has been applied by the courts in Federal cases, the decisions focus on whether or not other bidders would be prejudiced by the recipient accepting a bid with a material nonconformity. Thus, a material nonconformity that gives the bidder no advantage or that operates only to the disadvantage of the bidder may not require rejection. Examples of these situations include:

- Failure to acknowledge an IFB amendment that reduced the quantity of items required under the contract;
- Failure to indicate which of two acceptable designs would be used, as required by the IFB;
- Failure to acknowledge an amendment that reduced the cost of performance (i.e., stipulated a lessened requirement, which was prejudicial to the bidder's own competitive position), and thus no competitive advantage accrued to the bidder as a result of its failure to acknowledge the mistake;
- Failure to acknowledge an amendment extending the completion date for a construction project.

4.2.4 Bid Mistakes

Mistakes in bids are usually discovered after bids are opened and before the contract is awarded. A mistake does not necessarily mean the recipient cannot award a contract to the low bidder, although that could be the result. How a recipient typically treats the mistake will depend upon what the mistake is and when it is discovered. Some State laws explicitly address bid mistakes and must be consulted by recipients.

A mistake, or suspicion of a mistake, may be discovered by the procurement official during review of the bids. Some procedures call for identifying clear defects (e.g., absence of a bid bond) at the bid opening and rejecting the bid without reading it. This minimizes the need for any discussion as well as the likelihood of a bid protest. A mistake may be discovered by an unsuccessful bidder (not just the low bidder) when reviewing bids after bid opening.
Regardless of how the mistake is discovered, it is a problem in the sealed bidding method of procurement because of the strict rules of responsiveness.

The four generally accepted categories of bid mistakes are:

1. Minor informalities or irregularities in bids prior to award of the contract;
2. Obvious or apparent clerical mistakes discovered prior to award;
3. Mistakes other than minor informalities or irregularities in bids, or obvious or apparent clerical mistakes that are discovered prior to award; or
4. Mistakes discovered after award.

If a mistake fits within one of these categories, three things can happen:

1. The mistake can be corrected;
2. The mistake will be recognized and the bid allowed to be withdrawn; or
3. The mistake will not be recognized and the bid will not be allowed to be withdrawn.

Many transit properties in their procurement regulations have adopted rules relating to the treatment of these categories of mistakes. Rules that address this common problem make administration of the procurement process much easier because treatment of bids containing mistakes are not decided on a case-by-case basis but rather are handled in a consistent manner.

4.2.5 Bid Withdrawal

As discussed in Section 4.2.1 (Bid Opening) clauses typically are included in the IFB that address the late submission, modification, and withdrawal of bids.
These clauses generally are required by State law or patterned after Federal law, typically the FAR. When it comes to bid withdrawal, bidders generally are permitted to modify or withdraw their bids prior to bid opening. The rules governing bid withdrawals typically provide the specific instances in which a bidder is allowed to withdraw its bid after bid opening.

If a bidder has identified a mistake in its bid prior to award of the contract, the bidder should be allowed to withdraw its bid if:

- The mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or

- The bidder submits proof that clearly and convincingly demonstrates that a mistake was made.

If the bidder's request does not fit one of these categories, the recipient should seek advice from legal counsel before determining whether or not to allow the bidder to withdraw its bid. This is an issue that may be impacted by an interpretation of the relevant State law on public contracting.

If a bidder withdraws its bid according to the governing procurement rules, the recipient normally will proceed to the next lowest bidder without expecting compensation from the erring bidder. However, if the bidder is refused permission to withdraw, and attempts to withdraw by failure to perform (e.g., failure to produce a performance bond), the recipient may be in a position to terminate the bidder for default, minimize damages by awarding to the next lowest bidder, and recover the damages including the bid differential from the defaulting contractor. Recipients should evaluate all the costs associated with this course of action, including the long run effect on competition and pricing, before proceeding.

4.2.6 Single Bid

If a single bid is received in response to a solicitation, the recipient needs to determine whether or not competition is adequate. This would include reviewing the specifications to determine whether they are unduly restrictive. It might also include surveying potential sources that chose not to submit a bid to find out why they did not respond to the solicitation. Recipients should document the results of such surveys and include the documentation in the procurement history for audit purposes.

- *Adequate Competition* – FTA acknowledges competition to be adequate when the reasons for few responses were caused by conditions beyond the recipient's control. After the recipient determines that the specifications are not unduly restrictive and changes cannot be made to encourage greater competition, the recipient may determine the competition adequate. FTA's competition requirements will be fulfilled and the procurement will qualify as a valid competitive award provided the bid price is determined to be reasonable.
- *Inadequate Competition* – FTA acknowledges competition to be inadequate when the reasons for few responses were caused by conditions within the recipient's control. For example, if the specifications used were unduly restrictive, competition will be inadequate. If a recipient determines the competition is inadequate but the conditions for proceeding with the award as a sole source is justified, the recipient must still undertake either a price or cost analysis to determine the reasonableness of the bid price.
- *Price Analysis* – If the competition is deemed to be adequate or the recipient determines a sole source award is justified, a price analysis must

be performed to determine the reasonableness of the bid price. Various price analysis techniques may be used, and they include (among others) comparison to previous purchases, bidder's catalogue, market prices, or comparison to a valid independent cost estimate (ICE). If, on the basis of a price analysis, it is determined that the price is fair and reasonable, and if the bid is responsive and responsible, recipients may proceed with award. If, however, the reasonableness of the bid price cannot be established, recipients must proceed with a cost analysis discussed in Section 4.6 (Cost and Price Analysis) below.

- *Negotiation* – In those instances where either the price or cost analysis has not established that the bid price is fair and reasonable, recipients may enter into negotiations with the bidder in an attempt to establish a different price that ultimately can be determined to be reasonable. Some authorities view this as canceling the sealed bidding method of procurement and converting, through documentation, the procurement to either a competitive proposal (a negotiated procurement) or sole source procurement. This is an area that may be controlled or regulated by State law.

4.3 Competitive Proposals Evaluation Process

REQUIREMENT
Recipients must have a written method for conducting technical evaluations of competitive proposals received and for determining the most qualified offeror. Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program with price and other factors considered. See 2 C.F.R. §200.320, Methods of procurement to be followed, and FTA Circular 4220.1F, Chapter VI, paragraph 3.d. (2) – *Competitive Proposal Procurement Procedures*.

The following is a list of elements commonly found in the competitive proposal method of procurement:

- Both a technical and cost proposal is requested so that each is separately evaluated. Where the appearance of technical objectivity is important, it is a better practice for recipients to initially evaluate the technical proposals without knowledge of costs so that an objective and impartial evaluation can be obtained.
- The evaluation factors to be considered in the award are identified in the RFP along with the relative importance of each. While this requires only the ranking of the factors without quantifying the importance or describing the process for applying the factors to proposals, some agencies disclose their selection process in detail.

- *Disclosure Disadvantages* – Disclosing the specific weights and scoring processes may encourage proposers to distort their proposals, and may strengthen the disappointed proposer's challenge to the agency decision;
- *Disclosure Advantages* – A full description of the process guides proposers in understanding the recipient's needs, bolsters the objectivity of the evaluation team, encourages candor from the proposers during negotiations, and encourages competition through the perception of fair treatment.

- Many standard RFPs notify prospective offerors that award may be made on the basis of initial proposals submitted without any negotiations or discussions. The implication is that the initial proposal should be the proposer's best effort.
- Although performance bonds are often appropriate and required by IFBs, the use of a proposal guarantee is less common than bid guarantee. Because proposers generally have unavoidable opportunity during negotiations to render their proposals unacceptable, the purpose of a bid guarantee cannot be achieved with proposals. If, however, it is particularly important that the initial proposals be firm commitments by offerors, that frivolous proposals not be submitted, or that proposers are able to provide performance bonds, then a proposal guarantee in the form of a cashier's check, letter of credit, or approved bond may be a cost-effective means for recipients to meet these goals.
- With architectural and engineering services procurements, recipients must use competitive proposal procedures based on the Brooks Act, which requires selection to be based on qualifications and specifically excludes price as an evaluation factor (provided the price is fair and reasonable). See 40 U.S.C §1101 et. seq.
- Adequate documentation from the evaluation team or committee for selecting a proposer or ranking proposers. For examples of recipients' evaluation team/committee documentation, see Appendix B, section B-4.3.

4.3.1 Best Value

"Best value" describes a competitive, negotiated procurement process whereby an agency reserves the right to select the offer deemed most advantageous and of greatest value to the agency. The award selection is based upon consideration of a combination of technical and price factors such that a recipient may acquire technical superiority even if it must pay a premium price. If the recipient elects to use the best value selection method as the basis for award, the solicitation must contain language which establishes that an award will be made on a best value basis.

A premium price is the difference between the price of the lowest priced acceptable proposal and the one the recipient has determined offers the agency the best value. The term "best value" also means the expected outcome of

an acquisition that, in the recipient's estimation, provides the greatest overall benefit in response to its material requirements. To achieve best value in the context of acquisitions for public transportation purposes, the evaluation factors for a specific procurement should reflect the subject matter and the elements that are most important to the recipient. While FTA does not mandate any specific evaluation factors, the recipient must disclose in its solicitation the evaluation factors it establishes and the order of importance of those factors. Evaluation factors may include, but are not limited to, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. This list is intended neither to limit nor to dictate qualitative measures a recipient may employ, except that those qualitative measures established by a recipient must support the purposes of the Federal public transportation program.

It may be helpful to distinguish the concept of "best value" selections from the more traditional practice of selecting the lowest price proposal that is technically acceptable (although that too may actually represent what a recipient feels is the "best value" selection given the nature of the procurement). Both approaches require technical evaluations and price analysis, and both approaches require the solicitation to clearly describe how the selection decision will be made. Thus, *"best value"* requires tradeoffs between price and non-price factors to select the best overall value to the recipient. On the other hand, *"lowest price, technically acceptable proposal"* requires selection of the lowest price proposal meeting the minimum RFP requirements.

4.3.2 The FAR Concept of Best Value

The FAR describes a "best value continuum" in negotiated procurements where agencies are free to use any one of a combination of source selection approaches. For example, in acquisitions where the requirement is clearly definable and the risks of unsuccessful performance are small, cost or price may play a dominant role in source selection, i.e., the selection may be based on the lowest price technically acceptable proposal. Where, however, the agency's requirement is
less definitive, or where there is development work or greater performance risk, then price is less important, and technical or past performance considerations are more important in the selection process.

The FAR goes on to describe both *the tradeoff process* that is used when selecting a proposal other than the lowest price technically acceptable proposal, as well
as the process to be used when the lowest price technically acceptable proposal method is appropriate. Recipients should consider the following important principles from the FAR guidance on source selection in their own acquisitions:

- The best value selection methodology provides an agency with an opportunity to structure the source selection process in a way that is suitable for the nature of the agency's requirement. No longer is the emphasis on defining one's "minimum needs," with its corollary selection process of choosing the lowest price technically acceptable proposal. While that approach will probably be the one most often used by recipients, agencies are encouraged to structure selection procedures based on the realities of their requirements. Agencies are not expected to force all acquisitions into a lowest-price-technically-acceptable-proposal mold when that may result in unacceptable performance risks or preclude the agency from selecting products that are a better value to them than the lowest price products or services.

- When an agency decides that its requirements are sufficiently defined to use the lowest price technically acceptable selection process, the evaluation factors that establish the requirements of acceptability must be stated in the solicitation. Solicitations must specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-price factors.
- When the agency decides that its requirements are not defined with sufficient precision, or where there are performance risks such that selection of the lowest price technically acceptable proposal is not in the best interests of the agency, then a tradeoff process should be used to select the best value proposal. In this case, the importance of the non-price evaluation factors that will affect the contract award must be stated in the solicitation. The Federal approach in the solicitation is to state whether all evaluation factors other than price, when combined, are significantly more important than, approximately equal to, or significantly less important than, price. This permits the agency to make tradeoffs between price and technical merit. It also permits the offerors to know what is important to the agency - whether to focus on higher quality at the expense of cost, or lower cost at the expense of quality. It is not necessary to publish the specific weights (numerically) of the individual evaluation factors, only their relative importance (i.e., conceptually or adjectivally). Some Federal agencies have found through practice that the approach that provides the greatest degree of flexibility in selecting the best value proposal is one that places equal weight on the price and technical factors. This allows a choice in either direction as circumstances warrant.
- It is important to note that the perceived benefits of the higher priced proposal must merit the additional cost, and the rationale for tradeoffs must be documented in the contract file. It is not sufficient to say in the file that Company X received a higher total score than Company Y, and therefore deserves the award. Scores, without substantive explanations of the relative strengths and weaknesses of the competitive proposals, including the perceived benefits to the agency, are an insufficient basis for paying a higher price. The file must explain why Company X represents the best value to the agency. The necessity of documenting the specific reasons why one proposal offers a better value to the recipient than another proposal is why a mathematically driven selection decision is not appropriate.

4.3.3 Competitive Proposal Evaluation Mechanics

There are many different methods of conducting proposal evaluations to determine best value and many opinions as to which is the best approach. Recipients may employ any rating method or combination of methods, including: adjectival ratings, numerical weights, and ordinal rankings. Whatever the method, a statement of the relative strengths, deficiencies, significant weaknesses, and risks supporting the evaluation ratings must be documented in the contract file.

Some agencies have employed a quantitative approach of assigning scores to both technical and cost proposals, thereby compelling a source selection that is basically mathematically derived. Proponents of this method usually argue it is the most "objective," and, therefore, the fairest approach to determine a winner. On closer examination, however, all approaches are, to one degree or another, subjective. The decision regarding what score to assign any given factor is subjective and any formulas employed after the initial scoring cannot make the process an "objective" one. Further, recipients must have flexibility to make sound, factually-based decisions that are in their agency's best interests. Any approach that assigns a predetermined numerical weight to price, and then seeks to "score" price proposals and factor that score into a final overall numerical grade to automatically determine contract award, can result in unintended and adverse consequences. Rather, agencies should evaluate the prices offered but not score the price proposals. Prices should be evaluated and brought alongside the technical proposal scores in order to make the necessary tradeoff decisions as to which proposal represents the best overall value to the agency. Agencies should carefully consider the technical merits of the competitors and the price differentials to ascertain if a higher price proposal warrants the award based on the benefits it offers to the agency as compared to a lower price proposal. This is a subjective decision-making, tradeoff process.

The difficulties in trying to assign a predetermined weight to price and then scoring price proposals is that no one can predict in advance how much more should be paid for certain incremental improvements in technical scores or rankings (depending on what scoring method is used). For example, no one can predict the nature of what will be offered in the technical proposals until those proposals are opened and evaluated. Only then can the nature of what is offered be ascertained and the value of the different approaches proposed be measured.
It is against the actual technical offers made that the prices must be compared in a tradeoff process. Agencies cannot predict in advance whether a rating of "Excellent" for a technical proposal will be worth X dollars more than a rating of "Good," or whether a score of 95 is worth considerably more or only marginally more than a score of 87. It is what is underneath the "Excellent" and the "Good" ratings, or what has caused a score of 95 vs. a score of 87, that is critical. The goal is to determine if more dollars should be paid to buy the improvement, and, equally important, how many more dollars those improvements are perceived to be worth. It could well be that the improvements reflected in the higher ratings are worth little in terms of perceived benefits to the agency. In this case, the recipient does not want to get "locked into" a mathematically derived source selection decision. This may very well happen when price has been assigned a numerical score and the selection is based on a mathematical formula instead of a well- reasoned analysis of the relative benefits of the competing proposals.

Some agencies have recognized the pitfalls of using arithmetic schemes to make source selection decisions. They have opted not to use numerical scores to evaluate technical proposals and they have shifted to adjectival ratings instead, e.g., "Unacceptable," "Marginal," "Acceptable," "Highly Acceptable," "Outstanding." They have also heavily emphasized the need for substantive narrative explanations of the reasons for the adjective ratings and the source
selection official then focuses on the narrative explanations in determining if it is in the agency's best interest to pay a higher price for the technical improvements being offered. In this scenario price is evaluated and considered alongside technical merit in a tradeoff fashion using good business judgment to choose the proposal that represents the best value to the agency.

4.3.4 Competitive Proposal Evaluation Criteria

The solicitation will be more easily planned and developed, the criteria will be more accurately listed and ranked, and the evaluation process will be smoother and more objective if the evaluation process is thoroughly planned in advance. The evaluation process begins with the identification and definition of the criteria that will be most meaningful in assessing the relative advantage of the proposals to the agency. A recipient will generally include:

- *Past Performance* – The solicitation should advise offerors of the agency's approach in evaluating past performance, including evaluating offerors
  that have no relevant performance history, and should also advise offerors to identify past relevant contracts for efforts similar to the agency's requirement. The solicitation should also allow offerors to provide information on problems encountered on the identified contracts and corrective measures taken. This evaluation should also consider the past performance of key personnel and subcontractors that will perform major or critical aspects of the work. This evaluation of past performance, as one indicator of an offeror's ability to perform the contract successfully,
  is separate from the responsibility determination discussed in Section 4.1 (Responsibility of Contractor).
- *Technical Criteria* – Technical factors regarding the specific methods, designs, and systems proposed to be used by the offeror will be considered and
  they must be tailored to the specific requirements of the solicitation. These factors must represent the key technical areas of importance the agency intends to consider in the source selection decision. Technical factors should be chosen to support meaningful comparison and discrimination between competing proposals. If the agency has established minimum standards for determining technical acceptability of proposals, these standards must be clearly set forth in the solicitation.
- *Key Personnel* – An evaluation of key personnel is often suggested when the procurement involves services or requirements where management of the work is a critical factor in determining its success. Qualifications and experience of key personnel may be an important evaluation factor. Some agencies have required oral presentations by key personnel during which the agency officials may ask relevant

questions to determine the depth of their knowledge in critical areas.

- *Cost or Price* – Cost or price must be considered in every procurement, even those for professional services (e.g., legal, accounting, etc.), unless the services are those defined by Federal statutes as requiring a qualifications- based selection, such as A&E services. Competition normally establishes price reasonableness. Therefore, when contracting on a fixed price basis, comparison of the proposed prices normally will satisfy the requirement to perform a price analysis and no cost analysis will be necessary. If the contract is to be a cost reimbursement one, then a cost realism analysis should be performed to determine what the recipient realistically should expect to pay for the proposed effort. Recipients should never simply accept at face value the total estimated cost in the proposal and base a selection decision on the proposed amount, since many offerors tend to understate the estimated cost in hopes of winning the contract as the "low bidder." A cost realism analysis would use each offeror's specific labor and overhead rates as estimating factors (assuming they are not understated) and the agency's own estimates for labor hours, travel, materials, etc., based on the established technical approach. The weighing of the proposed technical and cost elements, leading to the award decision, would be made using the result of the cost realism analysis.
- *Relative Importance of Price and Non-Price Factors* – The solicitation must advise offerors if the selection is to be made on a "best value" basis. And, as already noted, the solicitation must also advise offerors whether price is approximately equal to, less than, or greater in importance than the technical and non-price evaluation factors as a whole.

4.3.5 Competitive Range

Recipients are required to have a method in place for conducting technical evaluations of the proposals received and for selecting awardees. As discussed in this section, determination of the "competitive range" for a solicitation is a concept that can be used when developing methods for selecting awardees under the competitive proposal method of procurement.

At this stage in the competitive proposal procurement process, the recipient has received proposals from interested offerors and has begun the process of evaluation and selection. Negotiation and the repeated analyses and evaluations required can be very time consuming and there is often a wide range of competence or cost-effectiveness in the initial proposals. The recipient may not wish to expend this effort on all the proposals for two reasons:

I. Certain proposals, upon evaluation, may be so much more inferior than others for price or other reasons that the possibility of accepting a subsequent offer is so remote as to make negotiations unnecessary; and

2. The recipient may have enough proposals such that it can be assured of negotiating the best buy in dealing only with a limited number of offerors; negotiating with more would be wasteful of both recipient resources and those of the marginal proposers.

For these reasons, a commonly used technique is to conduct negotiations only with offerors determined to be within the competitive range. In assessing the competitive range, competition remains an important objective and the effort in determining the competitive range is to preserve those proposals that stand a reasonable chance of being found acceptable; not to unduly limit competition by eliminating viable proposers.

Competitive range is a difficult concept to define in specific terms that are easily applied to all competitive procurements. This is because professional judgment must be used in establishing the competitive range. Procedures and factors for determining the competitive range may differ from procurement to procurement. Defining the competitive range must ensure that:

- It is not used to unfairly eliminate offerors;
- It is based on factors and criteria known to all offerors;
- It can be applied uniformly to all proposals; and
- It is well-documented in the procurement files.

For a particular procurement action, the recipient may decide to define the competitive range wide enough to provide as many offerors as possible with an opportunity to compete. On the other hand, it may be desirable to limit the number of qualified offerors to those who have a reasonable chance of being selected for award, e.g., offerors whose proposals are accepted as submitted or can be made acceptable through reasonable modifications. In either scenario,
all responsible offerors whose proposals are determined to be within the competitive range would be invited to participate in any oral and/or written discussions.

While it is not possible to identify all of the specific steps and analyses that could be performed in determining which proposals are within the competitive range, the following are provided for consideration in making this determination:

- The determination of which proposals are within the competitive range is usually made by the evaluation team (or procuring official, if there is no evaluation team).
- Competitive range determinations can be made using cost or price, technical and other factors identified in the solicitation.
- Detailed independent estimates prepared by the initiating department or project office can be considered when assessing the cost or price aspects of competitive range.
- The evaluation team's scoring of offerors' technical and management proposals is a logical basis for establishing which proposals are within the competitive range, as is scoring of other evaluation/award criteria specified in the solicitation. However, an agency may be limiting its options if it commits to competitive range determinations based on predetermined "cutoff scores." It is often difficult to justify omitting proposals with only one or two points' difference from the predetermined cutoff score. More importantly, the competitive range determination is a qualitative judgment based on the factual content of the proposals, and it must carefully consider both technical merit/performance and price. It does not lend itself to a predetermined formula since the relative values of the products that will be offered, and their prices, cannot be predicted in advance so as to reduce the determination to a predetermined formula.
- Borderline proposals need not automatically be excluded from the competitive range if there is a reasonable probability that they could be made acceptable. If there is doubt as to whether a proposal should be in the competitive range, the goal of achieving full and open competition is served by including it.
- Only those proposals that are deemed so deficient or so out of line as to preclude further meaningful negotiations need be eliminated from the competitive range.
- Competitive range determinations are significant documents in the procurement file. This documentation is helpful to serve as a basis for debriefing offerors and for responding to inquiries and protests. Many agency procurement procedures provide written notification to all offerors whose proposals have been eliminated from consideration for award. Such notification occurs at the earliest practicable time after this determination is made.
- Written and/or oral discussions are usually conducted with all offerors determined to be within the competitive range.
- At the conclusion of discussions with offerors in the competitive range the procuring official may ask all offerors to submit their best and final offers (BAFO) in writing. This combines fairness with incentive for each competitor to submit its best realistic offer. Section 4.3.8 (Request for Best and Final Offer) provides further details on requesting best and

final offers.

4.3.6 Discussions with Offerors

The recipient may wish to obtain clarifications from one or more offerors or hold discussions with all offerors immediately after receipt of proposals. Even though a recipient is not required to conduct discussions with any offeror, discussions can be an important part of the competitive procurement process. The content and extent of those discussions is a matter of judgment based on the particular facts of the procurement. Typically, the first discussions are oral presentations made by a short list of offerors within the competitive range as described in Section 4.3.5 (Competitive Range).

If an agency enters into negotiations or discussions (as opposed to simple requests for clarification) with one offeror, any appearance of unfairness or bias may be avoided by entering into negotiations with all remaining offerors. This includes advising an offeror of deficiencies in its proposal and affording them
an opportunity to satisfy the requirements by submitting a revised proposal. Circumventing the process merely by requesting "clarifications" when the agency is, in fact, conducting discussions, is a mistake. If the questions asked necessitate a response from an offeror to correct a deficiency or revise its proposal, then discussions have been held. If discussions are held with an offeror, fairness dictates conducting meaningful discussions with all.

A recipient is not, however, obligated to have all-encompassing discussions with offerors nor is it obliged to discuss every element of a technically acceptable proposal in the competitive range that has received less than a maximum possible score. Also, if a proposal is technically unacceptable as submitted and would require major revisions to become acceptable, the recipient is not required to include the proposal in the competitive range for discussion purposes.

After concluding discussions, the procurement official may realize there is a significant mistake or aspect of a particular proposal that the evaluators do not understand. Since allowing one offeror an opportunity to correct its proposal would constitute discussions with that firm, discussions must be reopened with all offerors in the competitive range who, in turn, must be permitted to submit revised proposals.

During discussions with offerors, the evaluation team may learn more about a technique used by offeror A that would complement offeror B's approach in a manner that would yield an advantageous offer from B. In such instances, the recipient may ask all offerors to submit a revised proposal with the advantageous approach. Or, after price proposals have been evaluated, someone on the evaluation team may suggest that an offeror with a high technical score be asked if it can meet the lower price of a competitor. Such techniques are considered technical leveling, technical transfusion or auctioning. Use of these techniques may cause offerors to react adversely. Because offerors are concerned about their position relative to their competitors and want to keep their strengths or unique ideas confidential, they may become more secretive in their discussions with the recipient if they sense the recipient may share their ideas, pricing, or positions with their competitors. This is not to discourage discussion of price or suggesting major revisions in a proposal, but rather to discourage the disclosure, even indirect, of one offeror's information to another. To do otherwise may result in offerors holding back on their strengths and valuable information until the BAFO period.

Maintaining confidentiality during the evaluation process has many advantages. Control of

confidential information will allow an agency to conduct more meaningful negotiations, particularly with respect to information provided by each offeror as it relates to their technical and cost proposals. In many States, trade secrets and other confidential information regarding a business' finances and operations is protected by statute and usually can be kept confidential during the evaluation process, and, in some instances, after the award of contract. State public information laws and the Federal Freedom of Information Act (FOIA), however, may affect what particular information can be protected, particularly if there is strong public interest in the procurement and inquiries are made by non- competitors and other parties interested in the activities of the transit agency.

4.3.7 Request for Revised Proposals

The most common tool used by procurement officials in competitive negotiations is a request for a revised proposal. The purpose of the request for revised proposals, like the original request for proposals, is to harness the competitiveness and creativity of the offerors to produce the most advantageous proposal for the agency. Typically, the agency lists and explains the deficiencies of a proposal. A complete revised proposal, including price (except under the Brooks Act) is requested from each offeror in the competitive range. Unless explicitly stated otherwise, the revised offer extinguishes the prior offer. While proposers will respond primarily to an agency's requests in preparing revised offers, an agency also wants to learn how its requests affect other aspects of the proposals. Based on the format of the proposals and the nature of the changes the agency is requesting, the agency may require that revised proposals be submitted in a form that will allow evaluators to easily identify the changes and form the basis of a coherent contract, if accepted. The offeror should clearly identify all changes made in the revised offer. The submission of the revised offers can trigger another round of evaluations, determination of a new competitive range, and discussions. An agency may repeat this cycle as many times as necessary to obtain the most advantageous offers. If the procurement

staff concludes they have obtained the most advantageous offer possible, they may recommend award.

Private parties in bilateral negotiations would probably make counteroffers to each other to advance the process. There are disadvantages to an agency making a counteroffer in a competitive procurement. A counteroffer would not only extinguish the offeror's last offer, it would also place the other competitors in the position of accepting or rejecting the counteroffer. Therefore, counteroffers are usually not made by procuring agencies.

4.3.8 Request for Best and Final Offer

The procuring official is now at the stage in the competitive negotiation process where he/she is ready to receive final offers. The official may now ask for a best and final offer (BAFO) from those offerors still within the competitive range. If there are offers that have no viable chance of being made competitive by this time, the BAFO request may be limited to only those offerors who are still competitive even if only one offeror is left at this stage of the procurement process. If, on the other hand, there is a significant possibility there will be a desire to improve further on the next offers, then the procuring official is not ready to request BAFOs, and, instead, should request revised offers.

The request for a BAFO usually includes the following elements:

- Specific notice that discussions are concluded;
- Notice that this is the opportunity for the offeror to submit a best and final offer;
- A definite, common cutoff date and time that allows a reasonable opportunity for the preparation and submission of the best and final offer; and
- Notice that the final offer must be received at the place designated by the time and date set in the request and is subject to any provisions dealing with late submissions, modifications, and withdrawals of proposals set forth in the solicitation.

Upon timely receipt of the BAFO(s) and final evaluation by the agency, the procuring official should be in a position to recommend award to a firm or individual in accordance with the terms and conditions of the solicitation.

The preferred practice is to ask for one BAFO. Requests for additional BAFOs should be avoided, if possible. However, additional technical or price/cost-related issues may surface as a result of the offeror's final submission or other factors that preclude a reasonable justification for contractor selection and award. If it is clearly in the procuring agency's best interests, discussions may be reopened and the issues resolved. Again, at the conclusion of the round of discussions, an additional request for BAFO(s) would be issued to all offerors still within the competitive range.

4.3.9 Award Based on Initial Proposals

Recipients may accept one of the initial proposals if it is clear that acceptance of the most favorable initial proposal without discussion will result in a fair and reasonable price to the agency. Therefore, as a general matter, it is advantageous for solicitations to contain a notice that award may be made without discussion of proposals

received, and that proposals should be submitted with the most favorable terms possible.

An agency is not required to conduct discussions with any offeror provided: (1) the solicitation did not commit in advance to discussions or it notified offerors that award might be made without discussion; and (2) the award is, in fact, made without any written or oral discussion with any offeror. This is often the case where the proposal is for services where rates are regulated and the competition is on the basis of service, e.g., certain types of insurance. If an agency accepts an initial offer, the determination of fair and reasonable price will be an important document in the procurement file.

4.3.10 Withdrawal of Proposal

The solicitation normally states a date and time by which offers must be submitted, and a period following that date during which the offers remain firm. See Section 3.5 (Common Elements of the Solicitation Process). Allowing offerors to withdraw or modify their proposals up to the time they are due will maximize competition and reduce the need for alternate or revised proposals during the evaluation stage. After the due date, however, the proposals are usually firm and cannot be withdrawn during the validity period. To ensure the legitimacy of proposals and discourage frivolous proposals, the agency should have the right to accept an initial proposal without regard to whether the offeror has had second thoughts concerning its submission.

As in the case of sealed bids, it is important to the integrity of the procurement process that all offers are serious and none are submitted for exploratory reasons or to cast a certain light on other offers. Although the negotiation process, in contrast to sealed bidding, reduces gamesmanship in the process, such a concern is still valid, particularly where the agency's preference is to accept an initial offer. In the case of a revised offer or BAFO, the solicitation can stipulate that the withdrawal of the offer does not invalidate the most recent offer on file.

4.3.11 Debriefing Unsuccessful Offerors

Offerors excluded from the competitive range or from award may request a debriefing or, alternatively, the agency may offer to provide a debriefing. If the reasons and rationale not to proceed with an offeror are well-documented, the procuring official can proceed to debrief the offeror(s) with confidence. A candid explanation of the process can serve the purposes of defusing any potential dispute by the disappointed offeror(s) as well as encourage future participation by the unsuccessful offerors. If there is a high probability that a dispute will materialize, then the agency is under no obligation to notify or debrief unsuccessful offerors.

During the debriefing, the procuring official should be prepared to discuss the reasons an offeror's proposal was rejected with openness and candor. Take this opportunity to educate the offeror on the competitive proposal process and avoid comparisons to the successful offeror. Focus on the strengths and weaknesses of the offer itself with specificity. If done properly and professionally, the agency may receive an improved competitive proposal from the offeror(s) in a future procurement.

Unless an agency's procedures require notification of the disappointed offeror(s) immediately, the procuring official may decide to hold off debriefing the losing offeror(s) until the contract is awarded. If there is reason to believe a losing firm is inclined to dispute or delay award of the contract,

State rules and procedures may still allow the agency to proceed with contract award prior to any debriefings. The disappointed firm(s), however, may become suspicious of the intent if the agency has not contacted them for further discussions or notified them of a pending award to another competitor. If the agency waits until award is made, which is a public action, the losing offeror(s) will be left with only two choices: (1) do nothing; or, (2) file a bid protest or legal action. If the losing offeror(s) chooses the first course of action, they may be reluctant to propose on future work due to mistrust in the process. If, however, the offeror(s) chooses the second course of action, to file either a protest or a lawsuit, this may result in a delay in the commencement of contract performance at substantial cost to the agency. Recipients must carefully weigh the risk of litigation against the risk of delaying award of the contract.

4.4 Two-Step Procurement Evaluation Process

A variation in the sealed bidding process that has long been recognized in public procurement is referred to as the two-step method of procurement. It has some characteristics of both sealed bidding and competitive proposals, and complies with all of FTA's requirements for the competitive proposal process. Two-step bidding is a two-phase process that generally consists of: (1) evaluation of the technical proposal only; and (2) consideration of price for those bids that are determined to be technically acceptable. Under the first step, discussions can be held with offerors similar to what takes place with the competitive proposals. In step two when the pricing proposals are considered, award can then be made to the lowest, responsive and responsible bidder.

The process is designed to:

- Obtain the benefit of sealed bidding by award of a contract to the lowest responsive, responsible bidder; and
- Obtain the benefit of the competitive proposal method of

procurement through the solicitation of technical offers and conducting discussions to determine the acceptability of the technical offers.

The process may be recognized by State law as a separate method of procurement. Or, it may be allowed as a variation of a sealed bidding statute, particularly in States where limitations on the use of the competitive proposal method exists.

The two-step method generally is used when it is not practical for recipients to prepare a definitive purchase or contract description that is suitable for award on price alone. In the absence of laws that require the use of sealed bidding, some transit agencies establish a preference for the two-step process over competitive negotiations when all of the following conditions are present:

- Available specifications are not definite or complete or may be too restrictive without technical evaluation (and any necessary discussion) to ensure mutual understanding of the technical requirements between each source and the recipient;
- Definite criteria exist for evaluating technical proposals;
- More than one technically-qualified source is expected to respond;
- Sufficient time will be available for use of the two-step method; and
- A firm fixed price contract or a fixed price contract with economic price adjustment will be used.

4.4.1 Step One of Process

Step One of the process normally involves the following steps.

Solicitation – In addition to the normal requirements for an IFB, the solicitation requires:

- That unpriced technical offers are requested;
- That the procurement is a two-step sealed bid procurement and that priced bids will be considered in the second step and only from those bidders whose unpriced technical offers are found to be acceptable in the first step;

- The criteria to be used in evaluating the unpriced technical offers;
- That the transit agency, to the extent determined to be necessary, may conduct oral or written discussions regarding the technical offers;
- A statement that bidders should submit proposals that are acceptable without additional explanation or information and that the transit agency may make a final determination regarding the acceptability of the proposals based solely on the basis of the proposals as submitted, and may proceed with the second step without requesting further information from any bidder;
- That bidders may designate those portions of the technical offers which contain trade secrets or other proprietary data which are to remain confidential; and
- That the item being procured will be furnished generally in accordance with the bidder's technical offer as found to be technically acceptable and will meet the requirements of the solicitation.

Amendments

- Amendments issued prior to the receipt of technical offers are important to all prospective bidders as in a "normal" IFB.
- Amendments issued after receipt of the technical offers need be submitted only to those bidders who submitted unpriced technical offers and they should be allowed to submit new technical offers or amend those previously submitted.

Receipt of Unpriced Technical Offers

- Unless required by law, unpriced technical offers need not be publicly opened.
- Offers are typically opened in front of two or more authorized agency employees as witnesses.
- Offers usually are not disclosed to unauthorized persons.

Evaluation

Evaluation of unpriced technical offers should be in accordance with the criteria set forth in the solicitation. The unpriced technical offers should be categorized as:

- Acceptable.
- Potentially acceptable (i.e., reasonably likely it can be made acceptable); or
- Unacceptable, in which case the contracting officer records in writing the basis for this finding and makes it part of the procurement file.
- Any proposal which modifies or fails to conform to the essential requirements or specifications of the solicitation can be considered nonresponsive and categorized as unacceptable.

- When an unpriced technical offer has been determined to be unacceptable, the bidder may be notified of that fact and is not normally afforded additional opportunities to submit supplemental information amending its technical offer.

Discussions

Discussions involving unpriced technical offers may be conducted with any offeror who submitted an acceptable or potentially acceptable technical offer.

- Discussions can be conducted in accordance with the principles discussed in Section 4.3.6 (Discussion with Offerors) involving the competitive proposal method of procurement.
- Once discussions have commenced, any offeror who has not been notified that its offer has been found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established.
- Such submission may be made at the request of the Contracting Officer, or upon the offeror's own initiative.

4.4.2 Step Two of Process

Step two of the process may be initiated without discussions if there are a sufficient number of acceptable proposals to ensure adequate price competition. Based upon the results of Step One, the recipient may wish to revise the technical specifications (minimum technical requirements) in Step Two in a manner that does not conflict with the final unpriced proposals. While there is no assurance that the prices will be close to each other, the recipient does know to what degree the proposals have competitive technical merit.

The procedures discussed in Section 4.2 (Sealed Bid Evaluation Process) may be followed in Step Two. Each bidder who submitted an unpriced offer that was determined to be acceptable in Step One is invited to submit a priced offer. The IFB states that the bidder will comply with the specifications and the offeror's acceptable technical proposal. No additional public notice or advertisement of the solicitation is necessary because such notice was given during the Step One Process. Award would be made to the lowest, responsive responsible offeror.

4.5 Sole Source Proposals Evaluation Process

REQUIREMENT
All procurement transactions must be conducted in a manner providing full and open competition. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply: (1) the item is available only from a single source; (2) the public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (3) *FTA or the pass-through entity* expressly authorizes noncompetitive proposals *in response to a written request from the recipient*; or (4) after solicitation of a number of sources, competition is determined inadequate. See 2 C.F.R § 200.320, Methods of procurement to be followed, and FTA Circular 4220.1F, Chapter VI, paragraph 3.i. – *Other Than Full and Open Competition*.

Public procurement essentially operates in an environment where full and open competition is the primary goal or aspiration and, in many cases, is a mandate. There are, however, legitimate reasons or situations where limited or no competition exists. The Uniform Guidance restricts the use of noncompetitive or sole source procurement, when FTA funds are involved, to the limited circumstances enumerated above. Additionally, State laws or agency regulations may further limit the use of sole source procurements.

Because procurement by sole source is a noncompetitive procurement, it is treated as an "exception-to-the-norm" in the public arena. The use of this method of procurement must be justified, and, frequently, pre-approval must be obtained before a sole source contract is executed. In this context, "justification" equates to documentation of the proposed action. Contracting officers should take reasonable steps to avoid using sole source procurements except in circumstances where it is both necessary and in the best interest of the agency.

The recipient must determine whether or not there is a valid justification to obtain the product or service using the sole source method without risking the use of Federal funds for those purposes. FTA permits use of Federal funds for sole source procurements if at least one of the following circumstances is present:

- The item is available only from a single source. Unique capability or availability must be definitively established.

- The public exigency or emergency for the procurement will not permit a delay resulting from competitive solicitation. Health and safety issues may be an adequate basis for a public exigency or emergency.
- When the agency's need for the supplies or services is of such an unusual or compelling urgency that the agency would be seriously injured unless sole source procurements were utilized.
- Authorized by FTA or the pass-through entity, in response to a written request by the recipient.
- Single bid or single proposal. After solicitation of a number of sources, competition is determined inadequate. If the recipient is satisfied about the bidding environment and the reasons why it only received one bid, it can negotiate a sole source contract to arrive at a reasonably priced contract.

It will be difficult to justify use of the sole source procurement method if the agency itself is responsible for the situation. For example, lack of advance planning, delays in procurement administration due to a shortage of procurement personnel or the incompetence of procurement personnel, and insufficient funds due to budgeting constraints may not be a sufficient justification for classifying
a needed procurement action as urgent or compelling. In these instances, an independent opinion is warranted. Questions that a recipient should consider in its sole source analysis include:

- Is there a competitive alternative (e.g. modifying the restrictive elements of the solicitation)? Does a survey of non-respondents indicate that a
re-solicitation is likely to produce additional competition? If so, the agency should conduct a new procurement.
- How many firms requested copies of the solicitation?
- Was the solicitation sent to all known firms with capability to perform the work?
- Could the scope or specification have been written differently to allow more firms to compete without damaging the recipient's ability to meet its needs?
- Were prospective vendors given adequate time to respond to the solicitation?
- Did prospective vendors request changes to the specification or additional time to respond and were such requests granted?
- Was the lack of competition due to the necessary inclusion of a proprietary product or service that would justify treating the solicitation as a sole source?

Some recipients annually publish a list of previous sole source contracts on their web sites in order to inform prospective vendors and suppliers of their sole sourced products and services. The objective of this practice is to inform
prospective vendors and suppliers of those purchased products so that a vendor having a product that it believes to be comparable to one that was bought via sole source could inform the agency and seek to have its product reviewed for acceptability and as one that could be offered competitively. Examples of such notices or procedures are in Appendix B, section B-4.5.

It is strongly recommended that recipients document very thoroughly and carefully the rationale for proceeding with a sole source procurement. The agency may have very specific requirements for making the case to sole source, and may have pre-approval requirements at a certain dollar threshold that
must be met. Also, the Board of Directors may require its approval of any proposed sole source procurement in excess of an established threshold prior to the commencement of the negotiations. There may be other documentation
requirements specific to the agency, State, or local government that must be met prior to the initiation of negotiations. For examples of recipients' sole source documentation requirements, see Appendix B, section B-4.5.

Regardless of the justification for proceeding with a sole source contract, recipients are required to obtain a proposal from the contractor and perform the requisite cost analysis to ensure the cost is fair and reasonable.

4.6 Cost and Price Analysis

REQUIREMENT
Recipients must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold, including contract modifications. The method and degree of analysis depends on the facts and circumstances of the procurement, but as a starting point, the recipient must make independent estimates before receiving bids or proposals. See 2 C.F.R § 200.323, *Contract cost and price*, and FTA Circular 4220.1F, Chapter VI, paragraph 6. – *Cost Analysis and Price Analysis*.

In general, the purpose of a cost or price analysis is to ensure the recipient does not pay unreasonably high prices to third party contractors. Prices, however, that are unreasonably low can also be detrimental to an agency's program if
they prove to be an indication that the offeror has made a mistake or doesn't understand the work to be performed. It is important for recipients to do a cost analysis or price analysis for every procurement action in excess of the Simplified Acquisition Threshold in order to determine how realistic the costs are, and
for recipients not to permit a "buy in" (an unrealistically low estimated contract cost and fee) that will eventually result in a substantial cost overrun. [Pursuant to 2 C.F.R. 200.88, the Simplified Acquisition Threshold means the dollar amount below which a non-Federal entity may purchase property or services using small purchase methods. The Simplified Acquisition Threshold is set by the Federal

Acquisition Regulation at 48 C.F.R. Subpart 2.1 (Definitions) and in accordance with 41 U.S.C. 1908. As of the publication of this BPPM in 2016, the simplified acquisition threshold is $150,000, but this threshold is periodically adjusted for inflation.]

FTA recognizes that some recipients may have difficulty obtaining the information necessary to conduct a proper cost or price analysis. Although neither FTA nor DOT may change the requirements for cost or price analysis, FTA continues
to seek a fair, practical solution to this problem consistent with the flexibility provided to Federal contracting officers under the FAR. Recipients may also use their own cost principles if they are consistent with the Federal cost principles.
The requirement to use the FAR cost principles affects the allowability of costs not only on cost-reimbursement contracts but also when evaluating and negotiating cost elements in order to establish fixed price contracts. Thus, whenever a recipient does a cost analysis of an offeror's cost/price proposal, it
will need to use the Federal cost principles or its own cost principles consistent with the FAR to determine what costs are acceptable for reimbursement under the FTA grant program.

Prior to developing a cost or price analysis, a recipient must develop a pre- solicitation independent cost estimate (ICE). Once bids or offers are received and prior to award, the recipient must then develop a cost or price analysis. Use of a cost or price analysis form can help recipients conduct consistent and sufficiently documented procurements.

For examples of forms used by recipients for cost or price analyses, see Appendix B, Section B-4.6.

4.6.1 Independent Cost Estimate (ICE)

Before issuing a solicitation, recipients must develop an independent cost estimate or ICE of the proper price and cost levels for the products or services to be purchased. Some recipients use the ICE as a basis for the Engineer's
or Project Sponsor's estimate of the contract value which is advertised in the solicitation. The ICE can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of such items as drawings, specifications, and prior data, such as cost data from
prior procurements. The pre-solicitation ICE should inform the post-bid cost and price analysis. The ICE can assist in determining the reasonableness or unreasonableness of price and/or the estimated costs to perform the work. If the recipient intends to require a breakdown of estimated costs, the in-house independent cost estimate should be broken down into the various cost elements.

The ICE is essentially the recipient's estimate of what the item or service "should cost." Available resources for completion of an ICE include: (1) the use of published price lists, (2) historical pricing information from contracts awarded by the recipient's agency, (3) comparable purchases by other agencies, (4) engineering estimates, and (5) independent third party estimates (e.g., an A/E construction cost estimate).

For sample ICE forms used by recipients, see Appendix B, section B-4.6.

4.6.2 Price Analysis

The *FTA Pricing Guide for FTA Grantees* is a valuable tool for FTA recipients in their performance of cost and price analysis to determine the reasonableness and the realism of prices offered by vendors, contractors, etc. on FTA funded procurements. The guide has not been updated to reflect the most recent dollar thresholds, but the guidance remains useful to recipients looking for guidance on different analysis techniques. The Guide describes six price analysis techniques that recipients might use depending on the circumstances of the particular procurement. The accepted forms of price analysis techniques include:

- Adequate price competition;
- Prices set by law or regulation;
- Established catalog prices and market prices;
- Comparison to previous purchases;
- Comparison to a valid recipient independent estimate; and
- Value analysis.

The Guide can be found at Federal Transit Administration website Third Party Procurement Pricing Guide. Some of the questions that recipients should ask in evaluating whether a price analysis is appropriate include:

- Can a determination that a price is fair and reasonable be made without having to analyze the cost elements that make up the total price?
- Are any of the six criteria above available to make a determination concerning the reasonableness of the price being offered?

4.6.3 Adequate Price Competition

In order to have adequate price competition, the following conditions must be present:

- At least two responsible offerors respond to a solicitation.
- Each offeror is able to satisfy the requirements of the solicitation.

- The offerors independently contend for the contract that is to be awarded to the responsive and responsible offeror submitting the lowest evaluated price.
- Each offeror must submit priced offers responsive to the express requirements of the solicitation.
- If the four conditions above are met, price competition is adequate unless one of the following is present:
- The solicitation was made under conditions that unreasonably deny one or more known and qualified offerors an opportunity to compete.
- The low competitor has such an advantage over other competitors that it is practically immune to the stimulus of competition.
- The lowest final price is not reasonable and this finding can be supported by facts.

4.6.4 Prices Set by Law or Regulation are Fair and Reasonable.

Recipients should acquire a copy of the rate schedules set by the applicable law or regulation. Once these schedules are obtained, the recipient needs to verify that the schedules apply to the situation and that it is being charged the correct price. For utility contracts, this policy applies only to prices prescribed by an effective, independent regulatory body.

4.6.5 Established Catalog Prices

The idea behind catalog prices is that a commercial demand exists and suppliers have been developed to meet that demand. The recipient's goal is to ensure it is getting at least the same price as other buyers in the market for these items. The recipient needs to be sure that the catalog is not simply an internal pricing document, and should request a copy of the document or at least the page on which the price appears. Established catalog prices require the following conditions to be present:

- Established catalog prices exist.
- The items are commercial in nature.
- They are sold in substantial quantities.
- They are sold to the general public.

4.6.6 Established Market Prices

Established market prices are based on the same principle as catalog prices except there is no catalog. A market price is a current price established in the usual or ordinary course of business between buyers and sellers free to bargain. These prices must be verified by buyers and sellers who are independent of the offeror. If the recipient does not know the names of other commercial buyers and sellers, it may obtain this information from the offeror.

4.6.7 Comparison to Previous Purchases

Changes in quantity, quality, delivery schedules, the economy, and inclusion of non-recurring costs such as design, capital equipment, etc. can cause price variations. Each differing situation must be analyzed, and the recipient should also ensure that the previous price was fair and reasonable. This determination will be based upon a physical review of the documentation contained in the previous files.

4.6.8 Comparison to a Valid Recipient Independent Cost Estimate

Verify the facts, assumptions, and judgments used by the estimator. Have the estimator provide the method and data used in developing the independent cost estimate. For example, did prices come from current catalogs or industry standards? The recipient should feel comfortable with the estimate before relying on it as a basis for determining a price to be fair and reasonable.

4.6.9 Value Analysis

This method requires a recipient to look at the item and the function it performs so the recipient can determine its worth. The decision of price reasonableness remains with the contracting officer; however, parties requiring value-added activity should be consulted for their expertise, and they should participate in making the decision.

4.6.10 Cost Analysis

Cost analysis is the review and evaluation of the separate cost elements and profit in an offeror's proposal and the application of judgment to determine how well the proposed costs represent what the cost of the contract should be assuming reasonable economy and efficiency. The FTA Pricing Guide also discusses the steps that must be taken to perform a cost analysis and gives guidance as to when the recipient should use a cost versus price analysis method.

4.6.11 Cost Realism Analysis

Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the proposed cost elements are realistic for the work to be performed, reflect a clear understanding of the requirements, and are consistent with the unique methods of performance and materials described in the offeror's technical proposal. Cost realism analyses should be performed on competitively awarded cost-reimbursement contracts to determine the probable cost of performance for each offeror. The probable cost may differ from the proposed cost and should reflect the recipient's best estimate of the cost of any contract that is most likely to result from the offeror's proposal. The probable cost is determined by adjusting each offeror's proposed cost to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost realism analysis. The probable cost should be used for purposes of evaluation to determine the best value. Cost proposals and cost analysis typically are associated with negotiated procurements, including modifications and change orders to existing contracts. In order to facilitate the evaluation of contractor cost proposals, it usually is helpful to prescribe the format of the cost proposals in the solicitation. This will ensure that all offerors submit proposals that can be easily compared to

one another on a cost element basis (if the procurement is competitive), and it will facilitate the evaluation of proposals against the in-house independent cost estimate, and for a cost realism analysis.

4.6.12 Technical Analysis

A technical analysis of the proposed types and quantities of materials, labor, special tooling, equipment, travel requirements, and other direct costs usually will be necessary. These analyses will have to be performed by personnel specialized in engineering, science or other disciplines. At a minimum, the technical analysis should examine the types and quantities of material proposed and the need for the types and quantities of labor hours and the labor types.

4.6.13 Advisory Audit Assistance

Advisory Audit Assistance is strongly recommended whenever the value of an offeror's proposal is significant and the costs of obtaining the audit assistance do not outweigh the potential benefits. If the offeror has performed work for
Federal agencies, there may very well be a Federal audit agency, such as Defense Contract Audit Agency (DCAA), that can be contacted by phone for the latest available audit information regarding direct labor rates, indirect cost rates, and other pertinent costs. If there are no Federal auditors, the recipient should consider contacting the independent CPA firm who audited and certified the contractor's most recent annual financial statements. Oftentimes these CPA firms will provide audit assistance. If the recipient does request an advisory pricing audit for the purpose of conducting negotiations, it should be sure
to inform the auditor that the FAR part 31 cost principles must be used to determine allowable costs. The recipient should also be sure to evaluate the proposed costs of any subcontractor that has submitted cost data to the prime contractor.

4.6.14 Profit/Fee

To negotiate a fair and reasonable profit, consideration should be given to:

- The complexity of the work to be performed;
- The risk borne by the contractor;
- The contractor's investment;

- The amount of subcontracting;
- The quality of its record of past performance; and
- Industry profit rates in the surrounding geographical area for similar work.

4.7 Documentation of Procurement Actions

REQUIREMENT
Recipients are required to maintain and make available to FTA written records detailing the history of each procurement action for a period of three years after the recipient and subrecipients, if any, have submitted a final expenditure report. Different retention periods may apply in the event of litigation or in other limited circumstances. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. See 2 C.F.R § 200.318(i) and 200.333 and FTA Circular 4220.1F, Chapter III, paragraph 3.d. – *Record Keeping*.

This section discusses the documentation requirements that relate most directly to the award of the contract. Recipients should note that documentation of contract decisions and actions is a common area of deficiency among FTA's recipients. The most commonly identified problems include:

- No independent cost estimate (ICE) prior to solicitation;
- No cost or price analysis of contractors' proposals;
- No documented rationale for the selected contract type;
- No documentation for the contractor selection decision; and
- No documentation describing how the price was determined or negotiated.

For examples of procurement documentation checklists developed by recipients, see Appendix B, section B-4.7.

4.7.1 Sealed Bid Procurement Documentation

At the time of bid opening there should be a public reading of the bids and a recording of them, usually referred to as an Abstract of Bid, which becomes a part of the written record for the procurement action. The decisions made throughout the award process are also included in the written record. Elements of the award decision that need to be included in the documentation include:

- A tabulation and evaluation of bids. This will include a determination that the low bid is fully responsive to the IFB. Responsiveness is discussed in Section 4.2.3 (Responsive Bidder). When there are lower bids than the one

that is accepted for award, the award decision document must give the reasons for

rejecting the lower bids. When there are equal low bids, the documentation must describe how the tie was broken.

- A determination that the low bidder is responsible. Responsibility is discussed in Section 4.1 (Responsibility of Contractor).
- A determination of the reasonableness of the price. Section 4.6 (Cost and Price Analysis) discusses the FTA requirement that every procurement action must include a cost or price analysis to determine the reasonableness of the proposed contract price. The starting point for this cost or price analysis should be the independent cost estimate or ICE, which is prepared prior to advertisement of the contract. Significant differences between the independent cost estimate and the low bid need to be discussed.

4.7.2 Negotiated Procurements

Having considered all of the available proposal evaluation data, the selection official must document the basis for the decision to select that offeror "whose proposal is most advantageous to the recipient's program with price and other factors considered." The contract file documentation should include the following:

- *Determination of Competitive Range* as discussed in Section 4.3.5 (Competitive Range). The Competitive Range Determination identifies those proposals that had a reasonable chance of being selected for award given their relative technical strengths and weaknesses, and their relative prices.
- The *Technical Evaluation* as discussed in Section 4.3.4 (Competitive Proposal Evaluation Criteria). The technical evaluation information indicates the relative strengths and weaknesses of the proposals together with the technical risks (if any) of the various approaches.
- A *Cost/Price Analysis* as discussed in Section 4.6 (Cost and Price Analysis). In all instances, the contract file must reflect evidence of a cost or price analysis having been completed. The recipient may wish to prepare a separate Cost/ Price Analysis memorandum analyzing the costs or prices proposed against:
  (a) the independent cost estimate prepared prior to solicitation; (b) specific company information in the proposals, such as the particular technical approach being offered; and (c) any other pertinent information such as a technical evaluation of the cost proposal, an advisory audit of the offeror's cost proposal, or a comparison of prices offered with prior procurements.

  If the contract being awarded is a cost-reimbursement type, the Cost/ Price Analysis needs to address the realism of the various cost elements
  proposed. Where the costs are unrealistically low, an adjustment should be made to reflect what the agency believes the effort will actually cost given the offeror's specific technical approach as well as its direct and indirect cost rates. This cost realism assessment

must be carefully considered when determining which offeror's proposal represents the best value for the procuring agency. All too often contractors are unrealistically optimistic in

estimating costs in competitive cost-type situations (known as "buying in"). The result is that the lowest proposed/estimated cost is not necessarily the most advantageous choice for the procuring agency.

- *Determination of Selected Contractor's Responsibility* as discussed in Section 4.1 (Responsibility of Contractor). Documentation regarding the selected contractor's responsibility should be included in the file.

4.7.3 Pre-Negotiation Plan and Memorandum of Negotiations

Many procuring agencies have adopted a requirement for written Pre- Negotiation Plans prior to conducting negotiations with offerors in negotiated procurement situations. The advantages of using this kind of document are numerous. First, it requires a reasoned analysis of the offeror's price leading to the establishment of a negotiation objective that is acceptable to all
organizational elements of the agency. Second, it allows the procurement official to develop a range of price objectives that are acceptable to agency management so that negotiations can be concluded if the price can be negotiated within the range established in the Pre-Negotiation Plan. A Pre-Negotiation Plan also brings together the various interested parties of the agency in the development and approval of a unified negotiation position so that internal agency differences
of opinion can be resolved before negotiations begin, producing negotiation objectives that everyone can support.

It is essential that every contract award be documented with a Memorandum of Negotiations. This memorandum must describe the most important aspects of the procurement history that, at minimum, would include the following information:

- A statement of the purpose of the procurement.
- A history of the procurement, including references to important documents with their dates and identifying numbers. These would include: advertisements of the procurement, RFP, technical evaluation of proposals, etc.
- The names and positions of each person who participated in the negotiations.
- An explanation of how the final price was negotiated. This explanation needs to reference the Pre-Negotiation Plan price objective (if such a Plan was developed), the independent cost estimate (which should always be developed), and any advisory audits that may have been conducted.
- A description of important contract terms and conditions, such as insurance requirements, DBE participation, Buy America provisions, etc.

4.8 Award Procedures

Contract awards generally follow one of two procedures:

1. *Offer and Acceptance* – When the agency is fully in agreement with all of the terms and conditions of the offer and desires to make an immediate contract award it may use a simple offer and acceptance form as the awarding document. All that is required is that the agency official sign the "acceptance" block on the form and issue it to the contractor. The form may reference documents such as the RFP, which contains the terms and conditions upon which the offer is based. This approach may work well if there have been no changes to the terms originally established in the RFP, but where there have been changes, either in the offeror's proposed terms or resulting from negotiations, the agency may avoid confusion by drafting a bilateral contract document which defines the final terms agreed upon.
2. *Bilateral Contract* – In many cases there will have been changes to the RFP terms or the proposal terms during the course of discussions and negotiations with the offerors. In such cases the agency may want to issue a preliminary notice of award notifying the successful offeror that it has been selected for award and that an integrated bilateral contract document will be forthcoming. This integrated contract would incorporate the final negotiated terms and conditions, including price, specifications, warranty provisions, etc. Having the offeror sign the contract with the final terms and conditions avoids the problem of confusion as to what the final agreement actually was, which could happen if the offer and acceptance format were used after revisions were discussed. Offerors should be advised not to start work until a contract has been signed by both parties.

4.8.1 Public Announcements of Contract Awards

For many years, various Federal appropriations laws imposed notification requirements on all recipients of Federal assistance awards exceeding $500,000.
In recent years, notification requirements have been limited to States, and the $500,000 threshold has been removed. Therefore, each State recipient must include provisions in all its requests for proposals, solicitations, Federal
assistance applications, forms, notifications, press releases, or other publications involving FTA assistance, that FTA is or will be providing Federal assistance for the project, the amount of Federal assistance FTA has provided or expects to provide, and the Catalog of Federal Domestic Assistance (CFDA) Number of the program that authorizes the Federal assistance. FTA interprets the statute to require that subrecipients, lessees, or third party contractors of the State at any tier also comply with those notification requirements. Because appropriations laws expire annually and these provisions have not been enacted as permanent legislation or even appear consistently in the same appropriations acts, recipients legislation or even appear consistently in the same appropriations acts, recipients need to review the various Federal appropriations acts for the applicable fiscal year to determine the required level of notification. FTA's Master Agreement incorporates the notification requirements that are in effect when that Master Agreement is issued.

4.9 Protest Procedures

Section 200.318(k) of Title 2, Code of Federal Regulations, provides that a recipient "alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the [recipient] of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the [recipient] unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction."

FTA recipients are responsible for resolving all contractual and administrative issues arising out of their third party procurements, including source evaluation and selection, protests of awards, disputes, and claims using good administrative practices and sound business judgment. FTA encourages the recipient to use appropriate alternative dispute resolution procedures.

FTA is not a party to its recipients' third party contracts, and does not have any obligation to any participant in its recipients' third party contracts. In general, FTA will not substitute its judgment for that of the recipient or subrecipient unless the matter is primarily a Federal concern. Examples of "Federal concerns" include, but are not limited to, situations where a special Federal interest is declared because of program management concerns, possible mismanagement, impropriety, waste, or fraud.

Recipients can adopt protest procedures that will provide an outlet for supplier concerns that cannot be informally resolved. These procedures will help the recipient resolve these concerns on a schedule that minimizes the ultimate cost to the agency. Recipients should consider including the procedures or key requirements of the procedures in their solicitations.

A protest is a potential contractor's remedy for correcting a perceived wrong in the procurement process. A protest must be accepted and reviewed with the understanding that integrity of the procurement process as well as the procurement office may be at stake. If an offeror does not have a satisfactory means of resolving its disagreement with the recipient, his efforts to obtain satisfaction, including the possibility of litigation, may substantially interfere with the procurement process and be costly to the agency. One aspect of the protest process is an acknowledgment that public procurement officials are making major public decisions, can conceivably err on occasion, and that there should be some process short of litigation to remedy such an error.

There are three basic types of protests, based on the time in the procurement cycle when they occur:

- A pre-bid or solicitation phase protest is received prior to the bid opening or proposal due date.
- A pre-award protest is a protest against making an award and is received after receipt of proposals or bids, but before award of a contract.
- A post-award protest is a protest received after award of a contract.

To ensure that protests are received and processed efficiently, recipients should have

adequate written bid protest procedures. FTA recommends that these procedures be included or referenced in the solicitation document. If they are referenced, information should be included on how a copy of the procedures may be acquired by any interested party. When the procedures are requested, they should be provided immediately. The written procedures typically address the following elements:

- Difference in procedures for pre-bid, pre-award, and post-award protests;
- Specific deadlines (in working days) for filing a protest, filing a request for reconsideration, and for the recipient's response to a protest;
- Specific contents of a protest (name of protester, solicitation/contract number or description, statement of grounds for protest);
- Location where protests are to be filed;
- Statement that the recipient will respond, in detail, to each substantive issue raised in the protest;
- Identification of the responsible official who has the authority to make the final determination;
- Statement that the recipient's determination will be final; and
- Allowance for request for reconsideration (if data becomes available that were not previously known, or there has been an error of law or regulation).

One of the concerns that may arise in administering a protest is the effect on the award or contract. The decision to open a bid or to award a contract prior to resolution of a protest rests with each recipient. However, should the grounds for the protest be found valid and on a matter that is primarily a Federal concern by FTA, FTA may choose not to participate in funding of the contract. Each recipient must weigh this risk against the cost to the agency for terminating the contract or providing alternative funding sources.

For examples of protest procedures used by recipients, see Appendix B, Section B-4.9.

4.9.1 FTA Involvement in Protests

FTA's involvement in bid protests is limited. The Uniform Guidance, as adopted by DOT, no longer includes the language in 49 C.F.R. § 18.36(b)(12) that provided for a direct appeal to FTA of a recipient's final decision on a bid protest. The Uniform Guidance provides that:

> "The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction." – 2 C.F.R. § 200.318(k)

Thus, the FTA's role is limited to considering matters that are "primarily a Federal concern." Accordingly, Section (1)(b)(2)(a) of Chapter VII of FTA Circular 4220.1F, which provides for direct appeals to FTA, is no longer applicable.

However, pursuant to 2 C.F.R. § 200.318(k), protesters may raise with the FTA matters that are primarily a Federal concern. Unlike 49 C.F.R. § 18.36(b) (12), which required a protester to exhaust all administrative remedies with the recipient before seeking an appeal with the FTA, 2 C.F.R. § 200.318(k) does not include a similar restriction on Federal review. That being said, only under extraordinary circumstances will FTA exercise its discretion to consider a Federal matter before the recipient has completed its review and resolution of the protest. Additionally, when raising Federal matters with the FTA prior to exhaustion of all administrative remedies with the recipient, protesters are advised to clearly articulate the Federal concern, its impact on the recipient's review of the protest, the prejudice to the protester that will result if FTA does not resolve the Federal matter immediately, and provide any other relevant documents or materials. Because matters involving the award of contracts should be addressed expeditiously, protesters must raise any Federal matters arising out of the recipient's award of a third party contract within five (5) business days of the recipient's final decision of the bid protest.

When considering a protester's request for FTA review of a Federal matter, the FTA may ask the recipient to respond to the request and provide additional documents. FTA recipients are reminded that they are required to maintain records pertinent to the award and provide the FTA access to those records for audits or examinations upon request. 2 C.F.R. § 200.336. As a best practice, a recipient should notify its FTA regional office when it receives a third party contract protest on a contract with substantial FTA funds, and keep FTA informed about the status of the protest.

END NOTES

1 *Freund v. United States*, 260 U.S. 60 (1922).
2 *Aragona Constr. Co. v. United States*, 165 Ct. Cl. 382 (1964).
3 *Air-A-Plane Corp. v. United States*, 187 Ct. Cl. 269, 408 F.2d 1030 (1969).
4 See *Aragona* above.
5 *Peter Kiewit & Sons Co. v. Summit Constr. Co.*, 422 F.2d 242 (8th Cir. 1969).
6 *Atlantic Dry Dock Corp. v. United States*, 773 F. Supp. 335 (M.D. Fla. 1991).
7 *Neil Gross & Co.*, 69 Comp. Gen. 247 (B-237434), 90-1 CPD ¶ 212.
8 *Coley Properties Corp.*, PSBCA 291, 75-2 BCA ¶ 11,514.
9 *Reliance Ins. Co. v. United States*, 20 Cl. Ct. 715 (1990).
10 *J.D. Hedin Constr. Co. v. United States*, 171 Ct. Cl. 70, 347 F.2d 235 (1965).
11 *Liebert Corp.*, 70 Comp. Gen. 448 (B-232234.5), 91-1 CPD ¶ 413.
12 *American Air Filter Co.*, 78-1 CPD 136.
13 *A-66501*, 15 Comp. Gen. 573 (1935); *B-95069*, 30 Comp. Gen. 34 (1950).
14 *Saddler v. U.S.*, 287 F. 2d 411 (Ct. Cl. 1961).
15 *General Contracting & Constr. Co. v. U.S.*, 84 Ct. Cl. 570 (1937); *McMasters v. State*, 15 N.E. 417 (N.Y. 1888).
16 ABA Model Procurement Code clause R5-401.06 Differing Site Conditions Clause. FAR 52.236-2 Differing Site Conditions.
17 *Kenny Constr. Co. v. Metropolitan Sanitary Dist.*, 309 N.E. 2d 221 (Ill. 1974).
18 FAR 52.236-2 Differing Site Conditions Clause, and FAR 52.243-4 Changes Clause.
19 FAR 52.242-14.
20 2 C.F.R. § 200.401.
21 *Modern Foods, Inc.*, ASBCA 2090, 57-1 BCA § 1229.
22 *Noblebrook Contractors, Inc.*, ASBCA 9736, 1964 BCA § 4283, 1964 BCA & 4408.
23 *S.N. Nielsen Co., v. U.S.*, 141 Ct. Cl. 793 (1958).
24 *B-E-C-K Christensen Raber-Kief & Assocs.*, ASBCA 16467, 73-1 BCA § 9884.
25 *Gregory & Reilly Assoc., Inc.*, FAACAP 65-30, 65-2 BCA § 4918; *Holtzen Constr. Co.*, AGBCA 413, 75-2 BCA § 11378.
26 *Bruce Constr. Corp. v. U.S.*, 324 F.2d 516 (Ct. Cl. 1963).
27 *Nager Elec. Co. v. U.S.*, 442 F.2d 936 (Ct. Cl. 1971); *S.W. Elecs. & Mfg. Corp.* ASBCA 20698, 77-2 BCA § 12,631 (1977), aff'd., 655 F.2d 1078 (Ct Cl. 1981).
28 *Bruce Constr. Corp. v. U.S.*, 324 F.2d. 516 (Ct Cl. 1963).
29 *Wunderlich Contracting Co. v. U.S.*, 351 F.2d 956 (Ct. Cl. 1965); *Turnbull, Inc. v. U.S.*, 389 F.2d 1007 (Ct. Cl. 1967).
30 *Paul Hardeman, Inc. v. U.S.*, 406 F.2d 1357 (Ct. Cl. 1969).
31 *Laburnum Contrs. Corp. v. U.S.*, 325 F.2d 451 (Ct. Cl. 1963).
32 FAR 31.105 and FAR 31.2.
33 FTA Circular 4220.1F (and succeeding circulars.)
34 This method is named after the landmark 1960 decision in *Eichleay Corp.*, ASBCA 5183, 60-2 BCA § 2688, aff'd., 61-1 BCA § 2894.
35 *Capital Elec. Co. v. U.S.*, 729 F.2d 743 (Fed. Cir. 1984).
36 The formula as stated in *Construction Contracting*, The George Washington University, 1991.
37 FTA Circular 4220.1F.
38 FAR 52.211-18. MPC R5-401.04.
39 *Brezina Constr., Inc.*, ENGBCA 3215, 75-1 BCA ¶ 10,989.
40 *Dunbar & Sullivan Dredging Co.*, ENGBCA 3165, 73-2 BCA ¶ 10,285
41 *Victory Constr. Co. v. U.S.*, 510 F.2d 1379 (Ct. Cl. 1975).
42 Bay Area Rapid Transit District (BART), *General Conditions for Construction Contracts*, Articles GC4.5 Increased or Decreased Quantities, and GC9.3 Force Account.
43 FAR 52.249-10, Default (Fixed Price Construction).

44 *Dicon, Inc. v. Marben Corp.*, 618 F.2d 40 (8th Cir. 1980).
45 Southern Flooring & Insulation Co., GSBCA 1360, 1964 BCA ¶ 4480.
46 *Kaufman DeDell Printing, Inc.*, ASBCA 19268, 75-1 BCA ¶ 11,042.
47 Panzieri-Hogan Co. v. Bender, 143 N.E. 739 (N.Y. 1923).
48 BART, Clause GC.8.5.1.4 — Anticipated Non-Work Weather Days.
49 See, e.g., *Peter Kiewit Sons Co. v. Summit Constr. Co.*, 422 F2d 242 (8th Cir. 1969).
50 *Davho Co.*, VACAB 1005, 72-2 BCA ¶ 9683 at 45,214.
51 U.S. ex. Rel. Heller Elec. Co. v. William F. Klingensmith, Inc., 670 F2d 1227, 1231 (D.C. Cir. 1982).
52 Aetna Casualty & Sur. Co. v. Butte-Meade Sanitary Water Dist., 500 F. Supp. 193, 197 (D.S.D. 1980).
53 *Canon Constr. Corp.*, ASBCA 16142, 72-1 BCA 8622.
54 Contracting & Material Co. v. City of Chicago, 314 N.E. 2d 598 (Ill App. Ct. 1974).
55 *Norair Eng'g. Corp v. U.S.*, 666 F. 2d 546 (Ct. Cl. 1981).
56 *William Lagnion*, ENGBCA 3778, 78-2 BCA § 13,260; *Lewis Constr. Co.*, ASBCA 5509, 60-2 BCA § 2732.
57 *Pathman Constr. Co.*, ASBCA 14285, 71-1 BCA § 8905.
58 *Electrical Enters., Inc.*, IBCA 971-8-72, 74-1 BCA § 10,528.
59 *Pan-Pacific Corp.*, ENGBCA 2479, 65-2 BCA § 4984.
60 *Varo, Inc.*, ASBCA 15000, 72-2 BCA § 9717.
61 *Wheeler Bros.*, ASBCA 20465, 79-1 BCA § 13,642.

APPENDIX

A

Federally Required and Other Model Contract Clauses

5. *Appendix A. Federally Required and Other Model Contract Clauses*

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A.1 ACCESS TO RECORDS AND REPORTS

49 U.S.C. § 5325(g)

2 C.F.R. § 200.333

49 C.F.R. part 633

Applicability to Contracts

The record keeping and access requirements apply to all contracts funded in whole or in part with FTA funds. Under 49 U.S.C. § 5325(g), FTA has the right to examine and inspect all records, documents, and papers, including contracts, related to any FTA project financed with Federal assistance authorized by 49 U.S.C. Chapter 53.

Flow Down

The record keeping and access requirements extend to all third party contractors and their contracts at every tier and subrecipients and their subcontracts at every tier.

Model Clause/Language

There is no required language for record keeping and access requirements. Recipients can draw on the following language for inclusion in their federally funded procurements.

Access to Records and Reports

a. Record Retention. The Contractor will retain, and will require its subcontractors of all tiers to retain, complete and readily accessible records related in whole or in part to the contract, including, but not limited to, data, documents, reports, statistics, sub-agreements, leases, subcontracts, arrangements, other third party agreements of any type, and supporting materials related to those records.

b. Retention Period. The Contractor agrees to comply with the record retention requirements in accordance with 2 C.F.R. § 200.333. The Contractor shall maintain all books, records, accounts and reports required under this Contract for a period of at not less than three (3)

years after the date of termination or expiration of this Contract, except in the event of litigation or settlement of claims arising from the performance of this Contract, in which case records shall be maintained until the disposition of all such litigation, appeals, claims or exceptions related thereto.

c. Access to Records. The Contractor agrees to provide sufficient access to FTA and its contractors to inspect and audit records and information related to performance of this contract as reasonably may be required.

d. Access to the Sites of Performance. The Contractor agrees to permit FTA and its contractors access to the sites of performance under this contract as reasonably may be required.

A.2 BONDING REQUIREMENTS

2 C.F.R. § 200.325

31 C.F.R. part 223

Applicability to Contracts

Bonds are required for all construction or facility improvement contracts and subcontracts exceeding the simplified acquisition threshold. FTA may accept the bonding policy and requirements of the recipient if FTA has determined that the Federal interest is adequately protected. If such a determination has ***not*** been made, the following minimum requirements apply:

a. A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
b. A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
c. A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

Flow Down

These requirements extend to all third party contractors and their contracts at every tier and subrecipients and their subcontracts at every tier that exceed the simplified acquisition threshold.

Model Clauses/Language

There is no required language for bonding requirements. Recipients can draw on the following language for inclusion in their federally funded procurements.

Bond Requirements

Bid Guarantee

Bidders shall furnish a bid guaranty in the form of a bid bond, or certified treasurer's or cashier's check issued by a responsible bank or trust company, made payable to the RECIPIENT. The amount of such guaranty shall be equal to **$$$$** or **X%** of the total bid price.

In submitting this bid, it is understood and agreed by bidder that the RECIPIENT reserves the right to reject any and all bids, or part of any bid, and it is agreed that the Bid may not be withdrawn for a period of [90] days subsequent to the opening of bids, without the written consent of RECIPIENT.

It is also understood and agreed that if the undersigned bidder should withdraw any part or all of his bid within [90] days after the bid opening without the written consent of the RECIPIENT, or refuse or be unable to enter into this Contract as provided above, or refuse or be unable to furnish adequate and acceptable Performance and Payment Bonds, or refuse or be unable to furnish adequate and acceptable insurance, as provided above, it shall forfeit its bid guaranty to the extent RECIPIENT'S damages occasioned by such withdrawal, or refusal, or inability to enter into an agreement, or provide adequate security thereof.

It is further understood and agreed that to the extent the defaulting bidder's bid guaranty shall prove inadequate to fully recompense RECIPIENT for the damages occasioned by default, then the undersigned bidder agrees to indemnify RECIPIENT and pay over to RECIPIENT the difference between the bid guarantee and RECIPIENT'S total damages so as to make RECIPIENT whole.

The undersigned understands that any material alteration of any of the above or any of the material contained herein, other than that requested will render the bid unresponsive.

Performance Guarantee

A Performance Guarantee in the amount of **100%** of the Contract value is required by the Recipient to ensure faithful performance of the Contract. Either a Performance Bond or an Irrevocable Stand-By Letter of Credit shall be provided by the Contractor and shall remain in full force for the term

of the Agreement. The successful Bidder shall certify that it will provide the requisite Performance Guarantee to the RECIPIENT within ten (10) business days from Contract execution. The RECIPIENT requires all Performance Bonds to be provided by a fully qualified surety company acceptable to the RECIPIENT and listed as a company currently authorized under 31 C.F.R. part 22 as possessing a Certificate of Authority as described hereunder. RECIPIENT may require additional performance bond protection when the contract price is increased. The increase in protection shall generally equal 100 percent of the increase in contract price. The RECIPIENT may secure additional protection by directing the Contractor to increase the amount of the existing bond or to obtain an additional bond.

If the Bidder chooses to provide a Letter of Credit as its Performance Guarantee, the Bidder shall furnish with its bid, certification that an Irrevocable Stand-By Letter of Credit will be furnished should the Bidder become the successful Contractor. The Bidder shall also provide a statement from the banking institution certifying that an Irrevocable Stand-By Letter of Credit for the action will be provided if the Contract is awarded to the Bidder. The Irrevocable Stand-By Letter of Credit will only be accepted by the RECIPIENT if:

1. A bank in good standing issues it. The RECIPIENT will not accept a Letter of Credit from an entity other than a bank.
2. It is in writing and signed by the issuing bank.
3. It conspicuously states that it is an irrevocable, non-transferable, “standby” Letter of Credit.
4. The RECIPIENT is identified as the Beneficiary.
5. It is in an amount equal to **100%** of the Contract value. This amount must be in U.S. dollars.
6. The effective date of the Letter of Credit is the same as the effective date of the Contract
7. The expiration date of the Letter of Credit coincides with the term of this Agreement.
8. It indicates that it is being issued in order to support the obligation of the Contractor to perform under the Contract. It must specifically reference the Contract between the RECIPIENT and the Contractor the work stipulated herein.

The issuing bank's obligation to pay will arise upon the presentation of the original Letter of Credit and a certificate and draft (similar to the attached forms contained in Sections X and Y) to the issuing bank's representative at a location and time to be determined by the parties. This documentation will indicate that the Contractor is in default under the Contract.

Payment Bonds

A Labor and Materials Payment Bond equal to the full value of the contract must be furnished by the contractor to Recipient as security for payment by the Contractor and subcontractors for labor, materials, and rental of equipment. The bond may be issued by a fully qualified surety company acceptable to (Recipient) and listed as a company currently authorized under 31 C.F.R. part 223 as possessing a Certificate of Authority as described thereunder.

Sample Bond Certifications

Performance Guarantee Certification

The undersigned hereby certifies that the Bidder shall provide a Performance Guarantee in accordance with the Specifications.

Designate below which form of Performance Guarantee shall be provided:

_____ Performance Bond

_____ Irrevocable Stand-By-Letter of Credit

BIDDER'S NAME: _____

AUTHORIZED SIGNATURE: ___

TITLE: _____

DATE: _____

Performance Bond

KNOW ALL MEN BY THESE PRESENTS: that _____

_____

(Insert full name and address and legal title of Contractor) as Principal, hereinafter called Contractor, and

_____

_____

_____*(Insert full name and address or legal title of Surety)* as Surety, hereinafter called Surety, are held and firmly bound unto RECIPIENT as Obligee, hereinafter called Authority, in the amount of Dollars ($) for the payment whereof Contractor and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Contractor has by written agreement dated , 20 , entered into a contract with the RECIPIENT for Contract No._____, which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and faithfully perform said Contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

The Surety hereby waives notice of any alteration or extension of time made by the RECIPIENT.

Whenever Contractor shall be, and is declared by the RECIPIENT to be in default under the Contract, the RECIPIENT having performed RECIPIENT'S obligations thereunder, the Surety may promptly remedy the default, or shall promptly

1. Complete the Contract in accordance with it terms and conditions, or

2. Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by Surety of the lowest responsible bidder, or, if the RECIPIENT elects, upon determination by the RECIPIENT and the Surety jointly of the lowest responsible bidder, arrange for a contract between such bidder and the Authority, and make available as Work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, the amount set forth in the first paragraph hereof. The term "balance of the contract price," as used in this paragraph, shall mean the total amount payable by the RECIPIENT to Contractor under the Contract and any amendments thereto, less the amount properly paid by the RECIPIENT to Contractor.

Any suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the Contract falls due.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the RECIPIENT or the heirs, executors, administrators or successors of the RECIPIENT.

Signed and sealed this_____day of_____20____.

WITNESS PRINCIPAL

_____(SEAL)

_____(Title)

WITNESS SURETY

_____ (SEAL)

_____(Title)

Attach hereto proof of authority of officers or agents to sign bond.

APPENDIX C SAMPLE REPORTS

Irrevocable Stand-By Letter Of Credit Certificate

The undersigned states that he/she is_____of the

(Title)

_____(The "Beneficiary") and hereby

(Name of Beneficiary)

Certifies on behalf of the Beneficiary to_____(the "Bank), with

(Name of Issuing Bank)

Reference to Irrevocable Standby Letter of Credit No._____Issued by the

Bank (the "Letter of Credit"), that:

1. The undersigned is duly authorized to execute and deliver this certificate on behalf of the Beneficiary.
2. The Beneficiary is making a drawing under the Letter of Credit.
3. An Event of Default has occurred under Contract No._____.
4. The amount of the draft presented with this certificate does not exceed the total maximum amount drawable today under the Letter of Credit as provided therein.

IN WITNESS WHEREOF, this certificate is executed this_____day of_____, 20____.

(NAME OF BENEFICIARY)

By:_____

Its:_____

Bank Draft

FOR VALUE RECEIVED

Pay on presentment to_____the sum of _____
_____ (Name of Beneficiary) Dollars ($)

Charge the Account of_____Irrevocably Standby Letter of
(Name of Issuing Bank)

Credit No._____Dated: 20_____.

To_____
(Name of Issuing Bank)

NAME OF BENEFICIARY

By_____

Its_____

A.3 BUS TESTING

49 U.S.C. § 5318(e)

49 C.F.R. part 665

Applicability to Contracts

The Bus Testing requirements pertain only to the purchase or lease of any new bus model, or any bus model with a major change in configuration or components to be acquired or leased with funds obligated by FTA. Recipients are responsible for determining whether a vehicle to be acquired requires full or partial testing or has already satisfied the bus testing requirements by achieving a passing test score in accordance with 49 C.F.R. part 665. Recipients must certify compliance with FTA's bus testing requirements in all grant applications for FTA funding for bus procurements.

Flow Down

There is no flow down requirement for Bus Testing.

Model Clause/Language

The operator of the bus testing facility is required to provide the resulting test report to the entity that submits the bus for testing. The manufacturer or dealer of a new bus model or a bus produced with a major change in component or configuration is required to provide a copy of the corresponding full bus testing report and any applicable partial testing report(s) to the recipient during the point in the procurement process specified by the recipient, but in all cases before final acceptance of the first bus by the recipient. The complete bus testing reporting requirements are provided in 49 C.F.R. § 665.11. Although no specific certification and bus testing language in required, recipients can draw on the following language for inclusion in their federally funded procurements.

Bus Testing

The Contractor [Manufacturer] agrees to comply with the Bus Testing requirements under 49 U.S.C. 5318(e) and FTA's implementing regulation at 49 C.F.R. part 665 to ensure that the requisite testing is performed for all new bus models or any bus model with a major change in configuration or

components, and that the bus model has achieved a passing score. Upon completion of the testing, the contractor shall obtain a copy of the bus testing reports from the operator of the testing facility and make that report(s) publicly available prior to final acceptance of the first vehicle by the recipient.

A.4 BUY AMERICA REQUIREMENTS

49 U.S.C. 5323(j)

49 C.F.R. part 661

Applicability to Contracts

FTA's Buy America law and regulations apply to projects that involve the purchase of more than $150,000 of iron, steel, manufactured goods, or rolling stock to be delivered to the recipient to be used in an FTA assisted project. FTA cautions that its Buy America regulations are complex. Recipients can obtain detailed information on FTA's Buy America regulation at: The Federal Transit Administration's Buy America website.

Flow Down

The Buy America requirements flow down from FTA recipients and subrecipients to first tier contractors, who are responsible for ensuring that lower tier contractors and subcontractors are in compliance.

Model Clause/Language

The Buy America regulation at 49 C.F.R. § 661.13 requires notification of the Buy America requirements in a recipients' bid or request for proposal for FTA funded contracts. Recipients can draw on the following language for inclusion in their federally funded procurements. Note that recipients are responsible for including the correct Buy America certification based on what they are acquiring. Recipients should not include both the rolling stock and steel, iron, or manufactured products certificates in the documents unless acquiring both in the same procurement.

Buy America

The contractor agrees to comply with 49 U.S.C. 5323(j) and 49 C.F.R. part 661, which provide that Federal funds may not be obligated unless all steel, iron, and manufactured products used in FTA funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. General waivers are listed in 49 C.F.R. § 661.7. Separate requirements for rolling stock are set out at 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. § 661.11.

The [bidder or offeror] must submit to [Recipient] the appropriate Buy America certification below with its [bid or offer]. Bids or offers that are not accompanied by a completed Buy America certification will be rejected as nonresponsive.

In accordance with 49 C.F.R. § 661.6, for the procurement of steel, iron or manufactured products, use the certifications below.

Certificate of Compliance with Buy America Requirements

The bidder or offeror hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j)(1), and the applicable regulations in 49 C.F.R. part 661.

Date: _____

Signature: _____

Company: _____

Name: _____

Title: _____

Certificate of Non-Compliance with Buy America Requirements

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j), but it may qualify for an exception to the requirement pursuant to 49 U.S.C. 5323(j)(2), as amended, and the applicable regulations in 49 C.F.R. § 661.7.

Date: _____

Signature: _____

Company: _____

Name: _____

Title: _____

In accordance with 49 C.F.R. § 661.12, for the procurement of rolling stock (including train control, communication, and traction power equipment) use the following certifications:

Certificate of Compliance with Buy America Rolling Stock Requirements

The bidder or offeror hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j), and the applicable regulations of 49 C.F.R. § 661.11.

Date: _____

Signature: _____

Company: _____

Name: _____

Title: _____

Certificate of Non-Compliance with Buy America Rolling Stock Requirements

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j), but may qualify for an exception to the requirement consistent with 49 U.S.C. 5323(j)(2)(C), and the applicable regulations in 49 C.F.R. § 661.7.

Date:

_____

Signature:

_____

Company:

_____

Name: _____

Title: _____

A.5 CARGO PREFERENCE REQUIREMENTS

46 U.S.C. § 55305

46 C.F.R. part 381

Applicability to Contracts

The Cargo Preference Act of 1954 requirements applies to all contracts involving equipment, materials, or commodities that may be transported by ocean vessels.

Flow Down

The Cargo Preference requirements apply to all contracts involved with the transport of equipment, material, or commodities by ocean vessel.

Model Clause/Language

The Maritime Administration (MARAD) regulations at 46 C.F.R. § 381.7 contain suggested contract clauses. Recipients can draw on the following language for inclusion in their federally funded procurements.

Cargo Preference - Use of United States-Flag Vessels

The contractor agrees:

a. to use privately owned United States-Flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to the underlying contract to the extent such vessels are available at fair and reasonable rates for United States-Flag commercial vessels;

b. to furnish within 20 working days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, "on-board" commercial ocean bill-of-lading in English for each shipment of cargo described in the

preceding paragraph to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590 and to the FTA recipient (through the contractor in the case of a subcontractor's bill-of-lading.); and

c. to include these requirements in all subcontracts issued pursuant to this contract when the subcontract may involve the transport of equipment, material, or commodities by ocean vessel.

A.6 CHARTER SERVICE

49 U.S.C. 5323(d) and (r)

49 C.F.R. part 604

Applicability to Contracts

The Charter Bus requirements apply to contracts for operating public transportation service.

Flow Down Requirements

The Charter Bus requirements flow down from FTA recipients and subrecipients to first tier service contractors.

Model Clause/Language

The relevant statutes and regulations do not mandate any specific clause or language. Recipients can draw on the following language for inclusion in their federally funded procurements.

Charter Service

The contractor agrees to comply with 49 U.S.C. 5323(d), 5323(r), and 49 C.F.R. part 604, which provides that recipients and subrecipients of FTA assistance are prohibited from providing charter service using federally funded equipment or facilities if there is at least one private charter operator willing and able to provide the service, except as permitted under:

1. Federal transit laws, specifically 49 U.S.C. § 5323(d);
2. FTA regulations, "Charter Service," 49 C.F.R. part 604;
3. Any other federal Charter Service regulations; or
4. Federal guidance, except as FTA determines otherwise in writing.

The contractor agrees that if it engages in a pattern of violations of FTA's Charter Service regulations, FTA may require corrective measures or impose remedies on it. These corrective measures and remedies may include:

1. Barring it or any subcontractor operating public transportation under its Award that has provided prohibited charter service from receiving federal assistance from FTA;

2. Withholding an amount of federal assistance as provided by Appendix D to part 604 of FTA's Charter Service regulations; or
3. Any other appropriate remedy that may apply.

The contractor should also include the substance of this clause in each subcontract that may involve operating public transit services.

A.7 CLEAN AIR ACT AND FEDERAL WATER POLLUTION CONTROL ACT

42 U.S.C. §§ 7401 – 7671q

33 U.S.C. §§ 1251-1387

2 C.F.R. part 200, Appendix II (G)

Applicability to Contracts

The Clean Air and Clean Water Act requirements apply to each contract and subcontract exceeding $150,000. Each contract and subcontract must contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401–7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251–1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

Flow Down

The Clean Air Act and Federal Water Pollution Control Act requirements extend to all third party contractors and their contracts at every tier and subrecipients and their subcontracts at every tier.

Model Clause/Language

Recipients can draw on the following language for inclusion in their federally funded procurements.

The Contractor agrees:

1) It will not use any violating facilities;
2) It will report the use of facilities placed on or likely to be placed on the U.S. EPA "List of Violating Facilities;"
3) It will report violations of use of prohibited facilities to FTA; and
4) It will comply with the inspection and other requirements of the Clean Air Act, as amended, (42 U.S.C. §§ 7401 – 7671q); and the Federal Water Pollution Control Act as amended, (33 U.S.C. §§ 1251-1387).

A.8 CIVIL RIGHTS LAWS AND REGULATIONS

Applicability to Contracts

The following Federal Civil Rights laws and regulations apply to all contracts.

1. Federal Equal Employment Opportunity (EEO) Requirements. These include, but are not limited to:
    a. Nondiscrimination in Federal Public Transportation Programs. 49 U.S.C. § 5332, covering projects, programs, and activities financed under 49 U.S.C. Chapter 53, prohibits discrimination on the basis of race, color, religion, national origin, sex (including sexual orientation and gender identity), disability, or age, and prohibits discrimination in employment or business opportunity.
    b. Prohibition against Employment Discrimination. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, and Executive Order No. 11246, "Equal Employment Opportunity," September 24, 1965, as amended, prohibit discrimination in employment on the basis of race, color, religion, sex, or national origin.
2. Nondiscrimination on the Basis of Sex. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 *et seq*. and implementing Federal regulations, "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 49 C.F.R. part 25 prohibit discrimination on the basis of sex.
3. Nondiscrimination on the Basis of Age. The "Age Discrimination Act of 1975," as amended, 42 U.S.C. § 6101 *et seq*., and Department of Health and Human Services implementing regulations, "Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance," 45 C.F.R. part 90, prohibit discrimination by participants in federally assisted programs against individuals on the basis of age. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq*., and Equal Employment Opportunity Commission (EEOC) implementing regulations, "Age

Discrimination in Employment Act," 29 C.F.R. part 1625, also prohibit employment discrimination against individuals age 40 and over on the basis of age.

4. Federal Protections for Individuals with Disabilities. The Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. § 12101 *et seq*., prohibits discrimination against qualified individuals with disabilities in programs, activities, and services, and imposes specific requirements on public and private entities. Third party contractors must comply with their responsibilities under Titles I, II, III, IV, and V of the ADA in employment, public services, public accommodations, telecommunications, and other provisions, many of which are subject to regulations issued by other Federal agencies.

Flow Down

The Civil Rights requirements flow down to all third party contractors and their contracts at every tier.

Model Clause/Language

Every federally funded contract must include an Equal Opportunity clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

Civil Rights and Equal Opportunity

The AGENCY is an Equal Opportunity Employer. As such, the AGENCY agrees to comply with all applicable Federal civil rights laws and implementing regulations. Apart from inconsistent requirements imposed by Federal laws or regulations, the AGENCY agrees to comply with the requirements of 49 U.S.C. § 5323(h) (3) by not using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.

Under this Agreement, the Contractor shall at all times comply with the following requirements and shall include these requirements in each subcontract entered into as part thereof.

1. **Nondiscrimination**. In accordance with Federal transit law at 49 U.S.C. § 5332, the Contractor agrees that it will not discriminate against any employee or applicant for

employment because of race, color, religion, national origin, sex, disability, or age. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.

2. **Race, Color, Religion, National Origin, Sex.** In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e *et seq*., and Federal transit laws at 49 U.S.C. § 5332, the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. chapter 60, and Executive Order No. 11246, "Equal Employment Opportunity in Federal Employment," September 24, 1965, 42 U.S.C. § 2000e note, as amended by any later Executive Order that amends or supersedes it, referenced in 42 U.S.C. § 2000e note. The Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, national origin, or sex (including sexual orientation and gender identity). Such action shall include, but not be limited to, the following: employment, promotion, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.
3. **Age.** In accordance with the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, U.S. Equal Employment Opportunity Commission (U.S. EEOC) regulations, "Age Discrimination in Employment Act," 29 C.F.R. part 1625, the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6101 *et seq*., U.S. Health and Human Services regulations, "Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance," 45 C.F.R. part 90, and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.
4. **Disabilities**. In accordance with section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 *et seq*., the Architectural Barriers Act of 1968, as amended, 42 U.S.C. §

4151 *et seq*., and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees that it will not discriminate against individuals on the basis of disability. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

A.9 DISADVANTAGED BUSINESS ENTERPRISE (DBE)

49 C.F.R. part 26

Background and Applicability

The Disadvantaged Business Enterprise (DBE) program applies to FTA recipients receiving planning, capital and/or operating assistance that will award prime contracts (excluding transit vehicle purchases) exceeding $250,000 in FTA funds in a Federal fiscal year. All FTA recipients above this threshold must submit a DBE program and overall triennial goal for DBE participation. The overall goal reflects the anticipated amount of DBE participation on DOT-assisted contracts. As part of its DBE program, FTA recipients must require that each transit vehicle manufacturer (TVM), as a condition of being authorized to bid or propose on FTA assisted transit vehicle procurements, certify that it has complied with the requirements of 49 C.F.R. § 26.49. Only those transit vehicle manufacturers listed on FTA's certified list of Transit Vehicle Manufacturers, or that have submitted a goal methodology to FTA that has been approved or has not been disapproved at the time of solicitation, are eligible to bid.

FTA recipients must meet the maximum feasible portion of their overall goal using race-neutral methods. Where appropriate, however, recipients are responsible for establishing DBE contract goals on individual DOT-assisted contracts. FTA recipients may use contract goals only on those DOT-assisted contracts that have subcontracting responsibilities. *See* 49 C.F.R. § 26.51(e). Furthermore, while FTA recipients are not required to set a contract goal on every DOT-assisted contract, they are responsible for achieving their overall program goals by administering their DBE program in good faith.

FTA recipients and third party contractors can obtain information about the DBE program at the following website locations:

Federal Transit Administration website Disadvantaged Business Enterprise page click here

Department of Transportation website Disadvantaged Business Enterprise Program click here

Flow Down

The DBE contracting requirements flow down to all third party contractors and their contracts at every tier. It is the recipient's and prime contractor's responsibility to ensure the DBE requirements are applied across the board to all subrecipients/contractors/subcontractors. Should a subcontractor fail to comply with the DBE regulations, FTA would look to the recipient to make sure it intervenes to monitor compliance. The onus for compliance is on the recipient.

Clause Language

For all DOT-assisted contracts, each FTA recipient must include assurances that third party contractors will comply with the DBE program requirements of 49 C.F.R. part 26, when applicable. The following contract clause is required in all DOT-assisted prime and subcontracts:

> The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 C.F.R. part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:
>
> (1) Withholding monthly progress payments;
>
> (2) Assessing sanctions;
>
> (3) Liquidated damages; and/or
>
> (4) Disqualifying the contractor from future bidding as non-responsible. 49 C.F.R. § 26.13(b).

Further, recipients must establish a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment the recipient makes to the prime contractor. 49 C.F.R. § 26.29(a). Finally, for contracts with defined DBE contract goals, each FTA recipient must include in each prime contract a provision stating that the contractor shall utilize the specific DBEs listed unless the contractor obtains the recipient's written consent; and that, unless the recipient's consent is provided, the contractor shall not be entitled

to any payment for work or material unless it is performed or supplied by the listed DBE. 49 C.F.R. § 26.53(f) (1).

As an additional resource, recipients can draw on the following language for inclusion in their federally funded procurements.

Overview

It is the policy of the AGENCY and the United States Department of Transportation ("DOT") that Disadvantaged Business Enterprises ("DBE's"), as defined herein and in the Federal regulations published at 49 C.F.R. part 26, shall have an equal opportunity to participate in DOT-assisted contracts. It is also the policy of the AGENCY to:

1. Ensure nondiscrimination in the award and administration of DOT-assisted contracts;
2. Create a level playing field on which DBE's can compete fairly for DOT-assisted contracts;
3. Ensure that the DBE program is narrowly tailored in accordance with applicable law;
4. Ensure that only firms that fully meet 49 C.F.R. part 26 eligibility standards are permitted to participate as DBE's;
5. Help remove barriers to the participation of DBEs in DOT assisted contracts;
6. To promote the use of DBEs in all types of federally assisted contracts and procurement activities; and
7. Assist in the development of firms that can compete successfully in the marketplace outside the DBE program.

This Contract is subject to 49 C.F.R. part 26. Therefore, the Contractor must satisfy the requirements for DBE participation as set forth herein. These requirements are in addition to all other equal opportunity employment requirements of this Contract. The AGENCY shall make all determinations with regard to whether or not a Bidder/Offeror is in compliance with the requirements stated herein. In assessing compliance, the AGENCY may consider during its review of the Bidder/Offeror's submission package, the Bidder/Offeror's documented history of non-compliance with DBE requirements on previous contracts with the AGENCY.

Contract Assurance

The Contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this Contract. The Contractor shall carry out applicable requirements of 49 C.F.R. part 26 in the award and administration of DOT-assisted contracts. Failure by the Contractor to carry out these requirements is a material breach of this Contract, which may result in the termination of this Contract or such other remedy as the AGENCY deems appropriate.

DBE Participation

For the purpose of this Contract, the AGENCY will accept only DBE's who are:

1. Certified, at the time of bid opening or proposal evaluation, by the [*certifying agency or the Unified Certification Program (UCP)*]; or

2. An out-of-state firm who has been certified by either a local government, state government or Federal government entity authorized to certify DBE status or an agency whose DBE certification process has received FTA approval; or

3. Certified by another agency approved by the AGENCY.

DBE Participation Goal

The DBE participation goal for this Contract is set at_____%. This goal represents those elements of work under this Contract performed by qualified Disadvantaged Business Enterprises for amounts totaling **not less than**_____% of the total Contract price. Failure to meet the stated goal at the time of proposal submission **may** render the Bidder/Offeror non-responsive.

Proposed Submission

Each Bidder/Offeror, as part of its submission, shall supply the following information:

1. A completed **DBE Utilization Form** (see below) that indicates the percentage and dollar value of the total bid/contract amount to be supplied by Disadvantaged Business Enterprises under this Contract.

2. A list of those qualified DBE's with whom the Bidder/Offeror intends to contract for the performance of portions of the work under the Contract, the agreed price to be paid to

each DBE for work, the Contract items or parts to be performed by each DBE, a proposed timetable for the performance or delivery of the Contract item, and other information as required by the **DBE Participation Schedule** (see below). No work shall be included in the Schedule that the Bidder/Offeror has reason to believe the listed DBE will subcontract, at any tier, to other than another DBE. If awarded the Contract, the Bidder/Offeror may not deviate from the DBE Participation Schedule submitted in response to the bid. Any subsequent changes and/or substitutions of DBE firms will require review and written approval by the AGENCY.

3. An original **DBE Letter of Intent** (see below) from each DBE listed in the **DBE Participation Schedule.**

4. An original **DBE Affidavit** (see below) from each DBE stating that there has not been any change in its status since the date of its last certification.

Good Faith Efforts

If the Bidder/Offeror is unable to meet the goal set forth above (DBE Participation Goal), the AGENCY will consider the Bidder/Offeror's documented good faith efforts to meet the goal in determining responsiveness. The types of actions that the AGENCY will consider as part of the Bidder/Offeror's good faith efforts include, but are not limited to, the following:

1. Documented communication with the AGENCY's DBE Coordinator (questions of IFB or RFP requirements, subcontracting opportunities, appropriate certification, will be addressed in a timely fashion);
2. Pre-bid meeting attendance. At the pre-bid meeting, the AGENCY generally informs potential Bidder/Offeror's of DBE subcontracting opportunities;
3. The Bidder/Offeror's own solicitations to obtain DBE involvement in general circulation media, trade association publication, minority-focus media and other reasonable and available means within sufficient time to allow DBEs to respond to the solicitation;
4. Written notification to DBE's encouraging participation in the proposed Contract; and
5. Efforts made to identify specific portions of the work that might be performed by DBE's.

The Bidder/Offeror shall provide the following details, at a minimum, of the specific efforts it made to negotiate in good faith with DBE's for elements of the Contract:

1. The names, addresses, and telephone numbers of DBE's that were contacted;
2. A description of the information provided to targeted DBE's regarding the specifications and bid proposals for portions of the work;
3. Efforts made to assist DBE's contacted in obtaining bonding or insurance required by the Bidder or the Authority.

Further, the documentation of good faith efforts must include copies of each DBE and non-DBE subcontractor quote submitted when a non-DBE subcontractor was selected over a DBE for work on the contract. 49 C.F.R. § 26.53(b) (2) (VI). In determining whether a Bidder has made good faith efforts, the Authority may take into account the performance of other Bidders in meeting the Contract goals. For example, if the apparent successful Bidder failed to meet the goal, but meets or exceeds the average DBE participation obtained by other Bidders, the Authority may view this as evidence of the Bidder having made good faith efforts.

Administrative Reconsideration

Within five (5) business days of being informed by the AGENCY that it is not responsive or responsible because it has not documented sufficient good faith efforts, the Bidder/Offeror may request administrative reconsideration. The Bidder should make this request in writing to the AGENCY's [*Contact Name*]. The [*Contact Name*] will forward the Bidder/Offeror's request to a reconsideration official who will not have played any role in the original determination that the Bidder/Offeror did not document sufficient good faith efforts.

As part of this reconsideration, the Bidder/Offeror will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so. The Bidder/Offeror will have the opportunity to meet in person with the assigned reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so. The AGENCY will send the Bidder/Offeror a written decision on its reconsideration, explaining the basis for finding that the Bidder/Offeror did or did not meet the goal or make adequate

good faith efforts to do so. The result of the reconsideration process is not administratively appealable to the Department of Transportation.

Termination of DBE Subcontractor

The Contractor shall not terminate the DBE subcontractor(s) listed in the **DBE Participation Schedule** (see below) without the AGENCY's prior written consent. The AGENCY may provide such written consent only if the Contractor has good cause to terminate the DBE firm. Before transmitting a request to terminate, the Contractor shall give notice in writing to the DBE subcontractor of its intent to terminate and the reason for the request. The Contractor shall give the DBE five days to respond to the notice and advise of the reasons why it objects to the proposed termination. When a DBE subcontractor is terminated or fails to complete its work on the Contract for any reason, the Contractor shall make good faith efforts to find another DBE subcontractor to substitute for the original DBE and immediately notify the AGENCY in writing of its efforts to replace the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the Contract as the DBE that was terminated, to the extent needed to meet the Contract goal established for this procurement. Failure to comply with these requirements will be in accordance with Section 8 below (Sanctions for Violations).

Continued Compliance

The AGENCY shall monitor the Contractor's DBE compliance during the life of the Contract. In the event this procurement exceeds ninety (90) days, **it will be the responsibility of the Contractor to submit quarterly written reports to the AGENCY that** summarize the total DBE value for this Contract. These reports shall provide the following details:

- DBE utilization established for the Contract;
- Total value of expenditures with DBE firms for the quarter;
- The value of expenditures with each DBE firm for the quarter by race and gender;
- Total value of expenditures with DBE firms from inception of the Contract; and
- The value of expenditures with each DBE firm from the inception of the Contract by race and gender.

Reports and other correspondence must be submitted to the DBE Coordinator with copies provided to the [*Agency Name1*] and [*Agency Name2*]. Reports shall continue to be submitted quarterly until final payment is issued or until DBE participation is completed.

The successful Bidder/Offeror shall permit:

- The AGENCY to have access to necessary records to examine information as the AGENCY deems appropriate for the purpose of investigating and determining compliance with this provision, including, but not limited to, records of expenditures, invoices, and contract between the successful Bidder/Offeror and other DBE parties entered into during the life of the Contract.

- The authorized representative(s) of the AGENCY, the U.S. Department of Transportation, the Comptroller General of the United States, to inspect and audit all data and record of the Contractor relating to its performance under the Disadvantaged Business Enterprise Participation provision of this Contract.

- All data/record(s) pertaining to DBE shall be maintained as stated in Section [insert reference to record keeping requirements for the Project.]

Sanctions for Violations

If at any time the AGENCY has reason to believe that the Contractor is in violation of its obligations under this Agreement or has otherwise failed to comply with terms of this Section, the AGENCY may, in addition to pursuing any other available legal remedy, commence proceedings, which may include but are not limited to, the following:

- Suspension of any payment or part due the Contractor until such time as the issues concerning the Contractor's compliance are resolved; and
- Termination or cancellation of the Contract, in whole or in part, unless the successful Contractor is able to demonstrate within a reasonable time that it is in compliance with the DBE terms stated herein.

DBE UTILIZATION FORM

The undersigned Bidder/Offeror has satisfied the requirements of the solicitation in the following manner (please check the appropriate space):

_____The Bidder/Offer is committed to a minimum of_____% DBE utilization on this contract.

_____The Bidder/Offeror (if unable to meet the DBE goal of %) is committed to a minimum of_____% DBE utilization on this contract and submits documentation demonstrating good faith efforts.

DBE PARTICIPATION SCHEDULE

The Bidder/Offeror shall complete the following information for all DBE's participating in the contract that comprises the DBE Utilization percent stated in the DBE Utilization Form. The Bidder/Offeror shall also furnish the name and telephone number of the appropriate contact person should the Authority have any questions in relation to the information furnished herein.

DBE IDENTIFICATION AND INFORMATION FORM

Name and Address	Contact Name and Telephone Number	Participation Percent (Of Total Contract Value)	Description Of Work To Be Performed	Race and Gender of Firm

A.10 EMPLOYEE PROTECTIONS

49 U.S.C. § 5333(a)

40 U.S.C. §§ 3141 – 3148

29 C.F.R. part 5

18 U.S.C. § 874

29 C.F.R. part 3

40 U.S.C. §§3701-3708

29 C.F.R. part 1926

Applicability to Contracts

Certain employee protections apply to all FTA funded contracts with particular emphasis on construction related projects. The recipient will ensure that each third party contractor complies with all federal laws, regulations, and requirements, including:

1. Prevailing Wage Requirements
    a. Federal transit laws, specifically 49 U.S.C. § 5333(a), (FTA's "Davis-Bacon Related Act");
    b. The Davis-Bacon Act, 40 U.S.C. §§ 3141 – 3144, 3146, and 3147; and
    c. U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Non-construction Contracts Subject to the Contract Work Hours and Safety Standards Act)," 29 C.F.R. part 5.
2. "Anti-Kickback" Prohibitions
    a. Section 1 of the Copeland "Anti-Kickback" Act, as amended, 18 U.S.C. § 874;
    b. Section 2 of the Copeland "Anti-Kickback" Act, as amended, 40 U.S.C. § 3145; and
    c. U.S. DOL regulations, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States," 29 C.F.R. part 3.
3. Contract Work Hours and Safety Standards
    a. Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. §§ 3701-3708; and supplemented by Department of Labor (DOL) regulations, 29 C.F.R. part 5; and

b. U.S. DOL regulations, "Safety and Health Regulations for Construction," 29 C.F.R. part 1926.

Flow Down

These requirements extend to all third party contractors and their contracts at every tier and subrecipients and their subcontracts at every tier. The Davis-Bacon Act and the Copeland "Anti- Kickback" Act apply to all prime construction, alteration or repair contracts in excess of $2,000. The Contract Work Hours and Safety Standards Act apply to all FTA funded contracts in excess of $100,000 that involve the employment of mechanics or laborers.

Model Clause/Language

The recipient must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. In addition, recipients can draw on the following language for inclusion in their federally funded procurements.

Prevailing Wage and Anti-Kickback

For all prime construction, alteration or repair contracts in excess of $2,000 awarded by FTA, the Contractor shall comply with the Davis-Bacon Act and the Copeland "Anti-Kickback" Act. Under 49 U.S.C. § 5333(a), prevailing wage protections apply to laborers and mechanics employed on FTA assisted construction, alteration, or repair projects. The Contractor will comply with the Davis-Bacon Act, 40 U.S.C. §§ 3141-3144, and 3146-3148 as supplemented by DOL regulations at 29 C.F.R. part 5, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction." In accordance with the statute, the Contractor shall pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, the Contractor agrees to pay wages not less than once a week. The Contractor shall also comply with the Copeland "Anti-Kickback" Act (40 U.S.C. § 3145), as supplemented by DOL regulations at 29 C.F.R. part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States." The Contractor is prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled.

Contract Work Hours and Safety Standards

For all contracts in excess of $100,000 that involve the employment of mechanics or laborers, the Contractor shall comply with the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 3701-3708), as supplemented by the DOL regulations at 29 C.F.R. part 5. Under 40 U.S.C. § 3702 of the Act, the Contractor shall compute the wages of every mechanic and laborer, including watchmen and guards, on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. § 3704 are applicable to construction work and provide that no laborer or mechanic be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchase of supplies or materials or articles ordinarily available on the open market, or to contracts for transportation or transmission of intelligence.

In the event of any violation of the clause set forth herein, the Contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, the Contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of this clause in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by this clause.

The FTA shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the Contractor or subcontractor under any such contract or any other Federal contract with the same prime Contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime Contractor, such sums as may be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for unpaid wages and liquidated damages as provided in this section.

The Contractor or subcontractor shall insert in any subcontracts the clauses set forth in this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in this agreement.

Contract Work Hours and Safety Standards for Awards Not Involving Construction

The Contractor shall comply with all federal laws, regulations, and requirements providing wage and hour protections for non-construction employees, in accordance with 40 U.S.C. § 3702, Contract Work Hours and Safety Standards Act, and other relevant parts of that Act, 40 U.S.C. § 3701 *et seq*., and U.S. DOL regulations, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Non-construction Contracts Subject to the Contract Work Hours and Safety Standards Act)," 29 C.F.R. part 5.

The Contractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three (3) years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid.

Such records maintained under this paragraph shall be made available by the Contractor for inspection, copying, or transcription by authorized representatives of the FTA and the Department of Labor, and the Contractor will permit such representatives to interview employees during working hours on the job.

The contractor shall require the inclusion of the language of this clause within subcontracts of all tiers.

A.11 ENERGY CONSERVATION

42 U.S.C. 6321 *et seq*.

49 C.F.R. part 622, subpart C

Applicability to Contracts

The Energy Policy and Conservation requirements are applicable to all contracts. The Recipient agrees to, and assures that its subrecipients, if any, will comply with the mandatory energy standards and policies of its state energy conservation plans under the Energy Policy and Conservation Act, as amended, 42 U.S.C. § 6201 et seq., and perform an energy assessment for any building constructed, reconstructed, or modified with federal assistance as required under FTA regulations, "Requirements for Energy Assessments," 49 C.F.R. part 622, subpart C.

Flow Down

These requirements extend to all third party contractors and their contracts at every tier and subrecipients and their subcontracts at every tier.

Model Clause/Language

No specific clause is recommended in the regulations because the Energy Conservation requirements are so dependent on the state energy conservation plan. Recipients can draw on the following language for inclusion in their federally funded procurements.

Energy Conservation

The contractor agrees to comply with mandatory standards and policies relating to energy efficiency, which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

A.12 FLY AMERICA

49 U.S.C. § 40118

41 C.F.R. part 301-10

48 C.F.R. part 47.4

Applicability to Contracts

The Fly America requirements apply to the transportation of persons or property, by air, between a place in the U.S. and a place outside the U.S., or between places outside the U.S., when the FTA will participate in the costs of such air transportation. Transportation on a foreign air carrier is permissible when provided by a foreign air carrier under a code share agreement when the ticket identifies the U.S. air carrier's designator code and flight number. Transportation by a foreign air carrier is also permissible if there is a bilateral or multilateral air transportation agreement to which the U.S. Government and a foreign government are parties and which the U.S. DOT has determined meets the requirements of the Fly America Act.

Flow Down Requirements

The Fly America requirements flow down from FTA recipients and subrecipients to first tier contractors who are responsible for ensuring that lower tier contractors and subcontractors are in compliance.

Model Clause/Language

The relevant statutes and regulations do not require any specific clause or language that recipients use in their third party contracts. A sample clause is provided for Federal contracts at 48 C.F.R. 52.247-63. Recipients can draw on the following language for inclusion in their federally funded procurements.

FTA proposes the following language, modified from the Federal clause.

Fly America Requirements

a) *Definitions.* As used in this clause--

"International air transportation" means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.

"United States" means the 50 States, the District of Columbia, and outlying areas.

"U.S.-flag air carrier" means an air carrier holding a certificate under 49 U.S.C. Chapter 411.

b) When Federal funds are used to fund travel, Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118) (Fly America Act) requires contractors, recipients, and others use U.S.-flag air carriers for U.S. Government-financed international air transportation of personnel (and their personal effects) or property, to the extent that service by those carriers is available. It requires the Comptroller General of the United States, in the absence of satisfactory proof of the necessity for foreign-flag air transportation, to disallow expenditures from funds, appropriated or otherwise established for the account of the United States, for international air transportation secured aboard a foreign-flag air carrier if a U.S.-flag air carrier is available to provide such services.

c) If available, the Contractor, in performing work under this contract, shall use U.S.-flag carriers for international air transportation of personnel (and their personal effects) or property.

d) In the event that the Contractor selects a carrier other than a U.S.-flag air carrier for international air transportation, the Contractor shall include a statement on vouchers involving such transportation essentially as follows:

Statement of Unavailability of U.S.-Flag Air Carriers

International air transportation of persons (and their personal effects) or property by U.S.-flag air carrier was not available or it was necessary to use foreign-flag air carrier service for the following reasons. See FAR § 47.403. *[State reasons]:*

(End of statement)

e) The Contractor shall include the substance of this clause, including this paragraph (e), in each subcontract or purchase under this contract that may involve international air transportation.

(End of Clause)

A.13 GOVERNMENT-WIDE DEBARMENT AND SUSPENSION

2 C.F.R. part 180

2 C.F.R part 1200

2 C.F.R. § 200.213

2 C.F.R. part 200 Appendix II (I)

Executive Order 12549

Executive Order 12689

Background and Applicability

A contract award (of any tier) in an amount expected to equal or exceed $25,000 or a contract award at any tier for a federally required audit (irrespective of the contract amount) must not be made to parties listed on the government-wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 C.F.R. part 180. The Excluded Parties List System in SAM contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

Recipients, contractors, and subcontractors (at any level) that enter into covered transactions are required to verify that the entity (as well as its principals and affiliates) with which they propose to contract or subcontract is not excluded or disqualified. This is done by: (a) checking the SAM exclusions; (b) collecting a certification from that person; or (c) adding a clause or condition to the contract or subcontract.

Flow Down

Recipients, contractors, and subcontractors who enter into covered transactions with a participant at the next lower level, must require that participant to: (a) comply with subpart C of 2 C.F.R. part 180, as supplemented by 2 C.F.R. part 1200; and (b) pass the requirement to comply with subpart C of 2 C.F.R. part 180 to each person with whom the participant enters into a covered transaction at the next lower tier.

Model Clause/Language

There is no required language for the Debarment and Suspension clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

Debarment, Suspension, Ineligibility and Voluntary Exclusion

The Contractor shall comply and facilitate compliance with U.S. DOT regulations, "Nonprocurement Suspension and Debarment," 2 C.F.R. part 1200, which adopts and supplements the U.S. Office of Management and Budget (U.S. OMB) "Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)," 2 C.F.R. part 180. These provisions apply to each contract at any tier of $25,000 or more, and to each contract at any tier for a federally required audit (irrespective of the contract amount), and to each contract at any tier that must be approved by an FTA official irrespective of the contract amount. As such, the Contractor shall verify that its principals, affiliates, and subcontractors are eligible to participate in this federally funded contract and are not presently declared by any Federal department or agency to be:

a) Debarred from participation in any federally assisted Award;
b) Suspended from participation in any federally assisted Award;
c) Proposed for debarment from participation in any federally assisted Award;
d) Declared ineligible to participate in any federally assisted Award;
e) Voluntarily excluded from participation in any federally assisted Award; or
f) Disqualified from participation in ay federally assisted Award.

By signing and submitting its bid or proposal, the bidder or proposer certifies as follows:

The certification in this clause is a material representation of fact relied upon by the AGENCY. If it is later determined by the AGENCY that the bidder or proposer knowingly rendered an erroneous certification, in addition to remedies available to the AGENCY, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. The bidder or proposer agrees to comply with the requirements of 2 C.F.R. part 180, subpart C, as supplemented by 2 C.F.R. part 1200, while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

A.14 LOBBYING RESTRICTIONS

31 U.S.C. § 1352

2 C.F.R. § 200.450

2 C.F.R. part 200 appendix II (J)

49 C.F.R. part 20

Applicability to Contracts

The lobbying requirements apply to all contracts and subcontracts of $100,000 or more at any tier under a Federal grant. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this agreement, the payor must complete and submit the Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Flow Down

The lobbying requirements mandate the maximum flow down pursuant to Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352(b)(5).

Model Clause/Language

49 C.F.R. part 20, Appendices A and B provide specific language for inclusion in FTA funded third party contracts as follows:

Lobbying Restrictions

The undersigned certifies, to the best of his or her knowledge and belief, that:

1. No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering

into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

2. If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.
3. The undersigned shall require that the language of this certification be included in the award documents for all sub-awards at all tiers (including subcontracts, sub-grants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

_____Signature of Contractor's Authorized Official

_____Name and Title of Contractor's Authorized Official

_____Date

A.15 NO GOVERNMENT OBLIGATION TO THIRD PARTIES

Applicability to Contracts

The No Obligation clause applies to all third party contracts that are federally funded.

Flow Down

The No Obligation clause extends to all third party contractors and their contracts at every tier and subrecipients and their subcontracts at every tier.

Model Clause/Language

There is no required language for the No Obligations clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

No Federal Government Obligation to Third Parties.

The Recipient and Contractor acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying Contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this Contract and shall not be subject to any obligations or liabilities to the Recipient, Contractor or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying Contract. The Contractor agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by the FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.

A.16 PATENT RIGHTS AND RIGHTS IN DATA

2 C.F.R. part 200, Appendix II (F)

37 C.F.R. part 401

Applicability to Contracts

If the recipient or subrecipient wishes to enter into a contract (or subcontract) with a small business firm or nonprofit organization for the performance of experimental, developmental, or research work under the FTA award, the recipient or subrecipient must comply with the requirements of 37 C.F.R. part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency. Except in the case of an "other agreement" in which the Federal Government has agreed to take more limited rights, the Federal Government is entitled to a non-exclusive, royalty free license to use the resulting invention, or patent the invention for Federal Government purposes. The FTA has the right to:

1. Obtain, reproduce, publish, or otherwise use the data produced under a Federal award; and
2. Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

Flow Down

The Patent Rights and Rights in Data requirements flow down to all third party contractors and their contracts at every tier that meet the definition of a research-type project under 37 U.S.C. § 401.2.

Model Clause/Language

Recipients can draw on language provided in 37 C.F.R. § 401.3 for appropriate Patent Rights and Data Rights Clauses for use in their federally funded research, development, demonstration, or special studies projects. Recipients should consult legal counsel for guidance in developing an appropriate Intellectual Property Agreement. At a minimum, recipients can include the following language in their standard boilerplates.

Intellectual Property Rights

This Project is funded through a Federal award with FTA for experimental, developmental, or research work purposes. As such, certain Patent Rights and Data Rights apply to all subject data first produced in the performance of this Contract. The Contractor shall grant the AGENCY intellectual property access and licenses deemed necessary for the work performed under this Agreement and in accordance with the requirements of 37 C.F.R. part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by FTA or U.S. DOT. The terms of an intellectual property agreement and software license rights will be finalized prior to execution of this Agreement and shall, at a minimum, include the following restrictions: Except for its own internal use, the Contractor may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may the Contractor authorize others to do so, without the written consent of FTA, until such time as FTA may have either released or approved the release of such data to the public. This restriction on publication, however, does not apply to any contract with an academic institution. For purposes of this agreement, the term "subject data" means recorded information whether or not copyrighted, and that is delivered or specified to be delivered as required by the Contract. Examples of "subject data" include, but are not limited to computer software, standards, specifications, engineering drawings and associated lists, process sheets, manuals, technical reports, catalog item identifications, and related information, but do not include financial reports, cost analyses, or other similar information used for performance or administration of the Contract.

1. The Federal Government reserves a royalty-free, non-exclusive and irrevocable license to reproduce, publish, or otherwise use, and to authorize others to use for "Federal Government Purposes," any subject data or copyright described below. For "Federal Government Purposes," means use only for the direct purposes of the Federal Government. Without the copyright owner's consent, the Federal Government may not extend its Federal license to any other party.
    a. Any subject data developed under the Contract, whether or not a copyright has been obtained; and

b. Any rights of copyright purchased by the Contractor using Federal assistance in whole or in part by the FTA.

2. Unless FTA determines otherwise, the Contractor performing experimental, developmental, or research work required as part of this Contract agrees to permit FTA to make available to the public, either FTA's license in the copyright to any subject data developed in the course of the Contract, or a copy of the subject data first produced under the Contract for which a copyright has not been obtained. If the experimental, developmental, or research work, which is the subject of this Contract, is not completed for any reason whatsoever, all data developed under the Contract shall become subject data as defined herein and shall be delivered as the Federal Government may direct.
3. Unless prohibited by state law, upon request by the Federal Government, the Contractor agrees to indemnify, save, and hold harmless the Federal Government, its officers, agents, and employees acting within the scope of their official duties against any liability, including costs and expenses, resulting from any willful or intentional violation by the Contractor of proprietary rights, copyrights, or right of privacy, arising out of the publication, translation, reproduction, delivery, use, or disposition of any data furnished under that contract. The Contractor shall be required to indemnify the Federal Government for any such liability arising out of the wrongful act of any employee, official, or agents of the Federal Government.
4. Nothing contained in this clause on rights in data shall imply a license to the Federal Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Federal Government under any patent.
5. Data developed by the Contractor and financed entirely without using Federal assistance provided by the Federal Government that has been incorporated into work required by the underlying Contract is exempt from the requirements herein, provided that the Contractor identifies those data in writing at the time of delivery of the Contract work.
6. The Contractor agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance.

A.17 PRE-AWARD AND POST-DELIVERY AUDITS OF ROLLING STOCK PURCHASES

49 U.S.C. 5323(m)

49 C.F.R. part 663

Applicability to Contracts

Recipients purchasing revenue service rolling stock with FTA funds must comply with the pre-award and post-delivery audit requirements set forth in 49 U.S.C. 5323(m) and supplemented by 49 C.F.R. part 663. For more information about pre-award and post-delivery audit requirements, please go to FTA's Buy America page on its website.

Flow Down

There is no flow down requirement for Pre-Award and Post-Delivery Audits of Rolling Stock.

Model Clause/Language

Part 663 of Title 49, Code of Federal Regulations, does not contain specific language to be included in third party contracts but does contain requirements applicable to subrecipients and third party contractors. Recipients are advised to use the model certificates and language contained in the audit handbook. Additionally, recipients can draw on the following language for inclusion in their federally funded procurements.

Pre-Award and Post-Delivery Audit Requirements

The Contractor agrees to comply with 49 U.S.C. § 5323(m) and FTA's implementing regulation at 49 C.F.R. part 663. The Contractor shall comply with the Buy America certification(s) submitted with its proposal/bid. The Contractor agrees to participate and cooperate in any pre-award and post-delivery audits performed pursuant to 49 C.F.R. part 663 and related FTA guidance.

A.18 PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS

49 U.S.C. § 5323(l) (1)

31 U.S.C. §§ 3801-3812

18 U.S.C. § 1001

49 C.F.R. part 31

Applicability to Contracts

The Program Fraud clause applies to all third party contracts that are federally funded.

Flow Down

The Program Fraud clause extends to all third party contractors and their contracts at every tier and subrecipients and their subcontracts at every tier. These requirements flow down to contractors and subcontractors who make, present, or submit covered claims and statements.

Model Clause/Language

There is no required language for the Program Fraud clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

Program Fraud and False or Fraudulent Statements or Related Acts

The Contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. § 3801 *et seq*. and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. part 31, apply to its actions pertaining to this Project. Upon execution of the underlying contract, the Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the underlying contract or the FTA assisted project for which this contract work is being performed. In addition to other penalties that may be applicable, the Contractor further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right

to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on the Contractor to the extent the Federal Government deems appropriate.

The Contractor also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA under the authority of 49 U.S.C. chapter 53, the Government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5323(l) on the Contractor, to the extent the Federal Government deems appropriate.

The Contractor agrees to include the above two clauses in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

A.19 PUBLIC TRANSPORTATION EMPLOYEE PROTECTIVE ARRANGEMENTS

49 U.S.C. § 5333(b) ("13(c)")

29 C.F.R. part 215

Applicability to Contracts

The Public Transportation Employee Protective Arrangements apply to each contract for transit operations performed by employees of a Contractor recognized by FTA to be a transit operator.

Flow Down

The employee protective arrangements clause flows down to all third party contractors and their contracts at every tier.

Model Clause/Language

There is no required language for the Public Transportation Employee Protective Arrangements clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

Public Transportation Employee Protective Arrangements

The Contractor agrees to comply with the following employee protective arrangements of 49 U.S.C. § 5333(b):

1. **U.S. DOL Certification**. Under this Contract or any Amendments thereto that involve public transportation operations that are supported with federal assistance, a certification issued by U.S. DOL is a condition of the Contract.
2. **Special Warranty**. When the Contract involves public transportation operations and is supported with federal assistance appropriated or made available for 49 U.S.C. § 5311, U.S. DOL will provide a Special Warranty for its Award, including its Award of federal assistance under the Tribal Transit Program. The U.S. DOL Special Warranty is a condition of the Contract.

3. **Special Arrangements**. The conditions of 49 U.S.C. § 5333(b) do not apply to Contractors providing public transportation operations pursuant to 49 U.S.C. § 5310. FTA reserves the right to make case-by-case determinations of the applicability of 49 U.S.C. § 5333(b) for all transfers of funding authorized under title 23, United States Code (flex funds), and make other exceptions as it deems appropriate, and, in those instances, any special arrangements required by FTA will be incorporated herein as required.

A.20 RECYCLED PRODUCTS

42 U.S.C. § 6962

40 C.F.R. part 247

2 C.F.R. part § 200.322

Applicability to Contracts

The Resource Conservation and Recovery Act, as amended, (42 U.S.C. § 6962 *et seq.*), requires States and local governmental authorities to provide a competitive preference to products and services that conserve natural resources, protect the environment, and are energy efficient. Recipients are required to procure only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 C.F.R. part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds $10,000 or the value of the quantity acquired during the preceding fiscal year exceeded $10,000.

Flow Down

These requirements extend to all third party contractors and their contracts at every tier and subrecipients and their subcontracts at every tier where the value of an EPA designated item exceeds $10,000.

Model Clause/Language

There is no required language for preference for recycled products. Recipients can draw on the following language for inclusion in their federally funded procurements.

Recovered Materials

The Contractor agrees to provide a preference for those products and services that conserve natural resources, protect the environment, and are energy efficient by complying with and facilitating compliance with Section 6002 of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. § 6962, and U.S. Environmental Protection Agency (U.S. EPA), “Comprehensive Procurement Guideline for Products Containing Recovered Materials,” 40 C.F.R. part 247.

A.21 SAFE OPERATION OF MOTOR VEHICLES

23 U.S.C. part 402

Executive Order No. 13043

Executive Order No. 13513

U.S. DOT Order No. 3902.10

Applicability to Contracts

The Safe Operation of Motor Vehicles requirements apply to all federally funded third party contracts. In compliance with Federal Executive Order No. 13043, "Increasing Seat Belt Use in the United States," April 16, 1997, 23 U.S.C. Section 402 note, FTA encourages each third party contractor to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company owned, rented, or personally operated vehicles, and to include this provision in each third party subcontract involving the project. Additionally, recipients are required by FTA to include a Distracted Driving clause that addresses distracted driving, including text messaging in each of its third party agreements supported with Federal assistance.

Flow Down Requirements

The Safe Operation of Motor Vehicles requirements flow down to all third party contractors at every tier.

Model Clause/Language

There is no required language for the Safe Operation of Motor Vehicles clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

Safe Operation of Motor Vehicles

Seat Belt Use

The Contractor is encouraged to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company-owned vehicles, company-

rented vehicles, or personally operated vehicles. The terms “company-owned” and “company-leased” refer to vehicles owned or leased either by the Contractor or AGENCY.

Distracted Driving

The Contractor agrees to adopt and enforce workplace safety policies to decrease crashes caused by distracted drivers, including policies to ban text messaging while using an electronic device supplied by an employer, and driving a vehicle the driver owns or rents, a vehicle Contactor owns, leases, or rents, or a privately-owned vehicle when on official business in connection with the work performed under this agreement.

A.22 SCHOOL BUS OPERATIONS

49 U.S.C. 5323(f)

49 C.F.R. part 605

Applicability to Contracts

The School Bus requirements apply to contracts for operating public transportation service.

Flow Down Requirements

The School Bus requirements flow down from FTA recipients and subrecipients to first tier service contractors.

Model Clause/Language

The relevant statutes and regulations do not mandate any specific clause or language. Recipients can draw on the following language for inclusion in their federally funded procurements.

School Bus Operations

The contractor agrees to comply with 49 U.S.C. 5323(f), and 49 C.F.R. part 604, and not engage in school bus operations using federally funded equipment or facilities in competition with private operators of school buses, except as permitted under:

1. Federal transit laws, specifically 49 U.S.C. § 5323(f);
2. FTA regulations, "School Bus Operations," 49 C.F.R. part 605;
3. Any other Federal School Bus regulations; or
4. Federal guidance, except as FTA determines otherwise in writing.

If Contractor violates this School Bus Agreement, FTA may:

1. Bar the Contractor from receiving Federal assistance for public transportation; or
2. Require the contractor to take such remedial measures as FTA considers appropriate.

When operating exclusive school bus service under an allowable exemption, the contractor may not use federally funded equipment, vehicles, or facilities.

The Contractor should include the substance of this clause in each subcontract or purchase under this contract that may operate public transportation services.

A.23 SEISMIC SAFETY

42 U.S.C. 7701 *et seq*.

49 C.F.R. part 41

Executive Order (E.O.) 12699

Applicability to Contracts

The Seismic Safety requirements apply only to contracts for the construction of new buildings or additions to existing buildings.

Flow Down

The Seismic Safety requirements flow down from FTA recipients and subrecipients to first tier contractors to assure compliance with the applicable building standards for Seismic Safety, including the work performed by all subcontractors.

Model Clauses/Language

The regulations do not provide suggested language for third party contract clauses. Recipients can draw on the following language for inclusion in their federally funded procurements.

Seismic Safety

The contractor agrees that any new building or addition to an existing building will be designed and constructed in accordance with the standards for Seismic Safety required in Department of Transportation (DOT) Seismic Safety Regulations 49 C.F.R. part 41 and will certify to compliance to the extent required by the regulation. The contractor also agrees to ensure that all work performed under this contract, including work performed by a subcontractor, is in compliance with the standards required by the Seismic Safety regulations and the certification of compliance issued on the project.

A.24 SUBSTANCE ABUSE REQUIREMENTS

49 U.S.C. § 5331

49 C.F.R. part 655

49 C.F.R. part 40

Applicability to Contracts

Third party contractors who perform *safety-sensitive functions* must comply with FTA's substance abuse management program under 49 C.F.R. part 655, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations." Under 49 C.F.R. § 655.4, *Safety-sensitive function* means any of the following duties, when performed by employees of recipients, subrecipients, operators, or contractors:

1. Operating a revenue service vehicle, including when not in revenue service;
2. Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;
3. Controlling dispatch or movement of a revenue service vehicle;
4. Maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service. This section does not apply to the following: an employer who receives funding under 49 U.S.C. § 5307 or § 5309, is in an area less than 200,000 in population, and contracts out such services; or an employer who receives funding under 49 U.S.C. § 5311 and contracts out such services;
5. Carrying a firearm for security purposes.

Additionally, third party contractors providing testing services involving the performance of safety sensitive activities must also comply with 49 C.F.R. part 40, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs."

Flow Down Requirements

The Substance Abuse requirements flow down to all third party contractors at every tier who perform a safety-sensitive function for the recipient or subrecipient.

Model Clause/Language

FTA's drug and alcohol rules, 49 C.F.R. part 655, are unique among the regulations issued by FTA. First, they require recipients to ensure that any entity performing a safety-sensitive function on the recipient's behalf (usually subrecipients and/or contractors) implement a complex drug and alcohol testing program that complies with part 655. Second, the rules condition the receipt of certain kinds of FTA funding on the recipient's compliance with the rules; thus, the recipient is not in compliance with the rules unless every entity that performs a safety-sensitive function on the recipient's behalf is in compliance with the rules. Third, the rules do not specify how a recipient ensures that its subrecipients and/or contractors comply with them.

How a recipient does so depends on several factors, including whether the contractor is covered independently by the drug and alcohol rules of another Department of Transportation operating administration, the nature of the relationship that the recipient has with the contractor, and the financial resources available to the recipient to oversee the contractor's drug and alcohol testing program. In short, there are a variety of ways a recipient can ensure that its subrecipients and contractors comply with the rules.

FTA has developed three model contract provisions for recipients to use "as is" or to modify to fit their particular situations.

Explanation of Model Contract Clauses

Option 1

The recipient ensures the contractor's compliance with the rules by requiring the contractor to participate in a drug and alcohol program administered by the recipient. The advantages of doing this are obvious: the recipient maintains total control over its compliance with 49 C.F.R. part 655. The disadvantage is that the recipient, which may not directly employ any safety-sensitive employees, has to implement a complex testing program. Therefore, this may be a practical option for only those recipients that have a testing program for their employees, and can add the contractor's safety-sensitive employees to that program.

Option 2

The recipient relies on the contractor to implement a drug and alcohol testing program that complies with 49 C.F.R. part 655, but retains the ability to monitor the contractor's testing program; thus, the recipient has less control over its compliance with the drug and alcohol testing rules than it does under Option 1. The advantage of this approach is that it places the responsibility for complying with the rules on the entity that is actually performing the safety-sensitive function. Moreover, it reserves to the recipient the power to ensure that the contractor complies with the program. The disadvantage of Option 2 is that, without adequate monitoring of the contractor's program, the recipient may find itself out of compliance with the rules.

Option 3

The recipient specifies some or all of the specific features of a contractor's drug and alcohol compliance program. Thus, it requires the recipient to decide what it wants to do and how it wants to do it. The advantage of this option is that the recipient has more control over the contractor's drug and alcohol testing program, yet it is not actually administering the testing program. The disadvantage is that the recipient has to specify and understand clearly what it wants to do and why.

SUBSTANCE ABUSE TESTING

Option 1

The Contractor agrees to participate in AGENCY's drug and alcohol program established in compliance with 49 C.F.R. part 655.

SUBSTANCE ABUSE TESTING

Option 2

The Contractor agrees to establish and implement a drug and alcohol testing program that complies with 49 C.F.R. parts 655, produce any documentation necessary to establish its compliance with part 655, and permit any authorized representative of the United States Department of Transportation or its operating administrations, the State Oversight Agency of [name of State], or

AGENCY, to inspect the facilities and records associated with the implementation of the drug and alcohol testing program as required under 49 C.F.R. part 655 and review the testing process. The Contractor agrees further to certify annually its compliance with parts 655 before [insert date] and to submit the Management Information System (MIS) reports before [insert date before March 15] to [insert title and address of person responsible for receiving information]. To certify compliance, the Contractor shall use the "Substance Abuse Certifications" in the "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements," which is published annually in the *Federal Register*.

SUBSTANCE ABUSE TESTING

Option 3

The Contractor agrees to establish and implement a drug and alcohol testing program that complies with 49 C.F.R. part 655, produce any documentation necessary to establish its compliance with part 655, and permit any authorized representative of the United States Department of Transportation or its operating administrations, the State Oversight Agency of [name of State], or AGENCY, to inspect the facilities and records associated with the implementation of the drug and alcohol testing program as required under 49 C.F.R. part 655 and review the testing process. The Contractor agrees further to certify annually its compliance with parts 655 before[insert date] and to submit the Management Information System (MIS) reports before [insert date before March 15] to [insert title and address of person responsible for receiving information]. To certify compliance the Contractor shall use the "Substance Abuse Certifications" in the "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements," which is published annually in the Federal Register. The Contractor agrees further to [Select a, b, or c] (a) submit before [insert date or upon request] a copy of the Policy Statement developed to implement its drug and alcohol testing program; OR (b) adopt [insert title of the Policy Statement the recipient wishes the contractor to use] as its policy statement as required under 49 C.F.R. part 655; OR (c) submit for review and approval before [insert date or upon request] a copy of its Policy Statement developed to implement its drug and alcohol testing program. In addition, the Contractor agrees to: [to be determined by the recipient, but may address areas such as: the selection of the certified laboratory, substance abuse professional, or Medical Review Officer, or the use of a consortium].

APPENDIX C SAMPLE REPORTS

A.25 TERMINATION

2 C.F.R. § 200.339

2 C.F.R. part 200, Appendix II (B)

Applicability to Contracts

All contracts in excess of $10,000 must address termination for cause and for convenience, including the manner by which it will be effected and the basis for settlement.

Flow Down

For all contracts in excess of $10,000, the Termination clause extends to all third party contractors and their contracts at every tier and subrecipients and their subcontracts at every tier.

Model Clause/Language

There is no required language for the Terminations clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

Termination for Convenience (General Provision)

The AGENCY may terminate this contract, in whole or in part, at any time by written notice to the Contractor when it is in the AGENCY's best interest. The Contractor shall be paid its costs, including contract close-out costs, and profit on work performed up to the time of termination. The Contractor shall promptly submit its termination claim to AGENCY to be paid the Contractor. If the Contractor has any property in its possession belonging to AGENCY, the Contractor will account for the same, and dispose of it in the manner AGENCY directs.

Termination for Default [Breach or Cause] (General Provision)

If the Contractor does not deliver supplies in accordance with the contract delivery schedule, or if the contract is for services, the Contractor fails to perform in the manner called for in the contract, or if the Contractor fails to comply with any other provisions of the contract, the AGENCY may terminate

this contract for default. Termination shall be effected by serving a Notice of Termination on the Contractor setting forth the manner in which the Contractor is in default. The Contractor will be paid only the contract price for supplies delivered and accepted, or services performed in accordance with the manner of performance set forth in the contract.

If it is later determined by the AGENCY that the Contractor had an excusable reason for not performing, such as a strike, fire, or flood, events which are not the fault of or are beyond the control of the Contractor, the AGENCY, after setting up a new delivery of performance schedule, may allow the Contractor to continue work, or treat the termination as a Termination for Convenience.

Opportunity to Cure (General Provision)

The AGENCY, in its sole discretion may, in the case of a termination for breach or default, allow the Contractor [an appropriately short period of time] in which to cure the defect. In such case, the Notice of Termination will state the time period in which cure is permitted and other appropriate conditions

If Contractor fails to remedy to AGENCY's satisfaction the breach or default of any of the terms, covenants, or conditions of this Contract within [10 days] after receipt by Contractor of written notice from AGENCY setting forth the nature of said breach or default, AGENCY shall have the right to terminate the contract without any further obligation to Contractor. Any such termination for default shall not in any way operate to preclude AGENCY from also pursuing all available remedies against Contractor and its sureties for said breach or default.

Waiver of Remedies for any Breach

In the event that AGENCY elects to waive its remedies for any breach by Contractor of any covenant, term or condition of this contract, such waiver by AGENCY shall not limit AGENCY's remedies for any succeeding breach of that or of any other covenant, term, or condition of this contract.

Termination for Convenience (Professional or Transit Service Contracts)

The AGENCY, by written notice, may terminate this contract, in whole or in part, when it is in the AGENCY's interest. If this contract is terminated, the AGENCY shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

Termination for Default (Supplies and Service)

If the Contractor fails to deliver supplies or to perform the services within the time specified in this contract or any extension, or if the Contractor fails to comply with any other provisions of this contract, the AGENCY may terminate this contract for default. The AGENCY shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. The Contractor will only be paid the contract price for supplies delivered and accepted, or services performed in accordance with the manner or performance set forth in this contract.

If, after termination for failure to fulfill contract obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the AGENCY.

Termination for Default (Transportation Services)

If the Contractor fails to pick up the commodities or to perform the services, including delivery services, within the time specified in this contract or any extension, or if the Contractor fails to comply with any other provisions of this contract, the AGENCY may terminate this contract for default. The AGENCY shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of default. The Contractor will only be paid the contract price for services performed in accordance with the manner of performance set forth in this contract.

If this contract is terminated while the Contractor has possession of AGENCY goods, the Contractor shall, upon direction of the AGENCY, protect and preserve the goods until surrendered to the AGENCY or its agent. The Contractor and AGENCY shall agree on payment for the preservation and protection of goods. Failure to agree on an amount will be resolved under the Dispute clause.

If, after termination for failure to fulfill contract obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the AGENCY.

Termination for Default (Construction)

If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will ensure its completion within the time specified in this contract or any extension or fails to complete the work within this time, or if the Contractor fails to comply with any other provision of this contract, AGENCY may terminate this contract for default. The AGENCY shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. In this event, the AGENCY may take over the work and compete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the AGENCY resulting from the Contractor's refusal or failure to complete the work within specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the AGENCY in completing the work.

The Contractor's right to proceed shall not be terminated nor shall the Contractor be charged with damages under this clause if:

1. The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include: acts of God, acts of AGENCY, acts of another contractor in the performance of a contract with AGENCY, epidemics, quarantine restrictions, strikes, freight embargoes; and
2. The Contractor, within [10] days from the beginning of any delay, notifies AGENCY in writing of the causes of delay. If, in the judgment of AGENCY, the delay is excusable, the time for completing the work shall be extended. The judgment of AGENCY shall be final and conclusive for the parties, but subject to appeal under the Disputes clause(s) of this contract.

If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of AGENCY.

Termination for Convenience or Default (Architect and Engineering)

The AGENCY may terminate this contract in whole or in part, for the AGENCY's convenience or because of the failure of the Contractor to fulfill the contract obligations. The AGENCY shall terminate by delivering to the Contractor a Notice of Termination specifying the nature, extent, and effective date of the termination. Upon receipt of the notice, the Contractor shall (1) immediately discontinue all services affected (unless the notice directs otherwise), and (2) deliver to the AGENCY 's Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this contract, whether completed or in process. AGENCY has a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, all such data, drawings, specifications, reports, estimates, summaries, and other information and materials.

If the termination is for the convenience of the AGENCY, the AGENCY's Contracting Officer shall make an equitable adjustment in the contract price but shall allow no anticipated profit on unperformed services.

If the termination is for failure of the Contractor to fulfill the contract obligations, the AGENCY may complete the work by contact or otherwise and the Contractor shall be liable for any additional cost incurred by the AGENCY.

If, after termination for failure to fulfill contract obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of AGENCY.

Termination for Convenience or Default (Cost-Type Contracts)

The AGENCY may terminate this contract, or any portion of it, by serving a Notice of Termination on the Contractor. The notice shall state whether the termination is for convenience of AGENCY or for the default of the Contractor. If the termination is for default, the notice shall state the manner in

which the Contractor has failed to perform the requirements of the contract. The Contractor shall account for any property in its possession paid for from funds received from the AGENCY, or property supplied to the Contractor by the AGENCY. If the termination is for default, the AGENCY may fix the fee, if the contract provides for a fee, to be paid the Contractor in proportion to the value, if any, of work performed up to the time of termination. The Contractor shall promptly submit its termination claim to the AGENCY and the parties shall negotiate the termination settlement to be paid the Contractor.

If the termination is for the convenience of AGENCY, the Contractor shall be paid its contract close-out costs, and a fee, if the contract provided for payment of a fee, in proportion to the work performed up to the time of termination.

If, after serving a Notice of Termination for Default, the AGENCY determines that the Contractor has an excusable reason for not performing, the AGENCY, after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a Termination for Convenience.

A.26 VIOLATION AND BREACH OF CONTRACT

2 C.F.R. § 200.326

2 C.F.R. part 200, Appendix II (A)

Applicability to Contracts

All contracts in excess of the Simplified Acquisition Threshold (currently set at $150,000) shall contain administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

Flow Down

The Violations and Breach of Contracts clause flow down to all third party contractors and their contracts at every tier.

Model Clauses/Language

FTA does not prescribe the form or content of such provisions. The provisions developed will depend on the circumstances and the type of contract. Recipients should consult legal counsel in developing appropriate clauses. The following clauses are examples of provisions from various FTA third party contracts. Recipients can draw on these examples for inclusion in their federally funded procurements.

Rights and Remedies of the AGENCY

The AGENCY shall have the following rights in the event that the AGENCY deems the Contractor guilty of a breach of any term under the Contract.

1. The right to take over and complete the work or any part thereof as agency for and at the expense of the Contractor, either directly or through other contractors;
2. The right to cancel this Contract as to any or all of the work yet to be performed;
3. The right to specific performance, an injunction or any other appropriate equitable remedy; and

4. The right to money damages.

For purposes of this Contract, breach shall include [AGENCY to define].

Rights and Remedies of Contractor

Inasmuch as the Contractor can be adequately compensated by money damages for any breach of this Contract, which may be committed by the AGENCY, the Contractor expressly agrees that no default, act or omission of the AGENCY shall constitute a material breach of this Contract, entitling Contractor to cancel or rescind the Contract (unless the AGENCY directs Contractor to do so) or to suspend or abandon performance.

Remedies

Substantial failure of the Contractor to complete the Project in accordance with the terms of this Agreement will be a default of this Agreement. In the event of a default, the AGENCY will have all remedies in law and equity, including the right to specific performance, without further assistance, and the rights to termination or suspension as provided herein. The Contractor recognizes that in the event of a breach of this Agreement by the Contractor before the AGENCY takes action contemplated herein, the AGENCY will provide the Contractor with sixty (60) days written notice that the AGENCY considers that such a breach has occurred and will provide the Contractor a reasonable period of time to respond and to take necessary corrective action.

Disputes

- **Example 1:** Disputes arising in the performance of this Contract that are not resolved by agreement of the parties shall be decided in writing by the authorized representative of AGENCY's [title of employee]. This decision shall be final and conclusive unless within [10] days from the date of receipt of its copy, the Contractor mails or otherwise furnishes a written appeal to the [title of employee]. In connection with any such appeal, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the [title of employee] shall be binding upon the Contractor and the Contractor shall abide be the decision.

- **Example 2:** The AGENCY and the Contractor intend to resolve all disputes under this Agreement to the best of their abilities in an informal manner. To accomplish this end, the parties will use an Alternative Dispute Resolution process to resolve disputes in a manner designed to avoid litigation. In general, the parties contemplate that the Alternative Dispute Resolution process will include, at a minimum, an attempt to resolve disputes through communications between their staffs, and, if resolution is not reached at that level, a procedure for review and action on such disputes by appropriate management level officials within the AGENCY and the Contractor's organization.

  In the event that a resolution of the dispute is not mutually agreed upon, the parties can agree to mediate the dispute or proceed with litigation. Notwithstanding any provision of this section, or any other provision of this Contract, it is expressly agreed and understood that any court proceeding arising out of a dispute under the Contract shall be heard by a Court de novo and the court shall not be limited in such proceeding to the issue of whether the Authority acted in an arbitrary, capricious or grossly erroneous manner.

  Pending final settlement of any dispute, the parties shall proceed diligently with the performance of the Contract, and in accordance with the AGENCY's direction or decisions made thereof.

Performance during Dispute

Unless otherwise directed by AGENCY, Contractor shall continue performance under this Contract while matters in dispute are being resolved.

Claims for Damages

Should either party to the Contract suffer injury or damage to person or property because of any act or omission of the party or of any of its employees, agents or others for whose acts it is legally liable, a claim for damages therefor shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

Remedies

Unless this Contract provides otherwise, all claims, counterclaims, disputes and other matters in question between the AGENCY and the Contractor arising out of or relating to this agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State in which the AGENCY is located.

Rights and Remedies

The duties and obligations imposed by the Contract documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by the AGENCY or Contractor shall constitute a waiver of any right or duty afforded any of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

APPENDIX

B

Examples of Procurement Practices

6. Appendix B. Examples of Procurement Practices

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Introduction

Since the last publication of the Manual in 2001, inclusive of 2005 updates, recipients' procurement practices have changed. This section includes examples of procurement practices submitted by recipients during FTA's online procurement practices forum in 2016. Examples from the 2001 Manual have been deleted and replaced in their entirety with 2016 submissions. This Appendix provides recipients actual examples of checklists, templates, sample language, etc. used by a transit agency procurement department. The Appendix is an ongoing and expanding document. It will be updated periodically with new examples. FTA solicits examples of procurement practices from its recipients and others in the industry. After review by FTA, new practices will be added to the Manual.

k. B-1.1 Resources for Smaller Recipients

The Wisconsin Toolkit describes the entire RFP procurement process from inception through award, and includes a number of helpful templates for FTA required documents such as Independent Cost Estimates, Cost/Price Analysis, Single Bid Analysis (if required), Procurement History File Checklist, Federal Clauses, etc. It can be a useful tool for all grantees, but may be particularly useful for smaller agencies without much procurement experience or established written procedures. FTA does not warrant that these documents comply with all FTA requirements. Recipients are responsible to ensure compliance.

Sample 1:

The Wisconsin RFPToolkit may be found at the Wisconsin DOT web page.

Sample 2:

The National Rural Transit Assistance Program, http://nationalrtap.org/, has a ProcurementPRO feature. ProcurementPRO, or QuickPRO, provides federally required clauses, certifications, and other useful documentation for projects.

l. B-2.2 Organizational Roles and Responsibilities

The structure of an organization can ensure appropriate checks and balances are in place to have a positive impact on procurement planning and practices across an agency.

Sample 1:

One agency requires that its Procurement group work closely with its internal audit department, its legal department, and the agency's executive secretary's office. The Procurement and Internal Audit function work closely on various procurement issues such as rate agreements, overhead rates, required pre-award reviews for specific funding partners, etc. The Procurement group works with its legal department to ensure that an attorney reviews all major solicitations prior to release for legal sufficiency, rationale for bid responsiveness findings, bid irregularity findings, protests, and change orders. The Procurement group also works closely with the Executive Secretary's office, which is responsible for the publication of bids, conducting bid openings, and ensuring adherence to timeliness requirements. In this organizational structure, multiple departments support the Procurement group in monitoring and upholding the integrity of the procurement process. This structure may help to ensure that procurement personnel have sufficient agency-wide support against internal or external pressures or influences. The structure may also provide for multiple checks, help to maintain independence of review, and protect against conflicts of interest.

Contracting OFFICER and User Responsibilities

Recipients may consider developing a checklist for their contracting officers and users to ensure a clear understanding of respective roles and responsibilities and that all required steps in a solicitation process are conducted. The following sample checklists are not intended to be exhaustive of all federally-required documentation for a procurement. They are intended to be only a starting point in developing a checklist. Additionally, not all procurements will require every item on the checklist. A

recipient must consult with the other portions of the manual to ensure that the checklists it develops are exhaustive.

Pre-Award Checklist for the Contracting Officer and User Department

Solicitation No:

Responsibilities of the User Department Manager	**Date**	**Initials**
Independent Cost Estimate (ICE)		
Statement of Work & Project Specifications		
Purchase Requisition		
Provide Written Justification if Liquidated Damages (if applicable)		
Contracting Officer Responsibilities		
Review Project Specifications		
Complete Rationale for Procurement Matrix		
Set Procurement schedule		
Develop Bid document (IFB)		
Coordinate Insurance Requirements with Risk Management (if applicable)		
Obtain DBE Goal (if applicable)		
Advertise Procurement		
Post Bid Document on Website		
Bidder's Mailing List		
Conduct Pre-bid Meeting (if applicable)		
Write Minutes of Pre-bid Meeting		
Send Minutes of Pre-bid Meeting to Vendors and Post on Website		
Respond to Questions/Clarifications, Send to Vendors & Post on Website		

Conduct Bid Opening		
Review Bids for Responsiveness		
Check Bid Bonds (if applicable)		
Check Performance Bonds (if applicable)		
Record Bids on Tabulation Sheet		
Evaluate Bids		
PM Review of Bids		
Debarment/Suspension Search		
DBE Coordinator Review of Bids (if applicable)		
Prepare Notice of Intent to Award Letter to Successful Firm(s)		
Notify Vendors Not Selected. Include Bid Tabulation		
Participate in Preparing Award Recommendation Document		

B-2.6 Organizational Conflicts of Interest: Sample Contract Terms

Recipients must take steps to avoid potential conflicts of interest before contract award or in their organizational documents. Examples of practices used by recipients to address conflicts of interest are below.

Example 1:

Federal Acquisition Regulation (FAR) Subpart 9.507 - *Solicitation Provision and Contract Clause* provides sample provisions and clauses used by federal agencies to avoid conflicts of interest. The FAR Subpart 9.507 is available here: The Federal Acquisition Regulation Subpart 9.507 page click here

Example 2:

Some recipients use an organizational conflict of interest checklist to help identify potential conflicts. Examples of questions on such a checklist may include, but are not limited to, the following:

- Has a consultant helped prepare the specification, statement of work or other requirements of the solicitation? If so, does the solicitation notify prospective offerors of the names of the consultant(s) and does it contain a notice not to communicate with them concerning the solicitation?
- Is the work in the solicitation of such a nature that the recipient must restrict the contract award to firms that have no financial interest in the outcome of the study in order to ensure objectivity? If so, has the recipient included provisions in the solicitation advising offerors that they may not compete for the award if they or a subsidiary company has any financial interest in the outcome of the study?
- If the solicitation involves a potential for follow-on work, such as construction of a project, should the recipient preclude the contractor doing this consulting work from participating in the follow-on work so as to avoid an unfair competitive

advantage in the competition for the follow on work? Has the recipient notified prospective offerors that, if selected for this contract, they may not participate in the follow-on work, either as a prime contractor or subcontractor?

Example 3: Specifications Preparation

Some federal agencies advise, in their solicitations, (1) which non-agency parties have participated in the development of the specifications and other related documents, (2) that no communication with these parties about the procurement is permitted, and (3) if an offeror does communicate with an excluded party, the offeror should be disqualified from participating in the solicitation.

(a) This contract, in whole or in part, provides for the Contractor to draft and/or furnish specifications in support of_____[*Contracting officer identify system or program*]. Further, this contract may task the Contractor to prepare or assist in preparing work statements that directly, predictably and without delay are used in future competitive acquisitions in support of_____[*Contracting officer identify program*]. The parties recognize that by the Contractor providing this support a potential conflict of interest arises as defined by FAR 9.505-2.

(b) During the term of this contract and for a period of_____[*Contracting officer insert period of time after contract completion that contractor will not be allowed to supply time*] after completion of this contract, the Contractor agrees that it will not supply as a prime contractor, subcontractor at any tier, or consultant to a supplier to the [federal agency], any product, item or major component of an item or product, which was the subject of the specifications and/or work statements furnished under this contract. The contractor shall, within 15 days after the effective date of this contract, provide, in writing to the Contracting Officer, a representation that all employees, agents and subcontractors involved in the performance of this contract have been informed of the provisions of this clause. Any subcontractor that performs any work relative to this contract shall be subject to this clause.

The Contractor agrees to place in each subcontract affected by these provisions the necessary language contained in this clause.

(c) For the purposes of this clause, the term "contractor" means the contractor, its subsidiaries and affiliates, joint ventures involving the contractor, any entity with which the contractor may hereafter merge or affiliate and any other successor or assignee of the contractor.

(d) The Contractor acknowledges the full force and effect of this clause. It agrees to be bound by its terms and conditions and understands that violation of this clause may, in the judgment of the Contracting Officer, be cause for Termination for Default under FAR 52.249-6. The Contractor also acknowledges that this does not represent the sole and exclusive remedy available to the Government in the event the Contractor breaches this or any other Organizational Conflict of Interest clause.

Example 4: Sample Provision for Restriction on Communications during Proposal Period

Sec. x.x Additional Rules With Respect To All Respondents

For purposes of this Request for Qualifications/Proposal (RFQ/P), the following terms will have the meaning ascribed to them below, unless the context clearly indicates otherwise:

"Respondent" means a (i) natural person, (ii) legal person, (iii) joint venture, (iv) partnership, or (v) consortium of individuals, and/or partnerships, and/or companies or other entities that submit a Statement of Qualifications (SOQ) and Proposal in response to this RFQ/P.

"Team Member" means a member of a Respondent. Team Members must be identified in Respondents' RFQ/P submissions and cannot be changed without the prior written consent of the Committee.

Please note the following with respect to Respondents:

Except as specifically provided to the contrary in this RFQ/P, no Team Member may join or participate, directly or indirectly, as a Team Member in more than one Respondent for this Project. Each person or legal entity who participates as a Team Member is responsible for ensuring that no other person or legal entity which is "Related" to it joins or participates, directly or indirectly, as a Team Member in any other Respondent. Unless otherwise provided herein, any violation of this provision shall disqualify the Respondent and its Team Members.

A person or company is "Related" to another person or legal entity if:

One may exercise Control over the other; or each is under the direct or indirect Control of the same ultimate person or legal entity.

For purposes of this RFQ/P, a person or legal entity exercises "Control" of another if it is the owner of any legal, beneficial or equitable interest in 50% or more of the voting securities in a corporation, partnership, joint venture or other person or entity, or if it has the capacity to control the composition of the majority of the board of directors of any such person or entity, or to control the decisions made by or on behalf of any such person or entity, or otherwise has the ability to direct or cause the direction of the management, actions or policies of any such person or entity (whether formally or informally); and the terms "Controlling" and Controlled" have corresponding meanings.

If for any reason, after the Submission Deadline and prior to the selection of a Preferred Proponent, a Respondent wishes or requires to: (i) change any Team Members listed in the Respondent's SOQ (either by adding new members, removing listed members or substituting new members for listed members), or (ii) materially change the ownership or Control of a Respondent or a Team Member, then, in each case, the Respondent must submit a written application (with such information as the Committee may require) to the Committee seeking its consent to the proposed change, which consent may be withheld or delayed in the absolute discretion of the Committee.

Example 5, Parties Disqualified From Participating In

Solicitation: Sec. x.z. Restricted Parties

Restricted Parties (as defined below), their respective directors, officers, partners, employees and persons or legal entities Related to them (as defined in Section x.x above) are not eligible to participate as Team Members, or advise any Team Member, directly or indirectly, or participate in any way as an employee, advisor, or consultant or otherwise in connection with any Respondents in matters related to the Project. Each Respondent will ensure that each Team Member does not use, consult, include or seek advice from any Restricted Party in matters related to the Project. However, Restricted Parties are allowed to advise any Respondent on matters unrelated to the Project. The following Restricted Parties have been identified:

Company A
Company B
Individual Named
Any subsidiary or affiliate of the above-mentioned persons or entities.

Moreover, Respondents must comply at all times during the procurement process with the Agency's Guidelines for the Evaluation of Conflicts of Interest and Unfair Advantages in the Procurement of Public-Private Partnership Contracts (the "Ethics Guidelines"). Prospective Respondents should review the Ethics Guidelines, which are available for download on the Agency's website: (insert web address here).

Finally, Respondents should be aware that the list of Restricted Parties is not exhaustive and that a person that is not included as a Restricted Party may still be prohibited from participating in the Project pursuant to the provisions of the Ethics Guidelines. However, the fact that a person provides or has provided services to the

Agency may not automatically prohibit such person from participating in the Project. Each Respondent is responsible for ensuring that all persons engaged to provide any type of assistance in connection with the Project are in compliance with the provisions of the Ethics Guidelines and, to the extent any question exists as to compliance with the Ethics Guidelines, the Respondent should consult with the Agency.

Failure to comply with this provision will disqualify a respondent from participation in this solicitation."

m. B-2.6 Organizational Conflicts of Interest: Sample Terms for Environmental Documents

Example 1:

Environmental documents prepared by, or in concert with, contractor or consultant support should contain a notice identifying which companies and consultants contributed to the document. An example of notice provisions used by a recipient is below:

"The list of outside contributors to any given environmental document can be extensive. For the ease of reading and efficiency, some recipients provide a general disclosure in the summary portion of an environmental document, then attach an appendix with the complete list of contributors, for example:

"Principal Contributors:

This Environmental Impact Statement (EIS) was prepared by consultants at the following firms: [Consultant 1], [Consultant 2], [Consultant 3], and [Consultant 4]. See Appendix A2 for a detailed list of preparers and the nature of their contributions."

n. B-3.2 Construction Contracts: Analytical Resources for Choosing Project Delivery Methods

The practices described below represent a few approaches that may enable the recipient to meet FTA's procurement documentation requirements for its choice of project delivery method. The practices also may provide helpful analytical resources for recipients in determining which method to adopt for a project. FTA recognizes that state governments may or may not authorize certain project delivery methods. While the cited resources are beneficial to recipients, the first requirement is always the determination and documentation that the recipient has the legal authority to use any of these delivery methods.

Sample 1:

Per the Transportation Research Board (TRB) website (www.trb.org), the below report (TCRP Web-Only Document 41) explores pertinent literature and research findings related to various project delivery methods for transit projects. The report also includes definitions of project delivery methods. Certain chapters of this report (2, 5, 6, 7, 8) are repeated in a *Guidebook* (TCRP Report 131), which was designed to be an easy to use and practical tool for transit agencies in choosing a project delivery method. This web report has the interview data, case studies of each of the nine alternative delivery method projects, and lessons learned.

Where to Find the TRB Report:

The TRB Report for TCRP Web-Only Document 41 (Project G-08), *Evaluation of Project Delivery Methods,* dated August 2008, may be found by clicking here.

Sample 2:

A companion publication to TCRP Web-Only Document 41 is TCRP Report 131: *A Guidebook for the Evaluation of Project Delivery Methods* (2009), which also explores the impacts, advantages and

disadvantages of including operations and maintenance as a component of a contract for project delivery. The report is based on an in-depth study of nine capital transit projects involving a number of different delivery methods. The methods discussed are Design-Bid-Build, construction manager at risk (CMAR) or construction manager/general contractor (CM/GC), Design-Build, and Design-Build-Operate- Maintain. The objective of the guidebook is to assist transit agencies in evaluating and selecting the most appropriate project delivery methods and in documenting the decisions in a Project Delivery Decision Report.

The guidebook offers a three-tiered project delivery selection framework that can be used by owners of transit projects to evaluate the pros and cons of each delivery method and select the most appropriate method for each project. Tier 1 is a qualitative approach that allows the user to document advantages and disadvantages of each competing delivery method. The user can then review the results of this analysis and select the best delivery method. If at the conclusion of this analysis, a clear option still does not emerge, the user can move to Tier 2. Tier 2 is a weighted matrix approach that allows the user to quantify the effectiveness of competing delivery methods and select the approach that receives the highest score. The third Tier uses principles of risk analysis to evaluate delivery methods. Regardless of how many tiers an agency uses to select a project delivery method, the framework forces the decision-makers to document their logic as they proceed through the process.

TCRP Report 131 also includes sample forms, developed by transit agencies, for project description and goals (Appendix C), an analytical delivery decision form (Appendix D), weighted matrix delivery decision form (Appendix E), sample procedures for determining the weights of selection factors (Appendix F), and forms for the optimal risk-based approach (Appendix G).

Where to Find the TRB Report:

TCRP Report 131: *A Guidebook for the Evaluation of Project Delivery Methods*, may be found online by clicking here.

o. B-3.2 CM/GC or CMAR: Approaches for Self-performed Work

The recipient will need, at some point, to award a certain amount of work to the Construction Manager at Risk (CMAR) or Construction Manager/General Contractor (CM/GC). Without a certain amount of self-performed work, many construction contractors may not be interested in CMAR projects. The practices described here pertain to the manner in which self-performed work could be awarded to a CMAR or CM/GC contractor.

It should be noted that recipients must negotiate a Guaranteed Maximum Price (GMP), also known as the Maximum Allowable Construction Cost (MACC), with the CMAR contractor at a point in the project when the designs are sufficiently matured. The amount of the GMP/MACC is negotiated based on the estimated value of the subcontracted work plus the self-performed work.

Practice 1:

Once the various bid packages have been developed for the construction phase, the CMAR contractor would solicit competitive sealed bids from subcontractors for individual work packages. Many agencies allow or require the CMAR contractor to self-perform a certain amount of the construction phase work (typically 30% or so). One practice is for the agency and the CMAR contractor to negotiate the price of the self-performed work, with the CMAR contractor submitting a detailed cost proposal that is reviewed by the agency against the agency's independent cost estimate.

Practice 2:

In an alternative approach, once the recipient and the CMAR contractor have agreed on which work packages the CMAR contractor will self-perform, the agency then solicits sealed bids from both the CMAR contractor and prospective subcontractors for these work packages. The CMAR contractor must submit the lowest responsive bid in order to perform the work. This practice may ensure that the prices being paid by the agency for all construction work on the project have been established through competitive bidding. This in turn could ensure that the best possible pricing is obtained for the entire project, not just the 70% usually subcontracted by the CMAR through competitive bids.

p. B-3.2 Recipient Approaches to the CM/GC or CMAR Delivery Method

Recipients have modified the CM/GC or CMAR delivery method or have approached this method in different ways. Summarized below are a few sample practices undertaken by recipients for this method.

Practice 1:

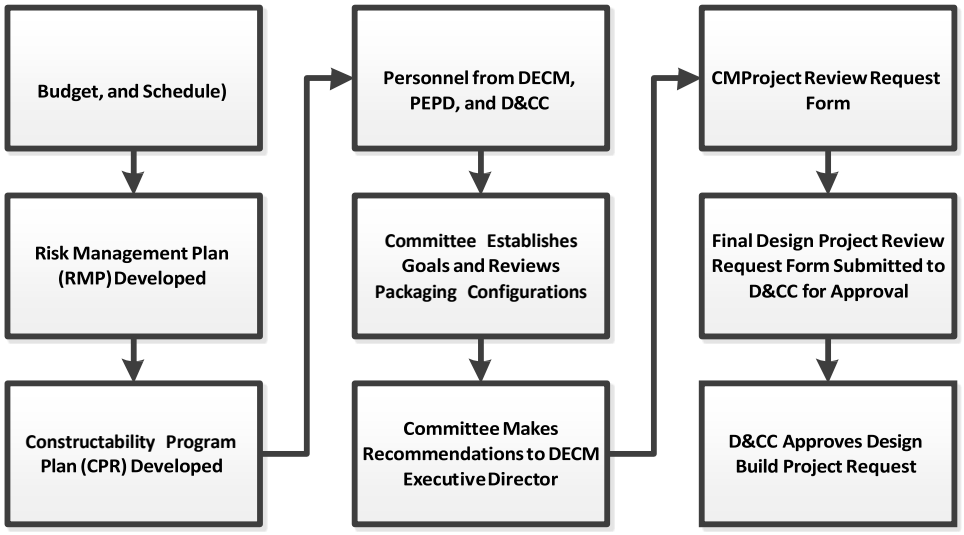
In Washington, GC/CM is authorized through the Revised Code of Washington (RCW 39.10.340) which establishes two types of GC/CM methods, a traditional method intended for facility or vertical projects and the Heavy Civil method, intended for linear, civil infrastructure projects. Agencies desiring to use the CM/GC method must ensure their projects meet certain criteria established in the legislation.

DELIVERY METHOD SELECTION PROCESS

Some agencies form an internal committee, which is comprised of representatives from various stakeholder departments such as Planning; Environmental and Project Development (PEPD); Design, Engineering, and Construction Management (DECM); and Procurement & Contracts.

The committee could review, among other things, the potential packaging/ project delivery method configurations based on the following six criteria: size and complexity, contract interfaces, jurisdictional boundaries, construction access and staging, maintenance of traffic, and staffing requirements, along with the requirements of RCW 39.10 (Washington State Law).

The committee could make its recommendations to the recipient's organizational leadership. A sample process is represented below.



CM/GC CONTRACTOR SELECTION PROCESS

The CM/GC selection process is broken into two phases during procurement; qualifications or the Request for Qualifications/Proposed Approach (RFQ/PA) and price or the Request for Final Proposals (RFFP). During the RFQ/PA phase the recipient ensures competition by establishing evaluation criteria that is specific to the project along with criteria required by RCW 39.10.360. Firms have the opportunity to demonstrate their experience on projects of similar scope and size and other alternative delivery methods like Design Build or CM at Risk. This process allows the recipient to determine who the most qualified firms are prior to receiving any price information. The statements of qualifications are reviewed by a selection committee which selects the most qualified firms to receive the RFFP.

The firms who receive the RFFP will submit sealed bids that establish the maximum costs for their General Conditions Work along with their fee for both the MACC and, if Heavy Civil, the negotiated self-performed work. A price score is then given to each finalist firm as established in the RFFP with the lowest bidder receiving the maximum allotted points for the pricing phase. The points are added to the firm's scores from the RFQ/PA phase and a highest ranked firm is established. This RFFP phase ensures the recipient has received competitive costs and price certainty for critical elements of the Total Contract Cost.

PRE-CONSTRUCTION SERVICES

After the highest ranked firm has been selected, the recipient and the CM/GC Contractor negotiate and execute a pre-construction services contract. The CM/GC Contractor performs services such as scheduling, cost estimating, constructability review, and value engineering. The CM/GC Contractor and the design team coordinate the design documents with a goal of minimizing discovery of design conflicts or errors and constructability, coordination or phasing issues during construction. The CM/GC Contractor provides cost estimates which are reconciled with the design estimates throughout the design phase to ensure that design is to budget. At 90% design, the CM/GC and the recipient begin their independent and separate Maximum Allowable Construction Cost (MACC) estimates. Another benefit is the procurement of early subcontract packages where the CM/GC may begin buyout and, in some cases, bid and award certain subcontract packages for early work such as earthwork, utility relocation, and site demolition.

NEGOTIATION OF THE TOTAL CONTRACT COST

After design has reached 90%, negotiations begin on cost elements of the work that were not bid during the RFFP phase including the components that comprise the MACC, such as the total subcontract cost, including negotiated self-performed subcontract work, as well as negotiated support services. The negotiation process and establishment of the total subcontract cost is the main difference between traditional CM/GC and Heavy Civil CM/GC. **Under the traditional method, state legislation requires that all subcontract work be competitively bid, even self-performed subcontract work.** Further, the CM/GC may only self-perform a maximum of 30% of the subcontract work. Bidding out all the subcontract work ensures sufficient competition just like a design-bid-build project would. Those bids are then used to establish the total subcontract cost which gives the recipient price certainty for its project because the total subcontract cost will not increase unless the recipient issues a change order.

For Heavy Civil CM/GC projects the total subcontract cost is established using a combination of negotiated work and bid work. Fifty percent (50%) of the total subcontract cost is established using competitive bids. However, the other 50% of the total subcontract cost may be negotiated with the CM/GC firm. In order to ensure that the negotiated portion of work is fair and reasonable, the CM/GC

Contractor must show the recipient a detailed breakdown of costs. The break down is analyzed in comparison to the design estimate in addition to a third party independent cost estimate which ensures the recipient successfully negotiates a fair and reasonable price for this portion of work. As the CM/GC firm already bid their fee for self-performed work during the RFFP phase of the procurement, the costs being negotiated here are limited to the actual cost of performing the work.

Practice 2:

Over the past five years, in order to maximize the benefit from the CM/GC delivery method, the recipient implemented the following best practices: early selection of the CM/GC firm; collocate the CM/GC preconstruction team with the design team; allow the CM/GC team time to review the drawings for conflicts and omissions during preconstruction; establish the estimating methodology early in preconstruction; clearly define in the designer's scope of work design coordination and integration with the CM/GC; and establish clear definitions in the general conditions as to what risk contingency can be used for.

Practice 3:

The practice described here relates to the establishment of a "teaming agreement" on large construction projects with a Construction Manager at Risk (CMAR) delivery method.

In this approach, the CMAR is employed under a Not-to-Exceed (NTE) or Guaranteed Maximum Price (GMP), under which it is responsible for employing and managing the construction work. When this project delivery method is used, the designer and the CMAR are working under separate contracts with the recipient, and they often have competing interests. The designer is not motivated to modify its designs based on suggestions from the CMAR (whose concerns are to minimize costs), and is likely to demand additional compensation from the recipient for such design changes. Further, the CMAR is not inclined to negotiate a price that is less than the Not to Exceed (NTE) or guaranteed maximum price (GMP).

This practice is an attempt to bring the designer and the CMAR together by offering financial incentives to cooperate with one another. The practice provides for shared cost savings and early completion incentives among the parties involved in the project. It has helped to foster a spirit of cooperation within the team and has produced significant cost savings.

The recipient develops and implements a *Cooperation Agreement* that is signed by the parties having a major influence on the outcome of the project. These parties at a minimum will include: (1) the Recipient; (2) the Designer; and (3) the CMAR.

The *Cooperation Agreement* defines the *Agreed Project Goals* and the *Agreed Objectives* of the Cooperation Agreement, which are defined as:

Building the project at a lower cost than planned

Completing the project sooner than planned at the time of award of the Design and CMAR contracts

Achieving earlier revenue service than identified in the *Agreed Project Goals*

The Agreement establishes the amounts of incentive fee that will be payable for cost savings and for schedule savings. Cost savings are defined to clarify what type of savings will qualify for the incentive payments. The fee percentage that each of the parties will be paid is also stated, and there is a dispute resolution procedure.

q. B-3.3 Joint Procurements

Conducting a joint procurement requires that two or more parties enter into an agreement committing them to the quantity of items to be purchased (which may be a minimum and a maximum) and obligating them to be bound by the results of the solicitation. The agreement should also spell out what the role of each participant will be and the rights it has during the solicitation process.

Recipients may want to consider the following questions before undertaking a joint procurement.

Questions To Ask:

Do the parties want the same item(s)?

Can the parties commit to specific quantities?

Does the solicitation meet all FTA requirements?

How will the responsibilities for the procurement be allocated?

r. B-3.4 Method of Procurement Checklist

It can be useful to create a process for determining the most appropriate method of procurement. This streamlines the decision making process and identifies the method so the recipient can ensure that its contract file contains all required documents and the contract itself contains all appropriate clauses. The samples below have been developed by recipients. By providing these checklists, FTA does not represent that these checklists are exhaustive of all FTA requirements. Recipients must independently review the applicable FTA guidance and ensure that their checklists include all FTA requirements.

Sample 1:

METHOD OF PROCUREMENT DECISION MATRIX

To determine which method of procurement is best suited, classify the situation by checking off the appropriate boxes below in each of the procurement methods below. All elements must apply that use that method.

☐ Independent Cost Estimate (Attached for every procurement over $3,500)

I. Mini-Purchase

☐Amount under $3,500

☐Three or more vendor quotes available

II. Small Purchase

☐Amount $3,500 to $150,000

☐Three or more vendor quotes (Competitive Procurement)

III. Competitive Procurement

☐Amount

☐Multiple Sources Available

☐Not an Emergency Purchase

IV. Sole Source

☐Emergency Procurement (Subset of Sole Source)

☐OEM, Custom Item

☐Only once Source Available

☐Approved by FTA – Sole Source

☐Public exigency issue/emergency

☐Competition is inadequate after public solicitation

(If all elements apply, continue to Emergency Procurement below)

☐This is a health and safety issue that prohibits delay

V. Sealed Bid – Invitation For Bid (IFB)

☐Complete & adequate specifications or purchase description

☐Two or more responsible bidders willing to complete

☐Selection can be made on basis of price

☐Procurement suitable for firm, fixed price

VI. Informal Competitive Bidding – Request for Quotation (RFQ)

☐Complete & adequate specifications or purchase description

☐Does not require complicated solicitation evaluation

VII. Competitive Proposals – Request for Proposal (RFP)

☐Complete specification not feasible

☐Bidder input needed for specification

☐Two or more responsible bidders willing to compete

☐Discussion needed with bidder after receipt of proposals, prior to award

s. B-3.4 On-Call Consulting / Task Order / Contracts

Recipients frequently find a need to use a contract for projects where the requirement is known generically but only defined in detail later as individual jobs become known and defined over a period of time. This is also referred to as an Indefinite Delivery Indefinite Quantity (IDIQ), a task order contract, or an on-call consulting services contract type. Examples of such contract types and their forms are below.

Sample 1:

SOLICITATION/CONTRACT EXAMPLE

TASK ORDER PROCEDURE

This is a task order contract. Each task order issued hereunder shall be identified by number, issued consecutively by the time of AGENCY's approval of the task. All work hereunder will be performed in accordance with the following:

1. Each task hereunder will be initiated by a request from AGENCY for the Consultant to propose an approach to the specified task. Consultant's proposal will include the personnel to be employed, the estimated hours for each, and a total cost, which may be, as the AGENCY directs, either a firm fixed price or a reimbursement of costs incurred by the Consultant plus a fixed fee. If personnel nominated for a task are outside the categories and hourly rates contained herein, Consultant shall identify the hourly rate and explain the reason for employing such personnel. Each such proposal may be negotiated regarding any matters other than the hourly rates established in the base contract.

2. Upon acceptance of Consultant's proposal, AGENCY shall issue a task order and notice to proceed to Consultant. Consultant shall promptly perform the services included in the task to AGENCY's satisfaction.

3. Payment for each task shall be generally in accordance with the payments Section above. Consultant shall invoice separately for each task; each invoice shall be identified by the contract and task number. For tasks scheduled for completion within three months after notice to proceed, AGENCY shall pay the entire amount due upon completion and acceptance of the task. For tasks expected to last more than three months, Consultant may invoice monthly on the basis specified in the task order for specified deliverables.

PRICING BY LABOR CATEGORY

The parties hereto agree that the rates contained below are those currently charged by Consultant for the categories of labor designated, and will be used in pricing each specific task order. In the event that additional categories of specialized labor are required for a specific task, the rate quoted shall be subject to review and approval by AGENCY. If pricing is based on hourly rates plus a fixed fee Consultant shall provide a breakdown of cost, including separate identification of labor cost, overhead, fixed fee and direct expenses for each task.

LABOR CATEGORY	HOURLY RATE (A)	OVERHEAD (XX.XXXX%) (B)	TOTAL HOURLY LABOR COST (A+B)
President/Principal in Charge	$		$
Vice President/Task Lead	$		$
Senior Consultant	$		$
Project Analyst	$		$
Other			

FIXED FEE $_____

t. B-3.4 Small Purchase Procedures

Recipients and sub-recipients should develop small purchase procedures for when they award small purchase contracts funded by FTA. An example of a small purchase procedure developed by a recipient is below.

Example:

Note: Recipients need to know that the small purchase procedure provided here uses a Wisconsin state threshold of $50,000 for small purchases instead of the Federal threshold. The recipient must determine what its State's threshold is and must ensure that its State-specific requirements are met with respect to all regulatory matters. The FTA small purchase threshold (currently $150,000) may be greater than the recipient's State or local regulations threshold. When State or local thresholds are less than the FTA threshold, recipients must comply with the lesser threshold. Section 8.3.b. of the Toolkit for Conducting Small Purchases does not apply to recipients outside of Wisconsin. This section deals with regulations of the Wisconsin Department of Workforce Development.

Where to Find the Wisconsin Small Purchase Toolkit:

For a copy of the Wisconsin Small Purchase Toolkit, please click here.

u. B-3.4 Combined Bid/Contract Examples

Section 3.4, Procurement Methods, describes the combined bid/contract method. A sample combined bid/contract used by a recipient is below.

Sample:

Instructions for use of Bid Pricing Form and Contract

This document is issued with the instructions for completion and submittal and scope or specification. The instructions should identify the manner of submittal, and the deadline for submittal, as well as any other documents that should be sent with the bid/contract form.

The pricing portion of the form should list each item for which pricing is requested and the quantity required, which may be either a fixed number or an estimated quantity. The vendor is required to fill in the unit price and the extended price (unit price times the number of units) for each line and the total price for all the lines.

If the recipient has established a DBE goal for the procurement, it should identify the goal, and the vendor will identify the percentage of participation it is committing to. This paragraph may also be used if the recipient sets goals for other types of small/minority participation. If no goal is established, this paragraph can be deleted from the form.

The offeror should complete the first signature block with a legally binding signature.

The recipient completes the acceptance block, identifying which line items it is accepting and inserting the total price, which may be either a fixed price if the quantities are fixed, or a not-to-exceed amount if the quantities are estimated.

The form should be signed by an individual authorized under the recipient's policies and procedures.

Attachments incorporated in the contract, including at a minimum the scope or specification and the contractual terms, should be listed at the bottom of the form and attached to the document when it is sent to the vendor, and included in the recipient's procurement file. Some agencies may post their standard contractual terms on their website; in that case the website location should be referenced and only any non-standard terms attached.

BID PRICING FORM AND CONTRACT

When countersigned by AGENCY, this document will form a binding contract, effective upon the date of signature by AGENCY. The contract will incorporate, by reference, all relevant portions of AGENCY's Invitation for Bids, including any amendments thereto; this document, including any attachments hereto; the bidder's representations and certifications submitted as part of its bid; and any other relevant materials submitted by the bidder as part of, or subsequent to, submittal of its bid.

FOR: IFB XX-XX (SUBJECT)

Submitted by: _____

TO:

Procurement Department

AGENCY

XXXXX East XXX Street

CITY, STATE XXXXX

The undersigned hereby unconditionally offers to furnish (Subject) at the firm fixed unit price(s) quoted below in conformance with the contractual terms and specifications received from AGENCY, which have been carefully examined and agreed to by submittal of this bid. The prices quoted are exclusive of all federal, state and local taxes, and include all charges for materials, labor, delivery, and any other goods or services necessary for the successful completion of the subject matter of this contract.

Description	Unit Price (Estimated)	Qty.	Extended Price
1. _____	$_____	_____	$_____
2. _____	$_____	_____	$_____
3. _____	$_____	_____	$_____
4. _____	$_____	_____	$_____
5. _____	$_____	_____	$_____

TOTAL PRICE .....$_____

A % DBE goal has been established for this contract. The undersigned hereby commits to attain a minimum % DBE participation. This commitment and the supporting documentation submitted by the bidder are hereby incorporated in the contract awarded to the bidder. [Note to Procurement Officer: Use only if a DBE goal has been established.]

Any bid that does not fully comply with all of AGENCY's terms, conditions, and specifications as set forth in this IFB document will be rejected. A bid submittal shall not include anything that could give the appearance of adding to, deleting from, changing, taking exception to, or qualifying any of AGENCY's terms, conditions, or specifications. Pricing shall be submitted only on this Bid Pricing Form and Contract. No other form or type of quotation, standard terms, conditions, and/or specifications will be accepted, except as specifically provided in this Invitation for Bid. No descriptive literature shall be submitted unless specifically required or requested by AGENCY.

When accepted by and signed on behalf of AGENCY, this bid form and all relevant portions of AGENCY's Invitation for Bid, including any amendments thereto; the bidder's representations and certifications submitted as part of its bid; and any other relevant materials submitted by the bidder as part of, or subsequent to submittal of its bid shall form a binding contract between AGENCY and the bidder for provision of the goods and performance of services as specified therein. This contract may be in the form of one or more originals or duplicates, each of which shall be equally binding on the parties.

BIDDER'S NAME (Company):_____

ADDRESS:_____

CITY, STATE, ZIP: _____

BY (Signature & Title):_____

PRINTED NAME:_____DATE: _____

_

TELEPHONE:_____FAX: _____

EMAIL: _____

THE INFORMATION BELOW IS TO BE COMPLETED BY AGENCY

AGENCY hereby accepts the above bid for items_____as listed above, subject to the contents of this Bid Pricing Form and Contract. The total price of this contract is (shall not exceed) $_____.

AGENCY

BY: NAME: ____

TITLE: _____

DATE: _____

ATTACHMENTS:

v. B-3.4 Terms and Conditions for Information Technology

Information technology contracts for transit providers may have special terms and conditions that recipients should consider. Technology procurements have inherent differences from other procurements that agencies process. For example, information technology products are often highly proprietary, which may limit the ability to understand the internal operating processes of the product. This means it is virtually impossible for the recipient to maintain the product without the vendor's support, and thus the ability to support the IT product then becomes an essential aspect of a successful procurement. Examples of sample terms, conditions, or practices used by recipients for IT contracts are below.

Sample 1:

Smaller agencies may find some economies by piggybacking off of larger agency procurements for IT contracts. Recipients are permitted to use Federal Supply Schedule 70 to acquire Information Technology (IT) of various types. For further guidance see FTA C 4220.1F, Ch. V, Para 6, and the GSA Cooperative Purchasing Program, available here.

Sample 2:

The American Public Transportation Association (APTA) has published a White Paper, *Technology Terms and Conditions*, defining a recommended process for the use of public transit agencies when procuring IT. The guidelines described in this practice may be useful for acquiring software and IT services, and for ensuring that the embedded components of bus and rail equipment are properly evaluated. The guidelines consist of 39 items focused on terms and conditions and risk management that may support technology procurements.

Where to find the APTA White Paper, the Process *for Defining Terms and Conditions When Acquiring Information Technology:* The American Public Transportation Association White Paper page click here.

The APTA White Paper describes, in depth, the following checklist and defines terms used in this checklist.

Checklist for IT Contracts Terms and Conditions

tem	Terms and Conditions
	Acceptance of Project
	Additional Business Units (Affiliated Agencies)
	Agency/Vendor/Contractor Responsibilities
	Assignment
	Change Order Process
	Compliance Matrix
	Confidentiality
	Current Information Technology Infrastructure
	Customizations
	Definitions of Words and Terms (Glossary)
	Delivery and Acceptance
	Disaster Recovery/Business Continuity
	Dispute Resolution
	Economies of Scale
	End of Life Cycle
	Grant of License and Scope of Use
	Indemnification
	Infringement
	Intellectual Property Rights
	Licenses, Ownership and Transfer
	Limitation of Liability
	Liquidated Damages
	Operations

	Order of Precedence
	Ownership and Use of Data
	Path Back (a.k.a. Insourcing)
	Payment and Delivery Schedule
	Project Personnel
	Records and Audit
	Security
	Site Visits
	Software Protection
	Source Code Escrow
	Standards Adherence
	Support and Maintenance
	Taxes
	Term of Agreement
	Training
	Warranty

B-3.5 Clauses to Encourage Contractor Risk Identification and Mitigation

As part of the RFP development process, recipients may identify project risks in the RFP and request that bidders/proposers respond on how such risks may be managed. Sample risk identification language, included in a recipient RFP, is below.

Sample:

RFP Evaluation Criterion 3

Project

Describe the following issues and your firm's approach to managing the following challenges on the E335 Project:

- E330 interface.
- I405 overcrossing.
- Traffic control, including pedestrian, bicycle, transit, and vehicular traffic.
- Environmental concerns including erosion control, treatment and control of runoff, vibration, and noise and dust mitigation.
- Impacts between E335 and other public and private contractors adjacent to the Project staging and work areas.
- Coordination with follow-on systems contractors using the same staging and work areas.
- Start-up, testing and commissioning for major elements of the work, including mechanical, electrical, ventilation and fire suppression systems including consideration given to third party permit requirements and integration with AGENCY'S overall system start-up and testing requirements.

Identify additional risks (no more than 10), ranked in the order of severity, and explain the challenges and opportunities to mitigate and manage those risks.

w. B-3.6 Late Submission of Bids or Proposals

A recipient establishes its right to reject late bids through the inclusion of a provision in its solicitation package. The following sample provision was developed based on Sec. 14.304 of the Federal Acquisition Regulation (Federal Acquisition Regulation website Part 14 Sealed Bidding click here). Some elements of this sample may be unnecessary for local or state recipients, as the provisions are specific to receipt of bids by federal agencies; recipients should develop their own locally or agency-specific provisions on accepting late bids:

Sample – Solicitation Language:

X.X.1 Any bid, modification, or withdrawal, that is received at the designated AGENCY office after the exact time specified for receipt of bids is "late" and will not be considered, unless it is received before award is made, the contracting officer determines that accepting the late bid would not unduly delay the acquisition; and—

a) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the AGENCY infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids; or

b) There is acceptable evidence to establish that it was received at the AGENCY office designated for receipt of bids and was under AGENCY's control prior to the time set for receipt of bids.

X.X.2 Acceptable evidence to establish the time of receipt at the AGENCY office includes a time/date stamp or handwritten notation of personnel in that office on the proposal wrapper, other documentary evidence of receipt maintained by the office, or oral testimony or statements of AGENCY personnel.

X.X.3 If an emergency or unanticipated event interrupts normal AGENCY processes so that bids cannot be received at the AGENCY office designated for receipt of bids by the exact time specified in the solicitation, and urgent AGENCY requirements preclude amendment of the solicitation closing date, the time specified for receipt of bids will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which the AGENCY office is open to the public.

X.X.4 Bids may be withdrawn by written notice to the Director of Procurement at any time prior to the exact time specified for receipt of bids. Notice may be electronic, provided a hard copy of the notice is delivered within 24 hours of the electronic transmission. A bid may be resubmitted prior to the time specified for receipt.

x. B-4.1 Determining Contractor Responsibility

FTA's procurement circular requires that the recipient determine that a responsible contractor is used for all purchases above the micro-purchase threshold (currently $3,500). See FTA C 4220.1F, Ch. IV, Paragraph 2.a. (1) for further guidance.

Examples of methods for documenting how responsibility is determined are below. Note that many states have their own legal requirements regarding responsibility determinations; recipients should ensure that any responsibility determinations are consistent with applicable state law.

Sample 1:

DETERMINATION OF RESPONSIBILITY

SOLICITATION NO:_____TITLE: _____

The offer submitted by_____has been reviewed and the offeror has been determined to be a responsible Contractor based upon the following:

_____Offeror has sufficient staff/resources (both project team and support staff and backup resources) to do the work.

Determined by: _____, Title: _____

(Attach supporting memorandum, organization charts, etc.)

_____Offeror has sufficient financial resources to complete the work. Determined by: _____, Title:_____.

Attach supporting memorandum, financial statements, bank references, etc.)

_____Offeror has a proven track record of completing work on time and within budget.

Determined by: _____, Title: _____.

(Attach supporting memorandum, references, etc.)

_____Offeror can provide the required bonds (if applicable).

Determined by:_____, Title: _____

Attach supporting memorandum, confirmation of bonding capacity, etc.)

_____Offeror is not debarred/suspended at federal or (if available) state level

Determined by:_____, Title: _____ *(Attach supporting memorandum, SAM screenshot, state screenshot, etc.)*

Based upon the above information, I have determined that_____is a responsible contractor for this procurement.

Signature_____Title_____

Date_____

_____

Sample 2:

Responsibility Determination Form

PO/Solicitation #: _____

Supplier: _____

Date: _____

For each of the areas described below, check that the appropriate research has been accomplished and provide a short description of the research and the results.

1. Appropriate financial, equipment, facility, and personnel ☐ Yes ☐ No

2. Ability to meet the delivery schedule ☐ Yes ☐ No

3. Satisfactory period of performance ☐ Yes ☐ No

4. Receipt of all necessary data from supplier ☐ Yes ☐ No

This vendor has been deemed responsible and does not appear on the declined or suspended list as shown in the attached. (SAM.gov) By signing below, Project Manager attests the awarded vendor meets the requirements of the Scope of Work.

_____

Project Manager Date

_____

Procurement Date

y. B-4.3 Evaluation Committee Member Statement on Conflicts of Interest

This document provides recipients with a form to ensure that evaluators in negotiated procurements (Requests for Proposals or RFP's) acknowledge the need to maintain complete confidentiality during the evaluation process. *See* FTA C 4220.1F, Ch. VI.

Use of this form increases the awareness and specificity of the confidentiality requirements, informing evaluators that they are not to discuss the content of the proposals, the RFP, or the recipient's negotiation strategy with individuals outside the evaluation group. The form is intended:

- To identify if the evaluator(s) have any personal or financial interest in the proposers.
- To provide concrete statements of responsibilities, expectations, and consequences for each evaluator before the evaluations begin.

z. Sample:

EVALUATION COMMITTEE MEMBER STATEMENT RFP

2016-RXX

(Title)

You have been asked to participate in the evaluation of offers received as the result of the competitive solicitation referenced above. It is essential that the integrity of the evaluation process be maintained to ensure each offeror is given fair and equal consideration. Your past or current relationship with particular firms and/or individuals must not influence your evaluation. The written responses to the solicitation and any subsequent respective clarifications and/or negotiations must stand alone. You are required to be particularly objective and guard against any tendency to favor a particular firm or individual.

The Evaluation Committee will evaluate all proposals received in response to the RFP which are determined to be responsive by the Procurement Officer. Proposals can only be evaluated by using the criteria listed in the Evaluation Criteria section of the RFP. No other criteria may be used. Initial evaluation must be based solely upon the proposal submitted; no other or additional information may be used.

In order ensure confidentiality during the evaluation process, committee members shall refrain from discussing the RFP with any fellow committee members (outside official evaluation committee meetings), Board members, management, supervisors, employees or individuals outside the agency during the evaluation process. All questions or clarifications shall be addressed to the Procurement Officer.

Committee members are not to discuss the content of the proposals, the RFP, or the agency's negotiation strategy with individuals outside the evaluation group.

All records of the evaluation committee, including notes and scoring sheets, may become public records. It is the responsibility of each member to ensure that they review the proposals in the time allotted and return the score sheets to the Procurement Officer. All records may be made available for review by any or all Proposers. It is very important to enter comments on the scoring sheets, so that you can explain your rationale during committee meetings and if it is required at a later date.

Please read and sign the following statement:

I have read, understand, and agree to the above, and I will adhere to the policies presented. I have no personal interest in seeing a specific offeror is awarded the contract. I shall keep all evaluation proceedings in strict confidence prior to contract award. I will do my best to base my recommendation for contract award solely upon evaluation criteria in the solicitation and each Offeror's response.

Following is a list of companies that have submitted offers:

1)

2)

3)

_____

Committee Member Signature

_____

Printed Committee Member Name

_____

Date

aa. B-4.5 Justification Form for Accepting a Single Offer

Provided below are two examples of procedures for documenting and justifying when a single quote is received and accepted in response to a competitive solicitation.

Example 1:

CERTIFICATION OF SINGLE QUOTE PROCUREMENT

POLICY: Based on full and open competition, AGENCY shall routinely research, promote, and otherwise optimize competitive supplier interest in all matters involving the expenditures of public funds for goods or services.

SINGLE QUOTE: In certain instances, competition is not legally required, or could not be obtained. In those instances (and in compliance with FTA regulations), there must be a justification as to why competition was not obtained and a basis for determining that the price quoted is fair and reasonable.

BRIEF DESCRIPTION OF PROCUREMENT:

_____

_____

REASON FOR SINGLE QUOTE:

UNABLE TO OBTAIN COMPETITION: Solicitation was sent to vendors. Only one response was received. I have reviewed the solicitation and verified that it is not unduly restrictive of competition. Non-responding sources were contacted, and gave the following reasons for not submitting a response:

(You must show documentation of your attempt to solicit at least 3 vendors for quotes.)

_____

_____

OTHER: `

_____

I DEEM THE PRICE TO BE FAIR AND REASONABLE, based on the following:

The price does not exceed that last price paid for the same item by more than x%.

PO or Contract #_____Date_____

Previous Price_____New Price Quoted_____

The procurement is for a standard commercial item (e.g., “off-the-shelf item”), and the price is equal to or less than the price of this same item sold to the general public or other government agency. This can be verified as follows (check at least one):

_____Published Price List obtained from the vendor (attach documentation).

_____From my experience and knowledge of the vendor’s type of business and based on the current market price for this item (attach documentation).

_____ The written quote includes a statement, “The price quoted is equal to or less than the price of this same item when sold to the general public.” (Written quote must be attached)

_____OTHER (explain and attach documentation): _____

_____

CERTIFICATION OF THIS PROCUREMENT: I hereby certify that the above-statements are true and accurate. I further certify that I have neither intentionally split this procurement to avoid competition, nor do I have or know of any other reason (including any influence from another person) to consider this a violation of Metro policy or federal or state laws and regulations.

Signed _____

Date _____

Example 2:

Single Source - Justification and Approval Form

(Reference: Transit Agency Procedure XXX-X)

SECTION I (To be completed by Contract Administrator):

1. Solicitation Number: _____

2. Proposed Contract Amount: _____

3. Period of Performance: _____

4. Supplier name, address, and contact information:

5. Brief description of requested items or services and their purpose:

6. Procurement History Overview:

Date Issued

Number of Firms Notified

Number of Firms that Downloaded Solicitation

Date Closed

Total Number of Bids/Proposals Received

Total Number of Responsive/Responsible Bids/Proposals

7. Determine if competition was adequate: Yes No

a. Did you conduct a review of the specifications for undue restrictiveness?

b. Did you survey potential bidders/proposers?

c. Did the survey of potential bidders/proposers confirm that the specifications were not too restrictive or written around a single source?

d. Did unrelated factors beyond Agency's control cause the potential sources not to submit a bid or proposal? If yes, please list one or more contributing factor (i.e. working at capacity):

e. Do you recommend re-issuing the solicitation? Please explain.

8. Compelling Urgency – Would a delay resulting from issuing a subsequent competitive solicitation cause significant harm to the Agency, or does a public exigency exist?

If you answered "Yes" above, please provide a brief explanation.

Project Manager: _____

Department: _____

Department Director: _____

Date: _____

I hereby certify that, to the best of my knowledge, the above justification is accurate and request that a single source be approved for the procurement of the above requested item(s) or service(s).

Director's Signature:

Date:

SECTION IV (THIS SECTION FOR USE BY AGENCY PROCUREMENT DEPARTMENT ONLY)

___Approved (Proceed with Single Source Award)

___Not Approved (Re-issue solicitation)

Reason for Non-Approval:

Contract Administrator:

_____Date: _____

Contract Manager:

_____Date: _____

Director of Procurement:

_____Date: _____

Notes:

bb. B-4.5 Practices to Enhance Competition on Sole Source Procurements

Some recipients develop sole source procedures which seek to enhance competition, or for future procurements on items which have been previously sole sourced. An example of such a practice is below:

Sample – Sole Source Policy Statement:

When the item to be purchased is available only from a single responsible source, a notice of the Agency's intent to purchase such item without competitive bidding shall be posted on the Agency's website, and, if bids have not been solicited for such item within the preceding twelve months, a notice must be published pursuant to Article VI (A) hereof. Any notices required by this paragraph shall set forth the Agency's intent to purchase the item without competitive bidding because the item is available from only one source and invite any firm which believes it can provide the item to so inform the Agency and to provide the Agency with additional information which confirms that it can supply the item.

cc. B-4.6 Independent Cost Estimates (ICE)

FTA recipients must make independent cost estimates (ICE) before receiving bids or proposals. This will allow both for appropriate budgeting and use of the ICE as a tool when conducting cost and/or price analysis of proposals. *See* FTA C 4220.1F, Ch. VI for further guidance.

Sample: INDEPENDENT COST ESTIMATE SUMMARY FORM

Requisition Number:_____Date of Estimate: _____

Description of Goods/Services:

_____

___New Procurement_____Contract Modification (Change Order)

___Exercise of Option

Method of Obtaining Estimate:

Attach additional documentation such as previous pricing documentation, emails, internet screen shots, estimates on letterhead, etc.

_____Published Price List (attach source and date)

_____Historical Pricing (attach copy of documentation from previous PO/Contract)

_____Comparable Purchases by Other Agencies (attach email correspondence)

_____Engineering or Technical Estimate (attach)

_____Independent Third-Party Estimate (attach)

_____Other (specify)_____(attach documentation)_____Pre-established pricing resulting from competition (Contract Modification only)

Through the method(s) stated above, it has been determined the estimated total cost of the goods/services is $_____.

The preceding independent cost estimate was prepared by:

_____

Name

_____

Signature

_____

Date

dd. B-4.6 Sample Cost and Price Analyses

Use of a cost or price analysis form can help recipients conduct consistent and sufficiently documented procurements. Examples of cost and price analysis forms used by recipients are below.

Sample 1 - Price Analysis:

PRICE ANALYSIS SUMMARY FORM

Contract/Order Number:_____Description: ___

The

price is determined to be fair and reasonable based on at least one of the following criteria (please check all that apply):

_____Found reasonable based on bids received (bid tabulation attached)

_____Found reasonable based on recent purchase by AGENCY (see attached)

_____Found reasonable based on recent purchase by others (see attached)

_____Obtained from current price list (see attached)

_____Obtained price from current catalog (see attached)

_____Obtained from advertisement (see attached)

_____Similar to related industries

_____Personal knowledge of item procured

_____Regulated rate (utility)

Other: _____

Explanation (if necessary):

_____

_____

_____

_____

_____

_

Copy of supporting documentation (purchase order, quotes, price list, etc.) is attached.

Completed by:

Name: _____

Title: _____

Date: _____

Sample 2 - Price Analysis:

Price Analysis/Reasonableness

PO/Contract#: _____

Project Name: _____

Vendor Name: _____

Dollar Value: _____

Description: _____

Rationale: _____

Analysis: Prices for this PO/Contract were reviewed by the Contract Administrator and determined to be fair and reasonable for the following reason(s):

☐Award based on lowest, responsive and responsible bid received - see attached quotes

☐Compared with prices paid for similar goods or services

☐Award based on availability (as stated in procurement docs)

☐Pricing deemed reasonable based on past purchase history attached

_____ _____

Contract Administrator Procurement Director/Manager

Sample 3 - Cost Analysis

PO:_____Prepared by: _____

Amount: _____

Description: _____

Vendor: _____

Description: _____

Unit of Measure: _____

Cost: _____

Total: _____

ICE: _____

Description: _____

Quantity: _____

Cost: _____

Total: _____

Cost for the services is quoted at $x,xxx and was estimated by Agency' Project Manager at $y,yyy. It is determined that the cost for this effort is fair and reasonable since total cost difference is within x% of the Independent Cost Estimate (ICE).

ee. B-4.7 Procurement History Contract File Contents Checklist

Developing an internal checklist ensures that a recipient has a system in place for standardizing the content of its contract files and fulfilling FTA documentation requirements. Below are sample procurement history checklists developed by recipients. Note that the below checklists are partial checklists and do not represent all of FTA's contract history or documentation requirements.

Sample 1:

A checklist may be found in the Wisconsin DOT's Request for Invitations for Bids Toolkit at Appendix O by clicking here.

Sample 2:

PROCUREMENT HISTORY

Procurement Title: Transit Survey

Procurement Number:

☐Received ICE (Independent Cost Estimate) DATE: _____

$____x,xxx_____

Procurement Method (Attach Method of Procurement Decision Matrix)

☐RFP

☐RFQ

☐IFB

☐Sole Source (justification attached)

Contract Type (Check appropriate type)

☐Firm Fixed

☐Cost Reimbursement

☐Time and Materials

*Cost Plus Percentage of Cost Contracts are Prohibited by the Federal Transit Administration (FTA) Vendor/Contractor Selection (Describe method and rationale for selection) (e.g. - This project was released as an Invitation for Bid as staff required a specific product or service and was advertised in public newspapers of general circulation.)

☐Excluded Parties List System was verified via **System for Award Management website click here**

☐Cost /Price Analysis

- Cost Analysis (Sole Source justification if applicable)
- Price Analysis (quotes to analysis attached)

☐Price Reasonableness (Information Attached)

☐Responsibility Determination Form (Attached and completed)

☐Small Purchase Checklist (If applicable)

Sample 3 – Binder/Contract File Index

1 ☐Procurement History

2 ☐Notice to Proceed☐ FINAL Contract (Executed)

3 ☐Change Orders/Amendments (Options)

4 ☐Board Reports (Release and Award)

5 ☐Awarded Bid/Proposal☐Bonds

6 ☐Purchase Order(s) / Invoices / Releases / Certified Payrolls

7 ☐Cost or Price Analysis / Reasonableness

8 ☐Insurance

9 ☐Correspondence (POST award)

10 ☐DBE

11 ☐Procurement Plan

12 ☐Independent Cost Estimate (ICE)

13 ☐Sole Source Justification

14 ☐ Addenda

☐ Solicitation (RFP/RFQ/IFB)

☐Attachment A – Scope of Work

☐Attachment B – Regulatory Requirements

☐Attachment C – Sample Contract or Purchase Order Terms and Conditions

☐Attachment D – Minimum Insurance Requirements

☐Attachment E – Protest Policy

☐Attachment F – Submission of Forms

☐Other

15 ☐Advertisement (If required)

16 ☐Notified Vendors/Bid List

17 ☐Pre-Proposal Meeting Documents – Job Walk (sign-in sheets)

18 Required Forms

☐Responsibility Determination Form (Prior to Award)

☐SAM.gov (print out results)

☐Method of Procurement Decision Matrix

☐Small Purchase Checklist (if applicable)

☐ FTA Checklist

19 ☐Protests

☐Public Records Requests

20 ☐Correspondence (prior to award)

21 ☐Rejection Letters

22 ☐Miscellaneous

23 ☐Bid Opening

☐Sign in for paper bids/construction (if applicable)

24 ☐Evaluations

☐BAFO (Best and Final Offer)

☐Recap of Responsiveness

☐Conflict of Interest/Non-Disclosure (Code of Conduct & Ethics Form)

25 ☐ Unsuccessful Proposals

26 ☐ Closeout

Sample 4 – Procurement History Checklist

Use this template checklist for ensuring that individual procurement files comply with appropriate Federal and local record-keeping requirements. The volume of documentation associated with the procurement will dictate the number of files required to properly maintain a complete history of the procurement. As such, the attached checklist must be properly annotated and filed in each procurement history file associated with the particular procurement at hand.

The Tabs identified are not intended to be all-inclusive and are not required for all procurements. The recipient must determine which Tabs are appropriate for the procurement at hand and may add Tabs that are otherwise necessitated by local procedures. The checklist must be signed and dated by the individual compiling the file.

Be sure to fill out the type of procurement you are looking to pursue.

Tab 1 - Document the reason for your procurement including Grant and ALI code.

Tab 2 - An Independent Cost Estimate is required for all procurements prior to advertising bids or offers.

Tab 3 - Insert the Procurement Plan and Timeline (if required).

Tab 4 - Insert the Statement of Work or specifications.

Tab 5 - Insert the Sole Source justification (if applicable).

Tab 6 - Insert pertinent Market Research documents (if any). This may also be included in the ICE.

Tab 7 - Insert the solicitation document and any subsequent amendments.

Tab 8 - Submit all documents to [oversight agency] and wait for written approval. DO not proceed until you have written approval.

Tab 9 - Insert documentation evidencing advertisement of the procurement.

Tab 10 - Insert documentation concerning the pre- bid or proposal conference (if applicable) and/or any solicitation Questions and Answers.

Tab 11 - Insert the signed acknowledgement of any solicitation amendments.

Tab 12 - Insert documentation concerning any “No Bid” letters or correspondence related to disqualification of bidders (“nonresponsive”) or offerors.

Tab 13 - Insert the Bidders List. This must be included in the solicitation and the vendor is required to complete with their bid.

Tab 14 - Insert Public Bid Opening documentation.

Tab 15 - Insert the Cost or Price Analysis including “fair and reasonable” price determination.

Tab 16 - Insert Single Bid Justification, if applicable.

Tab 17 - Insert the proposed contractor's "responsibility" determination (including evidence of checking the SAM.gov, etc.).

Tab 18 – Insert the Negotiation Memorandum (if applicable), otherwise insert documentation concerning clarifications or discussions and/or oral presentations (if held).

Tab 19 - Signed federal clauses and certifications.

Tab 20 - Submit all documents to [oversight agency] and wait for written approval. DO not proceed until you have written approval.

Tab 21 - Submit a copy of the Board's approval for the procurement.

Tab 22 - Insert the Notice of Intent to Award the contract.

Tab 23 - Insert any protest letters, decisions, or other related documents.

Tab 24 - Insert the signed and conformed contract.

Tab 25 - Insert any contract modifications and documents supporting such modifications.

Tab 26 - Insert documentation related to any option exercises including related contract modifications.

Tab 27 - Insert contractor-submitted data and reports.

Tab 28 - Insert correspondence/documentation related to complaints or contractor performance.

Tab 29 - Insert any documentation concerning pre-award or post-award Mistakes in Bid.

Tab 30 - Insert any applicable Invoices and Payment Vouchers.

Tab 31 - Insert any local or [oversight agency] correspondence that has not been filed under previous Tabs.

Tab 32 - Insert any pertinent contract administration correspondence between the subrecipient and the Contractor.

Tab 33 - Insert any pertinent correspondence/documents concerning contract close-out.

PROCUREMENT HISTORY FILE CHECKLIST Method of Procurement: IFB

CONTRACT NUMBER	CONTRACTOR NAME	CONTRACT AWARD DATE

COMMODITY CODE/ BRIEF ITEM DESCRIPTION	AMOUNT $	CONTRACT START DATE

	ITEM				ITEM		
		Y	N	N/A		Y	N	N/A
1.	WRITTEN HISTORY OF PROCUREMENT *(Appendix A)*			18.	NEGOTIATION MEMORANDUM *(If Applicable)*		
2.	INDEPENDENT COST ESTIMATE *(Appendix B)*			19.	SIGNED FEDERAL CLAUSES AND CERTIFICATIONS *(Appendix M)*		
3.	PROCUREMENT PLAN AND TIMELINE *(Appendix C and DOA 3720)*			20.	REQUIRED AWARD APPROVALS *(given by WisDOT)*		
4.	STATEMENT OF WORK SPECIFICATION			21.	BOARD APPROVAL (Submit a copy of the minutes)		
5.	SOLE SOURCE JUSTIFICATION *(Appendix F, if Applicable)*			22.	NOTICE OF INTENT TO AWARD		
6.	MARKET RESEARCH DOCUMENTS			23.	PROTESTS *(If Applicable)*		
7.	SOLICITATION AND AMENDMENTS *(Appendix G)*			24.	SIGNED (CONFORMED) CONTRACT		
8.	PRE-SOLICITATION APPROVALS *(given by WisDOT)*			25.	CHANGE ORDER REVIEW CHECKLIST *(Appendix N, if Applicable)*		
9.	ADVERTISING *(ad on VendorNet & local ads)*			26.	OPTION EXERCISES AND RELATED DOCUMENTS *(Submit annually, if applicable)*		
10.	PRE-BID CONFERENCE NOTES AND QUESTIONS & ANSWERS (*If Applicable)*			27.	CONTRACT DATA AND REPORTS *(If Applicable)*		
11.	BIDS AND SOLICITATION AMENDMENT ACKNOWLEDGEMENTS			28.	COMPLAINT AND PERFORMANCE REPORTS *(If Applicable)*		
12.	"NO BID" LETTERS OR OFFEROR DISQUALIFICATION CORRESPONDENCE			29.	DOCUMENTATION CONCERNING PRE- OR POST AWARD MISTAKES IN BID		
13.	BIDDER'S LIST *(Appendix H)*			30.	INVOICES/ VOUCHERS *(If Applicable)*		
14.	PUBLIC BID OPENING DOCUMENTATION *(Appendix J)*			31.	LOCAL OR WISDOT CORRESPONDENCE		
15.	COST OR PRICE ANALYSIS *(Appendix I)*			32.	GENERAL CONTRACT CORRESPONDENCE		
16.	SINGLE BID ANALYSIS *(Appendix K, if applicable)*			33.	CONTRACT CLOSE-OUT		
17.	CONTRACTOR RESPONSIBILITY DETERMINATION *(Appendix L)*						

REMARKS

ff. B-4.9 Sample Protest Procedures

Recipients are required to have procurement policies and procedures, which reflect applicable State, local, and tribal laws and regulations. As a best practice, such procedures should include a protest procedure and should also provide a notice of the protest procedures in each solicitation, including information on how the procedures may be obtained. FTA does not require recipients to post protest procedures on their websites. Recipients may want to consider developing their own internal policies as to when FTA is notified of a pending protest. The following are protest procedures (or excerpts) used by some recipients.

Sample 1 – Solicitation Notice:

PROTESTS

AGENCY's policy and procedure for the administrative resolution of protests is set forth in § XXX of AGENCY's Procurement Manual (PM). The PM contains rules for the filing and administration of protests, and is available on AGENCY's website at http://www.AGENCY.com/doing-business/bid-opportunities. AGENCY shall furnish a copy of § XXX upon a request to the procurement officer for this solicitation.

Sample 2 – Policy & Procedure:

PROTESTS

Policy

AGENCY policy requires that all prospective contractors be accorded fair and equal consideration in the solicitation and award of contracts. To that end, any interested party shall have the right to protest alleged inequities in the procurement process and to have its issues heard, evaluated and resolved administratively. "Interested party" is defined as an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by failure to award a contract.

Each solicitation above the small purchase threshold as defined herein shall contain, as part of the instructions to bidders/offerors, the following notice:

> Board policy and procedure for the administrative resolution of protests is set forth in § X.X of AGENCY's Procurement Procedures Manual (PPM). The PPM contains rules for the filing and administration of protests. The Contracting Officer shall furnish a copy of § X.X upon request. Chapter VII, Sec. 1.b. of Federal Transit Administration (FTA) Circular 4220.1 F addresses protests where federal funds are involved. FTA will only review protests regarding matters that are primarily of Federal concern.

Submittal Procedures

An interested party wishing to protest a matter involving a proposed procurement or contract award shall file a written submission with the Director of Procurement by certified mail or other delivery method by which receipt can be verified. Electronic submission of protests is not acceptable unless an original signed copy of the protest is received by the Director within 24 hours (not including weekends and holidays) after receipt of the electronic copy. The Director may, however, permit the electronic provision of supplemental information after the initial protest submittal. The protest shall include, at a minimum:

(a) The name and address of the protesting party and its relationship to the procurement sufficient to establish that the protest is being filed by an interested party;

(b) Identity of the contact person for the protestor, including name, title, address, telephone, fax and e-mail addresses. If the contact point is a third party representing the protester, the same information must be provided, plus a statement defining the relationship between the protester and the third party;

(c) Identification of the procurement;

(d) A description of the nature of the protest, referencing the portion(s) of the solicitation involved;

(e) Identification of the provision(s) of any law, regulation, or other governance upon which the protest is based;

(f) A compete discussion of the basis for the protest, including all supporting facts, documents or data;

(g) A statement of the specific relief requested; and

(h) A notarized affirmation by the protestor (if an individual) or by an owner or officer of the protestor (if not an individual) as to the truth and accuracy of the statements made in the protest submittal.

The protestor is solely responsible for the completeness and validity of the information provided. Any documents relevant to the protest should be attached to the written submission. Documents which are readily available on the Internet may be referenced to an appropriate link.

Protests shall be submitted in accordance with the requirements of this chapter and any directions included in the solicitation, and shall be addressed to the Director of Procurement. Unless otherwise specified in the solicitation, the written protest shall be accompanied by an electronic copy (CD) in PDF format. In case of a variance in the content of the written and CD submittals, the written version shall prevail.

The Contracting Officer, or an assigned Contracting Officer in cases where the conduct of the Contracting Officer for the procurement is called into question, shall conduct the administrative processing of protests filed with AGENCY or with FTA, and shall be responsible for the processing, documenting a protest, and recommending a decision to the Director of Procurement. The Director of Procurement shall request legal counsel to review and advise concerning any legal issues involved in a protest.

The Director of Procurement shall be responsible for overseeing the decision process and for the content of the decision. The Director shall ensure that all relevant parties within AGENCY have been involved in the decision-making process and shall, as

circumstances require, obtain the concurrence of the CEO or other personnel in a decision prior to its issuance.

AGENCY may decide a protest solely upon the written submission. The protest submission should, therefore, include all materials necessary to support the protester's position. Additional or supplemental materials may only be submitted at the request of, or with the permission of, the Director of Procurement.

If the procurement uses federal funds, a notice of receipt of a protest must be given to the appropriate regional office of the Federal Transit Administration (FTA). The form of notice may be specified by the regional office.

Protests of the Solicitation Process

A protest related to the technical scope or specification, terms, conditions, or form of a solicitation must be received no later than ten (10) working days prior to the date established for opening of bids or receipt of proposals; if the protest addresses an amendment to the solicitation, it must be received no later than ten (10) working days prior to the date established for opening bids or receipt of proposals or five (5) working days after the date of issuance of the amendment, whichever is later; in no event, however, may a protest of this nature be submitted after bids or proposals are received. The protest must conform in all respects to the requirements set forth above.

Upon receipt of such a protest, the Director of Procurement shall notify all prospective offerors and other known interested parties of the receipt and nature of the protest, and shall post a notice of the protest on AGENCY's procurement web page. Unless the Director of Procurement determines that delay will be prejudicial to the interest of AGENCY or that the protest patently lacks substantial merit, the solicitation process will be extended pending resolution of the protest.

Protests will be considered and either denied or sustained, in part or in whole, by the Director of Procurement in writing. A written decision specifying the grounds for sustaining all or part of or denying the protest will be transmitted to the protestor prior to the receipt of bids or proposals in a manner that provides verification of receipt.

A notice of the decision shall be provided to all parties given notice of the protest, and posted to AGENCY's procurement web page.

Should the protest be upheld in whole or in substantial part, the Contracting Officer may either (1) amend the solicitation to correct the document or process accordingly; or (2) cancel the solicitation in its entirety. If the solicitation is amended, the time for receipt of bids or proposals shall be equitably extended to permit all participants to revise their bids or proposals to reflect the decision. If the protest is denied, the solicitation shall proceed as if the protest had not been filed, unless the protester pursues the protest with the Federal Transit Administration (FTA) as defined below, or otherwise appeals the decision of the Director of Procurement, as defined below.

Protests received by AGENCY after the time periods specified above shall be considered untimely and may be denied on that basis unless the Director of Procurement concludes that the issue(s) raised by the protest involves substantial prejudice to the integrity of the procurement process.

Protests of the Evaluation Process

All bidders/proposers will be notified of the recommended award, upon a determination by Board staff of a recommendation to be made to the CEO, or the Board of Trustees, as appropriate. This notice will be transmitted to each proposer at the address contained in its proposal form, and shall be posted on the procurement page of the AGENCY website. Transmittal may be by electronic means or by hard copy. Any

proposer whose proposal is valid at the time of the staff determination may protest the recommended award on one or more of the following grounds:

(a) That the recommended awardee does not meet the requirements of the solicitation;
(b) That the bid or proposal recommended for acceptance does not meet the criteria of the solicitation or award;
(c) That the evaluation process conducted by AGENCY is improper, illegal, or the decision to recommend award is arbitrary and capricious.

The protest must conform in all respects to the requirements set forth above. The protest must be received by AGENCY at the address specified in the solicitation, no later than five (5) calendar days after the date such notification is publicly posted or sent to the bidder or proposer, whichever is earlier. A written decision stating the grounds for allowing or denying the protest will be transmitted to the protestor and the proposer recommended for award in a manner that provides verification of receipt. Such decision shall be final, except as provided in § X.X.X below or by applicable law or regulation.

Evaluation of Protests

A protest decision should ordinarily be written and published within ten (10) working days of receipt of the protest. The Director of Procurement may extend the response period if additional time is required to gather and evaluate information necessary for the decision or for other good cause.

Upon receipt of a protest, the Contracting Officer shall notify parties involved in the procurement as identified above, and such Board personnel or others as may be appropriate or necessary to determine the validity of the protest. Copies of the protest submittal, or portions thereof, may be provided to the notified parties as appropriate.

The Director of Procurement may request additional written information from the protestor or other parties, as necessary to determine the validity of the protest. A formal or informal hearing may be held. If a formal hearing is held, testimony shall be given under oath and a transcript or electronic recording of the proceeding shall be made; the transcript or recording shall be provided to the protestor and made part of the protest record.

The Director of Procurement shall redact from any submission under the protest process information which has been identified as proprietary, and which, in his/her judgment, is protected from disclosure under the State Public Records Act prior to furnishing such submission to any other party, unless the person furnishing the information consents, in writing, to distribution of the information to other interested parties.

Decision

Upon receipt and evaluation of all relevant information, including any pertinent law or regulations, the Director of Procurement shall prepare a decision. The decision will contain four parts:

I. SUMMARY – Describes briefly the protesting party, the solicitation involved, the issues(s) raised, and the decision.

II. BACKGROUND – Describes in more detail the history of the solicitation and the procurement events leading to the protest, the date the protest was received, and the process by which it was evaluated.

III. DISCUSSION - Identifies the issue or issues raised by the protestor, and the factors considered in reaching a decision, and the rationale for the decision.

IV. DETERMINATION - States the decision and any remedy or subsequent action, e.g. cancellation of the procurement, resulting from it.

Ordinarily, each issue raised in the protest will be discussed separately in Parts III and IV.

Decisions shall be signed and issued by the Director of Procurement. The decision shall be issued to the protestor; other interested parties shall receive either a copy of the decision or a notice of decision, as appropriate. Where appropriate, transmittal may be electronic, followed by hard copy. The protest document, the decision, and all other documentation related to the decision shall be public record except as otherwise provided by the State Public Records Act or AGENCY's regulations and policies.

Appeals

Decisions of the Director of Procurement may be appealed to the General Manager and Chief Executive Officer (CEO) by the protestor within five (5) working days after the decision is issued to the protestor. The appeal shall be in writing, addressed to the CEO with a copy to the Director of Procurement, and shall state with specificity the basis for the appeal. The CEO or designee shall review the written record of the protest and may conduct such further investigation as is deemed necessary or appropriate to reach a decision. The decision of the CEO will ordinarily be issued within fifteen (15) working days of receipt of the appeal; this time period may be extended if necessary to complete an investigation. The decision of the CEO shall be final and conclusive, except for such remedies as state or federal law or regulation may provide.

Record of Protest

Upon receipt of a protest, the Contracting Officer shall establish a separate file in which a complete record of the protest shall be maintained. The file shall constitute a separate portion of the overall procurement file.

The procurement protest file shall include reasonable and adequate documentation of the protest and outcome of the protest. Protest file documentation should be proportional to the size and complexity of the protest.

The protest file should, at a minimum, include the following:

I. The protest, including supporting documentation

II. Record of determination of protest timeliness

III. Record of internal distribution of protest

IV. Record of internal responses to protest

V. Record of legal review

VI. Determination and findings, including supporting documentation

VII. Protester response/appeal

VIII. Result of appeal

IX. Notice of cancellation of solicitation, if applicable

gg. B-5.1 Negotiating Construction Change Orders

In order to avoid entering into a prohibited Cost Plus Percentage of Cost (CPPC) arrangement, recipients need to negotiate the price of a prospective change order with the contractor before the change order is issued. To avoid the CPPC prohibition of negotiating cost proposals when the work has been completed, one recipient developed a procedure which allows for issuing a Notice to Proceed (NTP) with a not-to-exceed (NTE) funding amount. More importantly, the NTP includes a fixed fee amount stated in dollars, which is based on the independent cost estimate of the recipient, and which will become the fee amount payable in the event a negotiated agreement on price cannot be reached between the contractor and the recipient. The fee includes both profit and overhead. By fixing the fee in terms of dollars at the start of the work, and requiring that the latest point in the work when price negotiations will be held is at 85% of completion, the recipient ensures that they will not find themselves in a de facto CPPC situation. Either they will negotiate a lump sum agreement before 85% of completion, or the fee dollars originally established by the recipient will prevail. A sample change order using this procedure is below:

Sample – Change Order for a Not to Exceed Amount, Subject to Further Negotiation.

If a lump sum agreement on compensation is not made, the Contractor shall be issued a Notice to Proceed (NTP) that includes a Not to Exceed (NTE) value and a fixed fee for the overhead and profit as further described below. A lump sum agreement may be negotiated up to the time that 85% of the total dollar value of the NTE is expended. Where no lump sum agreement has been reached on compensation, the Contractor's compensation shall be increased by the following amounts and such amounts only:

For Extra Work consisting of performance of construction work at the construction site, an amount determined as follows:

a. In the case of Extra Work performed by the Contractor personally, an amount equal to the direct cost in money of the labor and materials

required for such Extra Work, plus a fixed dollar amount, as determined by the Engineer, not to exceed the amount that is equal to fifteen per cent (15%) of the Engineer's final estimate of the direct cost in money for labor and materials as required for such Extra Work, plus such rental for equipment (other than small tools) required for such Extra Work as the Engineer deems reasonable.

b. In the case of Extra Work performed by a subcontractor, an amount equal to the direct cost in money of the labor and materials required for such Extra Work, plus a fixed dollar amount, as determined by the Engineer, not to exceed the amount that is equal to fifteen per cent (15%) of the Engineer's final estimate of the direct cost in money for labor and materials for such Work, plus such rental for equipment (other than small tools) required for such Extra Work as the Engineer deems reasonable, plus a fixed dollar amount, as determined by the Engineer, not to exceed the amount that is equal to five per cent (5%) of the sum of the foregoing costs, percentage of cost, and rental. In no case shall the amount of the aggregate markup for the Contractor and all of his subcontractors at every tier exceed the dollar amount that is equal to fifteen per cent (15%) of the direct cost of the Extra Work.

Notice to Proceed:

You are hereby directed to perform all Work required to complete the items listed on Attachment A, dated x/x/xx.

Until such time that a Lump Sum agreement can be reached, compensation shall be computed on a cost-reimbursable basis in accordance with Chapter X, Clause XX of the Form of Contract entitled "Compensation for Extra Work." The total fee for this work is hereby fixed at $xx,xxx.

Total compensation for the extra work inclusive of all fees is not to exceed the amount of $xxx,xxx without written authorization.

The Contractor shall notify this office in writing when the cost of the Work performed is 80% of the Not to Exceed amount.

hh. B-5.1 Issuing Contract Modifications

Every recipient contract should have a changes clause provision. Examples of such provisions used by recipients, and the changes orders issued pursuant to those clauses, are below. Recipients should be mindful that the existence of a changes clause does not permit a recipient to make cardinal changes to an existing contract either through the execution of a single change order or a series of changes which are, by themselves, acceptable but which, in the aggregate, changes the nature of the work. FTA requires that cardinal changes be addressed as sole source contracts. See Circular 4220.1F Ch. I, Para 5.c.

Sample 1 - Contract Changes Clause:

AGENCY may at any time, by a written order, and without notice to sureties, if any, make changes within the general scope of this Agreement. Such change shall serve to modify this Agreement to the extent necessary to execute the change as directed. If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the Services under this Agreement, whether changed or not changed by the order, AGENCY shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the Agreement accordingly. The Contractor must assert its right to an adjustment under this article within three working days from the date of receipt of the written order. Failure by Contractor to give timely notice of the change could constitute waiver of a claim for an equitable adjustment. However, if AGENCY decides that the facts justify it, the AGENCY may receive and act upon a proposal submitted at any time before final payment of the Agreement. If the Contractor's proposal includes the cost of equipment or materials made obsolete or excess by the change, AGENCY shall have the right to prescribe the manner of the disposition of such equipment or materials. Failure to agree to any adjustment shall be a dispute under the Disputes article. However, nothing in this provision shall excuse the Contractor from proceeding with the Agreement as changed.

Sample 2 - Documentation of Contract Modification:

The same recipient uses the following standard form for issuing a contract modification:

[AGENCY]

Contract Modification

CONTRACT NO: ____ TITLE: _____

CONTRACTOR: _____

MODIFICATION NO: ____ DATE: _____

The above contract is hereby modified as follows, effective as of the date below:

[Scope change – include attachments if necessary]

The price of said contract is hereby increased ((OR) decreased) by _____ dollars ($_____) from ((OR) not to exceed)_____dollars ($_____) to ((OR) not to exceed)_dollars ($_____), (OR the price of said contract shall remain unchanged.) [Include attachments if necessary]

The time of contract performance is hereby increased (OR decreased) by _____days; the date of completion is changed from_____, 20 to_____, 20 (OR remains unchanged). [If specific milestones are changed they should be included or added as an attachment]

(Other changes – for example an increase or decrease to the DBE commitment due to the changed work)

Except as modified herein, all terms and conditions of the contract remain unchanged.

The effective date of this Modification is_____, 20__.

AGENCY

BY:_____TITLE: _____

Acknowledged and Agreed:

CONTRACTOR

BY:_____TITLE: _____

Attachments:

U.S. Department of Transportation
Federal Transit Administration

U.S. Department

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