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 *Amend 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:

1. 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

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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.

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].

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

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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.

d. 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.

e. 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."

f. 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."

g. 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.

h. 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.

i. 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:

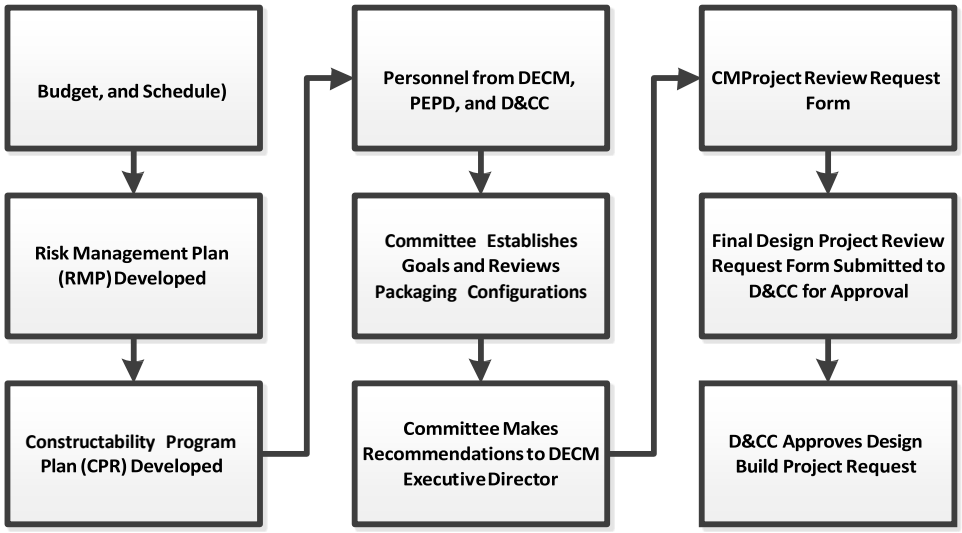
In Washington, GC/CM is authorized through the Revised Code of Washington (RCW 39.10.340) which establishes two types of GC/CM methods, a traditional method intended for facility or vertical projects and the Heavy Civil method, intended for linear, civil infrastructure projects. Agencies desiring to 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.

j. 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?

k. 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

l. 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 $_____

m. 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.

n. 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:

o. 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.

p. 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.

q. 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

r. 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.

s. 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

t. 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:

u. 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.

v. 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

w. 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).

x. 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

	I				I		
O	WRITTEN ITEM HISTORY OF PROCUREMENT *(Appendix A)*	N	/A	O 8	NEGOTIATION MEMORANDUM *(If Applicable)*	N	/A
.	INDEPENDENT COST ESTIMATE *(Appendix B)*			9.	SIGNED FEDERAL CLAUSES AND CERTIFICATIONS *(Appendix M)*		
.	PROCUREMENT PLAN AND TIMELINE *(Appendix C and DOA 3720)*			20.	REQUIRED AWARD APPROVALS *(given by WisDOT)*		
.	STATEMENT OF WORK SPECIFICATION			1.	BOARD APPROVAL (Submit a copy of the minutes)		
.	SOLE SOURCE JUSTIFICATION *(Appendix F, if Applicable)*			2.	NOTICE OF INTENT TO AWARD		
.	MARKET RESEARCH DOCUMENTS			3.	PROTESTS *(If Applicable)*		
.	SOLICITATION AND AMENDMENTS *(Appendix G)*			4.	SIGNED (CONFORMED) CONTRACT		
.	PRE-SOLICITATION APPROVALS *(given by WisDOT)*			5.	CHANGE ORDER REVIEW CHECKLIST *(Appendix N, if Applicable)*		
.	ADVERTISING *(ad on VendorNet & local ads)*			6.	OPTION EXERCISES AND RELATED DOCUMENTS *(Submit annually, if applicable)*		
0.	PRE-BID CONFERENCE NOTES AND QUESTIONS & ANSWERS (*If Applicable)*			7.	CONTRACT DATA AND REPORTS *(If Applicable)*		
1.	BIDS AND SOLICITATION AMENDMENT ACKNOWLEDGEMENTS			8.	COMPLAINT AND PERFORMANCE REPORTS *(If Applicable)*		
2.	"NO BID" LETTERS OR OFFEROR DISQUALIFICATION CORRESPONDENCE			9.	DOCUMENTATION CONCERNING PRE- OR POST AWARD MISTAKES IN BID		
3.	BIDDER'S LIST *(Appendix H)*			0.	INVOICES/ VOUCHERS *(If Applicable)*		
4.	PUBLIC BID OPENING DOCUMENTATION *(Appendix J)*			1.	LOCAL OR WISDOT CORRESPONDENCE		
5.	COST OR PRICE ANALYSIS *(Appendix I)*			2.	GENERAL CONTRACT CORRESPONDENCE		
6.	SINGLE BID ANALYSIS *(Appendix K, if applicable)*			3.	CONTRACT CLOSE-OUT		
7.	CONTRACTOR RESPONSIBILITY DETERMINATION *(Appendix L)*						

REMARKS

y. 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

z. 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.

aa. 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

East Building 1200 New Jersey Avenue, SE Washington, DC 20