FTA Procurement Webinar

- Preventing Key Procurement Deficiencies
- Procurement Aspects of FTA’s COVID-19 Supplemental Funds

The Workshop will begin soon. Please stay logged in.

July 2021
FTA Procurement Webinar

- Preventing Key Procurement Deficiencies
- Procurement Aspects of FTA’s COVID-19 Supplemental Funds

July 2021
Purpose of This Webinar

• Highlight key areas of deficiencies in FTA’s oversight review programs
  – Explain requirements related to these key areas
  – Discuss common drivers of deficiencies in these areas
  – Explore methods of preventing these deficiencies
• Procurement implications of COVID-19 supplemental funds
Statement on Guidance

This presentation includes summaries of requirements found in law. It also includes advice and best practices (i.e., ‘guidance’) for meeting those standards. Any compliance recommendations that go beyond the text of relevant statutes and regulations are guidance and not legally binding. Specific individual scenarios have to be analyzed independently to ensure the binding requirement is satisfied.
FTA’s Program Oversight Roles

FTA is responsible for conducting oversight activities to help ensure that recipients of Chapter 53 grants use the funds in a manner consistent with their intended purpose and in compliance with regulatory and statutory requirements.

Key Components

• Comprehensive Reviews (Triennial & State Management)
  – Occur every three years
  – Forward-looking instead of reactive
  – Assess management practices and program implementation

• Specialized Reviews (Financial, Procurement, & Civil Rights, etc.)
  – Occur at FTA’s discretion
  – Focus on specific areas of Federal compliance
FTA Oversight Review Manuals

- Consistent format for both manuals
- Procurement is one area of CORTAP Reviews
- PSR is a more in-depth look at procurement:
  - Larger sample size
  - More questions


FTA’s PSR Contractors Manual

22 Elements/Questions for the Review

2. Written Standards of Conduct  13. Liquidated Damages
3. Written Protest Procedures  14. Change Orders
4. Award to Responsible Contractors  15. Options
5. Written Record of Procurement History  16. Contract Length
6. Contract Administration System  17. Piggybacking
7. Full and Open Competition  18. Advance and Progress Payments
10. ICE/Cost or Price Analysis  21. Subrecipient Oversight
11. Clauses  22. Efficient and Economic Purchases

Underlined items are discussed in this presentation.
Deficiency Trends
Poll #1

Fill in the blank:

I think deficiencies in the procurement area are approximately ___% of all Triennial Review deficiencies.

- 10%
- 15%
- 20%
- 25%
## Triennial Review Findings by Topic Area

<table>
<thead>
<tr>
<th>Triennial Review Topic Area</th>
<th>2015</th>
<th>2016</th>
<th>2017</th>
<th>2018</th>
<th>2019</th>
<th>Total</th>
<th>% of All Findings</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Procurement</strong></td>
<td>388</td>
<td>333</td>
<td>313</td>
<td>372</td>
<td>299</td>
<td>1705</td>
<td>24%</td>
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<tr>
<td><strong>Disadvantaged Business Enterprise</strong></td>
<td>188</td>
<td>277</td>
<td>258</td>
<td>207</td>
<td>234</td>
<td>1164</td>
<td>16%</td>
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<tr>
<td><strong>Americans with Disabilities Act</strong></td>
<td>197</td>
<td>280</td>
<td>225</td>
<td>251</td>
<td>201</td>
<td>1154</td>
<td>16%</td>
</tr>
<tr>
<td><strong>Technical Capacity</strong></td>
<td>167</td>
<td>115</td>
<td>120</td>
<td>131</td>
<td>122</td>
<td>655</td>
<td>9%</td>
</tr>
<tr>
<td><strong>Financial Management and Capacity</strong></td>
<td>105</td>
<td>109</td>
<td>118</td>
<td>124</td>
<td>110</td>
<td>566</td>
<td>8%</td>
</tr>
</tbody>
</table>
Highlights of Key Procurement Deficiencies
Key Procurement Deficiency Areas

• Key procurement areas discussed in this webinar:
  – Independent Cost Estimate/Cost or Price Analysis
  – Responsibility/Suspension and Debarment
  – Clauses/Certifications
  – Buy America – Rolling Stock
  – Subrecipient Oversight

• Areas identified based on:
  – High number of deficiencies among recipients
  – Repeat deficiencies in these areas
  – Risk areas for recipients and FTA
Independent Cost Estimates and Cost or Price Analysis
Procurement
Lacking Required Independent Cost Estimate/Cost Analysis/Price Analysis

Relevant Question

P10. Does the recipient develop independent cost estimates (ICE) and conduct cost and/or price analysis as described in its policies and procedures for each procurement action above the Simplified Acquisition Threshold? *

*The Uniform Guidance only requires this for procurements above the Simplified Acquisition Threshold. The current Simplified Acquisition Threshold is $250,000.

This is the question # in both the CORTAP and PSR Contractors Manual.
Procurement

Lacking Required Independent Cost Estimate/Cost Analysis/Price Analysis

Relevant Indicators

a. Did the recipient develop an ICE prior to the receipt of bids and proposals for procurements above the Simplified Acquisition Threshold?

b. Did the recipient conduct a cost analysis or price analysis for every procurement action above the Simplified Acquisition Threshold?

These are the *Indicators of Compliance* in both the CORTAP and PSR Contractors Manual.
Poll #2

An Independent Cost Estimate (ICE) must be dated.

- True
- False
What drives these deficiencies?

• Recipients misclassify procurements as locally-funded
  – Often occurs when recipient is part of a state or local government that
does not routinely procure FTA-funded products or services

• Recipients do not conduct an ICE and/or Cost or Price analysis
  when applicable
  – Often happens with one type of procurement or buyer, and/or where
procurement is a decentralized function

• An ICE/cost or price analysis was conducted but not
documented

• The ICE is documented but after receipt of bids
What drives these deficiencies? (cont’d)

• Recipients do not provide sufficient documentation or backup information to support the ICE

• When necessary, there is no evidence that the ICE was factored into a cost or price analysis

• Cost analysis was required but not completed
  – For example: when there is no price competition (e.g., sole source, change order)
What can recipients do to prevent these deficiencies?

- Include the completion of an ICE and cost/price analysis in a checklist
- Develop a standardized form for ICE and cost/price analysis
  - FTA’s Best Practices Procurement Manual includes guidance (Section 4.6) and sample forms and checklists
  - FTA’s Pricing Guide for FTA Grantees also provides guidance materials

[Links to resources provided]
Responsibility Determinations and Suspension and Debarment
Procurement

Required Responsibility determination deficiencies/No verification that excluded parties are not participating

Relevant Question

**P4.** Does the recipient make awards only to responsible contractors as described in its policies and procedures and in compliance with the requirements of 49 U.S.C. 5325(j) and 2 CFR 200.318(h)?
Procurement

*Required Responsibility determination deficiencies/No verification that excluded parties are not participating*

**Relevant Indicators**

a. Do procurement files contain documentation that the recipient made written responsibility determinations prior to award, considering all required information?

b. Prior to award, does the recipient have documentation that third party contractors are not suspended or debarred?
Poll #3

What methods can be used to document that contractors are not suspended or debarred?

- Collect a certification from the contractor
- Include a contract clause
- Conduct a SAM.gov search
- Any of the above
Procurement

Required Responsibility determination deficiencies/No verification that excluded parties are not participating

What drives these deficiencies?

• Lack of consistency and/or documentation when determining contractor's responsibility prior to award in areas of:
  – Integrity
  – Compliance with public policy
  – Past performance
  – Financial and technical resources

• Recipients do not document one of the allowed methods regarding excluded parties for awards of $25,000 or more:
  – Inclusion of clause in contract, or
  – Collection of certification, or
  – Review of System for Award Management (SAM.gov) search conducted prior to award
Procurement

*Required Responsibility determination deficiencies/No verification that excluded parties are not participating*

What can recipients do to prevent these deficiencies?

- Use a standardized format to determine if the contractor has the:
  - Appropriate financial and technical resources
  - Record of satisfactory performance
  - Record of integrity (such as not being debarred or suspended)
  - Compliance with public policy issues (such as items certified to)
- Document SAM.gov search with date *prior* to all contract awards
  - While other methods are acceptable, this may be the most effective, but often the one that lacks documentation
Clauses
and
Certifications
Procurement

Missing FTA Clauses/Certifications

Relevant Questions

**P11.** Did the recipient include applicable federal clauses in FTA-funded procurements exceeding the micro-purchase limit and construction contracts over $2,000?

**P12.** Did the recipient include required certifications in solicitations and receive signed certifications from bidders as part of their bid or proposal, as applicable?
Relevant Indicators

P-11
a. Did the recipient include applicable required clauses in FTA-funded procurements?

P-12
a. Did the recipient include the required DBE transit vehicle manufacturer (TVM) certification in solicitations, receive signed certifications with bids and verify?

b. Did the recipient include required lobbying certifications in solicitations and receive signed certifications with bids in procurements over $100,000?

c. Did the recipient include required Buy America certifications in solicitations and receive signed certifications with bids in procurements over $150,000 that included iron, steel or manufactured products?
What drives these deficiencies?

• Recipients do not recognize a procurement as being FTA-funded
• Lack of consistency
  – If procurement is decentralized in an agency, one department may be compliant, while another has deficiencies
• Recipients are not using a current checklist for clauses and certifications
• An unanticipated high bid or increased contract cost causes a procurement to cross a monetary threshold, requiring additional clauses/certifications
Procurement
Missing FTA Clauses/Certifications

What drives certification deficiencies?

• Certifications not signed, are incomplete, or indicate both compliance and non-compliance
• Recipients require a signed ‘certification’ but rely on the bidder to develop the certification wording
• Signed certifications not received at time of bid submission
• TVM Certifications not verified with FTA information prior to award
What can recipients do to prevent these deficiencies?

- Use a clause and certification checklist, based on
  - Contract provisions noted in 2 CFR 200, Appendix II
  - Clause checklist in the PSR Contractors’ Guide
  - FTA’s Master Agreement (issued annually)
- Develop a method for identifying FTA-funded procurements
  - Across departments
  - With others conducting procurements on transit’s behalf
- Read/verify certifications when submitted
Buy America
For
Vehicle Purchases
Procurement
*Pre-award and/or Post-Delivery Certifications Lacking*

**Relevant Question**

**P20.** If the recipient procured rolling stock with FTA funds, did it comply with the requirements of 49 CFR part 663, including pre-award and post-delivery Buy America audit requirements, resident inspector requirements, and purchaser’s certifications?
Poll #4

Are Buy America audits and certifications the same thing?

- Yes
- No
Relevant Indicators

b. For rolling stock purchases, did the recipient conduct pre-award and post-delivery audits to ensure the manufacturer(s) complied with contract specifications and Buy America?

c. Did the recipient document its pre-award and post-delivery audits by completing and maintaining written certifications?
What drives this deficiency?

- Recipients or subrecipients purchase rolling stock vehicles with FTA funds
- Recipients do not make internal file documentation that they conducted the pre-award and/or post-delivery activities
- Pre-award and/or post-delivery activities are conducted by someone outside of procurement (operations, maintenance, subrecipient, contractor), but signed certifications cannot be located when needed
Procurement
Pre-award and/or Post-Delivery Certifications Lacking

What can recipients do to prevent this deficiency?

• Pre-award, recipient must
  – Conduct Buy America audit (> $150,000) and **sign certification** of compliance with Buy America
    ▪ Certification by the manufacturer is not adequate
  – Receive certification of compliance with FMVSS from manufacturer
  – Review proposed vehicle specifications and **sign certification** of compliance with purchaser’s requirements

• Post-delivery, recipient must
  – Conduct Buy America audit (> $150,000) and **sign certification** of compliance with Buy America
    ▪ Certification by the manufacturer is not adequate
  – Observe FMVSS sticker and **sign certification** of compliance with FMVSS
  – Inspect and road test vehicles and **sign certification** of compliance with purchaser’s requirements
What can recipients do to prevent this deficiency?

- Determine who is conducting pre-award/post-delivery audits and who is signing the internal certifications
- Develop a retention policy for the certifications
- Utilize FTA’s ‘Buy America Handbook’

Subrecipient Oversight
Procurement

Insufficient oversight of subrecipient procurements

Relevant Question

**P21.** Does the recipient perform oversight of its subrecipients’ FTA-funded procurement activities as described in its policies and procedures?
Procurement

*Insufficient oversight of subrecipient procurements*

Relevant Indicators

a. Does the recipient implement oversight procedures of its subrecipients for FTA-funded procurements?

b. Do subrecipient procurement files reviewed demonstrate adequate oversight by the recipient?
Procurement

**Insufficient oversight of subrecipient procurements**

**What drives this deficiency?**

- Recipients have subrecipients that purchase items with FTA funds
- Oversight is decentralized, not comprehensive, or non-existent
- Oversight activities not consistently documented
- Follow-up of oversight findings does not occur
- Oversight procedures/checklists not updated as procurement requirements change
- Complications when subrecipients are also direct FTA recipients
What can recipients do to prevent this deficiency?

- Create a comprehensive, standardized oversight approach
  - Include oversight procedures from question P21 of the PSR or CORTAP Contractors Manual
    - Sample include in next slides
- When regulations change, review and revise oversight guides
- Document oversight activities and corrective measures
- Follow up with subrecipients on findings
# Procurement

*Insufficient oversight of subrecipient procurements*

## Subrecipient Oversight Items in PSR Contractors Manual

**Review systemwide elements:**
- Written procurement policies and procedures
- Written standards of conduct
- Protest procedures

**Select one procurement that has been reviewed by the recipient to verify:**
- Responsibility & suspension/debarment determination
- Written record procurement of actions
- Method to ensure the most efficient and economic purchase
- Contract administration and oversight procedures
- No use of geographic preferences or mis-use of prequalification lists
- Appropriate method of procurement was used
- No use of the cost plus percentage of cost type of contracting
- A&E services procured using a qualifications-based process
- Independent estimate completed
- Cost or price analysis conducted
### Procurement

*Insufficient oversight of subrecipient procurements*

#### Subrecipient Oversight Items in PSR Contractors Manual

<table>
<thead>
<tr>
<th>Select one procurement that has been reviewed by the recipient to verify:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inclusion of clauses</td>
</tr>
<tr>
<td>Receipt of bid, performance, and payment security and inclusion of Davis Bacon wage determinations for applicable construction contracts</td>
</tr>
<tr>
<td>Receipt of all applicable certifications for:</td>
</tr>
<tr>
<td>☐ Transit Vehicle Manufacturer (TVM) certification</td>
</tr>
<tr>
<td>☐ Lobby certification</td>
</tr>
<tr>
<td>☐ Buy America certification</td>
</tr>
<tr>
<td>Correct administration of liquidated damages</td>
</tr>
<tr>
<td>Change order management</td>
</tr>
<tr>
<td>Correct use of options</td>
</tr>
<tr>
<td>Adherence to time limitations for bus or rail rolling stock or replacement parts</td>
</tr>
<tr>
<td>Correct use of piggybacking</td>
</tr>
<tr>
<td>No use of advance payments and adequate protection for progress payments</td>
</tr>
<tr>
<td>Receipt of bus testing reports</td>
</tr>
<tr>
<td>Compliance with Buy America requirements for rolling stock</td>
</tr>
</tbody>
</table>
Overall Tips for Preventing Procurement Deficiencies

• Review past areas of deficiency
  – Triennial/State Management Reviews
  – PSR/FMO/DBE Reviews

• Have a system for identifying FTA-funded procurements

• Use checklists to standardize compliance

• Document internal processes

• Thoroughly review all documentation and certifications received for compliance prior to award
Overall Tips for Preventing Procurement Deficiencies

• Determine if policies and procedures cover:
  – 2 CFR 200.318 – 327
  – Other regulations such as Buy America, DBE, etc.

• Update policies and procedures, especially when:
  – Requirements change
  – Internal processes are modified
  – Relevant sections of FTA’s Master Agreement are revised

• Train all that perform procurement, contract administrative, or project management roles on policies and procedures
Procurements with FTA COVID-19 Supplemental Funds
## FTA Coronavirus Funding

<table>
<thead>
<tr>
<th>Act</th>
<th>Date</th>
<th>Amount for Transit</th>
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</thead>
<tbody>
<tr>
<td>Coronavirus Aid, Relief, and Economic Security (CARES) Act</td>
<td>March 27, 2020</td>
<td>$25 Billion</td>
</tr>
<tr>
<td>Coronavirus Response and Relief Supplemental Appropriations Act of 2021 (CRRSAA)</td>
<td>December 27, 2020</td>
<td>$14 Billion</td>
</tr>
<tr>
<td>American Rescue Plan Act (ARP)</td>
<td>March 11, 2021</td>
<td>$30.5 Billion</td>
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</table>
FTA Coronavirus Information and Resources

FTA Coronavirus Landing Page

FTA Coronavirus FAQs

https://www.transit.dot.gov/coronavirus

Key FTA COVID-19 Funding Procurement Concepts

- All 5307 (even in large urbanized areas), 5310 (CRRSA and ARP only), and 5311 recipients eligible for operating assistance at 100%.
- Under certain circumstances, administrative leave for maintenance and operations contracts is eligible.
- Recipients may modify contracts to pay for eligible operating/maintenance expenses to retain readiness or eligible fixed operations/maintenance expenses.
- Funds can be used for operations and maintenance expenses incurred after January 20, 2020, even if the original contract did not meet all Federal requirements. New contracts need to follow all federal requirements.
- 2 CFR 200. 320 already permitted the use of a noncompetitive (sole source) procurement for emergencies.
Resources

• 2 CFR 200.317 thru 2 CFR 200.327
  https://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title02/2cfr200_main_02.tpl
• FTA Master Agreement
  https://www.transit.dot.gov/funding/grantee-resources/sample-fta-agreements/fta-grant-agreements
• FTA Procurement Resources Website
  https://www.transit.dot.gov/funding/procurement/procurement
• FTA Best Practices Procurement Manual
• National RTAP ProcurementPRO
  http://www.nationalrtap.org/Web-Apps/ProcurementPRO
• National Transit Institute
  www.ntionline.com
• FTA Calculating, Documenting, and Charging Operating Expenses Webinar
  https://www.transit.dot.gov/safety/triennial-reviews/calculating-documenting-and-charging-operating-expenses-webinars
Questions and Answers
Thank You!

This session has been recorded and may be posted on FTA’s website